

International Jurisdiction in Diesel Emissions Claims under the Brussels Ibis Regulation

La giurisdizione internazionale nelle controversie sulle emissioni Diesel in base al Regolamento Bruxelles Ibis

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Abstract: The broke of the Dieseltgate in the Unites States in September 2015 gave rise to a multitude of cross-border claims brought by the final purchasers/consumers against the car and engine manufacturers involved in the emissions scandal. The article examines which rules on jurisdiction laid down in Regulation 1215/2012 apply to cross-border Dieseltgate-related claims with particular regard to the interpretative issues which arise with regard to the *forum delicti* under Art. 7 n. 2 of the Brussels Ibis Regulation.

Keywords: Dieseltgate, international jurisdiction, Brussels Ibis Regulation, place of the event giving rise to the damage, place of the damage.

Riassunto: Lo scoppio del Dieseltgate negli Stati Uniti nel settembre 2015 ha dato luogo a una moltitudine di controversie transfrontaliere esperite dagli acquirenti/consumatori finali nei confronti delle case automobilistiche e dei fabbricanti dei motori coinvolti nello scandalo delle emissioni. L'articolo esamina quali norme sulla giurisdizione contenute nel Regolamento 1215/2012 siano applicabili alle cause transfrontaliere connesse al Dieseltgate con particolare riguardo alle questioni interpretative che sorgono relativamente al *forum delicti* di cui all'Art. 7 n. 2 del Regolamento Bruxelles Ibis.

Parole chiave: Dieseltgate, giurisdizione internazionale, Regolamento Bruxelles Ibis, luogo del fatto generatore del danno, luogo del danno.

Summary: I. Introduction. II. International jurisdiction under Regulation 1215/2012 in Dieseltgate claims. III. The *forum delicti* under Art. 7 n. 2 of Regulation 1215/2012. IV. The place of the event giving rise to the damage. V. The place of the damage. VI. Conclusion.

I. Introduction

1. Some years before the eruption of the Volkswagen Diesel emissions scandal (“Dieseltgate or Emissionsgate”), the European Commission’s Joint Research Centre (JRC) signalled significant discrepancies between car nitrogen oxide (NOx) emissions under laboratory conditions and those observed on the road¹. The Dieseltgate began on 18 September 2015 when the United States Environmental Protec-

¹ M. WEISS, P. BONNEL, R. HUMMEL, U. MANFREDI, R. COLOMBO, G. LANAPPE, P. LE LIJOUR, M. SCULATI, *Analyzing on-road emissions of light-duty vehicles with Portable Emissions Measurement Systems (PEMS)*, JRC Technical and Scientific Report

tion Agency (EPA) issued a notice of violation of the Clean Air Act to Volkswagen². The notice alleged that Volkswagen installed a software into its Diesel vehicles that circumvented US emissions standards³. Volkswagen subsequently admitted the installation of a defeat device in 11 million Diesel-fuelled vehicles worldwide⁴. However, besides Volkswagen, other motor vehicle manufacturers such as Fiat, Mercedes Benz, Opel, Peugeot, Porsche, Renault and Volvo resulted to be involved in the Emissionsgate⁵.

2. The software implicated in the Dieselpgate was able to detect when a vehicle was being tested in a laboratory and to activate its emissions control system for compliance with the limit values laid down in Regulation 715/2007⁶. However, on the road, the software disabled the emissions control system and the vehicles produced emissions well above the limit values and the NOx emissions standards⁷. Despite the subsequent software's update in order to purify exhaust gas, it was found that such exhaust gas purification was operational only at an outside temperature of between 15 and 33°C and at a driving altitude of less than 1000 metres ("temperature window")⁸. The European Court of Justice ("ECJ") found that both kind of software (the original and the updated one) were prohibited by Arts. 3, paragraph 10,⁹ and 5, paragraph 2,¹⁰ of Regulation 715/2007¹¹.

3. The Dieselpgate gave rise to a multitude of cross-border claims brought by the final purchasers/consumers against the car and engine manufacturers involved in the emissions scandal and domiciled in different States. In the EU context, the provisions to determine the competent court may be found in Regulation 1215/2012¹² provided that the defendant is domiciled in a EU Member State as required by Art.

62639, EUR 24697 EN, Ispra, Italy, 2011; M. WEISS, P. BONNEL, R. HUMMEL, N. STEININGER, *A complementary emissions test for light-duty vehicles: Assessing the technical feasibility of candidate procedures*, JRC Scientific and Policy Report 75998, EUR 25572 EN, Ispra, Italy, 2013.

² On the legal implication of the Dieselpgate see F. BERTELLI, *Dealing with the Dieselpgate Scandal in the US and EU*, in *The Italian Law Journal*, 2, 2021, p. 619 ff.; M. FRIGESSI DI RATTALMA (ed.), *The Dieselpgate. A Legal Perspective*, Springer, Berlin, 2017.

³ <https://www.epa.gov/vw/learn-about-volkswagen-violations>.

⁴ European Court of Auditors, The EU's response to the "dieselpgate" scandal. Briefing Paper February 2019, p.12.

⁵ A. CRESPO HERNÁNDEZ, *El Derecho internacional privado frente al escándalo de las emisiones de los motores diésel*, in *Cuadernos de Derecho Transnacional*, 2, 2024, p. 416.

⁶ 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 vehicle repair and maintenance information, in *Official Journal of the European Union*, L 171 of 29 June 2007. The objective of the regulation is, pursuant to recital 6, the «reduction in nitrogen oxide emissions from diesel vehicles [...] to improve air quality and comply with limit values for pollution».

⁷ European Court of Auditors, The EU's response to the "dieselpgate", cit., p. 12; European Court of Justice, judgments of 9 July 2020, *Volkswagen*, C-343/19, ECLI:EU:C:2020:534, para 8; 8 November 2022, *Deutsche Umwelthilfe*, C-873/19, ECLI:EU:C:2022:857, para 25.

