

# VOI11S

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## AMSTERDAM COURT

private law department

Judgment of **24 January 2024**

In the cases C/13/686493 / HA

ZA 20-697 of

the foundation

**DIESEL EMISSIONS JUSTICE FOUNDATION,**

based in Amsterdam, e i

s e r e s,

L.C.M. Berger, lawyer, Amsterdam,

against

1. the foreign-law company  
**MERCEDES-BENZ GROUP AG**  
based in Stuttgart, Germany,
3. the private limited liability company **MERCEDES-**  
**BENZ NEDERLAND B.V.**  
based in Nieuwegein,  
Advocate Mr J.S. Kortmann of Amsterdam,
4. the private company with limited liability **ASV**  
**AUTOMOBIELBEDRIJYEN B.V.**,  
based in Veghel,
5. the private limited liability company **AUTO KÖKCÜ**  
**B.V.**,  
based in Vijfhuizen,
6. the private limited liability company **AUTO WÜST**  
**DORDRECHT B.V.**,  
Based in Oud-Beijerland,
7. the private limited liability company  
**AUTO WÜST HELLEVOETSLUIS B.V.**,  
Based in Oud-Beijerland,
8. the private limited liability company  
**AUTO WÜST B.V.**,  
Based in Oud-Beijerland,
9. the private limited liability company  
**VAN DRIEL AUTOBEDRIJF B.V.**,  
based in Liempde,
10. the private company with limited liability **LOUWMAN**  
**MB G B.V.**  
based in The Hague,
11. the private limited liability company **LOUWMAN MB**  
**R B.V.**

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based in The Hague,

12. the private limited liability company AUTOSERVICE  
VAN DEN AKKER B.V.,

based in Uden,

14. the private limited liability company

**JOB TWENTE B.V.**,

based in Zuna, municipality of Wierden,

15. the private limited liability company

**COR MILLENAAR B.V.**,

based in Amstelveen,

16. the private limited liability company GOMES NOORD

HOLLAND B.V.,

based in Alkmaar,

17. the private limited liability company LOUWMAN MB

B.V.,

based in The Hague,

18. the private limited liability company MERCEDES-

BENZ DEALER BEDRIJYEN B.V.,

based in The Hague,

19. the private limited liability company

**SMEETS M.B. EINDHOVEN B.V.**,

based in Heerlen,

20. the private limited liability company

**SMEETS M.B. VENLO B.V.**,

based in Heerlen,

21. the private limited liability company **SMEETS M.B.**

**ZUID-LIMBURG B.V.**,

based in Heerlen,

22. the private limited liability company

**HEDIN AUTOMOTIYE IM B.V.**,

(formerly STERN IM B.V.),

based in Utrecht,

23. the private company with limited liability VAN

MOSSEL MB B.V.,

based in Rotterdam,

24. the private limited liability company

**WENSINK AUTOMOTIYE B.V.**,

based in Apeldoorn,

Advocate first M.H.C. Sinninghe Damsté, then C.W.M. Lieveverse, now mr.

B. Kemp, Amsterdam,

ged aagd e n,

and

C/13/695611 / HA ZA 21-60 of

the foundation

**CAR CLAIM FOUNDATION,**

based in Rotterdam, e i  
s e r e s,  
Advocate Mr P. Haas of Rotterdam,

at

the aforementioned defendants.

Stichting Diesel Emissions Justice will hereinafter be referred to as SDEJ, Stichting Car Claim will hereinafter be referred to as Car Claim. Defendants 1 and 3 will hereinafter jointly be referred to as Mercedes. Defendants 4 to 12 and 14 to 24 will hereinafter be collectively referred to as the Partners.

The cases will also be referred to separately below as the SDEJ case and the Car Claim case.

## **1. The conduct of proceedings**

### In both cases

1.1. By interlocutory judgment of 22 June 2022 (ECLI:NL:RBAMS:2022:3586), the court (i) declared Stichting Emission Claim (hereinafter SEC) inadmissible, (ii) declined jurisdiction insofar as it concerned the claims brought by SDEJ and Car Claim against Mercedes-Benz Group AG for the benefit of Non-NL Purchasers, (iii) held that Article 3:305a (old) of the Dutch Civil Code applied to these cases and the claims brought and (iv) the cases referred to the role for claims by Mercedes and the Partners with regard to (a) the admissibility of SDEJ and Car Claim respectively under Article 3:305a (old) of the Civil Code and (b) the applicable law, in particular in the relationship between the NL Purchasers and Mercedes-Benz Group AG.

1.2. By rolling decision of 19 October 2022, the court rejected the requests by Mercedes and the Partners to suspend or stay the proceedings for the duration of the appeal filed by SEC.

1.3. On 9 November 2022, Mercedes filed partial reply 'phase 2' briefs on admissibility and applicable law, with exhibits, in each of the two cases. Also on 9 November 2022, the Partners in the SDEJ case filed a reply brief on admissibility SDEJ and applicable law, with exhibits, and the Partners in the Car Claim case filed a reply brief on admissibility SCC and applicable law, with exhibits.

1.4. By interlocutory judgment dated 21 December 2022, oral proceedings were stipulated on, inter alia, the issues mentioned above under 1.1(iv).

1.5. This oral hearing was held on 24 May 2023. Minutes were taken of it.

1.6. As announced at the hearing on 24 May 2023, the court issued an interlocutory judgment on 7 June 2023 (ECLI:NL:RBAMS:2023:8485) on, in brief, the

constituencies, the litigation funding agreements and the late submissions, always from SDEJ and Car Claim. In dat vonnis is tevens overwogen dat partijen zich in de in te dienen akten desgewenst tevens kunnen uitlaten over de gevolgen voor elk van beide zaken van het op 14 maart 2023 uitgesproken faillissement van Cor Millenaar B.V. (gedaagde 15).

1.7. By roll call decision of 5 July 2023 (ECLI:NL:RBAMS:2023:8583), in brief, the decisions of the interlocutory judgment of 7 June 2023 were upheld.

1.8. On 2 August 2023, SDEJ in the SDEJ case filed a deed of submission of details of size of constituency and financing agreement, with exhibits, and Car Claim in the Car Claim case filed a deed containing a statement pursuant to article 22 Rv also containing a claim for an order for non-disclosure with a claim for the imposition of penalty payments also containing a deed of submission of exhibits, with exhibits.

1.9. On 30 August 2023, Mercedes filed a deed on substantiation of an actual subordination and the submitted financing agreement in each of the two cases, and the Partners filed a reply deed size subordination and financing agreements, with exhibits, in each of the two cases.

1.10. By letter dated 11 September 2023, the Registrar wrote, in so far as relevant here, to the lawyers of Car Claim and Mercedes:

The court first notes that the auditor's report plays a role in the ex officio assessment of Car Claim's admissibility in (the size of) its constituency. The objections to the auditor's report raised by Mercedes in its reply deed will be included in this assessment. The same applies to the auditor's defence to these objections. The letter dated 30 August 2023 from Car Claim's lawyer and the letter of the same date from Mercedes' lawyer are therefore added to the file. If and insofar as the assessment from an adversarial point of view shows there is reason to do so, the party/parties concerned will be given the opportunity to (further) comment on the auditor's report by deed.

1.11. Finally, judgment was rendered.

#### Overview of this judgment

In this judgment, the court assesses the admissibility of SDEJ and Car Claim in their claims. One of the issues here is whether the interests for which the foundations are defending are sufficiently similar such that they are bundleable. This is the case for most of the claims. The two foundations are sufficiently representative given the size of their constituencies. The agreement with its litigation funder brought into the proceedings by SDEJ shows that it is sufficiently independent of its funder. In the case of Car Claim, although a provision is found which lays down this independence, as the full agreement has not been brought into the proceedings, the court cannot yet assess the independence. Car Claim will be given the opportunity to still bring the funding agreement fully into dispute. The verdict on its admissibility will depend on this. SDEJ is already declared admissible in most of the claims in this judgment. Furthermore, the judgment contains provisions on the further progress of the proceedings

2. The

facts In both

cases

A number of facts were set out in the interlocutory judgment of 22 June 2022. These facts are repeated and supplemented here to the extent still relevant.

In the SDEJ case

2.1. The statutes of SDEJ, as amended on 19 May 2020, open, so far as relevant here, as follows:

**DEFINITIONS**

In the articles of association, the following definitions shall apply:

(...)

- b. Claim or Claims: Complaints, demands and/or claims made by the Complainants and/or the Foundation in the interest of the Complainants, on any legal basis whatsoever, against one or more Entities and/or their Policy Holders in respect of any form of detriment, loss or damage which the Complainants claim to have suffered or to be suffering, individually or collectively, as a result of unauthorised manipulation of vehicle emissions in certain test situations and/or the misrepresentation by the Entities in relation to the actual levels of such emissions, commonly known as the diesel emissions scandal, which expressly includes, but is not limited to, claims by the Complainants in connection with the purchase, ownership or leasing of vehicles and claims in Relation to emissions of environmentally hazardous substances;
- c. Victims: all natural persons or legal entities under private or public law, or their legal successors, who have been directly or indirectly harmed or injured in any way whatsoever by the acts or omissions of the Entities and Policymakers and on which the Claims are based, in the broadest sense of the word;
- d. Entities:
  - i. all (legal) persons, in particular manufacturers of passenger cars, commercial vehicles, trucks and other vehicles, including their affiliated companies, who focus on the production and/or sale of such vehicles, of which it has become apparent or at the foundation there is any suspicion that they contain one or more Unauthorised Manipulation Instruments, all this in the broadest sense of the word;
  - ii. all (legal) persons who are or were involved in the production and/or development of an Unauthorised Manipulation Device, all in the broadest sense;
  - iii. all (legal) persons who are or were involved in the import, distribution and/or sale or lease of vehicles with an Unauthorised Manipulation Device, including the (exclusive) importers and dealers of the relevant car manufacturers referred to under i. above, all this in the broadest sense of the word;
  - iv. the Policy Officers of the entities referred to above under (i.) to (iii.); and/or
  - v. other entities and/or (supervisory) organisations, and/or their Policy Holders, who are (have been) involved in any way in the authorisation and/or approval of the relevant vehicles;
- e. Unauthorised Manipulation Device or Unauthorised Manipulation Device a manipulation device within the meaning of Article 3(10) of European Regulation No 715/2007, or within the Sense of a similar provision in subsequent legislation, that does not fall within any of the exceptions defined in this Regulation or subsequent legislation;
- f. Participant: a Debtor who has entered into an agreement with the Foundation;

2.2. SDEJ's articles of association further read, in so far as relevant here:

**GOAL**

**ARTICLE 2**

- 1. The purpose of the foundation is to promote and pursue the interests of the Debtors in general and the Unitholders in particular, including but not limited to:
  - a. representing the interests of Victims worldwide in connection with the Claim;

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- b. Promoting the interests of Defendants and representing Defendants in legal proceedings within the Netherlands and in other jurisdictions, such as civil, criminal and administrative proceedings, as appropriate;
  - c. to obtain and distribute financial compensation for (part of) the damages allegedly suffered by the Deterred Parties, including Unitholders;
  - d. representing the collective interests of Victims in environmental matters, in legal proceedings within the Netherlands and in other jurisdictions, such as civil, criminal and administrative proceedings, as appropriate;
  - e. anything related or conducive to the above, all in the broadest sense;
- all to the extent deemed appropriate by the board.
2. The foundation seeks to achieve this goal by, among other things:
- a conducting legal proceedings on any basis whatsoever in all jurisdictions, including but not limited to proceedings under Art.305a of the Civil Code, protecting the interests of the Debtors, on behalf of the foundation and/or on behalf of the Debtors, as applicable, negotiating and entering into agreements on behalf of or in the interests of the Debtors and the Unitholders, resolving outstanding disputes through one or more settlement agreements, including but not limited to settlement agreements which may subsequently be declared binding by the Amsterdam Court of Appeal at the request of the foundation pursuant to Article 7:907 of the Civil Code;
  - b. Acting as spokesperson and representative of Victims, Participants and other ultimate stakeholders;
  - c. streamlining and coordinating agreements between Defendants and third parties;
  - d. obtaining funding at a financing fee to fulfil its objective;
  - e. selecting, retaining and supervising the lawyers, law firms and experts chosen by the foundation to litigate and/or negotiate on behalf of the foundation and/or Unitholders;
  - f. obtaining and distributing - or monitoring and supervising - the distribution of any financial compensation or distribution for the benefit of Unitholders;
  - g. provide the opportunity for interested parties within and outside the Netherlands to join the foundation as Unitholders by entering into the Participation Agreement.
3. The foundation has no profit motive.

#### ORGANS AND GOVERNANCE STRUCTURE

##### ARTICLE 3

- 1. The foundation has the following bodies:
  - a. a board;
  - b. a supervisory board; and
  - c. a joint meeting of management and supervisory board.
- 2. The foundation has Unitholders.

( )

##### BOARD: TASK AND POWERS ARTICLE 6

4. The outline of the foundation's governance structure is set out by the board each year, based on the principles contained in the Code of Claims. The board indicates the extent to which it follows the provisions contained in the Code of Claims.

To the extent that the foundation does not follow the provisions of the Code of Claims, the board shall state why and to what extent it deviates from them.

5. The board is obliged to submit any proposed substantial change in the governance structure of the foundation to the supervisory board for discussion. The board will put the foregoing on the agenda of the meeting as a separate agenda item.

##### SUPERVISORY BOARD: COMPOSITION, APPOINTMENT, RESIGNATION ARTICLE

1. The Supervisory Board of the foundation shall consist of three or more natural persons.
3. Members of Supervisory Board are appointed and suspended by the Supervisory Board. The Code of Claims contains provisions on the desired composition of the foundation's Supervisory Board. When appointing members of the Supervisory Board, these provisions shall be followed to the extent possible.

### In the Car Claim case

2.3. Car Claim's articles of association, as amended on 3 July 2020, open, so far as relevant here, as follows:

#### **DEFINITIONS**

In the articles of association, the following definitions shall apply:

- b. Car Owner: (legal) person who has purchased or leased one or more Manipulated Vehicles in the Relevant Period;
- c. Car manufacturer: all legal entities (and their (actual) policymakers) that belong or have belonged to the group of companies of a car manufacturer that is or has been involved in an emissions scandal (...);
- i. Manipulated Vehicle means a vehicle of one of the brands carried by a Car Manufacturer, equipped or fitted with hardware and/or software (...) with the intention of manipulating emission tests and/or as a result of which the legal emission standards are exceeded;
- k. Local Dealer: a dealer officially authorised by a Car Manufacturer in (one or more) Manipulated Vehicles during the Relevant Period with (at the time) an outlet in the Netherlands;
- l. Participant: (legal) person who has entered into a participation agreement with the foundation;
- o. Relevant Period: the period during which Manipulated Vehicles were sold and/or delivered;
- u. Update: soft- and/or hardware modifications applied to (part of) the Manipulated Vehicles by which the prohibited soft- and/or hardware was allegedly removed, as a result of which the Manipulated Vehicles would allegedly meet legal emission standards;
- w. Claim: complaints, demands and/or claims of the Car Owners and/or of the Foundation in the interest of the Car Owners, on any legal basis whatsoever, against one or more Car Manufacturers in respect of any form of detriment, loss and/or damage that the Car Owners have suffered, are suffering and/or will suffer. as a result of the manipulation of the emissions of Manipulated Vehicles in certain test situations and/or the misrepresentations by Car Manufacturers as to the actual levels of such emissions.

2.4. Car Claim's articles of association further read, in so far as relevant here:

#### **GOAL**

##### **ARTICLE 2**

1. The foundation aims to promote the interests of Autobeziners, including but not limited to:
  - a. establishing and investigating the course of events leading to and involving (i) the development and installation of prohibited software and/or hardware in the Manipulated Vehicles and (ii) the sale and/or supply of the Manipulated Vehicles to the Car Owners;
  - b. determining and investigating the course of events leading to and relating to (the consequences of) the application of one or more Updates to the Manipulated Vehicles;
  - c. determining and investigating (i) all (financial) consequences of the above for the Car Owners, (ii) the possibility for the Car Owners to enforce Claims against (one or more) Car Manufacturers, including, but not limited to the rescission of their purchase agreements of Manipulated Vehicles with Local Dealers against (full) repayment of the purchase price, (iii) the possibility for the Car Owners to obtain (full) compensation from the responsible parties for the damage they have suffered and will suffer, (iv) the possibility for the

Car Owners to obtain (or have obtained) all necessary indemnities and/or warranties in respect of all possible negative consequences of the manipulation of the Manipulated Vehicles - both before and after one or more Updates - on Manipulated Vehicles, in order to continue the undisturbed use of the Manipulated Vehicles and (v) alternative options for resolving the emission problems of Manipulated Vehicles;

d. Obtaining a (liability) declaration from any court of competent jurisdiction that (one or more) Car Manufacturers, Bosch, their (former) management boards, their (former) supervisory boards, (one or more) Importers (one or more) Local Dealers and/or other culpable parties have violated applicable laws and regulations including, but not limited to, violation of laws and regulations regarding environmental (standards), unfair trade practices, misleading advertising and/or (consumer) sales law and any obligations to the Car Owners arising therefrom;

e. bringing actions for injunctions and/or seizures;

f. obtaining compensation for the (financial) impact on Car Owners; and

g. anything related or conducive to the above, all in the broadest sense.