⁸ European Court of Justice, judgment of 8 November 2022, *Deutsche Umwelthilfe*, cit., para 84; A. CRESPO HERNÁNDEZ, *El Derecho internacional privado*, cit., pp. 415-416.

⁹ Art. 3, paragraph 10, of Regulation 715/2007 defines a «defeat device» as «any element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use».

¹⁰ Art. 5, paragraph 2, of Regulation 715/2007 prohibits «[t]he use of defeat devices that reduce the effectiveness of emission control systems» and lists three alternative exceptions to the prohibition. According to the European Court of Justice, judgment of 17 December 2020, *CLCV*, C-693/18, ECLI:EU:C:2020:1040, para 115 «Article 5(2)(a) of Regulation No 715/2007 must be interpreted as meaning that a defeat device, such as that at issue in the main proceedings, which systematically improves the performance of the emission control system of vehicles during type-approval procedures in order to comply with the emission limits laid down by that regulation, and thus obtain the approval of those vehicles, cannot fall within the scope of the exception to the prohibition on such devices laid down in that provision, which relates to the protection of the engine against damage or accident and the safe operation of the vehicle, even if that device helps to prevent the ageing or clogging up of the engine».

¹¹ European Court of Justice, judgments of 14 July 2022, *GSM Invest*, C-128/20, ECLI:EU:C:2022:570; 14 July 2022, *IR*, C-134/20, ECLI:EU:C:2022:571; 14 July 2022, *DS*, C-145/20, ECLI:EU:C:2022:572; 8 November 2022, *Deutsche Umwelthilfe*, cit.

¹² Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), in *Official Journal of the European Union*, L 351 of 20 December 2012.

4, paragraph 1, of Regulation Brussels Ibis. These claims also fall within the scope of application of Regulation 1215/2012 since they constitute «civil and commercial matters» pursuant to Art. 1, paragraph 1.

4. This article examines the relevant heads of international jurisdiction contained in Regulation 1215/2012 with particular regard to the «place where the harmful event occurred» under Art. 7 n. 2 (*forum delicti*). This expression has been recently interpreted in the *Volkswagen* and *FCA Italy* judgments of the ECJ concerning two Dieselgate claims¹³. Since these claims may be qualified as defective-product liability cases, this contribution analyzes how the previous *Kainz* and *Zuid-Chemie* ECJ jurisprudence¹⁴ has to be coordinated with *Volkswagen* and *FCA Italy*. In light of the principle of consistent interpretation between Regulation 1215/2012 and Regulation 864/2007¹⁵, the implications for the applicable law will also be considered.

II. International jurisdiction under Regulation 1215/2012 in Dieselgate claims

5. Some of the provisions on jurisdiction contained in Regulation 1215/2012 are inapplicable to the Diesel emissions claims. As far as the special forum for «matters relating to a contract» (Art. 7 n. 1) is concerned, in light of the privity test adopted in its *Handte* judgment and confirmed by subsequent jurisprudence¹⁶, the ECJ stated that even in the case of a chain of international contracts between manufacturer, distributor, car dealer and final consumer, Art. 5 n. 1 of the Brussels Convention of 1968¹⁷ (now Art. 7 n. 1 of the Brussels Ibis Regulation) «does not apply to an action between a sub-buyer of goods and the manufacturer, who is not the seller, relating to defects in those goods or to their unsuitability for their intended purpose»¹⁸ since «there is no contractual relationship between the sub-buyer and the manufacturer because the latter has not undertaken any contractual obligation towards the former»¹⁹. It follows that in order to apply Art. 7 n. 1 of the Brussels Ibis Regulation there must be a direct contractual relationship between claimant and defendant (privity test). This condition is clearly not met if the final purchaser sues the manufacturer who is not the seller of the vehicle.

6. Art. 7 n. 1 of Regulation 1215/2012 seems however applicable to an action for termination or annulment of the contract of sale or compensation for damages brought by the final buyer against the car dealer given the existence of a direct contractual relationship between the parties to the dispute. However, since retailers were not involved in the incorporation of the defeat device which reduced the effectiveness of emission control systems they may not be held liable on the merits²⁰.

7. The privity test is also at the core of Art. 18, paragraph 1, of the Brussels Ibis Regulation, allowing the consumer to bring proceedings in the courts of the EU Member State in which he/she is

¹³ European Court of Justice, judgments of 9 July 2020, *Volkswagen*, cit.; 22 February 2024, *FCA Italy*, C-81/23, ECLI:EU:C:2024:165. On *Volkswagen* see P. THIEFFRY, *Le Dieselgate, rare rencontre du droit international privé et de l'environnement en aval des mines de potasse d'Alsace*, in *Revue trimestrielle de droit européen*, 1, 2021, p. 220 ff. On the *FCA Italy* judgment see M. ANDJIC, *Konkretisierung des Orts des Schadenseintritts nach Art. 7 Nr. 2 Brüssel Ia-VO in den sogenannten „Dieselfällen“*, in *Zeitschrift für Europäisches Privatrecht*, 4, 2024, p. 947 ff.; L. IDOT, *Règlement Bruxelles I Bis. Règle de compétence en matière délictuelle*, in *Europe*, 4, 2024, p. 43 ff.

¹⁴ European Court of Justice, judgments of 16 July 2009, *Zuid-Chemie*, C-189/08, ECLI:EU:C:2009:475; 16 January 2014, *Kainz*, C-45/13, ECLI:EU:C:2014:7.

¹⁵ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), in *Official Journal of the European Union*, L 199 of 31 July 2007.

¹⁶ European Court of Justice, judgments of 27 October 1998, *Réunion européenne*, C-51/97, ECLI:EU:C:1998:509, paras 19-20; 1 October 2002, *Henkel*, C-167/00, ECLI:EU:C:2002:555, paras 38-39; 17 October 2013, *OTP Bank*, C-519/12, ECLI:EU:C:2013:674, para 25; 16 June 2016, *Universal Music*, C-12/15, ECLI: EU:C:2016:449, para 24.