2. The foundation seeks to achieve this goal by, among other things:

a. enabling Car Owners to join the foundation as Participants;

b. to negotiate and enter into agreements to settle disputes between (one or more) Car Manufacturers, (...), (one or more) Importers, (one or more) Local Dealers and/or other culpable parties on the one hand and the foundation and/or the Unitholders and/or the Car Owners on the other hand by means of a settlement agreement, which can be declared generally binding under Dutch law on the basis of the Mass Mass Claims Settlement Act in Collective Action (*tVamca*) and/or the Collective Mass Claims Settlement Act (**hem**);

c. identifying and conducting possible legal proceedings against (one or more) Car Manufacturers, (...), (one or more) Importers, (one or more) Local Dealers and/or other culpable parties respectively for their responsibility in relation to what is described in Article 2(1);

d. claiming compensation for the (financial) consequences for the Unitholders and/or the Car Owners from (one or more) Car Manufacturers, (...), (one or more) Importers, (one or more) Local Dealers and/or other vender(s) respectively for their responsibility in relation to what is described in Article 2(1);

e. seeking out, investigating, analysing and pursuing all possible avenues within and outside the Netherlands for obtaining compensation for the Unitholders and/or the Car Owners both in and out of court;

f. Assisting any public investigative body inside and outside the Netherlands in investigating what actually happened regarding the acts and/or omissions of (one or more) Car Manufacturers, (...), (een of meer) Importeurs en/of (een of meer) Lokale Handelaren inzake het ontwikkelen, het produceren en het installeren van verboden soft- en/of hardware in de Gemanipuleerde Voertuigen en/of het importeren, verkopen en/of het (doen) leveren van de Gemanipuleerde Voertuigen aan de Autobezitters, zoals beschreven in artikel 2 lid 1, en mogelijk het initiëren van onderzoeken binnen en buiten Nederland daaromtrent;

g. obtaining funding - in accordance with the provisions of the Claims Code - to fulfil its objectives;

h. selecting, retaining and supervising the lawyers, law firms and experts chosen by the foundation to litigate and/or negotiate on behalf of the foundation, the Unitholders and/or the Car Owners;

i. obtaining and distributing - or monitoring and supervising the distribution - any financial compensation or distribution for the benefit of the Unitholders and/or the Car Owners.

3. The foundation has no profit motive.

## ORGANS AND GOVERNANCE STRUCTURE

### ARTICLE 3

1. The foundation has the following bodies:

a. a board;

b. a supervisory board; and

c. a joint meeting of management and supervisory board.

2. The governance structure of the foundation is set up in accordance with the provisions of the Claims Code. Deze code is opgesteld door de Commissie Claimcode en is van toepassing op onder meer stichtingen die optreden overeenkomstig artikel 3:305a BW en stichtingen die optreden met het oog op het aangaan en verbindendverklaring van een vaststellingsovereenkomst als bedoeld in artikel 7:907 BW.

3. The board and the supervisory board are responsible for maintaining the foundation's governance structure and compliance with Claim Code.



4. The foundation has Unitholders.

**BOARD: COMPOSITION, APPOINTMENT, RESIGNATION**  
**ARTICLE 5**

1. The board of the foundation consists of a number of three or more natural persons to be determined by the supervisory board.

2. The Code of Claims includes provisions on the desired composition of the foundation's board. When appointing board members, these provisions are followed to the extent possible.

**BOARD: TASK AND POWERS ARTICLE 6**

4. The board is required to set out annually the main features of the foundation's governance structure based on the Claims Code. In this statement, the executive board shall include the extent to which the foundation follows the provisions of the Code of Claims. To the extent that the Board deviates from the Code of Claims, it shall explain why and to what extent the foundation deviates from it.

5. The board is obliged to submit any proposed change in the governance structure of the foundation and in its compliance with the Claims Code to the supervisory board for discussion. The board will include the foregoing as a separate agenda item on the meeting agenda.

**SUPERVISORY COUNCIL: COMPOSITION, APPOINTMENT, RETIREMENT**  
**ARTICLE 10**

1. The Supervisory Board of the foundation consists of a number of three or more natural persons to be determined by the Supervisory Board.

2. In the Code of Claims, provisions on the desired composition of supervisory boards of the foundation are included. When appointing supervisory board members, these provisions are followed to the extent possible.

In both cases

2.5. Mercedes-Benz Group AG produces, among others, vehicles with diesel engines. Mercedes-Benz Nederland B.V. importeert onder meer deze voertuigen in Nederland.

2.6. The group of defendants referred to as the Partners consists of dealers and service partners. The dealers sell new vehicles manufactured by Mercedes-Benz Group AG (and imported by Mercedes-Benz Nederland B.V.). They also carry out maintenance on these vehicles. The service partners do not sell new vehicles produced by Mercedes-Benz Group AG (and imported by Mercedes-Benz Nederland B.V.). They do, however, service these vehicles. They also deal in used vehicles, including vehicles produced by Mercedes-Benz Group AG (whether or not imported by Mercedes-Benz Nederland B.V.).

In the SDEJ case

2.7. By letter dated 20 May 2020, SDEJ wrote to Mercedes-Benz Group AG (and in copy to Mercedes-Benz Nederland B.V. and "Other Mercedes-Benz dealers in the Netherlands"), insofar as relevant here:

This letter is sent to you on behalf of *Stichting Diesel Emissions Justice*, a foundation established under the laws of the Netherlands (also referred to as DEJF or the Foundation), acting in the collective interest of all the persons and entities whose interests the Foundation represents, and on behalf of the individual participants that the Foundation represents.

#### Introduction

This letter is a notification of liability to:

- Daimler AG (**Daimler**);
- (...);
- the importers of Mercedes-Benz vehicles in the Netherlands, i.e. Mercedes-Benz Cars Nederland B.V. (**MBCN**) for passenger cars and Mercedes-Benz Vans Nederland B.V. (**MBVN**) for vans; and
- individual car dealers based in the Netherlands (as listed in enclosed attachment as Annex 1, the Dealers),

collectively referred to as: the **Respondents** and the entities mentioned above in sub (i), (ii), (iii) and (iv) collectively referred to as: **Mercedes**. This notice of liability concerns the design, development, manufacturing, installation and utilization of impermissible defeat devices (**Defeat Devices**) in diesel engines that were installed in vehicles of the Mercedes-Benz brand or any other brand of the Daimler group (**Vehicles**), which Vehicles were sold or leased in the European market.

The Defeat Device, the presence and functioning of which was not disclosed to the relevant authorities, regulators, consumers and the market in general, falsely and fraudulently influenced measurements during vehicle emissions testing in accordance with EU type-approval legislation. The Defeat Devices were installed in hundreds of thousands or even millions of Vehicles which Mercedes sold or leased in the European Union (EU).

The Vehicles were developed by Daimler (...). MBCN and MBVN imported the Vehicles into the Netherlands and the Dealers sold or leased the Vehicles. Due to the presence of the Defeat Devices, the Vehicles were not in compliance with the EU applicable emission and type approval regulations that are applicable to the Vehicles. Daimler also issued false certificates of conformity (CoCs), in which Mercedes incorrectly stated that the Vehicles complied with the relevant applicable European emission regulations. As a result, the value of the Vehicles has greatly depreciated, and owners and lessees of the Vehicles run the risk that they may no longer be able to use their Vehicles on the road, or may be confronted with use restrictions. Moreover, there are strong indications that software updates proposed by Daimler (...) do not fix the problem but rather create additional problems, leading to additional damage. For the same reasons, the qualities of the Vehicles were inconsistent with the reasonable expectations of their purchasers or lessees, particularly as Daimler has marketed the Vehicles as 'clean' (or even the 'cleanest') and 'environmentally friendly'. In this letter, we refer to this constellation of facts as: the **Fraud**.

With the development and large-scale application of Defeat Devices in their Vehicles, Daimler (...) aimed to circumvent the ever-stricter European emissions standards. These standards found their way into the regulations as set out in the EU vehicle type-approval framework Directive 2007/46/EC and developed further in the Euro 4 Regulation (applicable as of January 2005), the Euro 5 Regulation (applicable as of September 2009) and, currently, the Euro 6 Regulation (applicable as of September 2014). These regulations aim to curb ever-growing emissions substances in car exhaust fumes with deleterious effects on public health and the environment.

This letter contains a description of the objectives of the Foundation, a summary of the relevant facts within their legal context, a brief analysis of the legal grounds of liability of the Respondents under Dutch law and a description of the remedies sought by the Foundation. We conclude with a few remarks concerning the way forward.

This letter also serves as formal notice aimed at interrupting the limitation period [*stuitingsbrief*], as referred to in Section 3:317 of the Dutch Civil Code (DCC) for any and all claims relating to the Fraud of any and all parties whose interests the Foundation represents.

#### Next steps

The Foundation primarily intends to resolve this matter through settlement negotiations and requests the Respondents to enter into settlement discussions (Section 3:305a(3)(c) DCC (Recast)).

We would like to point out specifically that the Foundation is willing to discuss a pan-European settlement with you in order to ensure that Daimler can move forward with its (truly) green transition. Through its pan-European basis of participants, its expertise and experience, the Foundation is best placed to ensure the implementation of a European settlement, both in and out of court.

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However, if this invitation remains unanswered or does not result in a first settlement discussion being scheduled within two weeks from the date of receipt of this letter, the Foundation will pursue litigation without giving prior notice to the Respondents.

2.8. Mercedes-Benz Group AG did not respond, or at least not in substance, to this letter. With one exception, the parties to whom a copy was sent also did not respond to this letter, at least not in substance.

#### In the Car Claim case

2.9. Bij brief van 20 juli 2020 heeft Car Claim, voor zover hier van belang, aan Mercedes-Benz Group AG geschreven:

##### Introduction

1. This is a claim letter on behalf of the Dutch foundation, Stichting Car Claim (the '**Foundation**'). The Foundation represents the interests of all former and current owners and users of cars with Euro 5 and Euro 6 diesel engines (the '**Car Owners**'), which cars are equipped with illegal defeat devices (the '**Affected Vehicles**').

2. This claim letter contains a notice of liability and an invitation from the Foundation to Daimler AG ('**Daimler**') to enter into discussions regarding a collective resolution of the claims of European Car Owners against Daimler. The Foundation wishes to enter into a dialogue and explore an amicable settlement. Such settlement can be declared binding by the Amsterdam Court of Appeal in the Netherlands, providing a swift and cost-efficient solution for the European Car Owners and Daimler.

##### Daimler's involvement in the diesel emission scandal

10. In the past few years, it became apparent that Daimler is (...) involved in the diesel emission scandal. Daimler recalled many of its diesel models for reasons related to the emission control system. The German type approval authority (KBA) has repeatedly ordered Daimler to recall its diesel cars and to implement measures to fix the defects related to the emission control systems. To date, Daimler conducted over 30 recalls in connection with the emission control systems in different categories of its Euro 5 and Euro 6 diesel models equipped with various engine types.

11. According to KBA, all Daimler Affected Vehicles that are registered in KBA's database as being recalled contain inadmissible defeat devices. KBA explains that these defeat devices reduce the effectiveness of the emission control systems in the recalled Affected Vehicles, which is not permitted under Regulation 715/2007. KBA indicates that the published list of recalled vehicles is not exhaustive, because the test procedures are still being conducted. Daimler has already recalled over three million Affected Vehicles and is likely to recall more, as the investigations are ongoing.

12. The Foundation noticed in the media that Daimler has applied software updates to some of its Affected Vehicles. However, as recent test results confirm, the applied software updates have not solved the emission problems. Even after the software updates, the emissions of Daimler Affected Vehicles still exceed the European limits. The German Minister of Transport had accused Daimler of trickery and asked Daimler "*to clean up the mess*".

##### Legal obligations of car manufacturers including Daimler

(...)

29. Aforementioned investigations and tests show that car manufacturers use various types of defeat devices reducing the effectiveness of emission control systems under normal conditions of operation. To date, at least the following types of defeat devices have been identified in Affected Vehicles of various car manufacturers:

- (1) thermal window defeat device;
- (2) test recognition defeat device;
- (3) hot restart defeat device; and
- (4) timer defeat device.

#### **Daimler fails to comply with EV emission regulation**

30. Unfortunately, Daimler is no exception. Test results show that Daimler uses at least three of these defeat devices: the thermal window defeat device, the hot restart defeat device and the test recognition defeat device. The latter is reported to be present for the purpose of limiting the injection of (a sufficient amount of) urea mixture Adblue, which neutralises the NO<sub>x</sub>, to test situations. Other reports identify Daimler Affected Vehicles also being fitted with a so-called "coolant setpoint temperature control". This ensures that the coolant circuit is artificially kept cooler, delaying the warm-up of the engine oil and thus ensuring that the test cycle complies with the emission limit values in the laboratory, while on the road the same car exceeds these limits.

31. Aforementioned investigations and tests have also revealed that many diesel cars made by Daimler fail to meet the European emission limits under normal operational conditions. The Euro 5 limits allow diesel cars to emit no more than 180 mg NO<sub>x</sub> per kilometre. The Euro 6 limits allow diesel cars to emit no more than 80 mg NO<sub>x</sub> per kilometre. The Affected Vehicles of Daimler emit more NO<sub>x</sub> than allowed under the European emission regulations. The Foundation elaborates a few.

(...)

#### **Notice of liability**

47. Daimler Euro 5 and Euro 6 Affected Vehicles are fitted with illegal defeat devices. Daimler developed, produced, marketed and distributed its Affected Vehicles to the European Car Owners. Therefore, the Foundation holds Daimler accountable and liable for all damage of the European Car Owners in connection with the illegal defeat devices in their Affected Vehicles.

#### **Interruption of prescription period**

48. If and insofar as any prescription period would apply to claims of Car Owners against Daimler in relation to the Affected Vehicles, and to the extent legally possible, the Foundation herewith interrupts these prescription periods.

#### **Invitation to enter into settlement negotiations**

49. The infringement of the emission limits and the use of illegal defeat devices have been going on for years. Daimler has not solved this problem and to date did not show any intention to solve the problem properly. The reasonable period of time in which it should have dealt with its problems has passed.

50. The Foundation requests Daimler to

(1) recall all Daimler Affected Vehicles owned by European Car Owners and ensure that their Affected Vehicles will fully comply with the applicable emission limits under normal conditions of use and with the emission regulations of the European Union and the respective Member States, all within a reasonable period of time;

(2) ensure and guarantee that the measures that will be taken in order to have the Affected Vehicles to comply with the applicable emission limits and regulations of the European Union and the respective Member States, will not have any negative effects whatsoever on the Affected Vehicles or the way these are being used by the Car Owners under normal conditions of operation,

if and to the extent that it is not possible to properly and fully repair the Affected Vehicles and to ensure that the measures will have no negative effects, to

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(1) make it possible for the European Car Owners to return their Affected Vehicles to Daimler (dealers) and to repay to the Car Owners the purchase price thereof; or

(2) if Car Owners for whatever reason cannot or do not wish to return the Affected Vehicle to (a) Daimler (dealer), to properly and fully compensate those Car Owners for the damage due to the presence of defeat devices in their Affected Vehicles.

51. The Foundation would appreciate and urge you to review these claims of the European Car Owners and consider whether it is willing to meet these claims. We kindly invite you to enter into a constructive dialogue with the Foundation about the available options in order to reach a Pan-European solution for all European Car Owners along the lines set out above. The Foundation truly believes that its initiative may provide a real opportunity for you to come to a meaningful and solid solution on a European level, in the interest of all parties and resolve the diesel emission crisis once and for all.

52. The Foundation kindly requests you to reply to this letter within 30 days after today.

2.10. By letter dated 18 August 2020, Mercedes-Benz Group AG wrote to Car Claim, to the extent relevant here:

We refer to a claim notice of 20 July 2020 (...) of Stichting Car Claim (SCC).

In the claim notice SCC suggests it has the power to act on behalf of all former and current European owners and users of cars with Euro 5 and Euro 6 diesel engines. It is unclear to us what the basis should be for such a wide representation - no evidence has been provided.

We kindly request you to send us the documentation showing your authority to represent the persons you call 'Car Owners', in the absence of which we will regard your letter as to have no effect whatsoever.

In the meantime, we reject SCC's allegations and do not accept any liability. We reserve all rights and defences.

2.11. By e-mail message dated 15 December 2020, Car Claim's lawyer wrote to the lawyer of Mercedes-Benz Nederland B.V., to the extent relevant here:

On behalf of my client Foundation Car Claim (**'Foundation'**), I send to you with the following.

Among other things, the Foundation represents the interests of former and current owners and users of Euro 5 and Euro 6 diesel vehicles of Daimler AG (**'Daimler'**), who have been duped by the Daimler diesel emissions scandal (**'Car Owners'**). In this regard, on 20 July 2020, the Foundation held Daimler liable and invited them to enter into consultations on a reasonable solution. A copy of that letter with attachment is enclosed herewith (...). For more information on the Foundation, its initiative and the Daimler emissions scandal, please refer to the contents of this annex.

On 30 July 2020, another interest group, Stichting Diesel Emissions Justice (**'SDEJ'**), brought WAMCA proceedings against Daimler, its Dutch importers Mercedes-Benz Vans Nederland B.V. and Mercedes-Benz Cars Nederland and its Dutch dealers (collectively referred to here as **'Daimler et al'**). (...). You are acting in those proceedings as counsel for both Daimler, and the Importers.