¹⁷ 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, in *Official Journal*, C 27 of 26 January 1998.

¹⁸ European Court of Justice, judgment of 17 June 1992, *Handte*, C-26/91, ECLI:EU:C:1992:268, para 21.

¹⁹ European Court of Justice, judgment of 17 June 1992, *Handte*, cit., para 16.

²⁰ In this sense see also A. CRESPO HERNÁNDEZ, *El Derecho internacional privado*, cit., p. 418.

domiciled or in the courts of the EU Member State in which «the other party to a contract», namely the trader or professional, is domiciled. Indeed, in *Club La Costa* the ECJ highlighted that said rule on jurisdiction «appl[ies], in accordance with the wording of that provision, only to an action brought by a consumer against the other party to the contract, which necessarily implies that a contract has been concluded by the consumer with the trader or professional concerned»²¹. The protective fora in Section 4 of Regulation 1215/2012 are therefore excluded as well in claims related to the Dieselgate²².

8. The final buyer of a Diesel vehicle equipped with a defeat device may sue the manufacturer before the court of the EU Member State where the latter is domiciled (*forum rei* under Art. 4 of Regulation 1215/2012). The domicile of the defendant has to be determined in accordance with Arts. 62 and 63 of the Regulation. Other potentially available special fora to the victim are, with regard to civil claims for damages or restitution raised in criminal cases, the court seized of criminal proceedings if that court has jurisdiction under its own law to entertain civil proceedings (Art. 7 n. 3) and, in tort claims, the court for the place where the harmful event occurred or may occur (*forum delicti* under Art. 7 n. 2). The latter provision will be examined in the following paragraphs since it has given rise to several questions of interpretation²³.

III. The *forum delicti* under Art. 7 n. 2 of Regulation 1215/2012

9. Art. 7 n. 2 of the Brussels Ibis Regulation applies to «matters relating to tort, delict or quasi-delict». According to the *Kalfelis* judgment, this phrase has an autonomous and independent meaning «covering all actions which seek to establish the liability of a defendant and which are not related to a ‘contract’» within the meaning of now Art. 7 n. 1²⁴. In the already mentioned *Handte* decision the ECJ stated that the expression «matters relating to a contract» contained in Art. 7 n. 1 covers a situation in which there is an «obligation freely assumed by one party towards another»²⁵. It follows that if the matter does not fall within Art. 7 n. 1, it is covered by Art. 7 n. 2²⁶.

10. The action for tortious liability may be brought before the *forum delicti* against the car manufacturer by the final buyer of the vehicle (individual action) as happened in the *FCA Italy* case²⁷ or by a consumer association such as the Verein für Konsumenteninformation/VKI (representative action²⁸). In the *Volkswagen* case 574 consumers assigned to the VKI their claims for the purpose of bringing proceedings for damages²⁹. Representative actions of this kind do not satisfy the above-mentioned pri-

²¹ European Court of Justice, judgments of 14 September 2023, *Club La Costa*, C-821/21, ECLI:EU:C:2023:672, para 51; 26 March 2020, *Primera Air Scandinavia*, C-215/18, ECLI:EU:C:2020:235, para 61; 25 January 2018, *Schrems*, C-498/16, ECLI:EU:C:2018:37, para 45; 14 May 2009, *Ilsinger*, C-180/06, ECLI: ECLI:EU:C:2009:303, paras 52-53.

²² A. CRESPO HERNÁNDEZ, *El Derecho internacional privado*, cit., p. 419.

²³ For a detailed analysis of Art. 7 n. 2 of Regulation 1215/2012 see R. MONICO, *La giurisdizione in materia extracontrattuale nello spazio giudiziario europeo*, Giappichelli, Torino, 2022.

²⁴ European Court of Justice, judgment of 27 September 1988, *Kalfelis*, C-189/87, ECLI:EU:C:1988:459, para. 18.

²⁵ European Court of Justice, judgment of 17 June 1992, *Handte*, cit., para 15.

²⁶ European Court of Justice, judgment of 13 March 2014, *Brogssitter*, C-548/12, ECLI:EU:C:2014:148, para 27. A. BRIGGS, *Civil Jurisdiction and Judgments*, Informa Law, Oxon-New York, 2015, p. 239: «if the matter does not relate to a contract [...], the proceedings may fall within Art. 7 n. 2»; T.C. HARTLEY, *International Commercial Litigation. Text, Cases and Materials on Private International Law*, II ed., Cambridge University Press, Cambridge, 2015, p. 45.

²⁷ European Court of Justice, judgment of 22 February 2024, *FCA Italy*, cit.

²⁸ Pursuant to Art. 3 n. 5 of Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, in *Official Journal of the European Union*, L 409 of 4 December 2020, a «representative action» is «an action for the protection of the collective interests of consumers that is brought by a qualified entity as a claimant party on behalf of consumers to seek an injunctive measure, a redress measure, or both». Recital 36 specifies that the «individual consumers should not be claimant parties in the proceedings».

²⁹ European Court of Justice, judgment of 9 July 2020, *Volkswagen*, cit., paras 7-8.

vity test developed in the *Handte* decision³⁰ and later confirmed in *Henkel*³¹ and may thus be brought before the *forum delicti* under Art. 7 n. 2 of Regulation 1215/2012, but not before the *forum contractus* under Art. 7 n. 1.

11. Art. 7 n. 2 confers jurisdiction on the courts of the EU Member State where the «harmful event occurred or may occur» (*locus delicti*). In the landmark *Bier* decision the ECJ established for the first time the well-known ubiquity rule (“*Bier* rule”) which applies to all distance delicts – a category which includes product liability cases such as the Diesel emissions claims – where the conduct and the caused loss occur in different EU Member States. Under the *Bier* rule the broad notion of «harmful event» means the place of the event giving rise to the damage (*locus commissi delicti* or *Handlungsort*) or the place of the damage itself (*locus damni* or *Erfolgsort*). The claimant may choose to bring the action in either of these places³².

12. The problem that arises concerns the localisation of both places in the specific context of Dieselgate claims. This further interpretative issue is not new since the ECJ has frequently specified the two prongs of the ubiquity theory on a case-by-case basis³³.

IV. The place of the event giving rise to the damage

13. As regards the first prong of the *Bier* rule, namely the *locus commissi delicti*, if there are several causal events which are equally capable of causing the damage, the question is whether the initial or the final event of the causal chain may be relevant for the purpose of attributing jurisdiction under Art. 7 n. 2 of Regulation 1215/2012.

14. According to ECJ jurisprudence, the place of the initial event giving rise to the damage is of relevance, *i.e.* the place of the «first act by which the tortfeasor ‘brings the tort into the world’»³⁴. In its *Bier* ruling the ECJ made reference to the «*place of the event* which gives rise to and is *at the origin of that damage*»³⁵, while in the *Shevill* defamation case the ECJ specified that the place where the publisher of the newspaper is established «is the place where the harmful event originated and from which the libel was issued and put into circulation»³⁶.

15. In the case of product liability the following *Handlungsorte* may be relevant: the place where the product was designed and manufactured or where the different parts of the same product are assembled into the final product, the place where the manufacturer is established, the place where the product is put into circulation or transferred to the retailer and the place of purchase of the product by the final consumer.

16. In *Kainz* the ECJ held that the place of the initial event giving rise to the damage is the place where the product was manufactured³⁷. This connecting factor – which may not coincide with the domicile of the manufacturer (*forum rei* under Art. 4 of Regulation 1215/2012) – is consistent with the principle of proximity between the dispute and the *forum commissi delicti*, the possibility of gathering

³⁰ See para 5 of this article.

³¹ European Court of Justice, judgment of 1 October 2002, *Henkel*, C-167/00, ECLI:EU:C:2002:555, para 38: «the consumer protection organisation and the trader are in no way linked by any contractual relationship». In this case claimant was the VKI.

³² European Court of Justice, judgments of 30 November 1976, *Bier*, cit., paras 24-25; 16 July 2009, *Zuid-Chemie*, cit., para 23; 9 July 2020, *Volkswagen*, cit., para 23; 22 February 2024, *FCA Italy*, cit., para 26.

³³ See R. MONICO, *La giurisdizione in materia extracontrattuale*, cit., p. 231 ff.

³⁴ Opinion of Advocate General Bobek of 28 February 2018, *flyLAL*, C-27/17, para 104.

³⁵ European Court of Justice, judgment of 30 November 1976, *Bier*, cit., para 25 (emphasis added).

³⁶ European Court of Justice, judgment of 7 March 1995, *Shevill*, C-68/93, ECLI:EU:C:1995:61, para 24.

³⁷ European Court of Justice, judgment of 16 January 2014, *Kainz*, cit., paras 26, 29, 33.

evidence in order to establish the defect in question, the efficacious conduct of proceedings, the sound administration of justice³⁸ and the foreseeability of the competent court by both parties to the dispute³⁹.

17. With specific regard to the Dieseltgate claims, in its *Volkswagen* judgment the ECJ found that the *locus commissi delicti* is the place in a EU Member State where the motor vehicles were equipped with the software that manipulates data relating to exhaust gas emissions⁴⁰. In the *Volkswagen* case the latter place and the connecting factor of the place where the manipulated vehicles were manufactured established in *Kainz* were both located in Germany⁴¹. However, in cases where they are different but located in the same EU Member State⁴² or in different EU Member States, should one place prevail over the other or should both places be available at the choice of the claimant/final buyer? It remains open whether *Volkswagen* overruled the *Kainz* jurisprudence, provided that it makes no reference at all to the *Kainz* decision. Both connecting factors established in *Kainz* and *Volkswagen* are irrelevant in the context of Art. 4, paragraph 1, of Regulation 864/2007 on the application, as a general rule, of the *lex loci damni* «irrespective of the country in which the event giving rise to the damage occurred».

18. In the event that the installer of the software is not the manufacturer of the vehicle or of the engine, in light of the *Melzer* jurisprudence the court of the place of the event giving rise to the damage only has jurisdiction over the presumed perpetrator who has acted within this court's jurisdiction⁴³.

19. It should finally be noted that a representative action may be brought before the court of the place in a EU Member State where the vehicles were manufactured or equipped with a defeat device by the manufacturer. A concentration of all claims in one EU Member State will be possible since such places will be exactly the same for all consumers.

V. The place of the damage

20. With reference to the second prong of the *Bier* rule, pursuant to well-established case law of the ECJ, only the direct and initial damage (*Erstschaden*) is relevant for the establishment of the international and territorial jurisdiction of the *forum damni* under Art. 7 n. 2 of the Brussels Ibis Regulation.

21. Indeed, in the *Dumez* and *Marinari* rulings the ECJ stated that the place of the damage covers «the place where the event giving rise to the damage [...] directly produced its harmful effects upon the person who is the immediate victim»⁴⁴ but not «the place where the victim claims to have suffered financial damage following upon initial damage arising and suffered [...] in another [EU Member] State»⁴⁵.

³⁸ European Court of Justice, judgment of 16 January 2014, *Kainz*, cit., para 27.

³⁹ European Court of Justice, judgment of 16 January 2014, *Kainz*, cit., para 28.

⁴⁰ European Court of Justice, judgment of 9 July 2020, *Volkswagen*, cit., para 24. In *FCA Italy* the ECJ did not consider the first prong of the *Bier* formula since the parties disagreed only on the determination of the place where the damage occurred. In para 40 the ECJ stated that «the incorporation of the illegal device [...] constitutes the event giving rise to the damage».