SDEJ's summons dated 30 July 2020 was entered in the Central Register of Collective Action Proceedings on 31 July 2020. By roll call decision of 30 September 2020, the court extended by two months (i.e. until 31 December 2020) the deadline for the Foundation to issue a writ of claims (**'Claims'**) to Daimler et al. Copy of this rolling decision is attached (...).

Like SDEJ, the Foundation is of the view that Daimler c.s. is liable to Car Owners for the consequences of the Daimler diesel emissions scandal. The Foundation therefore intends to sue Daimler et al. on the same grounds and with institution of the Claims as SDEJ has included in its summons dated 30 July 2020. I refer in this regard to SDEJ's subpoena, the contents of which are known to your clients.

The Foundation understands that the Importers did not respond in substance to SDEJ's invitation to consultations of 20 May 2020 (...). Nevertheless, the Foundation (...) hereby invites the Importers to enter into consultations with it regarding a reasonable resolution of the consequences of the Daimler diesel emissions scandal and the Foundations' Claims against your clients. On behalf of the Foundation, I am happy to keep myself available for consultations and in any event, by Tuesday 29 December 2020 at the latest, to hear from you whether your clients are willing to settle the Claims against your clients in full, failing which the Foundation will subpoena your clients. This invitation also applies to Daimler, which has not accepted the Foundation's first proposal to enter into consultations on a reasonable solution.

Mercedes-Benz Nederland B.V. did not respond to this invitation for consultation.

2.12. By e-mail message of the same date, Car Claim's lawyer wrote, in so far as relevant here, to the Partners' then lawyer:

On behalf of my client Foundation Car Claim (**'Foundation'**), I write to you with the following.

Among other things, the Foundation represents the interests of former and current owners and users of Euro 5 and Euro 6 diesel vehicles of Daimler AG ("Daimler"), who have been duped by the Daimler diesel emissions scandal (**"Car Owners"**). In this regard, on 20 July 2020, the Foundation held Daimler liable and invited them to enter into consultations on a reasonable solution. A copy of that letter with attachment is attached hereto (...). For more information on the Foundation, its initiative and the Daimler emissions scandal, please refer to the contents of this annex.

On 30 July 2020, another interest group, Stichting Diesel Emissions Justice (**'SDEJ'**), brought WAMCA proceedings against Daimler, its Dutch importers Mercedes-Benz Vans Nederland B.V. and Mercedes-Benz Cars Nederland and its Dutch dealers (collectively here: **'Daimler c.s.'**). (...) You are acting in those proceedings as counsel for Daimler's Dutch dealers.

SDEJ's summons dated 30 July 2020 was entered in the central register of collective action proceedings on 31 July 2020. By roll call decision of 30 September 2020, the court extended by two months (i.e. until 31 December 2020) the deadline for the Foundation to issue a writ of summons with similar claims (**'Claims'**) to Daimler et al. Copy of this rolling decision is attached (...).

Like SDEJ, the Foundation is of the view that Daimler c.s. is liable to Car Owners for the consequences of the Daimler diesel emissions scandal. The Foundation therefore intends to sue Daimler et al. on the same grounds and with institution of the Claims as SDEJ has included in its summons dated 30 July 2020. I refer in this regard to SDEJ's subpoena, the contents of which are known to your clients.

The Foundation understands that your clients did not respond in substance to SDEJ's invitation to consultations of 20 May 2020 (...). Nevertheless, the Foundation (...) hereby invites (...) to enter into consultations with it regarding a reasonable solution to the consequences of the Daimler diesel emissions scandal and the Foundations' Claims against your clients. On behalf of the Foundation, I would like to keep myself available for consultation and, in any event, to hear from you no later than Tuesday 29 December 2020 whether your clients are willing to settle the Claims against your clients in full, failing which the Foundation will sue your clients. This invitation also applies to Daimler, which has not accepted the Foundation's first proposal to enter into consultations on a reasonable solution.

In case your clients do not intend to respond to the Foundation's invitation for consultation, I would like to hear from you by Monday 28 December before 9 a.m. at the latest whether the summonses against your clients can be served on your office.

The Partners did not accept this invitation for consultation. The writ of summons addressed to the Partners was served on 30 December 2020 with the consent of their then attorney at law to the office of such attorney.

### 3. The **disputes**

#### In the SDEJ case

3.1. Following the interlocutory judgment of 22 June 2022 (in which it was understood that Article 3:305a (old) of the Civil Code applied to the claims brought), parts 1, 2 and 3 of SDEJ's amended claim lapsed (see below in 8.1). The remaining parts read (verbatim) as follows:

REASONS WHY the Foundation requests the Court to rule, as far as possible enforceably, as follows:

Insofar as the Court holds that the claims are subject to the Mass Claims Settlement Act in a Collective Action, as it came into force on 1 January 2020,

#### Admissibility exclusive stakeholder and narrowly defined group

(...)

#### Statements for justice

4. rule that:

4.1 with regard to the protection of small self-employed persons, that non-profit associations and foundations, as well as sole proprietorships, combinations of natural persons such as general partnerships, or legal persons with only one employee whose turnover in the financial year preceding the year of purchase of the Affected Vehicle did not exceed EUR **100,000**, are to be regarded as consumers in the judgments to be awarded in these proceedings.

4.2 regarding unfair commercial practices:

4.2.1 the conduct of the Daimler and the Importer(s) (now after the merger Mercedes-Benz Nederland B.V., hereinafter in singular the "**Importer**") as described in the body of this summons qualify as an unfair trade practice and are therefore unlawful towards the Consumers;

4.2.2 the conduct of the Daimler and the Importer as described in the body of this summons is imputable to the Dealers so that the unfair commercial practices are also imputable to the Dealers and their conduct is unlawful towards the Consumers;

4.2.3 the Contracts concluded between Consumers and Dealers - at least before 14 June 2014 - as a result of the aforementioned unfair commercial practices are voidable;

4.2.4 the Dealers, Daimler and the Importer are jointly and severally liable for damages to the Consumers in view of the unfair commercial practices.

4.3 Regarding error:

4.3.1 the Consumers, Lessees Buyers and Business Buyers are authorised to annul the Agreements.

4.4 with regard to conformity, product liability and non-performance:

4.4.1 That the Affected Vehicles do not comply with the Agreements;

4.4.2 that the reasonable period to repair or replace the defects in the Affected Vehicles has expired unused;

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4.4.3 That the Consumers, Lessees Buyers and the Business Buyers are entitled to claim from the relevant Dealers replacement of the present Affected Vehicle to the extent that they still have their Affected Vehicle in their possession;

4.4.4 That the Consumers, Lessees Buyers and Business Buyers have the power to terminate their respective Agreements with the respective Dealers.

4.5 in respect of unfair commercial practices, error, non-conformity, product liability and breach of contract:

4.5.1 that the Consumers, Lessees Buyers and Business Buyers claiming annulment or rescission of the Agreement with the relevant Dealers, or case replacement, on the basis of the claims to be awarded under this Petition, including declarations of entitlement, shall not be liable to pay any compensation for the use of the relevant Affected Vehicle if awarded;

4.6 Regarding tort:

4.6.1 that each of Daimler, the Importer and the Dealers, or at least one or more of them, acted unlawfully towards Consumers, Business Buyers and Lessees;

4.6.2 that the unlawful conduct of the Daimler and the Importer towards the Consumers, the Business Buyers and the Lessees can also be held against the Dealers;

4.6.3 that each of Daimler, the Importer and the Dealers, or at least one or more of them, were guilty of unlawful class action within the meaning of Section 6:166 of the Civil Code towards the Consumers, the Business Buyers and the Lessees;

Actions for annulment rescission and damages

5. in respect of the Consumers, Lessees Buyers and Business Buyers who are still in possession of their vehicles at the time of the judgment to be given in these proceedings and who have not expressed their desire to retain their GetrolTen Vehicle before the final judgment to be given in these proceedings, rule as follows:

5.1 primary:

5.1.1 declare the annulment of the Agreement between the Consumer, Lessees Buyers or the Business Buyer and the relevant Dealers, order the relevant Dealers to repay the entire purchase price of the Affected Vehicle, without claiming any compensation in connection with the use of the Affected Vehicle or its depreciation.

5.2 In the alternative:

5.2.1 order the relevant Dealers from whom the Consumer, Lessees Buyer or the Business Buyer purchased the Affected Vehicle to take back the Affected Vehicle and replace it with a new one of a Comparable Type, without being entitled to any compensation in connection with the use of the Affected Vehicle or its decrease in value.

alternatively

5.2.2 to order the Daimler and the Importer jointly and severally to take back the Affected Vehicle and replace it with a new one of a Comparable Type, without being entitled to any compensation in connection with the use of the Affected Vehicle or its depreciation.

5.3 In the further alternative:

5.3.1 To rule that the Contracts concluded by the Consumers, Lessees Buyers or the Business Buyers with the relevant Dealers have been rescinded and the latter are bound to repay to the relevant Consumers and the Business Buyers the purchase price, without the latter will be able to claim



claim compensation in connection with the use of the Affected Vehicle or its diminished value.

5.4 In the further alternative:

5.4.1 Declare that the Agreements concluded by Consumers, Lessees Buyers and Business Buyers with the relevant Dealers shall, upon the first request of a Consumer, Lessees Buyers or a Business Buyer, be deemed annulled or, in the alternative, rescinded, whereupon the relevant Dealers shall be obliged to refund the purchase price to the relevant Consumers, Lessees Buyers or Business Buyers, without the latter being able to claim compensation in connection with the use of the Affected Vehicle or its diminished value.

5.5 more in the alternative:

5.5.1 Order Daimler, the Importer and the Dealers jointly and severally to compensate the Consumers, Lessees Buyers and the Business Buyers for the damages they have suffered through:

5.5.1.1 - if the Consumer, Lessees Buyer and the Business Buyer so opts and requests - compensation other than in cash, namely by replacement of the Affected Vehicle with a new one of a Comparable Type, without the Defendants thereby being able to claim compensation in connection with the use of the Affected Vehicle or its diminution in value;

5.5.1.2 compensation.

6. in respect of Consumers, Lessees Buyers and Business Buyers who, at the time of the judgment to be given in these proceedings, are no longer in possession of their Affected Vehicle or who, prior to the final judgment to be given in these proceedings, have expressed a desire to retain their Affected Vehicle:

6.1 Order Daimler, the Importer and the Dealers jointly and severally to compensate the Consumers, Lessees Buyers and the Business Buyers for the damages they have suffered, as further to be determined by the Court.

7. Regarding Lessees:

7.1 order Daimler and the Importer jointly and severally to compensate the Lessees for the losses they have suffered, as to be further determined by the Court

8. In all cases where a monetary claim is awarded, to add statutory interest from the moment the Defendants, or one or more of them, are in default, with the Foundation claiming statutory commercial interest within the meaning of Section 6:119a of the Dutch Civil Code for the benefit of the corporate injured parties.

9. Order the defendants to pay the costs of these proceedings, including, if applicable, the reasonable and proportionate costs referred to in Section 10181(2) of the Civil Code incurred by the Foundation for the purposes of the proceedings, all to be increased by statutory interest from the date of the judgment to be given in these proceedings.

all this on the understanding that, to the extent that Your Court considers that the collective action law as it applied prior to the entry into force of the Act on Settlement of Mass Damage in a Collective Action applies to the underlying complex of facts, then it applies that the claims under 1, 2 and 3 of this petition lapse, as well as the claims for payment of monetary damages.

3.2. The list of abbreviations and definitions contained in SDEJ's subpoena reads (verbatim), as far as relevant here:

Consumer	A person, to svie the wen consumer protection applies - whether through the so-called reflex effect or not - and who has a Affected Vehicle purchased, leased or otherwise used.

Daimler	Daimler Aktiengesellschaft, manufacturer of vehicles of the Mercedes-Benz brand, among others, and one of the Defendants in these proceedings.
Dealers	Netherlands-based car dealers and leasing companies that leased, sold or delivered one or more Affected Mercedes-Benz brand vehicles to one or more Defendants and are co-defendants in this procedure.
Diesel scandal	The large-scale and systematic deployment of Illegal Manipulation devices in diesel vehicles from car manufacturers such as VW c.s. and Daimler, among others, used by authorities and owners of Affected Vehicles have been misled.
Duped	The (legal) persons, including Consumers, Business Buyers, and Lessees, who have been harmed by the Diesel Scandal, because they are an Affected Have bought, leased or delivered vehicle.
Affected Vehicle	An agreement concluded by Daimler, including one or more to its affiliates, manufactured and fitted with an Illegal Manipulation Device diesel vehicle of the Mercedes-Benz brand approved by a type-approval authority in the European Union, such as the CBA, on the basis of the Euro 5 or Euro 6 limits and by a Defendant in the period 1 January <b>2009</b> to 31 January <b>2019</b> has been bought, leased or otherwise obtained.
(...)	
Illegal Instrument of Manipulation or Illegal Manipulation tools	One or more manipulation tools as intended in Article 5(2) first sentence of European Regulation No 715/2007 and thus reduce the efficiency of emission control systems, without one or more of the exceptions listed in the same paragraph 2 (second sentence and enumeration) of application.
Importers	MBCN and MBVN, both importers of vehicles of the Mercedes-Benz brand, among others, in the Netherlands.
(...)	
CBA	The <i>Kraftfahrt Bundesamt</i> , the German organisation that is responsible for testing and approving vehicle types submitted for type approval in Germany. The CBA is the equivalent of the Dutch Rijksdienst voor het Wegverkeer (RDW).

Lessee	A Consumer or a Business Buyer, who has a Affected Vehicle leased.
Lessee Copper	A Lessee removing his or her Affected Vehicle from under a financial lease agreement has acquired and became its legal owner after the end of the lease.
Manipulation tool	A defeat device within the meaning of Article 3(10) of European Regulation No 715/2007, being an element of design which measures temperature, vehicle speed, engine speed, acceleration, intake depression or other parameters for the purpose of activating, modulating, decelerating or deactivating any part of the emission control system so as to reduce the effectiveness of the emission control system under conditions encountered during normal operation of the vehicle to be expected.
(...)	
Closely-defined Group	The narrowly defined group referred to in section 1018e para. 2 Rv which is further delineated in this writ in section VI.B.
Agreement(s)	The purchase agreement(s), or lease agreement(s) under which the Defendants were given the disposal of the Affected Vehicles.
Foundation	Diesel Emissions Justice Foundation, the plaintiff.
Similar Type	A vehicle that in terms of (environmental) performance, driving style, appearance and value - assuming there would not have been an Illegal Manipulation Device at the Affected Vehicle - and which is similar to the Affected Vehicle.
(...)	
Corporate Buyer	A (legal) person who has an Affected Vehicle purchased who is not a Consumer.

"Daimler" now stands for "Mercedes-Benz Group A-G" and "Importers" for "Importer".

3.3. Mercedes concludes its conclusion in the SDEJ case referred to above at 1.3 as follows:

Mercedes-Benz Group c.s. requests your Court by judgment, so far as possible provisionally enforceable:

1. Declare SDEJ inadmissible or deny its claims;

2. order SDEJ to pay the costs of the proceedings, plus the follow-up costs of EUR 163 without service or EUR 248 if service is served, all to be paid within fourteen days of the date of the judgment, and - in the event that the costs are not paid within that period - plus statutory interest on the costs as from fourteen days of the date of the judgment.

3.4. The Partners conclude their conclusion in the SDEJ case referred to above at 1.3 as follows:

**WITH CONCLUSION:**

That the usv Court be pleased by judgment, always to the extent possible provisionally enforceable:

- Declare SDEJ inadmissible in its claims, or at least dismiss those claims;

- order SDEJ to pay the costs of the proceedings, including the follow-up costs of an amount of EUR 255 without service, increased by an amount of EUR 85 in case of service, with a stipulation that if these costs are not paid within 14 days from the date of the judgment to be given in this case, statutory interest will be payable thereon from the 15th day after the date of the judgment.

In the Car Claim case

3.5. Following the interlocutory judgment of 22 June 2022 (in which it was understood that Article 3:305a (old) of the Civil Code applied to the claims brought), parts 1 and 2 of Car Claim's amended claim lapsed (see below in 8.2). The remaining parts read (verbatim) as follows:

REASONS WHY Car Claim requests the Court to rule, as far as possible enforceably, as follows:

Voor zover de Rechtbank oordeelt dat op de vorderingen de Wet Afwikkeling Massaschade in een Collectieve Actie van toepassing is, zoals die op 1 januari 2020 in werking is getreden,

Admissibility exclusive advocate and narrowly defined group

A. rule that Car Claim is admissible in these collective action proceedings;

(...)