⁴¹ See European Court of Justice, judgment of 9 July 2020, *Volkswagen*, cit., para 24: «it is apparent from the documents before the Court that the place of the event giving rise to the damage is in the Member State within the territory of which the motor vehicles at issue were equipped with software that manipulates data relating to exhaust gas emissions, that is to say, in Germany»; Opinion of Advocate General Campos Sánchez-Bordona of 2 April 2020, *Volkswagen*, cit., para 42: «[i]n the order for reference, the national court makes clear that, in its opinion, the event triggering (the event giving rise to) the damage occurred in the place where the manipulated vehicles were manufactured, that is to say, Germany».

⁴² Art. 7 n. 2 of Regulation 1215/2012 determines both the international jurisdiction and the territorial jurisdiction, *i.e.* it determines the specific geographically national competent court within a EU Member State.

⁴³ European Court of Justice, judgment of 16 May 2013, *Melzer*, C-228/11, ECLI:EU:C:2013:305, para 41; A. CRESPO HERNÁNDEZ, *El Derecho internacional privado*, cit., pp. 420-421.

⁴⁴ European Court of Justice, judgment of 11 January 1990, *Dumez*, C-220/88, ECLI:EU:C:1990:8, para 20; 9 July 2020, *Volkswagen*, cit., para. 27.

⁴⁵ European Court of Justice, judgments of 19 September 1995, *Marinari*, C-364/93, ECLI:EU:C:1995:289, para 21; 9 July 2020, *Volkswagen*, cit., para. 26. See also European Court of Justice, judgment of 22 February 2024, *FCA Italy*, cit., paras 28-29.

As a consequence, the damage suffered by an indirect victim of the tort (*dommage par ricochet*) and the consequential harm (*Folgeschaden*) are irrelevant in order to determine the competent court.

22. In *Volkswagen* the ECJ held that the initial damage directly suffered by the final purchasers consisted in the loss in value of the vehicles stemming from the difference between the price paid and the vehicles' actual value owing to the installation of the software⁴⁶. Consequently, the damage occurred only at the time the vehicles were purchased, as they were acquired for a price higher than their actual and intrinsic value⁴⁷.

23. A further issue that arises concerns the material or merely financial character of the damage, a question that is relevant for the localization of the *locus damni*⁴⁸. In *Volkswagen* the ECJ did not follow the Opinion of Advocate General Campos Sánchez-Bordona who had convincingly argued that «the existence of the vehicle as a *tangible* object [does not] preclude classification of the harm as financial [...]. When the vehicle's actual characteristics were made public, purchasers did not discover that they had a *lesser* vehicle or *another* vehicle but rather a vehicle with a lower value: in short, a smaller asset. The vehicle, as a physical object, *symbolises* the reduction in assets and makes it possible to identify the origin of that reduction. However, in this case, that does not alter the *intangible* essence of the loss which the software manipulation caused to purchasers»⁴⁹. Instead, the ECJ qualified the damage as being material since it affects vehicles which are tangible assets⁵⁰ rather than the financial assets of the affected consumer⁵¹. In the Court's view, said material damage corresponds «to the reduction in the intrinsic value of the vehicle which [the consumer] has purchased and which has been found to have a defect»⁵².

24. According to the ECJ, the above-mentioned initial, direct and material loss in value of the vehicles occurred at the place where such vehicles were purchased by the consumers from the car dealers⁵³. By doing so, the ECJ reinforces the position of the final consumer⁵⁴ on the basis of a kind of *forum actoris* (*Klägergerichtsstand*)⁵⁵ even if nothing in the judgment suggests that the ECJ is pursuing a *favor*

⁴⁶ European Court of Justice, judgments of 9 July 2020, *Volkswagen*, cit., paras 29, 31; 22 February 2024, *FCA Italy*, cit., paras 30, 37.

⁴⁷ European Court of Justice, judgments of 9 July 2020, *Volkswagen*, cit., para 30; 22 February 2024, *FCA Italy*, cit., para 33.

⁴⁸ See European Court of Justice, judgment of 12 September 2018, *Löber*, C-304/17, ECLI:EU:C:2018:701, para 36, a case concerning purely financial losses, where the ECJ held that in addition to the place of the victim's domicile, the place of the victim's bank account and of the place where the bank is established, «other specific circumstances of that situation also contribute to attributing jurisdiction».

⁴⁹ Opinion of Advocate General Campos Sánchez-Bordona of 2 April 2020, *Volkswagen*, cit., para 38.

⁵⁰ European Court of Justice, judgment of 9 July 2020, *Volkswagen*, cit., paras 32-35. According to H. MEYLE, *Rethinking "the Place of the Damage Rule" in Private International Law. A Critical Analysis of the ECJ Case Law*, in *Yearbook of Private International Law*, 22, 2020/2021, p. 493 the reasoning of the ECJ «is hardly convincing in light of the fact that the defeat devices did not affect the material substance of the vehicles». The surprising and doubtful qualification of the damage in *Volkswagen* as being purely material has been underlined by C. ARMBRÜSTER, *Schadensersatzklage gegen VW wegen Dieselskandal auch in EU-Mitgliedstaat des Erwerbs des manipulierten Kfz („Verein für Konsumenteninformation“)*, in *Entscheidungen zum Wirtschaftsrecht*, 18, 2020, p. 574; T. BACHMEIER, M. FREYTAG, *Deliktsgerichtsstand nach EuGVVO am Ort des Schadenseintritts – Abgrenzung zwischen Erstschaaden und Folgeschaden bei Kfz-Mängeln*, in *Recht der Internationalen Wirtschaft*, 9-10, 2020, p. 607; D. RODI, *Anmerkung zu EuGH, Urt. v. 9.7.2020 – C-343/19, Verein für Konsumenteninformation/VW*, in *GPR*, 1, 2021, pp. 16-17; A. STADLER, C. KRÜGER, *Internationale Zuständigkeit und deliktischer Erfolgsort im VW-Dieselskandal*, in *IPRax*, 6, 2020, p. 513. By contrast, T. MARZAL, *Le forum delicti à l'épreuve du Dieseldgate*, in *Revue critique de droit international privé*, 4, 2021, pp. 881-882 finds that «[i]l faut donc se féliciter de la décision de la Cour retenant la qualification de dommage matériel».