Statements of law

3. rule that:

3.1 with regard to the protection of small self-employed persons, that non-profit-making associations and foundations, as well as sole proprietorships, combinations of natural persons such as general partnerships, or legal persons with only one employee whose turnover in the financial year preceding the year of purchase of the Affected Vehicle did not exceed EUR **100,000**, are to be regarded as consumers in the judgments to be awarded in these proceedings;

3.2 regarding unfair commercial practices:

3.2.1 the conduct of Mercedes-Benz and the Importer as described in the body of this writ of summons qualify as an unfair commercial practice and are therefore unlawful towards consumers;

3.2.2 Mercedes-Benz and the Importer are jointly and severally liable for damages towards the Consumers in view of the unfair commercial practices;

3.3 Regarding error:

3.3.1 the Consumers, Lessees Buyers and the Business Buyers are authorised to annul the Contracts concluded between them and the respective Traders;

3.4 regarding non-conformity and non-performance:

3.4.1 That the Affected Vehicles do not comply with the Agreements;

3.4.2 that the reasonable period to repair or replace the defects in the Affected Vehicles has expired unused;

3.4.3 that the Consumers, Lessees Buyers and the Business Buyers are entitled to claim from the relevant Dealers replacement of the present Affected Vehicle to the extent that they still have their Affected Vehicle in their possession;

3.4.4 That the Consumers, Lessees Buyers and Business Buyers have the power to terminate, or at least partially terminate, their respective Contracts with the respective Traders and are thereby entitled to a price reduction to be determined by the Court;

3.5 with regard to error, non-conformity and breach of contract:

3.5.1 That the Consumers, Lessees Buyers and Business Buyers to be assigned under this Petition shall not be liable for any compensation for the use of the relevant Affected Vehicle pursuant to the claims to be assigned under this Petition for the undoing of their Agreements, or for case replacement;

3.6 Regarding tort:

3.6.1 that Mercedes-Benz and the Importer acted unlawfully towards Consumers, Business Buyers and Lessees;

#### Claim for damages

4. Order Mercedes-Benz and the Importer jointly and severally to compensate the Consumers, Lessees Buyers and the Business Buyers for the damages they have suffered, by way of:

4.1 if the Consumer, Lessees Buyer and the Business Buyer so opts and requests - compensation other than in cash, namely by replacement of the Affected Vehicle with a new one of a Comparable Type, without the Defendants thereby being entitled to any compensation in connection with the use of the Affected Vehicle or its diminution in value;

4.2 damages, as to be further determined by the Court;

5. Order Mercedes-Benz and the Importer jointly and severally to compensate the Lessees for the losses they have suffered, as further to be determined by the Court;

6. In all cases where a monetary claim is awarded, to add statutory interest from the moment the Defendants, or one or more of them, are in default, with Car Claim claiming statutory commercial interest for the benefit of the business victims within the meaning of article 6:119a of the Dutch Civil Code;

7. Order the defendants jointly and severally to pay the costs of these proceedings, including, if applicable, the reasonable and proportionate costs within the meaning of Section 10181(2) of the Civil Code incurred by Car Claim for the purposes of the proceedings, as further determined by the Court, all to be increased by statutory interest from the date of the judgment to be given in these proceedings;

all this on the understanding that, to the extent that the Court holds that the underlying complex of facts is subject to collective action law as it applied prior to the entry into force of the Act on Settlement of Mass Damage in a Collective Action, then it applies that the claims under 1 and 2 of this petition lapse, as well as the claims for payment of monetary damages.

3.6. The glossary of terms contained in Car Claim's summons reads (verbatim), so far as relevant here:

Car owners	The (legal) persons, including Consumers, Business Buyers, Lessees and Lessees Buyers as defined in the SDEJ Subpoena, who have been adversely affected by the diesel emissions scandal because they purchased, leased or delivered
Consumers	Persons, on whom the legal consumer protection applies - whether or not via the so-called reflex effect - and who have purchased, leased or otherwise used an Affected Vehicle
Daimler	Daimler AG, defendant sub 1
(...)	
Vehicles affected	An agreement concluded by Daimler, including one or more to its affiliates, manufactured and fitted with an Illegal Manipulation Device diesel vehicle of the Mercedes-Benz brand approved by a type-approval authority in the European Union, such as the CBA, on the basis of the Euro 5 or Euro 6 limits and by a Defendant in the period 1 January <b>2009</b> to 31 January <b>2019</b> has been bought, leased or otherwise obtained
Traders	The Dutch dealers and/or leasing companies, defendants sub 4 to sub 23, who leased, sold or delivered
(...)	
Importers	MBCN and MBVN together
CBA	The Kraftfahrt Bundesamt, the German organisation that is responsible for testing and approving vehicle types submitted for type approval in Germany. The CBA is the equivalent of the Dutch Rijksdienst voor het Wegverkeer (>)
Lessees	Consumers or Business Buyers, who are an Affected Have leased vehicle
Lessees Buyers	Lessees who use their Affected Vehicle by virtue of have acquired a financial lease and become legal owners after the lease expires

Illegal Instrument of Manipulation	One or more manipulation instruments as intended in Article 5(2) first sentence of the Regulation and thus reduce the effectiveness of emission control systems, without one or more of the exceptions listed in the same paragraph 2 (second sentence and enumeration) of application is
Closely-defined Group	The narrowly defined group referred to in article 1018e(2) Rv, which is further delineated in paragraph VI.B of the SDEJ Subpoena
Agreements	The purchase and/or leases, as defined in paragraph II.B.3 of the SDEJ Subpoena
SDEJ	The Diesel Emissions Justice Foundation
SDEJ Subpoena	Subpoena from SDEJ dated July 30, 2020
(...)	
Foundation	The stichting;g Stichting Car Claim, claimant
Similar Type	A vehicle that in terms of (environmental) performance, driving style, appearance and value - assuming there would not have been an Illegal Manipulation Device at the Affected Vehicle - and that is similar to the Affected Vehicle
Regulation	Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to repair and maintenance information
Corporate Buyers	(Legal) persons, not being a Consumer, who Have purchased an Affected Vehicle

"Daimler" now stands for "Mercedes-Benz Group A-G" and "Importers" for "Importer".

3.7. Mercedes concludes its conclusion in the Car Claim case referred to above at 1.1 as follows:

Mercedes-Benz Group c.s. requests your Court by judgment, so far as possible provisionally enforceable:

1. Declare Car Claim inadmissible or deny its claims;

2. order Car Claim to pay the costs of the proceedings, plus the follow-up costs of EUR 163.00 without service of notice or EUR 248.00 if service of notice is effected, all to be paid within fourteen days of the date of the judgment, and - in the event that the costs are not paid within that period - plus statutory interest on the costs as from fourteen days of the date of the judgment.

3.8. The Partners conclude their conclusion in the Car Claim case referred to above at 1.3 as follows:

**WITH CONCLUSION:**

That it pleases your Court by judgment, always as far as possible provisionally enforceable:

- Annul SCC's subpoena;
- Declare SCC inadmissible in its claims, or at least dismiss those claims;
- order SCC to pay the costs of the proceedings, including the follow-up costs of EUR 255 without service, increased by an amount of EUR 85 in the event of service, with a stipulation that if these costs are not paid within 14 days of the date of the judgment to be given in this case, statutory interest will be payable thereon from the 15th day after the date of the judgment.

4. The further assessment - **introduction**

In the SDEJ case

4.1. The court notes that SDEJ's lawyer wrote to her by letter dated 31 May 2023, in so far as relevant here:

During the oral hearing (...) on 24 May 2023, the court asked Emissions Justice whether it was prepared to withdraw its claims for the following group of Victims: (legal) persons who bought or leased an Affected Vehicle in the Netherlands (of the Mercedes-Benz brand), but are domiciled in an EU country other than the Netherlands (hereinafter: the **Non-NL Owners**).

(...)

However, while Emissions Justice will continue to defend all (foreign) Victims, including the Non-NL Owners, Emissions Justice is prepared to amend its claim in the present proceedings such that it no longer maintains the claims brought on behalf of these Non-NL Owners. Emissions Justice will amend its claim accordingly at the next (substantive) stage (of course only if appropriate).

The fact that an Affected Vehicle was exported to a foreign country at some point does not affect the fact that the vehicle in question was sold as new in the Netherlands at the time and may have been sold again as a used vehicle to a buyer/customer in the Netherlands on one or more subsequent occasions. Claims relating to these transactions and relating to (eventually) exported Affected Vehicles simply remain within the scope of the claims brought.

In the Car Claim case

4.2. Car Claim amended its claim by deed of production also reducing its claim at the oral hearing on 24 May 2023. These amendments have already been incorporated in the representation of the amended claim in 3.5 above. Furthermore, this deed reads as follows:



### III.2 Claim reductions

#### III.2.1 In respect of all Defendants

12. Car Claim no longer acts for foreign victims (Petitum (old), sub 1.1) in these proceedings. It acts exclusively for *Dutch* victims, who at the time they entered into the relevant agreement(s) had their residence in the Netherlands and purchased an Affected Vehicle in the Netherlands (Petitum, sub 1.1, 1.1.1 and 1.2.1).

15. Car Claim limits the definition of Affected Vehicles to Euro 5 and Euro 6 diesel vehicles of category MI, M2, N 1 and/or N2 of Art. 2 of the Emissions Regulation, which were placed on the market under the Mercedes-Benz brand from 1 September 2009 to 31 December 2019.

## 5. Nullity of summons

### In the Car Claim case

5.1. As mentioned above at 3.8, the Partners first seek the annulment of Car Claim's summons. To this end, they submit the following. In the interlocutory judgment of 22 June 2022, it was decided that the Car Claim case and the SDEJ case should be pursued separately. The role joinder does not affect the independence of each of the two cases, as confirmed in the role joinder decision of 19 October 2022. Therefore, Car Claim's summons must independently satisfy the requirements of Section 111(2) introductory paragraph and subparagraph (d) of the Rv. Car Claim's summons does not meet these requirements. Both for part of the factual substantiation of its claims and for part of the legal substantiation of its claims, Car Claim only refers in its summons to parts of the SDEJ summons that was brought into the proceedings as production I. Car Claim notes that those parts of the summons do not comply with the requirements of Section 111(2)(d) of the Dutch Code of Civil Procedure. In doing so, Car Claim notes that those parts of SDEJ's subpoena are to be considered repeated and inserted. This approach is not sufficient, Partners said.

5.2. Car Claim raises a defence.

5.3. The court considered as follows.

a. Pursuant to Article 11(2) opening words and under d Rv, the writ of summons must state the claim and its grounds. In the grounds of the claim, the plaintiff states the facts and rights on which his claim is based, in other words, the plaintiff motivates his claim. The plaintiff who wishes to invoke facts and rights not mentioned in the summons must do so in such a way that it is clear to the court what is submitted to it for consideration as the basis for the claim, and to the defendant on which to base his defence. Section 120(1) of the Dutch Code of Civil Procedure attaches the sanction of nullity of the writ of summons to non-compliance with section 11(2) opening words and under d of the Code of Civil Procedure.

b. Assuming the applicability of the WAMCA, SDEJ brought proceedings against the Partners (and Mercedes) under the current Section 3:305a of the Civil Code in conjunction with Section 1018c of the Code of Civil Procedure.

c. Pursuant to Section 1018d Rv, Car Claim subsequently also brought a collective claim against the Partners (and Mercedes). Section 1018d(1) Rv provides that such a subsequent collective claim can only be brought in respect of the same

event or events as that to which the first collective claim relates, on similar questions of fact and law. The Partners do not argue that Car Claim failed to comply with this requirement.

d. Car Claim brought SDEJ's subpoena into the proceedings as production 1, stating in its subpoena thereby:

15. In the run-up to the issuance of this summons, the Foundation explored the form in which it intends to engage the Defendants in legal proceedings, and the (legal) position it intends to take vis-à-vis SDEJ and the Defendants in the WAMCA proceedings already initiated by SDEJ. In this regard, the Foundation held background consultations with SDEJ. After having consulted with SDEJ and with a view to efficient litigation, the Foundation has opted for issuing a summary summons, in which it aligns itself as much as possible with the claims filed by SDEJ (...), as well as with the facts, circumstances and legal bases put forward for that purpose by SDEJ, unless the Foundation expressly states otherwise in this summons.

16. Where appropriate, the Foundation does so by means of explicit references to the paragraphs containing relevant contentions and substantiation from the SDEJ Subpoena, which should always be considered repeated and inserted at the appropriate place in this Subpoena.

e. Car Claim, "if and to the extent that Emissions Justice is also admissible", claimed that SDEJ should be appointed as exclusive advocate within the meaning of section 1018e(1) Rv and that it should be stipulated that it, Car Claim, should be allowed to carry out litigation actions independently, "all coordinated to the greatest extent possible with the exclusive advocate" (parts B and C of its claim).

f. Referring to section 1018d(3) Rv, the roll call decision of 20 January 2021 considered that a reasonable interpretation of the law would mean that the collective claim brought by SDEJ and the collective claim brought by Car Claim would be dealt with together as one case. That single case involved both SDEJ's claim (and its grounds) and Car Claim's claim (and its grounds). Compare the knock-on effect of this fact in section 1018e(2) Rv (the court, in addition to appointing the most suitable claimant as exclusive representative, assesses exactly what the collective claim entails) and section 1018g Rv (the court, after appointing an exclusive representative, sets a time limit for completing the grounds).

g. The decision of 22 June 2022, reproduced above at 1.1(iii), put an end to the handling of the class actions brought by SDEJ and Car Claim on the basis of the WAMCA. As a result, SDEJ and Car Claim (which until then had not done anything wrong in a procedural sense also according to the Partners), and with them the Partners (and Mercedes), found themselves in a substantially different procedural law regime, namely that of Article 3:305a (old) BW (and Rv without title 14A). Instead of one case, there are now two cases.

h. Also in view of the purpose and purport of Section 111(2) opening words and (d) Rv, it must be assumed that Car Claim's reference to SDEJ's summons must be deemed to retain its meaning even after the case has continued as two cases. Thus, in the somewhat unusual circumstances outlined above, the Partners cannot object to Car Claim that it could - and, in ordinary circumstances, possibly should - have been clearer about the grounds of its claim. Nor do the Partners argue, or at least not sufficiently, that their litigation position was prejudiced by Car Claim's approach.

5.4. The Partners' plea of nullity of Car Claim's subpoena is therefore dismissed.

## 6. Admissibility - introduction

### In both cases

6.1. The question whether SDEJ and Car Claim themselves are admissible and the question whether they are admissible in the collective claim brought by them are procedural questions. Partly in view of Article 10:3 of the Civil Code, these questions must be answered under Dutch law. This also applies to the relationship between SDEJ respectively Car Claim on the one hand and Mercedes-Benz Group AG on the other, to the extent that in that relationship materially foreign rather than Dutch law applies.

6.2. Article 3:305a (old) BW reads, in so far as relevant here:

1. A foundation or association with full legal capacity may bring an action for the protection of similar interests of other persons to the extent that it promotes those interests pursuant to its articles of association.
2. A legal entity as referred to in paragraph 1 shall not be admissible if it has not made sufficient efforts in the circumstances to achieve the claimed by conducting consultations with the defendant. A period of two weeks after receipt by the defendant of a request for consultation stating what is claimed shall in any event be sufficient for that purpose. A legal entity as referred to in paragraph 1 shall also be inadmissible if the legal action does not sufficiently safeguard the interests of the persons for whose benefit the legal action has been brought.
3. An action referred to in paragraph 1 (...) may not extend to compensation to be paid in money.

6.3. The questions referred to above under 6.1 must be answered ex officio and on the basis of the facts and circumstances at the time of answering ('ex nunc').

6.4. In principle, SDEJ and Car Claim respectively bear the burden of proof and, if sufficiently contested, the burden of proof regarding the requirements of Article 3:305a(1) (old) of the Dutch Civil Code: the so-called similarity requirement and the so-called articles of association requirement. After all, these are (positively formulated) conditions for admissibility. Mercedes and the Partners in principle bear the burden of proof with regard to the facts and circumstances of Article 3:305a(2) (old) DCC: the so-called consultation requirement and the so-called guarantee requirement. After all, these are (negatively worded) conditions for inadmissibility.

## 7. Admissibility - foundations

### In the SDEJ case

7.1. SDEJ is a foundation (within the meaning of Article 2:285(1) of the Civil Code), so it can bring a claim under Article 3:305a(1) (old) of the Civil Code.

### In the Car Claim case

7.2. Car Claim is also a foundation (within the meaning of Article 2:285(1) of the Dutch Civil Code).

## **8. Admissibility - monetary damages**

### In the SDEJ case

8.1. In view of the part of Article 3:305a paragraph 3 (old) of the Civil Code reproduced above under 6.2, the final sentence of the petition applies: parts 1, 2 and 3 as well as the claims for payment of monetary damages lapse. As the court understands, the latter concerns parts 5.5.1.2, 6, 6.1, 7 and 7.1 as well as part 8, insofar as it builds on these parts.

### In the Car Claim case

8.2. In view of the part of Article 3:305a paragraph 3 (old) of the Civil Code reproduced above under 6.2, the final sentence of the petition applies: parts 1 and 2 as well as the claims for payment of monetary damages lapse. As the court understands it, the latter relates to parts 4.2, 5 and 6, insofar as the ancillary claims related thereto build on these parts .

## **9. Admissibility - statutes**

### In both cases

9.1. Article 3:305a(1) (old) BW stipulates, insofar as relevant here, that an interest organisation may bring an action to protect similar interests, "insofar as it promotes these interests pursuant to its articles of association".

9.2. The articles of association requirement includes two sub-requirements. The first sub-requirement is that the articles of association of the interest group provide for representation of the interests of other persons to be protected by the legal action. The second sub-requirement is that the starting point is that the mere description of the purpose of an interest organisation does not yet entitle it to bring an action to protect the interests of other persons; however, exceptions to this starting point are conceivable (HR 27 June 1986, ECLI:NL:HR: 1986:AO8410; De Nieuwe Meer).

### In the SDEJ case

9.3. SDEJ argues that its claims fit within its statutory objective and that it was and is active in the area of, what it calls, the Diesel scandal.

### In the Car Claim case

9.4. Car Claim argues that its collective claims fit within its (amended) statutory purpose and that it was and is operating for the benefit of Car Owners as defined by it.

### In both cases

9.5. Mercedes and the Partners put up no defence.

9.6. The court sees no reason in the pleadings to find ex officio that SDEJ and/or Car Claim do not (meet) the statute requirement. It is therefore concluded that SDEJ and Car Claim meet the statute requirement.

## **10. Admissibility - similarity**

### In both cases

10.1. Article 3:305a(1) (old) BW stipulates, insofar as relevant here, that the legal action brought must serve to protect similar interests of other persons.

10.2. According to settled case law of the Supreme Court, the similarity requirement is satisfied if the interests which the legal action seeks to protect lend themselves to bundling, so that efficient and effective legal protection can be promoted for the benefit of the interested parties. "This makes it possible to rule in a single procedure on the issues and claims raised by the legal action, without the need to take into account the special circumstances of the individual interested parties" (HR 26 February 2010, ECLI:NL:HR:2010:BK5756, Baas in Eigen Huis/Plazacasa). A certain abstract test is appropriate here; compare HR 27 November 2009, ECLI:NL:HR:2009:BH2162 (WorldOnline).

### In the SDEJ case

10.3. SDEJ argues that the similarity requirement has been met.

### In the Car Claim case

10.4. Car Claim argues that the similarity requirement is met.

### In both cases

10.5. Mercedes and the Partners argue against this, in brief, that the cases are too diverse in several respects to be able to speak of similarity, or of bundleness of interests involved in the claims brought that could promote efficient and effective legal protection for the benefit of interested parties. According to Mercedes and the Partners, this concerns both the individuals on whose behalf SDEJ and Car Claim are acting and the diesel vehicles affected, as well as the (bases of the) claims brought. The Partners add that they too are too diverse in several respects to speak of similarity or bundling. According to the Partners, this concerns both the factual position and the legal position of each of them.

10.6. The court discusses similarity below on the basis of three issues: the stakeholder groups being sued (10.6.1 and onwards), the diesel vehicles (10.6.6 and onwards) and the bases of the claims brought, discussing six categories of claims (10.6.13 and onwards). The conclusion is that there is sufficient similarity for some of the claims.

*'Other persons' vort Article 3:305a(1) (old) BW*

In the SDEJ case

10.6.1. SDEJ defines the "Closely Defined Group" in the petitum of its subpoena as "all persons and/or legal entities who (...) have purchased (...) one or more new or used Affected Vehicles (...) or(...) own one or more new or used Affected Vehicles under financial lease, where the Lessee has not yet become the legal owner". In doing so, SDEJ distinguishes, in the case of purchase, between (i) Consumers who bought their Affected Vehicle new or used from a Dealer (Partner; *court*) and who still own their Affected Vehicle, (ii) Consumers who bought their Affected Vehicle new or second-hand from a Dealer and who no longer own the Affected Vehicle, (iii) Lessees Buyers who still own their Affected Vehicle, (iv) Lessees Buyers who no longer own their Affected Vehicle, (v) Consumers who bought their Affected Vehicle from other than a Dealer, (vi) Business Buyers who have bought their Affected Vehicles new or second-hand from a Dealer and who still own their Affected Vehicle, (vii) Business Buyers who have bought their Affected Vehicles new or second-hand from a Dealer and who no longer own their Affected Vehicle, and (viii) Business Buyers who have bought their Affected Vehicle from other than a Dealer.

10.6.2. By the letter of 31 May 2023 quoted above at 4.1, SDEJ's lawyer announced that if the proceedings were to continue, SDEJ would amend its claim to the effect that it would not uphold the claims brought on behalf of "Non-NL Owners". "Non-NL Owners" is defined in that letter as "(legal) persons who have purchased or leased an Affected Vehicle in the Netherlands (of the Mercedes-Benz brand), but are domiciled in an EU country other than the Netherlands".

In the Car Claim case

**10.6.3.** Car Claim defines the "Closely Defined Group" according to its latest claim amendment as "all persons and/or legal entities who, have purchased (...) or(...) own one or more new or used Affected Vehicles under financial lease, where the Lessee has not yet become the legal owner and who, at the time the relevant agreement(s) was/are entered into, had their habitual residence in the Netherlands". In case of purchase, Car Claim distinguishes between (i) Consumers who bought their Affected Vehicle new or second-hand from a Dealer (Partner; *court*) and who still own their Affected Vehicle, (ii) Consumers who bought their Affected Vehicle purchased new or second-hand from a Dealer and who no longer own the Affected Vehicle, (iii) Lessees Buyers who still own their Affected Vehicle, (iv) Lessees Buyers who no longer own their Affected Vehicle, (v) Consumers who bought their Affected Vehicle from other than a Dealer, (vi) Business Buyers who bought their Affected Vehicles new or second-hand from a Dealer and who still own their Affected Vehicles, (vii) Business Buyers who bought their Affected Vehicles new or second-hand from a Dealer and who no longer own their Affected Vehicles and (viii)

Business Buyers who have purchased their Affected Vehicle from other than a Dealer.

In both cases

10.6.4. The concept of "Closely Defined Group" derived from the WAMCA does not (no longer) apply in these cases, but also, according to the applicable article 3:305a paragraph 1 (old) of the Civil Code, delineates the group of persons to whose interests the claims brought by SDEJ and Car Claim respectively are directed, i.e. determines who are the interested parties in the collective claims brought by SDEJ and Car Claim respectively.

10.6.5. The group of stakeholders remaining after the (announced) requirement changes is still diverse. This is reflected in the definitions quoted above under 10.6.1 and 10.6.3. For instance, the group of interested parties includes buyers and lessees, buyers and lessees of new diesel vehicles and buyers and lessees of used diesel vehicles, buyers and lessees of a Partner and buyers and lessees of another counterparty, consumers and business users. Nevertheless, all these (legal) persons have, according to SDEJ and Car Claim, one thing in common: they are or have been buyers or lessees of one or more diesel vehicles (of the Mercedes-Benz brand) produced by Mercedes-Benz Group AG with an illegal manipulation device (hereinafter: IMI). All interested parties therefore have, according to SDEJ and Car Claim, the same factual position. In this sense, there is sufficient similarity, or at least bundling, of interests involved in the actions brought that promotes efficient and effective legal protection on behalf of the interested parties.

*The diesel vehicles*

In the SDEJ case

10.6.6. In its summons, SDEJ defines "Affected Vehicle" as "a diesel vehicle of the Mercedes-Benz brand manufactured by Daimler (now Mercedes-Benz Group AG; *court*) (...) and fitted with an Illegal Manipulation Device that has been approved by a type-approval authority in the European Union, such as the CBA, on the basis of Euro 5 or Euro 6 limits and was purchased, leased or otherwise obtained by a Defendant in the period 1 January 2009 to 31 January 2019".

In the Car Claim case

10.6.7. Car Claim uses the same definition of "Affected Vehicle" as SDEJ in its writ. By its deed dated 24 May 2023, Car Claim reduced its claim in that it limited the definition of "Affected Vehicles" to "Euro 5 and Euro 6 diesel vehicles of category M1, M2, N1 and/or N2 within the meaning of Art. 2 of the Emissions Regulation, placed on the market under the Mercedes-Benz brand from 1 September 2009 to 31 December 2019".

In both cases

10.6.8. Mercedes and the Partners argue, in summary, the following. Mercedes-Benz Group AG used a wide variety of techniques to control NO<sub>x</sub>-emissions in diesel vehicles during the relevant period used by SDEJ and Car Claim (1 January 2009 and 1 September 2009 to 31 January 2019, respectively). These techniques were permissible and useful. For the many different diesel vehicles and vehicle types marketed during the period in question, many thousands of software versions were designed with different settings ('calibrations'). To the extent that the software versions of the diesel vehicles covered by the claims brought by SDEJ and Car Claim contain the same calibration at some point, the question of whether the relevant "Affected Vehicles" contain an IMI still cannot be answered on a collective basis. To do so, other calibrations associated with the calibration in question, as well as the physical characteristics of these vehicles, must also be taken into account. Indeed, the same calibration may have varying influences on the vehicle's emission behaviour, depending on (among other things) the vehicle's body, weight, transmission, *engine control unit* and air resistance. Ultimately, it will always be necessary to examine how much NOK the vehicle emits in which conditions. Similarly, whether a criticised functionality is justified can only be answered on the basis of the individual characteristics of the vehicle in question. The consequence of all this is that the "Vehicles involved" are so diverse that no general conclusions can be drawn about the (very different) functionalities therein. Incidentally, this also explains why, in respect of Mercedes-Benz, the *Kraftfahrt-Bundesamt* (KBA) did not order a recall for an entire fleet of vehicles with the same engine, or even for vehicles with the same type-approval number.

10.6.9. The parties further debated whether and, if so, which "Affected Vehicles" (diesel vehicles covered by the collective claims of SDEJ and Car Claim) are also "Affected Vehicles" (diesel vehicles with an IMI). In this context, the recall actions ordered (well) by the CBA and the objections and appeals lodged against them by Mercedes-Benz Group AG were discussed, among other things. With regard to the series of (engines of) diesel vehicles with IMIs identified by the CBA, the presence of IMIs can (so long as it has not been ruled otherwise on appeal) be assumed. Thus, there is bundling of the interests involved in the actions brought which can promote efficient and effective legal protection for the benefit of interested parties. The purchasers and lessees of those diesel vehicles are in the same factual position and have an interest in collective action on their behalf. Moreover, in assessing whether IMI exists, it is possible to differentiate by (for example) type of vehicle, model and/or version. The argument that many thousands of software versions and calibrations have been used for the various diesel vehicles and vehicle types does not stand in the way of bundling, as it is apparently the case that the CBA has identified series of vehicles fitted with (the same) IMI. The owners/lessees of all vehicles in such a series are thus in an equal position and their interests are thus bundleable.

10.6.10. Also considering the fact that the subpoenas date from several years ago, the circumstance that Mercedes and the Partners in these cases have since obtained further



have provided information on the "Affected Vehicles" and the circumstance that relevant developments (may) have occurred in the meantime outside these cases, there is, however, reason to take a closer look at which vehicles belong to the "Affected Vehicles". First of all, it is incumbent on Mercedes to inform SDEJ and Car Claim and the court of the following as it has the data:

- apart from the recalls ordered by the CBA mentioned in the case documents, have any other recalls been ordered in respect of Mercedes diesel vehicles on the basis of the presence of an IMI? what objection and/or appeal procedures against ordered recalls are still pending?  
Have any recall orders been quashed?  
In which cases has the recall order become final?

Pursuant to the provisions of Section 22 Rv, the court orders Mercedes to further clarify its contentions by answering the above questions. The case will be referred to the roll for that purpose. Further proceedings will be discussed at the end of this judgment.

#### *The Partners*

10.6.11. The Partners additionally argue, in summary, the following. Each of the Defendants conducts a completely different business and has its own role in the development, production, import and sales process of the Affected Vehicles. In particular, substantial differences can be identified between the Partners, both in (scope of) their business activities and in their knowledge level and capacity (dealers and/or service partners). There are also differences in the transactions carried out by the Partners during the Relevant Period (including but not limited to types of vehicles and technical specifications thereof) and the terms and conditions applied thereto. These differences mean that the Partners cannot be classified as a homogeneous group.

10.6.12. It is not in dispute that all new "Involved Vehicles" sold in the Netherlands were sold by the Partners. In addition, the Partners sold used "Affected Vehicles". This means in any event that, if and to the extent that Mercedes has marketed new "Affected Vehicles" in the Netherlands, each of those vehicles has been sold by one of the Partners. In these circumstances, similarity and bundling does not require that each of the Partners has sold "Affected Vehicles" to each stakeholder group, nor is the number of vehicles sold by each of the Partners relevant. What is required is that each stakeholder group has purchased from at least one of the Partners. Since the Partners collectively sold all new Involved Vehicles and also some of the used Involved Vehicles, this can be assumed. The Partners argue that only dealers sell new vehicles and dealers and service partners sell used vehicles. However, since the claims include used vehicles with an IMI, that distinction is irrelevant for bundling purposes. It can be assumed that if the Service Partners have sold second-hand vehicles that they (may) also have been vehicles with an IMI. If a Partner believes that it did not sell any (new or second-hand) Involved Vehicle in the relevant period, it can state so in the

content stage pose and substantiate. The Partners argue that there are differences in the level of knowledge between them. However, they have not explained why that would be relevant to the bundling of the claims brought in this litigation, so the court ignores that argument.

However, SDEJ and Car Claim will be declared inadmissible in their claims against the Partners insofar as they are aimed at defending the interests of (legal) persons who, during the relevant period, obtained a Mercedes diesel vehicle through a lease arrangement ('lease drivers'). The Partners explained that they do not enter into leasing agreements and that leasing activities are housed in separate companies. To this, SDEJ and Car Claim did not respond. At this state of affairs, SDEJ and Car Claim have not sufficiently substantiated that the 'lease drivers' have a claim against the Partners, so there is no similarity of interest either. SDEJ and Car Claim will therefore be declared inadmissible in these claims.

#### *The (bases of the) claims*

10.6.13. As noted in the interlocutory judgment of 22 June 2022, at 6.15, not all claims were brought against all defendants on behalf of the same (groups of) interested parties.

10.6.14. Below, we will assess for each (category of) claim whether it concerns interests that can be sufficiently generalised. The starting point here is whether the particulars of individual cases can be (sufficiently) abstracted from when assessing the claim.

#### *I. Declaration of the right of certain parties to be deemed consumers*

10.6.15. This concerns section 4.1 of SDEJ's claim and section 3.1 of Car Claim's claim.

10.6.16. These parts, which concern the so-called reflex effect for the benefit of the interested parties concerned, cannot be assessed collectively. To answer the question of whether the interested parties concerned can rely on the protection due to a consumer, the individual circumstances of the interested party are relevant, for example for which intended use the diesel vehicle was purchased. SDEJ and Car Claim are therefore inadmissible in these parts of their claims.

#### *II. Statements of law regarding unfair commercial practices*

10.6.17. This concerns section 4.2 (with subsections 4.2.1 to 4.2.4) of SDEJ's claim and section 3.2 (with subsections 3.2.1 and 3.2.2) of Car Claim's claim. SDEJ and Car Claim start the same way. Their first subsection seeks a declaration that Mercedes' conduct constitutes unfair commercial practices and "is therefore unlawful towards Consumers".

Next, (only) SDEJ takes a turn. Its second subsection seeks a declaration that Mercedes' conduct is imputable to the Partners, so that the unfair commercial practices can also be imputed to them and their

conduct are unlawful towards the Consumers. The third subsection of SDEJ seeks to hold that the contracts that came into existence between Consumers and the Partners (or at least, as the court understands it, came into existence between Consumers and the Partners before 14 June 2014) are voidable as a result of the aforementioned unfair commercial practices. Finally, SDEJ and Car Claim again end up largely the same. Their fourth and second subpart, respectively, seek a declaration that Mercedes is jointly and severally liable for damages against Consumers in view of the unfair commercial practices. SDEJ also involves Partners in this.

10.6.18. The interests of the individuals on whose behalf SDEJ and Car Claim are defending are sufficiently similar and bundled insofar as the conduct imputed to Mercedes on this part is concerned. In essence, this concerns the failure to disclose that the vehicles contained an IMI, which SDEJ and Car Claim allege was the case with all affected vehicles. In view of this, the interests of the persons on whose behalf SDEJ stands are also sufficiently similar and bundleable as far as the imputability of Mercedes' conduct to the Partners is concerned. The grounds set out for this attribution (text and scope of the directive and the law, the role of Mercedes-Benz Nederland B.V. and the Partners in the production and sales chain, and social standards) do not require an individual assessment per Partner but apply to all Partners. This also applies to voidability of the agreements between Consumers and Partners based on this ground. That each Partner was not involved in several sales does not make this different. Finally, the interests of the persons on whose behalf SDEJ and Car Claim are acting are sufficiently similar and bundleable insofar as joint and several damages are concerned, including insofar as Partners are concerned.

### *III. Statements of law regarding error*

10.6.19. This concerns section 4.3 and subsection 4.3.1 of SDEJ's claim and section 3.3 and subsection 3.3.1 of Car Claim's claim.

10.6.20. In general, a reliance on error (and the annulment of the legal act based thereon) requires an assessment of individual circumstances on the part of the interested party and their influence on its will. In these cases, however, all interested parties are concerned with exactly the same circumstance, namely the ignorance of the (alleged) presence of an IMI at the time of the purchase of the diesel vehicle and the consequent failure to comply with the applicable Dutch and European laws and regulations. This circumstance, if established, is of such importance that it can lead to granting the claimed declarations of law even without additional individual circumstances. The same applies to the interested parties' ignorance of the (allegedly) less environmentally friendly performance of the diesel vehicles. The interests of the persons on whose behalf SDEJ and Car Claim are defending are thus sufficiently similar to be assessed collectively. Whether the presence of an IMI and/or the less environmentally friendly performance of a vehicle are such essential characteristics that no right-thinking buyer would buy the vehicle in question upon knowledge thereof will be assessed at the substantive stage of the proceedings.