⁵¹ European Court of Justice, judgment of 22 February 2024, *FCA Italy*, cit., paras 31, 38.

⁵² European Court of Justice, judgment of 22 February 2024, *FCA Italy*, cit., para 31.

⁵³ European Court of Justice, judgment of 9 July 2020, *Volkswagen*, cit., paras 35, 40.

⁵⁴ T. BACHMEIER, M. FREYTAG, *Deliktsgerichtsstand nach EuGVVO*, cit., p. 606; M. COMBET, *La dissémination du contentieux en matière de protection des consommateurs acquéreurs de véhicules truqués*, in *Revue des affaires européennes*, 3, 2020 p. 643.

⁵⁵ S. K. LOHN, A. K. PENNERS, *Der Klägergerichtsstand nach Art. 7 Nr. 2 EuGVVO*, in *Europäisches Wirtschafts- und Steuerrecht*, 1, 2021, pp. 35, 38; F. RIELÄNDER, *Neues zum „Dieselskandal“: (k)ein Klägergerichtsstand für geschädigte Fahrzeugkäufer gegen die Hersteller!?*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 10, 2024, p. 462; R. WAGNER, *EuGVVO: Abgasskandal – Klage von Fahrzeugkäufern gegen VW in einem anderen Mitgliedstaat möglich*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 16, 2020, p. 728.

*laesi*⁵⁶. The Court justified its interpretation in *Volkswagen* on the basis of the “central paradigms” informing Art. 7 n. 2 of Regulation 1215/2012⁵⁷, namely the principles of predictability of the competent *forum damni*, proximity and sound administration of justice. The Court also expressly referred to consistency with Art. 6, paragraph 1, of Regulation 864/2007 on the law applicable to unfair competition⁵⁸. Two observations must be made in this regard.

25. First, the place of purchase is highly uncertain, fortuitous⁵⁹ and can easily be manipulated by the consumers⁶⁰. It is, moreover, a connecting factor which is able to potentially confer jurisdiction on the courts of all the 27 EU Member States. Second, the reference to Art. 6, paragraph 1, of the Rome II Regulation on the law applicable to unfair competition claims is misleading provided that the Dieselpgate claim at issue may be qualified as a product liability – rather than an unfair competition – claim⁶¹. This is supported by some passages of the judgment where the ECJ refers to «vehicles [which] became defective as soon as that software had been installed», «a defect that affects vehicles», «a vehicle which is defective», «the vehicle is defective» and «the defective product»⁶². At the same time, in *Volkswagen* the ECJ held that for the purposes of Art. 6, paragraph 1, of Regulation 864/2007, the place where the collective interests of consumers are (or are likely to be) affected is the place where the product is purchased by consumers⁶³. The *Volkswagen* case thus ensures a parallelism (*Gleichlauf*) between the *forum damni* under Art. 7 n. 2 of Regulation 1215/2012 and the applicable law under Art. 6, paragraph 1, of Regulation 864/2007 in unfair competition cases concerning the Dieselpgate. There is however no such parallelism between Art. 7 n. 2 and Art. 5, paragraph 1, of the Rome II Regulation in product liability claims since the latter provision is rooted on the grouping of contacts method and not on the single connecting factor of the place of damage.

26. In the *Volkswagen* case the purchase and delivery of the manipulated vehicles took place in the same EU Member State (Austria)⁶⁴. The *FCA Italy* case gave the ECJ the opportunity to clarify its previous *Volkswagen* judgment, namely what should count as the place of purchase (and, accordingly, as the place of the damage) if the conclusion/signature of the contract of sale took place in one EU Member State (Germany) but the vehicle was delivered and normally used by the consumer in another EU Member State (Austria)⁶⁵.

27. The ECJ ruled out the place where the contract of sale was concluded because the contractual stipulations for acquiring the vehicle are irrelevant for the manufacturer’s tortious liability⁶⁶. The Court also explicitly rejected the place where the vehicle is normally used by the final purchaser because it would not meet the objective of predictability of Art. 7 n. 2 of the Brussels Ibis Regulation⁶⁷. In the Dieselpgate context the connecting factor of the place of the normal use of the product previously established in *Zuid-Chemie*⁶⁸ is thus irrelevant for the purpose of determining the competent *forum damni*. In *Zuid-Chemie* the ECJ was already asked to decide whether the place of damage in product liability cases is the place where the defective product (*i.e.* the micromix, a contaminated product used for the manu-

⁵⁶ A. CRESPO HERNÁNDEZ, *El Derecho internacional privado*, cit., p. 422; T. MARZAL, *Le forum delicti à l’épreuve du Dieselpgate*, cit., pp. 886.

⁵⁷ On the central paradigms of EU private international law see T. LUTZI, *Internet Cases in EU Private International Law - Developing a Coherent Approach*, in *International and Comparative Law Quarterly*, 3, 2017, p. 693 ff.

⁵⁸ European Court of Justice, judgment of 9 July 2020, *Volkswagen*, cit., paras 36, 38-39.

⁵⁹ S. BERNASCONI, *La competenza giurisdizionale sulle azioni risarcitorie promosse nell’ambito della vicenda Dieselpgate negli Stati membri UE*, in *Danno e responsabilità*, 1, 2021, p. 71.

⁶⁰ M. LEHMANN, *Where Did Economic Loss Occur in the VW Emissions Case?*, in <https://eapil.org>.

⁶¹ S. BERNASCONI, *La competenza giurisdizionale sulle azioni risarcitorie*, cit., p. 69; M. LEHMANN, *Remaining Questions About CJEU Judgment in VKI v Volkswagen*, in <https://eapil.org>.

⁶² European Court of Justice, judgment of 9 July 2020, *Volkswagen*, cit., paras 30, 33-34, 37, 39, respectively.