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10.6.21. That the claims for error are bundleable has the effect that the resulting and consequential claims (5.1-5.5.1.1 of SDEJ and 4/4.1 of Car Claim) are as well.

*IV. Statements of law in respect of conformity, product liability and non-performance*

10.6.22. This concerns section 4.4 (with subsections 4.4.1 to 4.4.4) of SDEJ and section 3.4 (with subsections 3.4.1 to 3.4.4) of Car Claim. Unlike SDEJ, Car Claim no longer relies on product liability as a result of its latest claim change, as is also evident from number 14 of its deed of that date quoted above at 4.2.

10.6.23. If the alleged reproach about the presence of an IMI is established, the positions of the interested parties will coincide on that essential point. The question then arises whether the alleged circumstance that a diesel vehicle is equipped with an IMI and therefore does not comply with the applicable laws and regulations should be qualified as non-compliant. Whether this is so is a question that can be answered in general terms. In this context, it is significant that nothing was communicated to the interested parties about the presence of the alleged IMI. In any event, the information that was provided by the Partners (which may have been different from case to case) did not have the purport of warning of the presence of an IMI or informing that the vehicle did not comply with the applicable laws and regulations.

Therefore, to that extent, the differences in what was communicated to the buyers and lessees do not preclude similarity and bundling. SDEJ will have to further explain the alleged product liability and its place in the context of conformity and default in the remainder of its case.

10.6.24. The claimed declaratory judgment that the reasonable time to repair or replace the defects (the court reads: *because of* the defects) in the Affected Vehicles has expired unused (subsection 4.4.2 of SDEJ's claim, subsection 3.4.2 of Car Claim's claim) can also be assessed without considering individual circumstances of the interested parties.

Similarly, the claimed declaratory judgment that the Consumers, Lessees Buyers and the Business Buyers are entitled to claim from the relevant Partners replacement of the present Affected Vehicle to the extent that they still own their Affected Vehicle (subsection 4.4.3 of SDEJ's claim, subsection 3.4.3 of Car Claim's claim) can also be assessed without considering individual circumstances of the interested parties. Thus, these claims are also bundleable.

10.6.25. Subpart 4.4.4 of SDEJ's claim and subpart 3.4.4 of Car Claim's claim are not entirely parallel. Car Claim's subpart also relates to partial rescission and also seeks price reduction. The court has already ruled above that the claimed declarations of law regarding non-conformity are sufficiently similar. The claimed declarations of law with regard to rescission are an extension of this, as rescission is one of the remedies in the event of non-conformity. On the basis of Section 7:22 paragraph 1 opening words and under a BW, it must be assessed whether a vehicle in question with an IMI complies with the agreement. Whether an affected vehicle with an IMI constitutes a deviation from the

agreed, which justifies the consequences of dissolution, can be answered in general terms. Individual circumstances need not be taken into account in this judgment. Similarly, the question whether the default requirement has been met in this case can be answered in general terms as the nature of the alleged defect in performance is the same for all interested parties. The question whether the Partners can invoke the "unless- formula" of Article 6:265 BW/7:22 paragraph 1 opening words and under b BW can be assessed at least insofar as it concerns a (partial) rescission or price reduction invoked on the basis of the presence of an IMI, without individual circumstances being relevant. After all, the positions of all owners/lessees of Affected Vehicles are the same on that point. In the event that Car Claim's allegations are justified, the question whether a purchase price reduction is warranted in case of partial rescission based on the alleged non-conformity (or in case of a consumer purchase pursuant to Art. 7:22 paragraph 1 subsection b BW), can also be answered in a general sense. It is possible that in this case, the extent of a purchase price reduction due to the alleged presence of an IMI (which circumstance would apply to all interested parties) can also be answered in general terms. In that case, individual circumstances can be abstracted from. In line with this, Car Claim is also admissible in subsection 6 of its claim which relates to the entitlement to statutory interest on a price reduction. The question whether statutory interest is due, Indeed, can also be answered in general terms.

*K. Claims that **mercedes** is not entitled to claim compensation in relation to use or depreciation of an Affected Vehicle*

10.6.26. This concerns several subparts of the claims of SDEJ and Car Claim. The view that it is incorrect and unreasonable in all cases to determine that interested parties are liable to pay any usage or value compensation because of the deliberate and structural deception by Mercedes-Benz Group AG that is allegedly attributable to each of the defendants can be assessed in general terms. Indeed, underlying that view is the fact that the specific circumstances of the individual interested party do not matter because of the deliberate deception. For the rest - that is, to the extent that the aforementioned position would be found not to be followed in substance - the aforementioned claims do not lend themselves to collective assessment. If it is established that, in determining the consequences of a (partial) destruction, dissolution or case replacement, defendants do have a claim for compensation in connection with the use of the vehicle and/or its diminished value, the individual circumstances of the interested party, such as the condition of the vehicle, must be taken into account when determining the amount.

*VI. Statements of law in tort*

10.6.27. This concerns section 4.6 (subsections 4.6.1 to 4.6.3) of SDEJ and section 3.6 and subsection 3.6.1 of Car Claim. Unlike SDEJ, Car Claim does not pursue a tort-based claim against the Partners since the last claim amendment. Furthermore, unlike SDEJ, Car Claim no longer claims a declaratory judgment from that date that Mercedes was guilty of tortious conduct within the meaning of article 6:166 of the Civil Code (see numbers 13 and 16 of its deed of 24 May 2023).

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10.6.28. These parts are aimed at protecting similar interests, so they can be assessed collectively. In view of what SDEJ and Car Claim have put forward as the basis for the declarations of law claimed against Mercedes, it will have to be assessed in the substantive phase whether the diesel vehicles placed on the Dutch market during the relevant period and subsequently purchased or leased by the interested parties contained IMIs. In assessing whether conduct was unlawful, special circumstances on the part of the interested parties can be abstracted from. Those circumstances are relevant only in questions of, for example, damages scope and causal link. Those questions are not before us in these proceedings and can be raised in individual follow-up proceedings after a given judgment of unlawfulness. The fact that differences exist between interested parties therefore does not detract from the possibility of dealing with these parts collectively. The interests of the persons on whose behalf SDEJ and Car Claim are defending are similar in this respect and are therefore bundleable. The allegations made by SDEJ in its case against Partners are also collectively addressable. To that extent, too, there is sufficient similarity and bundleness.

#### *Differences in applicable conditions*

10.6.29. In the differences in sales transactions and the conditions applied by the Partners, the court sees insufficient reason to declare SDEJ and Car Claim inadmissible in one or more of their claims. When it comes to a limitation of a possible compensation obligation, the extent of damages is not at issue in these proceedings due to the applicability of the old collective action law. Furthermore, it will have to be assessed in the main proceedings whether (also) the business purchasers can exercise the rights granted to them by law in the event of non-conformity. This will be assessable at least in part collectively. When it comes to the time limit within which to complain, general questions will also have to be answered, such as whether it can be required to complain. Thus, the Partners' reliance on the applicable conditions does not mean that the assessment of one or more claims is necessarily and entirely limited to an assessment of the individual circumstances of an individual. The same applies to the Partners' reliance on breach of the duty to complain and on limitation.

#### *Conclusion*

10.6.30. Within the limits drawn above, the similarity requirement was met in both the SDEJ case and the Car Claim case.

### **11. Admissibility - guarantee requirement**

#### In both cases

11.1. Article 3:305a paragraph 2, last sentence, (old) BW stipulates that an interest organisation is inadmissible if the legal action does not sufficiently safeguard the interests of the persons for whose benefit it was instituted.

11.2. In the interlocutory judgment of 7 June 2023, it was considered, in so far as relevant here:

*The constituencies*

2.3. SDEJ and Car Claim relied on the applicability of the WAMCA in their subpoenas. Mercedes and the Partners argue that SDEJ and Car Claim have not demonstrated that they represent an actual existing constituency relevant to these cases and that they have not made verifiable assertions about the number of stakeholders affiliated to them. Mercedes and the Partners further argue that they have received few, if any, complaints about their diesel vehicles. Mercedes and the Partners consider this all the more significant because SDEJ and Car Claim were allegedly set up ad hoc by US law firms with their own commercial objectives.

2.4. SDEJ counters that as of 12 May 2023, 15,456 Mercedes diesel vehicles were registered with it and that the registrants have expressed their support for its work and the proceedings it has brought. Car Claim counters Mercedes' and the Partners' defence that by 24 May 2023, some 6,000 Car Owners (as defined in its writ) had registered with it.

2.5. The court considered as follows.

The so-called safeguarding requirement from Article 3:305a paragraph 2 (old) of the Civil Code aims to exclude interest organisations with impure motives. Whether the interests to which the collective action relates are sufficiently safeguarded must be assessed on the basis of the facts and circumstances of the concrete case. It follows from the legislative history that, when assessing whether or not the interests of the persons concerned are sufficiently safeguarded by the collective action, the court must examine (i) to what extent the persons concerned ultimately benefit from the collective action if the claim is granted and (ii) to what extent it may be relied upon that the claimant organisation has sufficient knowledge and skills to conduct the proceedings. The legislative history lists a number of factors that may play a role in answering these questions in a general sense. The size of the group of injured parties affiliated to the interest organisation and to what extent they support the collective action are such factors. Article 3:305a (old) BW, unlike the current article 3:305a paragraph 2 BW, does not require that the interest organisation be sufficiently representative for admissibility in a collective action. However, the factors that play a role in assessing the representativeness of an interest organisation can be taken into account when assessing whether the guarantee requirement has been met. The legislative history emphasises that the number of injured parties affiliated to an interest organisation is not a formal requirement. It constitutes svel an important indication that the guarantee requirement has been met, but should not always be decisive.

2.6. Against this background, the court needs to understand the following information to be provided by SDEJ and Car Claim, respectively, by deed:

- a. the number of individual stakeholders affiliated to it specifically for claims against Mercedes and the Partners as at 1 June 2023 (hereinafter: stakeholders);
- b. In what way did stakeholders apply;
- c. what contact details did they provide (which does not involve those contact details themselves);
- d. Are they resident or not in the Netherlands;
- e. what data did they provide about the vehicle in question (which does not involve that data itself **goes**);
- f. they are purchaser or lessee of the vehicle in question;
- g. Do they include owners or lessees of more than one vehicle and, if so, how many vehicles are involved? **it**;
- h. what amount each of them has paid or owes to it;
- i. Has it entered into an agreement with each of them regarding the percentage to be remitted if the interested party receives compensation from Mercedes and/or the Partners and, if so, what is the nature of this agreement;
- j. In what way did each of them organise stakeholder input on the next steps to be taken.

The court asked SDEJ and Car Claim to attach to their deed an auditor's certificate as to the accuracy of the data provided.

(...)

*The process funding agreements*

2.8. It is not in dispute that SDEJ's case is funded by Consumer Justice Network B.V. and that of Car Claim by CF ND Car Ltd. Mercedes and the Partners argue that the relevant agreements

should be brought into play. They argue that it must be certain that the litigation funders cannot exert undue influence. SDEJ and Car Claim (if its defence that it is not bound to bring the agreement into litigation is overruled) are in themselves willing to bring the financing agreements into litigation, but wish to render unreadable parts of the transcripts to be made available to Mercedes and the Partners. This concerns in particular the budget available to each of them.

2.9. In the court's view, in order to assess the admissibility of SDEJ and Car Claim, it is necessary for them to submit their financing agreements to the court in their entirety, without unreadable parts. This also applies to the annexes, with the exception of the annex(es) regarding the legal relationship between SDEJ respectively Car Claim and its lawyer. In doing so, the court also requires confirmation that the documents so provided contain all agreements between SDEJ respectively Car Claim and its funders. In this way, the court can satisfy itself that SDEJ and Car Claim have sufficient funds to bear the costs of their affairs and that control in these matters is sufficiently vested in them. In the copies of the litigation funding agreements to be made available to Mercedes and the Partners, SDEJ and Car Claim may, if they so wish, render illegible the budget available to each of them. Mercedes and the Partners did not object to this.

The Court sees no reason for making (other) commercially sensitive information illegible. Without further explanation, which is lacking, it is difficult to see why the submission of this information would (or could) prejudice the position in and outside these cases of SDEJ and Car Claim and the persons they represent.

11.3. The court starts by stating that it sees no reason in the assertions made by the parties on both sides and in the submissions made by the parties to the proceedings to find *of its own motion* that SDEJ and/or Car Claim do not satisfy the guarantee requirement on the basis of facts and circumstances other than those put forward by Mercedes and the Partners, except for the assessment of Car Claim's financing agreement given in 11.28(f).

11.4. The following will first discuss the constituencies and then the financing agreements.

#### *The constituencies*

##### In the SDEJ case

11.5. SDEJ, in its deed of 2 August 2023, answers the questions raised in the interlocutory judgment of 7 June 2023 (with reference to a report, dated 21 July 2023, of Drs. ing. T. Krol RA of Kroll B.V.), in so far as relevant here, as follows:

**11. Question a. Number of affiliated stakeholders.** As of 1 June 2023, **13,858** individual Stakeholders had signed up **with** Emissions Justice, in the sense that they have provided sufficient information to Emissions Justice; expressed support for its initiative or entered into an agreement with it setting out the terms of their participation. (...).

**12. Question b. Method of registration.** Registration of claimants takes place electronically (...).

**13. Question c. The contact details provided.** The contact details requested include email address, name, address and (optionally) a telephone number. (...). The information is stored in Emissions Justice's CRM system, which went live on 1 April 2022. Registrations prior to that date have all been reviewed and entered into the CRM database. Insofar as all relevant data is present, Kroll has also identified these claimants as Interested Parties. (...).

14. Question (c) is (...) limited to the contact details and vehicle data provided by the Interested Parties. Emissions Justice enriches such data, inter alia, by exchanging information with third parties, such as the



RDW. This partially automated system aims to secure and verify the claims of Interested Parties as far as possible for accuracy (..).

**15. Question d. Are the Interested Parties resident in the Netherlands or not?** Of the 17,668 claims notified as of 1 June, 98.4% were notified with an address in the Netherlands. These include 13,558 Interested Parties (out of a total of 13,858) with a total of 17,381 claims (out of a total of 17,668). (...).

**16. Question e. Type of data given on just involved vehicle.** After registration, Emissions Justice will have the following vehicle details: Registration number / VIN number, make, year of manufacture, type, fuel type (...). Emissions Justice can use this data to determine whether, according to the RDW and Mercedes, the cars are eligible for a diesel-related recall (...).

**17. Question f. Are the Interested Parties buyers or lessees of the vehicle in question?** Of the 13,858 Interested Parties registered with Emission Justice, 11,617 registered their car(s) exclusively as buyers. 1987 Interested Parties registered *cars* exclusively as *lessees*. The remaining 254 Interested Parties registered both as buyers and as *lessee cars*. These include a taxi company that bought and leased vehicles, or individuals who alternate between buying and leasing cars. Of the 17,668 Claims registered with Emissions Justice, 14,817 see a purchased - and 2,851 see a leased vehicle.

**18. Question g. How many of the Interested Parties have notified more than one vehicle?** The total number of claims registered with Emissions Justice is 17.66g. In total, 1,913 Interested Parties have notified more than one VIN number. This group notified a total of 5,702 VIN numbers. The number of Interested Parties thus amounts to 13,858 (...).

**19. Question h. What amount has each paid or is each owed to Emissions Justice.** Under the terms and conditions applied by Emissions Justice, Interested Parties are not liable to pay any upfront fee. Nor is there any administration fee, annual contribution or contribution if the litigation costs when the court dismisses the Claim or a Collective Action. Only in the event of a positive outcome for Interested Parties, Interested Parties will owe Emissions Justice a fee of up to 27.5% of the proceeds received, including costs and VAT, as applicable.

**20. Question i. Has Emissions Justice entered into an agreement with each Interested Party on the percentage to be remitted if the Interested Party receives compensation and, if so, what is the wording of this agreement.** As of 1 June 2023, 12,789 (92.3% of 13,858) of the Interested Parties had a participation agreement with Emissions Justice in which they agreed to the percentage to be remitted and the other terms and conditions. The contracted Stakeholders collectively registered 16,569 Claims with Emissions Justice (i.e., 93.8% of 17,668). the contractual result-dependent fee amounts to a maximum of 27.5%, including costs and VAT, as applicable.

**21.** The remaining 1,069 Stakeholders did not yet have a participant agreement with Emissions Justice as of 1 June 2023. Each of these Interested Parties did already declare support for Emissions Justice's proceedings and gave its consent to share its data with third parties, including the RDW, for further verification. It also verified whether their claims fit within the scope of the proceedings (...).

**22. Question j. Way in which the input of Interested Parties is regulated.** Although the WAMCA does not as yet apply to these proceedings, Emissions Justice assumes that this question relates to the requirement of Art. 3:305a(2)(b) (new) of the Civil Code (adequate participation mechanisms to participate in or represent in decision-making). It follows from the legislative history that an interest group can meet this requirement by enabling affiliates to express their views on certain decisions.

**23.** Emissions Justice explains on its website that it consults supporters at relevant times, for example on the distribution of any financial compensation to be obtained (art 2(1)(c) Statutes), and on any settlement proposal (art 10 Statutes).

**24.** Emissions Justice also holds the relevant contact details of Stakeholders registered with it and communicates with them on a regular basis, for example in the context of status updates and news releases, verifying registration details, obtaining individual survey responses or sending specific information (...). Through these lines of communication, it is easy for it to

for example, conducting a survey of Stakeholders or calling them to decision-making. This is sufficient at this stage.

2.3 Remaining question: vehicles bought from Dealers.

25. (...). As stated at the hearing, Emissions Justice does not currently ask this question as a mandatory field of information in the initial registration process. Through the existing lines of communication that Emissions Justice maintains with Stakeholders, this question can be submitted to them at a later stage on an individual level.

11.6. Mercedes argues against SDEJ's answers, in summary, as follows. The purpose of the audit opinion ordered by the court is obvious: the court wishes to learn from the auditor whether the data provided by SDEJ is correct. SDEJ has not submitted an auditor's report on the accuracy of the data provided. Mr Krol's report is not an auditor's report because, on the contrary, he (explicitly) did not prepare it in his capacity as an auditor. Nor does the content of Mr Krol's report say anything about the accuracy of the data provided by SDEJ.

11.7. The Partners argue against SDEJ's responses, in summary, as follows. SDEJ misunderstands that these proceedings are concerned only with NL Buyers and wrongly assumes too broad notions of 'Interested Parties' and 'Claims'. SDEJ does not have a sufficient constituency consisting of NL Buyers. 'Claims' referring to vehicles outside the relevant period are not relevant. Input from 'Stakeholders' is not plausible. SDEJ does not answer the 'remaining question': it remains unknown how many vehicles were purchased from Partners, and if so from which Partners.

#### In the Car Claim case

11.8. Car Claim, in its deed of 2 August 2023, answers the questions raised in the interlocutory judgment of 7 June 2023 (with reference to a report, dated 25 July 2023, of M.P.J. van der Vight AA of Driblad Accountants B.V., brought into the proceedings by it), in so far as relevant here, as follows:

##### ii.2 Sub-question a: **Number of connected Car owners**

(...)

11. Based on the license plates and/or VIN numbers provided by Car Claim, Car Claim verifies whether the notified vehicle actually qualifies as an Affected Vehicle. Car Claim does this using an application linked to (historical) data from the RDW database.

12. As of 1 June 2023, 6,244 Affected Vehicles have been registered with Car Claim specifically for Car Claim's claims against Defendants. These Affected Vehicles have been notified by 2,580 different Car Owners. These Car Owners comprise both business and private parties.

##### **It.3 Sub-question b: Mode of notification**

13. Car owners register with Car Claim by two means. First, through Car Claim's registration platform on its website (...) ('**Car Claim registration platform**').

14. Car owners can additionally register with Car Claim via the registration platform of Consumentenbond on its website (...) ('**Consumentenbond registration platform**'). Car Claim entered into a cooperation agreement with Consumentenbond partly for this purpose.

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#### 11.4 Sub-question c: Contact details

39. Car Claim interprets sub-question c of the Court to mean that the Court wishes to know what contact details of notified Car Claim owners Car Claim has.

41. Of all Car Owners who have registered via the registration platform Car Claim holds the name, residential or business address, an email address and telephone number. These are mandatory fields in the registration process. This also applies to the large corporate parties for whom Car Claim provides the registration outside the platform as a customised service.

42. Of all Car Owners who have registered through the Consumer Association Registration Platform, Car Claim has at least the name and email address. These are mandatory fields in the registration process

( . . )

11.5 Subquestion d: Do car owners live in the Netherlands?

44. Yes, all Car Owners listed under sub-question a who have applied to Car Claim for this procedure until 1 June 2023 are resident or domiciled in the Netherlands.

#### 11.6 Sub-question e: Stated data on the Affected Vehicles

45. All Car Owners compulsorily provide the following details about the Affected Vehicles on the Car Claim registration platform:

- the registration number
- the VIN number
- the make and model
- the year of construction
- the method of acquisition (purchase or lease)
- the stores of purchase (new or used)
- the date of purchase
- purchase price
- purchased from private individual or company
- current or former ownership; and
- whether or not a software update has been performed

46. In addition, Car Owners may provide the following documents relating to their Affected Vehicles:

- Maintenance invoices
- Proof of ownership
- Proof of sale/trade-in
- Proof of software update
- Purchase agreement
- Purchase invoice
- Sales invoice
- Registration certificate
- Correspondence

47. Through the Consumer Association Registration Platform, all Car Owners in relation to the Affected Vehicles compulsorily provide the registration number. Based on the registration number, Car Claim also immediately has the VIN number, make, model, fuel type, year of manufacture and list price of the reported Affected Vehicle. In addition, Car Claim owners can provide the following details:

- the method of acquisition (purchase or lease)
- the state of purchase (new or used)
- the date of purchase
- purchase price
- purchased from private individual or company; and
- current or former ownership.

48. Car owners can also upload documents such as a registration certificate, the purchase and sales invoice, confirmation of an executed update or relevant correspondence.

#### 11.7 Sub-question f: Buyers or lessees

49. Currently, not all Car Claim-registered Car Owners have filled in whether they bought or leased the Affected Vehicle.

50. From the information already provided to Car Claim by the Car Claim-registered Car Owners in this context, it follows that 90% of the Affected Vehicles they notified were purchased and 10% were leased.

#### 11.8 Subquestion g: Car owners with more than one Affected Vehicle

51. Car Owners who registered with Car Claim include Car Owners who purchased two or more Affected Vehicles. How many Affected Vehicles are involved varies from Car Owners who purchased two Affected Vehicles during the Relevant Period to one (business) Car Owner who contributed a fleet of 2,105 Affected Vehicles.

#### 11.9 Sub-question h: Contributions from car owners?

52. Car Claim owners have not paid and do not owe a participation fee to Car Claim. Car Claim does not solicit financial contributions from its participants, nor does it charge a registration fee. The registration process at Car Claim through the Car Claim Registration Platform and Consumer Registration Platform does not provide for this either. Car owners can register with Car Claim free of charge.

53. Only in the situation where Car Owners receive compensation offered by Defendants or legally determined by Defendants, Car Claim will retain a percentage of up to 25% thereof. However, Car Claim endeavours to make the costs of these proceedings, in whole or in part, part of any settlement to be reached with Defendants in order to maximise the Car Owners' net compensation.

#### 11.10 Sub-question i: Participation agreements.

54. Car Claim enters into participation agreements with Car Owners registered with it.

#### 11.11 Sub-question j: Stakeholder input on follow-up steps

58. Car Claim understands this question to mean that the Court wishes to learn in what way Car Claim owners will have a say in any follow-up steps to be taken by Car Claim against Defendants, after the present collective proceedings will be concluded.

59. This is regulated in, inter alia, the participation agreements Car Claim enters into with Car Claim owners. The participation agreements authorise Car Claim, pursuant to article 3:60 of the Dutch Civil Code and article 7:414 of the Dutch Civil Code, to do on their behalf all that is necessary to achieve compensation, including conducting settlement negotiations with or follow-on proceedings against the Defendants in order to collect their claim against the Defendants. The participation agreement also provides that Car Owners may provide Car Claim with "the necessary information and evidence to assist the Foundation in proving that you are entitled to compensation" in the follow-up process.

60. In addition, Car Claim collects input from its notified Car Owners on an ongoing basis and gives them the opportunity to have a say in relation to the actions to be taken against the Defendants. Car Claim does this in various ways, such as through personal correspondence and physical meetings with notified Car Owners. This method of input from Car Claim Owners will be maintained by Car Claim in any follow-up action it may take against the Defendants.

#### 11.12 The Dealers from which the Car Owners purchased their Affected Vehicles

61. Car Claim's constituency is formed by its *statutory* constituency (in these proceedings, the Car Owners). Not merely Car Owners who have registered with Car Claim. These proceedings of Car Claim relate to Affected Vehicles. These include at least over 185,000 cars in the Netherlands. Their current- and former owners form Car Claim's constituency.

63. Car Owners registered with Car Claim have indicated to Car Claim that they purchased or leased Affected Vehicles from all defendant Dealers, except from defendant sub 5 (Auto Kökcti B.V.), defendant sub 12 (Autoservice Van den Akker B.V.) and defendant sub 14 (Cor Millenaar B.V.).

11.9. Mercedes argues against Car Claim's answers, in summary, as follows. The purpose of the audit opinion ordered by the court is obvious: the court wishes to learn from the auditor whether the data provided by Car Claim is correct. Car Claim did not submit an auditor's report on the accuracy of the data provided. The report of (Mr Van der Vight of) Drieblad Accountants B.V. is unsuitable because by applying the wrong standard 4400N, no conclusions should be drawn or assurance provided. Also in substance, the report submitted by Car Claim says nothing about the accuracy of the data it provided.

11.10. The Partners argue against Car Claim's answers, in summary, as follows. Car Claim misunderstands that these proceedings are enket to NL Buyers and wrongly relies on overly broad notions of "Car Owners" and "Affected Vehicles". Car Claim does not have a sufficient constituency consisting of NL Buyers. The input of 'Car Owners' is not plausible. Car Claim does not answer the 'remaining question': it remains unknown how many vehicles were purchased from the Partners, and if so from which Partners.

11.11. The court first refers to the Registrar's letter reproduced above at 1.10.

#### In both cases

11.12. The court considers that no detailed instructions were given in the interlocutory order dated 7 June 2023 regarding the nature of the auditor's report to be attached to its deed by SDEJ and Car Claim, respectively. The reports submitted by SDEJ and Car Claim are both from an auditor. According to their reports, both auditors are aware that their reports serve to be used in these cases. Both auditors have provided an insight into how they have established the accuracy of the data provided on the number of persons supporting the collective claim of SDEJ and Car Claim respectively. This gives the court sufficient confidence in the accuracy of the reported number of stakeholders affiliated to SDEJ and Car Claim respectively. It was not within the auditor's remit to test the accuracy of the data declared by the interested parties; thus, he was also not required to examine whether these data corresponded to documentary evidence. Nor is it relevant for assessing the size of the constituency of SDEJ and Car Claim respectively. The reports submitted show the number of stakeholders affiliated to SDEJ and Car Claim respectively. In doing so, both SDEJ and Car Claim have recorded sufficient data to establish whether the interested parties who have applied to them belong to the owners or lessees of Affected Vehicles.

The court considers the claims made by SDEJ and Car Claim and now well-founded numbers of connected stakeholders, compared to the number of stakeholders for whom

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SDEJ and Car Claim claims respectively, sufficient to consider both interest groups representative.

*The financing agreements*

11.13. Principle III of the 2019 Claims Code reads:

The interest organisation may enter into an agreement with a sound external financier for the purpose of financing its statutory activities. The board shall satisfy itself that individual board members and members of the supervisory board, as well as the lawyer or other service providers engaged by the interest organisation, are independent and autonomous from the external financier and the (legal) persons directly or indirectly associated with it, as well as that the external financier and the (legal) persons directly or indirectly associated with it are independent from the other party to the collective action. The agreement shall provide for arrangements to ensure the independence and autonomy referred to in the previous sentence. The board shall ensure that the financing conditions (including the scope and system of the remuneration to be agreed upon) do not reasonably conflict with the collective interest of the (legal) persons for whose benefit the interest organisation acts by virtue of its objective under the articles of association.

In the SDEJ case

11.14. The rolling decision of 5 July 2023 considered, in so far as relevant here:

2.1. SDEJ requests further instructions regarding the decision that the funding agreement should be brought into the proceedings. Briefly, these further instructions should include an additional curtailment of the given order, namely, primarily, that SDEJ be required to provide only the information relevant to the assessment of "sufficient funds" and "sufficient control", alternatively, that the court prohibit Mercedes and the Partners from disclosing to third parties the content of the litigation funding agreement and any related documents and from including in any judgment to be published any information on the content of the litigation funding agreement (Sections 28(1) and 29(4) of the Code of Civil Procedure (Rv)). Mercedes and the Partners oppose this.

2.2. The court considered that the application essentially amounted to a request to amend the interlocutory order by limiting SDEJ's obligations or Mercedes and subjecting the Partners to further conditions. The Code of Civil Procedure does not provide for the possibility of amending a judgment rendered, except in the event of a manifest error or failure to rule on (part of) the claim. SDEJ has not argued that this is the case.

2.3. The request not to publish the judgment in part can be made after it has been rendered; this request is only admissible if compelling interests oppose (full) publication, see article 29 paragraph 2 Rv. Whether this is the case cannot be assessed by the court at this time. The request for partial non-publication will therefore be decided in the judgment. Section 29(4) Rv does not apply because the case was not heard in camera. The requests are therefore rejected.

11.15. Following the rolling decision of 5 July 2023, SDEJ brought into the proceedings by deed (a copy of) the "amended and restated funding agreement" (hereinafter: the SDEJ funding agreement), dated 23 May 2023, between it and Consumer Justice Network B.V. (hereinafter: CIN). The end of the SDEJ deed reads, so far as relevant here:

Section 4.3.2 LFA provides that the Financier could provide certain services to (...) Emissions Justice in order to relieve Emissions Justice of sales (...). In practice, these services appear to be limited to maintaining Emissions Justice's website, supporting the production and sending of newsletters, providing a secretariat and some other support activities. Other services Emissions Justice has deliberately placed elsewhere (...). For

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Insofar as parties involved with the Funder have been involved in the recruitment or administration of Interested Parties, the Funder shall not charge any fee for this, other than costs incurred by it for third parties it engages. There are no further commercial arrangements with the Funder or its affiliated parties.

SDEJ further produced for the court a document entitled "Budget Diesel Emissions Justice Foundation relating to Mercedes litigation". It has attached an e-mail message dated 1 August 2023 from its director B.J. Tiesinga to one of its lawyers which, in so far as relevant here, reads:

I hereby confirm on behalf of the Board of the Diesel Emissions Justice Foundation that the attached set-up (. .) is the correct representation of the applicable **budget agreements / commitments ('the Budget')** on Mercedes as agreed between the Funder and the Board of the Foundation.

#### In the Car Claim case

11.16. Car Claim brought into the proceedings (inter alia) by deed a redacted copy of a *Litigation Funding Agreement* (hereinafter: the Car Claim Funding Agreement), dated 5 January 2022, between CF ND Car Ltd (hereinafter: CF ND Car), itself and the firm of its attorney. Car Claim hereby confirmed that the Financing Agreement submitted, including its annexes, comprised all the agreements made between it and CF ND Car in relation to these proceedings against Mercedes and the Partners. Car Claim further submitted to the court an Excel file entitled "Case Budget".

#### In both cases

1.17. Mercedes and the Partners subsequently responded to both financing agreements.

11.18. Mercedes and the Partners first argue that SDEJ and Car Claim are commercial claims organisations, which do not seek to serve the interests of injured parties but the interests of their litigation funders and their lawyers. SDEJ and Car Claim should therefore be declared inadmissible. Mercedes and the Partners base this on the formation history of SDEJ and Car Claim respectively, because, according to them, the initiative emanated from lawyers who, moreover, were involved in (the formation of) the litigation financier.

11.19. The court does not consider important who took the initiative to establish an interest group, when this took place and which persons were involved, but whether the interest group as it eventually took shape is sufficiently independent in relation to the litigation financier and the lawyers working for it, and thus the interests of the persons for whom it advocates are sufficiently safeguarded. This will be discussed in more detail below.

#### *Compensation for SDM and Car Claim if it comes to compensation*

11.20. SDEJ and Car Claim have included in the participation agreements with their participants that they are (under certain circumstances) entitled to compensation for the costs incurred by

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costs incurred by them (if they fail to make the costs incurred by them part of a settlement or court judgment). SDEJ applies a maximum fee of 27.5 per cent, which is 2.5 per cent more than Car Claim. The maximum fee charged by Car Claim is equal to the upper limit of the 10% to 25% range previously adopted in case law (see Amsterdam Court of Appeal 13 July 2018, ECLI:NL:GHAMS:2018:2422), as also included in the explanatory notes to the Claims Code. SDEJ's fee is even above that. SDEJ provided a summary explanation for this when asked. The court is not yet convinced that a rate of 27.5% is justified. The higher the percentage of the fee to be charged by a claim foundation, the more difficult it may be to reach a settlement. This is not in the interest of SDEJ's supporters. Moreover, it is unclear what portion of the percentage that SDEJ and Car Claim will deduct from any compensation will be used to reimburse the costs they have incurred. At this stage, however, this is not yet a reason for declaring SDEJ or Car Claim inadmissible, as this issue will only be fully addressed when declaring any settlement agreement generally binding in WCAM proceedings (article 7:907-910 BW and 1013-1018a Rv). In WCAM proceedings, it may still be ruled that the interests of the supporters of SDEJ and Car Claim are insufficiently safeguarded for the reasons mentioned above. In these proceedings, in which the collective claims of SDEJ and Car Claim, due to the applicability of the old collective action law, concern declarations of rights and not monetary damages, the court will not draw any consequences from this. The court does recommend that SDEJ bring its compensation in line with the range previously adopted in case law.