⁶³ European Court of Justice, judgment of 9 July 2020, *Volkswagen*, cit., para 39.

⁶⁴ European Court of Justice, judgment of 9 July 2020, *Volkswagen*, cit., paras 10, 12.

⁶⁵ European Court of Justice, judgment of 22 February 2024, *FCA Italy*, cit., paras 34, 40.

⁶⁶ European Court of Justice, judgment of 22 February 2024, *FCA Italy*, cit., paras 36-37.

⁶⁷ European Court of Justice, judgment of 22 February 2024, *FCA Italy*, cit., para 42.

⁶⁸ European Court of Justice, judgment of 16 July 2009, *Zuid-Chemie*, cit., paras 29, 32.

facture of fertiliser) was delivered to the purchaser in one EU Member State (Belgium) or whether it is the place where the product was normally used (*i.e.* the claimant's factory in the Netherlands where the micromix was processed into fertiliser, causing substantial damage to that fertiliser which was suffered by the claimant). The ECJ ruled in favour of the latter since the damage occurred during «the processing by [the claimant] of the contaminated micromix into fertiliser [which] caused that fertiliser to be of limited utility or even rendered it unusable»⁶⁹. The different interpretation of the *Erfolgsort* adopted by the ECJ in *Zuid-Chemie* and *FCA Italy* shows that the moment of occurrence of damage – which must be assessed on a case-by-case basis – plays a crucial role in the determination of the competent court of the place of damage. As already mentioned, in *Volkswagen* and *FCA Italy* the loss in value of the manipulated vehicle occurred at the moment and at the place of its purchase or delivery.

28. By contrast, the ECJ championed the place where the vehicle was delivered to the final purchaser which, in the Court's opinion, meets the principle of predictability as the manufacturer must expect to be sued there⁷⁰. With its interpretative solution the ECJ transformed once more the *forum damni* under Art. 7 n. 2 into a *forum victimae*⁷¹ and adopted the same connecting factor which applies to the sale of goods under Art. 7 n. 1, lett. b), first indent of the Brussels Ibis Regulation. It follows that the same problems in the case of delivery by carriage⁷² may now arise under Art. 7 n. 2 as well, at least in Diesel emissions claims. In addition, the “contractualisation” of the place of damage undermines the mutual exclusivity of Arts. 7 n. 1 and 7 n. 2 of Regulation 1215/2012 and the principle *res inter alios acta*, given that the contractual arrangements between the car dealer and the consumer could determine the (highly unpredictable) *forum damni* before which the manufacturer of the vehicle may be sued⁷³. In *FCA Italy* the purchaser's domicile and the vehicle's delivery and normal use were all located in the same EU Member State (Austria). It is doubtful whether the ECJ would confirm its interpretation in the case of delivery in a different EU Member State for *e.g.* tax purposes⁷⁴.

29. The interpretation of the *locus damni* under Art. 7 n. 2 in *Volkswagen* and *FCA Italy* may be relevant for the purpose of establishing the place of the damage in Dieselgate claims pursuant to the general conflict of laws rule under Art. 4, paragraph 1, of Regulation 864/2007⁷⁵ and the place of purchase contained in the special conflict of laws rule dealing with product liability cases under Art. 5, paragraph 1, lett. b) of the Rome II Regulation. It should be noted that in the latter provision the place of purchase (*i.e.*, in light of *FCA Italy*, the place of delivery to the final buyer) is however coupled with the place of marketing of the product in the same country.

30. Given the silence of the ECJ, the mosaic theory first developed in the *Shevill* case does not seem applicable to product liability claims⁷⁶. As to this approach, the courts of the place of the event giving rise to the damage have full/unlimited jurisdiction to determine all the damage (*Gesamtschaden*) allegedly caused to the victim of the tort, while the courts of the place where the damage occurred have partial/limited jurisdiction only in respect of the damage caused in the territory of the EU Member State of the court seised. What emerges from the ECJ jurisprudence is that the *Mosaiktheorie* is a sectoral, rather than a general, approach being only applicable to actions for damages in matters relating to defa-

⁶⁹ European Court of Justice, judgment of 16 July 2009, *Zuid-Chemie*, cit., para 34.

⁷⁰ European Court of Justice, judgment of 22 February 2024, *FCA Italy*, cit., paras 40-41, 43.

⁷¹ F. RIELÄNDER, *Neues zum „Dieselskandal“*, cit., p. 463.

⁷² P. BERTOLI, *Nozioni di diritto internazionale privato e processuale*, Giappichelli, Torino, 2023, p. 41 ff.

⁷³ M. LEHMANN, *The Never-Ending Diesel Saga – CJEU Rules in MA v FCA Italy et al.*, in <https://eapil.org>.

⁷⁴ M. LEHMANN, *The Never-Ending Diesel Saga*, cit., therefore advocates for «a holistic approach to damage localisation, which takes into account all the circumstances of the case»; M. LEHMANN, *Deliktsgerichtsstand bei Klagen von Fahrzeugkäufern gegen VW*, in *Neue Juristische Wochenschrift*, 39, 2020, p. 2872. Similarly, S. BERNASCONI, *La competenza giurisdizionale sulle azioni risarcitorie*, cit., p. 71.

⁷⁵ A. CRESPO HERNÁNDEZ, *El Derecho internacional privado*, cit., pp. 424-425; F. RIELÄNDER, *Neues zum „Dieselskandal“*, cit., p. 467.

⁷⁶ R. MONICO, *La giurisdizione in materia extracontrattuale*, cit., p. 217 and fn. 257.

mation⁷⁷, infringement of personality rights⁷⁸ and copyright⁷⁹ and publication on the internet of allegedly disparaging comments⁸⁰, where the initial event causes harm in several EU Member States (so-called *multi-state damages*). On the contrary, in product liability cases such as the Dieselgate the consumer/final purchaser of the defective/manipulated product suffers harm only in one EU Member State, *i.e.* where the purchase or delivery took place. This is confirmed by *Kainz* and *Zuid-Chemie* which do not contain any reference to the mosaic principle.