#### In the SDEJ case

11.21. Mercedes and the Partners point out that the SDEJ Financing Agreement was amended the day before the oral hearing on 24 May 2023. This fact is not important in itself because, as considered above under 6.3, admissibility must be assessed ex nunc.

11.22. Mercedes and the Partners further argue that SDEJ did not confirm that the documents it provided contained all the agreements between SDEJ and its litigation funder. To the letter, this defence is correct. However, as mentioned above at 11.15, SDEJ did state - after a presentation about a possible further cooperation between it and CIN - that there is no question of further commercial agreements with its litigation financier or its affiliates. The court considers this statement sufficiently clear and understands it to mean that it has been declared that the documents provided contain all agreements between SDEJ and CIN, as requested by the court.

#### In both cases

11.23. The court was satisfied that SDEJ and Car Claim had sufficient resources to meet the costs of their cases.

#### In the SDEJ case

11.24. A closer look at the SDEJ financing agreement makes a few things stand out. First, CIN is more than a passive financier. It also provides services to



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SDEJ. However, this mere circumstance is not a stumbling block in the context of the guarantee requirement. The SDEJ Funding Agreement further stipulates that the decision-making power regarding the litigation and settlement strategy rests exclusively with SDEJ (Article 2.1: "(...) The decision-making power regarding the litigation and settlement strategy rests exclusively with the Foundation." ). Immediately afterwards, in Article 2.2, there follows an information and consultation obligation of SDEJ towards CIN. However, this information and consultation obligation elaborated in Article 8 is clauseed: it applies only "to the extent possible and allowed". This "extent" is first of all determined by the premise in Article 2.1. Also in this light, SDEJ's understanding, expressed in Article 5.1.1, of the *return on investment* envisaged by CIN (and SDEJ's commitment to take this into account when entering into agreements with its participants and when opening negotiations and entering into agreements with Mercedes and the Partners) does not raise any predominant objections. For completeness, it is noted that Director Coleman of CIN stepped down as a member of SDEJ's supervisory board with effect from 2 March 2023.

11.25. Mercedes and the Partners also pointed out that SDEJ and CJN entered into a Service Level Agreement, dated 25 August 2021, with Litigo B.V. (hereinafter Litigo) and that Litigo's sole director was chairman of SDEJ's board of directors from 3 June 2020 to 14 October 2021. According to Mercedes and the Partners, the profit sharing included in this agreement violates principle II of the 2019 Claims Code, which precludes "any (legal) person directly or indirectly affiliated to the interest group" from having a profit motive. Against this, SDEJ points to a detailed provision in the agreement with Litigo to the effect that the profit sharing is result-dependent and does not prejudice the claims of the persons for whom it is acting in this case. On this reading, the court does not follow Mercedes and the Partners in their objections.

11.26. All in all, SDEJ passes the test of the guarantee requirement.

11.27. In the absence of sufficiently compelling interests, the court dismissed SDEJ's request for partial non-publication of the judgment.

#### In the Car Claim case

11.28. The court considered as follows.

a. Under Section 22(3) Rv, the court may draw the inference it deems appropriate from a party's unjustified refusal to produce the requested documents in full.

b. Car Claim argues that its financing agreement with CF ND Car contains trade secrets and, on that basis, rendered certain parts of the copy of this agreement brought into the proceedings illegible to both the court and Mercedes and the Partners. It further provided the budget only to the court and not to Mercedes and the Partners. The latter is in accordance with the court's instructions, the former is not. The issue to be assessed is whether this restriction on knowledge is justified. The court ruled on this beforehand, by expressly instructing that the funding agreement should be provided without any passages therein illegible

have been made. The court stands by that decision. The argument that these are trade secrets is rejected. First, it is impossible to see what monetary value knowing the details of the agreements between Car Claim and its litigation financier would represent. On top of that, it has happened before in legal practice that the court wanted to see the agreements made between interest group and litigation financier. This case commenced as proceedings under the WAMCA; Car Claim and its funder should therefore also have taken into account that the court would request the funding agreement in order to verify whether Car Claim had sufficient funds to conduct the proceedings and whether its position vis-à-vis the litigation funder was sufficiently independent. The circumstance that the proceedings continue under the old law on collective actions does not alter this, because also under old law it must be examined whether the guarantee requirement of Article 3:305a(2) (old) of the Dutch Civil Code is met and therefore whether the interest group is sufficiently independent.

c. The financing agreement shows that Car Claim and CF ND Car itself already took into account the possibility that the court would request the financing agreement:

16.3 Each party agrees not to disclose any Confidential Information to a third party unless:  
(...)

(d) the disclosure is required by law (including by an order of a court of competent jurisdiction) or by the regulations of any government or government agency having jurisdiction over the party concerned;

d. If the funding agreement shows that the interest organisation does not have a sufficiently independent position vis-à-vis the litigation financier, this leads to inadmissibility of the interest organisation. This means that if the agreement has been rendered partly illegible, so that it cannot be fully reviewed, the starting point is that the illegible passages may contain agreements that impair the interest organisation's independence. The most obvious consequence is therefore the inadmissibility finding. The court will not attach that consequence to the refusal at this stage. Article 17.6 shows the intention to give Car Claim a sufficiently independent position in relation to its funder. Indeed, this provision reads as follows:

#### 17.6 The Action

The Parties recognise that the Law Firm must at all times comply with its duties under the *Lawyers Act* and the *Rules of Conduct for Lawyers* to act independently and in the best interests of the Foundation and in accordance with its professional duties. The Parties also recognise that, in accordance with Claim Code 2019, nothing in this Agreement entitles the Funder to attempt to and/or to control the conduct by the Law Firm and/or the Foundation of the Action and/or the Proceedings.

To pursue the Action, the Foundation will:

- (i) comply with the Code of Civil Procedure, all Orders and the Claim Code 2019 (unless there is a justifiable reason for deviation from the Claim Code 2019);
- (ii) instruct the Law Firm to conduct the Action in compliance with the Code of Civil Procedure and any Judgment, Order or award made in the Proceedings;
- (iii) act fairly and adequately in the interests of the Class Members at all times;
- (iv) immediately make the Law Firm and the Funder aware of any issue which may compromise the Foundation's obligations to the Class Members, in accordance with the Claim Code 2019;
- (v) co-operate fully and at all times throughout the Action with, and promptly provide such instructions and assistance to, the Law Firm as it may require for pursuing the Action;
- (vi) act with the utmost good faith in all its dealings with the Funder and the Law Firm;

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(vii) comply with the terms of this Agreement;  
(viii) prosecute the Action diligently;  
(ix) to the extent this will not result in any breach of its obligations under the Claim Code 2019, comply with the reasonable advice of the Law Firm and assist its conduct of the Action, including without limitation whether it would be appropriate to make or accept any offer to settle the Action;

e. In view of the intention expressed in this provision and given the fact that this is one of the first times that financing agreements have been tested, the court will give Car Claim the opportunity to still fully comply with the previously given instructions (including the provision of the financing agreement without any illegible parts, except for the budget). The court will also give Car Claim the opportunity to delete from the financing agreement those parts of the financing agreement still to be discussed below that (possibly) contradict the above, in consultation with CF ND Car, or at least to amend the financing agreement in such a way that the court's objections are addressed. Car Claim will be given the opportunity to let the court know whether it has agreed such an amendment to the financing agreement with CF ND Car and to bring that amendment by deed.

f. The parts of the Car Claim financing agreement referred to above under (e) to which objections are raised are as follows.

Article 14.3. The independence of the interest group vis-à-vis the litigation funder means that the funding agreement should not include any provisions limiting the interest group's freedom to deviate from its lawyer's advice.

Article 18.1. The independence of the interest group vis-à-vis the litigation funder implies that the funding agreement should not include provisions that restrict the interest group's freedom to choose and, where necessary, replace its lawyer.

Article 20. This provision restricts the freedom of the "Car Owner" who gets the impression that his interests are insufficiently represented to switch to another interest organisation in which he has more confidence. Therefore, this provision violates the guarantee requirement of Article 3:305a(2) (old) BW.

g. Since the court finds no justification for the refusal to produce the full funding agreement (except for the budget), there is also no ground for a prohibition on disclosure under sections 28 Rv, 1019ib(1) and 22a(3) Rv.

h. Car Claim made a conditional application to open an interim appeal. The conditions entail the court (a) ruling that, based on the information provided to the court by Car Claim in its deed of 2 August 2023, it is not established that Car Claim complied with the funding requirements; and (b) deciding not to refer the assessment of the illegible parts of the Car Claim funding agreement to another chamber of the court and (c) maintains in full the order to Car Claim to produce its integral funding agreement to Mercedes and the Partners as set out in the interlocutory order of 7 June 2023 and finds that Car Claim's compelling reasons do not justify a departure from that order (Article 22

para 2 Rv). These conditions were met. However, also in light of the foregoing considerations and rulings, the District Court saw no reason in Car Claim's submissions to lodge an interim appeal against the decisions taken under a to g above. The Court therefore rejected Car Claim's request.

11.29. The matter will be referred to the roll for Car Claim to file the deed referred to above at 11.28(e). Thereafter, Mercedes and the Partners will be given the opportunity to comment on the matter by an answer deed. Thereafter, Car Claim's admissibility will be decided. The court notes that if the passages rendered unreadable to date contain provisions that impair Car Claim's independent position vis-à-vis its litigation funder or are otherwise in breach of the guarantee requirement, no further remedy will be offered and in that case those provisions will result in inadmissibility of Car Claim.

## **12. Admissibility - consultation requirement**

### In both cases

12.1. Pursuant to the provisions of Article 3:305a paragraph 2, first sentence, (old) BW, a party commencing a collective action is inadmissible if, in the given circumstances, this party did not make sufficient efforts to achieve the claimed by conducting consultations with the defendant(s). A period of two weeks after receipt by the defendant of a request for consultation stating the claimed is in any case sufficient according to paragraph 2 of Article 3:305a (old) of the Civil Code.

12.2. It follows from the legislative history that the purpose of the consultation requirement, in brief, is to prevent a defendant from being summoned hardly at all and to promote the parties to reach a solution themselves.

### In the SDEJ case

12.3. By the letter of 20 May 2020 quoted above under 2.7, SDEJ invited Mercedes and the Partners to the consultation referred to in Article 3:305a(2), first sentence, (old) of the Civil Code. It was neither stated nor shown that this letter did not reach the addressees. However, they did not respond to it, with the exception of Baan Hengelo B.V. (originally defendant 13). SDEJ withdrew the claim against this original defendant in response to this response. In respect of the remaining defendants, SDEJ complied with the two-week period provided for in the first sentence of Article 3:305a(2) (old).

12.4. SDEJ has thus complied with the consultation requirement.

### In the Car Claim case

12.5. By the letter of 18 August 2020 quoted above under 2.10, Mercedes-Benz Group AG responded negatively to Car Claim's invitation for consultation. Mercedes-Benz Nederland B.V. did not respond to that invitation. With regard to these defendants, Car Claim respected the two-week deadline. With the

permission of the Partners' then lawyer to serve the writ of summons on her office intended for them, the path to consultations with the Partners was closed.

12.6. Car Claim has thus fulfilled the consultation requirement.

#### *Conclusion of admissibility SDM and Car Claim*

12.7. It follows from the foregoing that SDEJ is admissible in its claims, except to the extent that for certain claims in paragraphs 10.6.13-10.6.28 otherwise decided. The admissibility of Car Claim cannot yet be decided.

### **13. Applicable law**

#### In both cases

13.1. In the interlocutory judgment of 22 June 2022, at 6.38, it was noted that the question of applicable law in particular concerns the relationship between the NL Buyers and Mercedes-Benz Group AG. The words "in particular" can now be replaced by "exclusively". SDEJ and Car Claim base their relevant claims, in brief, on the fact that Mercedes-Benz Group AG acted unlawfully towards the NL Buyers.

13.2. The law applicable to an alleged tort or delict should be determined by reference to Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations ('Regulation Rome II'). When interpreting concepts used in the Rome II Regulation, the court is free to use the conceptual system of the Brussels I-bis Regulation and the related case-law of the Court of Justice of the European Union.

13.3. Under Article 4(1) Regulation Rome II, the law of the country where the damage occurs applies.

13.4. In its judgment of 9 July 2020, ECLI:EU:C:2020:534 (Verein für Konsumenteninformation/Volkswagen), the CJEU ruled that Article 7(2) of Regulation Brussels I-bis is to be interpreted as meaning that, where vehicles have been unlawfully fitted with software manipulating emissions data by their manufacturer in one Member State before being purchased from a third party in another Member State, the place where the damage occurs is in the latter Member State. Thus, the place where the vehicle was purchased is the place where the harmful event occurred. It follows that the place where the alleged damage of interested parties whose vehicle was purchased in the Netherlands is the Netherlands. This means that Dutch law applies to the claims against Mercedes-Benz Group AG to which these collective actions (also) relate.

13.5. By analogy with the above, in the court's opinion this also applies to the claims brought against Mercedes-Benz Group AG on behalf of Dutch stakeholders who leased their vehicle in the Netherlands.

13.6. Mercedes' reliance on Article 4(3) Rome II in view of NL Buyers residing in Germany is no longer relevant.

#### **14. Bankruptcy Cor Millenaar B.V.**

##### In both cases

14.1. By the interlocutory decree of 7 June 2023, the parties were given the opportunity to comment on the consequences for each of the two cases of the bankruptcy of Cor Millenaar B.V. (defendant 15) declared on 14 March 2023.

14.2. Only the Partners have taken advantage of this opportunity. With reference to Article 29 Bankruptcy Act, they request the court to regard the proceedings against Cor Millenaar B.V. as suspended by operation of law.

14.3. The court considered that Articles 25 to 29 Bankruptcy Act (FW) regulate the consequences of the declaration of bankruptcy for legal claims brought by or against the debtor. The ruling on 22 June 2022 that Article 3:305a (old) of the Civil Code applies to the SDEJ case and the Car Claim case means that these cases no longer involve claims that have direct satisfaction from the estate. In these cases, SDEJ and Car Claim can achieve no more than a judgment that each of the interested parties can potentially use in exercising pecuniary claims against, among others, Cor Millenaar B.V. Section 29 of the FW does not apply, nor does section 26 of the FW. What does apply is Section 28 Fw. As no steps as referred to in that section have been taken as yet, the cases against Cor Millenaar B.V. will be continued for the time being.

15. 7ot lock

##### In both cases

15.1. The question of the admissibility of Car Claim is as yet unanswered. However, there is reason to briefly consider the situation that will arise if Car Claim is also found admissible.

15.2. First, the question arises as to the necessity and usefulness of continuing two largely similar cases side by side. As SDEJ and Car Claim each have their own constituencies, the continuation of the SDEJ case and the Car Claim case, respectively, is legally acceptable for the time being. However, SDEJ and Car Claim are expected to consult with each other on the effectiveness and manageability of continuing both cases, having regard to the interests of the individuals they represent but also the interests of Mercedes and the Partners. SDEJ and Car Claim have already expressed their willingness to do so

15.3. In any event, the court will automatically join the Car Claim case with the SDEJ case under section 222(1) Rv. The parties did not object to this on the occasion of the oral hearing.

15.4. The Car Claim case will now be referred to the roll for taking a deed of Car Claim referred to at 11.28 and 11.29. Mercedes and the Partners may respond thereto four weeks thereafter. The deeds may only relate to the provisions of 11.28 and 11.29 and the content of the deeds may not exceed five pages. Thereafter, the court will decide on the admissibility of Car Claim. There will be no further proceedings in the SDEJ case pending the exchange of deeds in the Car Claim case. This case will be referred to the roll for decision on further litigation.

15.5. Subsequently, the SDEJ case and Car Claim case - depending on the ruling on admissibility - will be referred to the roll, for a Mercedes deed as referred to in 10.6.10. To that, SDEJ and (possibly) Car Claim may respond. In their deed, they may also comment on what has been considered under 15.2 and address developments that have occurred since the summons and adjust their contentions and, if necessary, their claims accordingly. If Car Claim is declared inadmissible, what was considered under 15.2 is no longer relevant and only SDEJ will be allowed to comment in the manner mentioned in the previous sentence.

Subsequently, the cases (c.q. the case) will be referred to a subsequent role for submissions of reply by Mercedes and the Partners respectively. It is not excluded that the court will at some point make further decisions on the course of the proceedings, for example in connection with the objection and appeal procedures of Mercedes-Benz Group AG against the decisions of the CBA.

#### *Right switch*

15.6. Mr Broesterhuizen will no longer be part of the combination handling this case after this judgment, as she is working elsewhere in the judiciary. Mr N.C.H. Blankevoort will replace her.

## **16. The decision**

The court:

### In the Car Claim case

16.1. refers the matter to the roll of **21 February 2024** for deed on the part of Car Claim referred to in paragraphs 11.28 and 11.29, then reply deed by Mercedes and the Partners;

### in the SDEJ case

16.2. refers the case to the roll of 17 April 2024 for decision on continuing proceedings;

### in both cases

16.3. reserves any further decision.

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This judgment has been rendered by R.H.C. Jongeneel, M.C.H. Broesterhuizen and M.C.H. M.L.S. Kalf, Judges, assisted by A.A.J. Wissink, Registrar, and pronounced in public on 24 January 2024.

A handwritten signature in blue ink, appearing to be 'R.H.C. Jongeneel', written in a cursive style.