31. In the event that a representative action is brought by a consumer association such as VKI, the place of the purchase or delivery of the manipulated vehicle to the final purchasers will not be the same for all consumers. The interpretation of the second prong of the *Bier* formula in light of the *Volkswagen* and *FCA Italy* decisions thus leads to a fragmentation of the courts before which the collective actions will be litigated. This appears to be the case even if the different places of delivery are located in the same EU Member State, given that Art. 7 n. 2 determines international as well as territorial jurisdiction⁸¹.

VI. Conclusion

32. The Dieselgate broke in the United States in September 2015 and has been defined as the by now largest industrial fraud in modern history⁸². It involved the installation of software on certain Diesel vehicles aimed at misrepresenting the levels of NOx emissions. The ECJ qualified these software as defeat devices being prohibited by Regulation 715/2007. The article aims to examine which rules on jurisdiction laid down in Regulation 1215/2012 apply to cross-border Dieselgate-related claims brought by the consumer/final purchaser against the vehicle manufacturer.

33. The article argues that the *forum contractus* under Art. 7 n. 1 of Regulation 1215/2012 and the consumer *forum* under Art. 18, paragraph 1, may be inapplicable because the privity test (*i.e.* the existence of a direct contractual relationship between claimant and defendant) established by the ECJ in the *Handte* and *Club La Costa* decisions is not met. Instead, the application of the *forum rei* under Art. 4 of the Brussels Ibis Regulation and of Art. 7 n. 3 on the jurisdiction of the courts seised of criminal proceedings is quite straightforward.

34. Another applicable provision is Art. 7 n. 2 on the *forum delicti* which has however given rise to several interpretative issues. Indeed, between 2009 and 2024 the ECJ issued four relevant judgments to shed light on the interpretation of Art. 7 n. 2 in product liability cases. The two most recent decisions – *Volkswagen* and *FCA Italy* – specifically concern Dieselgate-related claims and have thus given the opportunity to the ECJ to add new pieces to the puzzle. These decisions are also relevant with reference to the interpretation of Art. 5 n. 3 of the Lugano Convention of 2007⁸³ in the event that the purchase or delivery to the final buyers takes place in Iceland, Norway or Switzerland⁸⁴.

35. The ECJ confirmed that Dieselgate claims may be brought, at the claimant's choice, either before the court of the place of the initial event giving rise to the damage, or before the court of the place

⁷⁷ European Court of Justice, judgment of 7 March 1995, *Shevill*, cit., para 33.

⁷⁸ European Court of Justice, judgment of 25 October 2011, *eDate*, C-509/09, ECLI:EU:C:2011:685, paras 51-52.

⁷⁹ European Court of Justice, judgment of 3 October 2013, *Pinckney*, C-170/12, ECLI:EU:C:2013:635, para 45.

⁸⁰ European Court of Justice, judgment of 21 December 2021, *Gtflitx Tv*, C-251/20, ECLI:EU:C:2021:1036, para 43.

⁸¹ R. MONICO, *La giurisdizione in materia extracontrattuale*, cit., p. 156.

⁸² BEUC Report, Seven years of Dieselgate. A never-ending story, 12 December 2022, <https://www.beuc.eu/position-papers/seven-years-dieselgate-never-ending-story>.

⁸³ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in *Official Journal of the European Union*, L 339 of 21 December 2007.

⁸⁴ C. ARMBRÜSTER, *Schadensersatzklage gegen VW wegen Dieselskandal*, cit., p. 574; S. K. LOHN, A. K. PENNERS, *Der Klägergerichtsstand nach Art. 7 Nr. 2 EuGVVO*, cit., p. 38; R. WAGNER, *EuGVVO: Abgasskandal – Klage von Fahrzeugkäufern gegen VW*, cit., p. 728.

where the direct and initial damage occurred (ubiquity rule). In *Volkswagen* the ECJ held that the place of the initial event giving rise to the damage is where the vehicle was equipped with the defeat device. If this place does not coincide with the connecting factor of the place where the product was manufactured as previously established in *Kainz*, it remains open which one should prevail. The ECJ further stated that the place of the damage is where the manipulated vehicles have been purchased by the final consumer. *FCA Italy* specifies this part of the *Volkswagen* judgment by clarifying that what should count as the place of purchase is where the vehicle was delivered to the consumer. What follows is a “contractualisation” of the *forum damni* since in Dieselgate claims the same connecting factor contained in Art. 7 n. 1, lett. b), first indent, is also relevant in the context of Art. 7 n. 2. The ECJ did not confirm the connecting factor of the place of the normal use of the product already established in *Zuid-Chemie*. This is because of the crucial role which is played by the moment when the damage occurred in order to localise the *locus damni*⁸⁵.

36. The article has also shown that with reference to representative actions the interpretation of Art. 7 n. 2 provided by the ECJ in *Volkswagen* and *FCA Italy* ensures a concentration of claims only before the *forum commissi delicti* but not before one *forum damni*⁸⁶. This is because unlike the place of manufacture and/or manipulation of the vehicles, the place of purchase or delivery will not be exactly the same for all final purchasers.

Table on the specification by the ECJ of the ubiquity rule under Art. 7 n. 2 of Regulation 1215/2012 in product liability cases.

ECJ DECISION	PLACE OF THE EVENT	PLACE OF THE DAMAGE
<i>Zuid-Chemie</i> (C-189/08)	–	Normal use of the product
<i>Kainz</i> (C-45/13)	Manufacture of the product	–
<i>Volkswagen</i> (C-343/19)*	Manipulation of the product	Purchase of the product
<i>FCA Italy</i> (C-81/23)*	–	Delivery of the product

* Cases concerning the Dieselgate.

⁸⁵ See para 27 of this article.

⁸⁶ In this sense see also A. CRESPO HERNÁNDEZ, *El Derecho internacional privado*, cit., p. 423.