

# Pop goes the diesel! A Case comment on Case C-343/19 *Verein fur Konsumenteninformation v Volkswagen AG*

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## Facts of the present case

Austrian consumer protection association *Verein fur Konsumenteninformation* (VKI) brought a claim in Austria against German car manufacturer *Volkswagen AG*. VKI represents 574 consumers who had purchased Volkswagen diesel vehicles in Austria, before Volkswagen was revealed to have manipulated data regarding exhaust gas emissions from those vehicles, which was a contravention of EU legislation. This resulted in a large drop in the defective vehicles' market value. VKI alleges that had the consumers been aware of such data manipulation, they would either have not purchased the vehicle, or purchased it at a price reduced by at least 30%, and therefore claims on a tort basis, the difference between the purchase price and market value<sup>1</sup>. The present CJEU decision stems from Volkswagen contesting the jurisdiction of the Austrian courts to hear the case.

## Applicable legal rules

As the CJEU notes, the default position is that jurisdiction 'is generally based on the defendant's domicile', per Article 4 of the Brussels I Regulation. However, apart from the defendant's domicile, alternative jurisdiction may be found where there is a 'close connection'<sup>2</sup> between the court and the action. Article 7(2) of Brussels I provides that for matters of tort, alternative jurisdiction can be established 'in the courts for the place where the harmful event occurred or may occur'.<sup>3</sup> Furthermore, the CJEU in *Zuid-Chemie* confirmed that the 'place where the harmful event occurred' covers both the place where the damage occurred and the place of the event giving rise to it,<sup>4</sup> and that the defendant may be sued at either place.<sup>5</sup> It is undisputed that the 'place of the event giving rise to [damage]' is Germany - the place where the problematic vehicles were 'equipped with software that manipulates data relating to exhaust gas emissions'.<sup>6</sup> The overarching legal question in this case is therefore whether Austria is the 'place where the damage occurred'. The CJEU ruled that the Austrian court has jurisdiction to hear the case. Two key factors considered were that (1) the damage is 'initial damage', and that (2) the damage is not purely financial, which will be discussed respectively below.

## The damage in question is 'initial damage'

The CJEU previously established in *Marinari* that the 'place where the harmful event occurred' cannot include 'every place where the adverse consequences of an event...can be felt'<sup>7</sup>. This is because recognition of consequential loss as a valid basis for jurisdiction would effectively afford the claimant a carte blanche to sue in his jurisdiction of choice (often his domicile), contravening the policy of Brussels I that 'rules of the jurisdiction should be highly predictable' for the *defendant*.<sup>8</sup>

At first sight, *Volkswagen* seems to factually align with *Marinari*. In *Marinari*,<sup>9</sup> the Italian claimant suffered from loss of promissory notes and reputational damage, inter alia, in London. He subsequently brought a claim in Italy, claiming that though the 'harmful event' occurred in England, the 'damage' occurred in Italy, where he could no longer use the money. Jurisdiction for Italian courts was rejected

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<sup>1</sup> n.1, [9].

<sup>2</sup> Recital 16, Regulation No. 1215/2012.

<sup>3</sup> Article 7(2), Regulation No. 1215/2012.

<sup>4</sup> C-189/08, *Zuid-Chemie*, [23].

<sup>5</sup> C-21/76, *Bier v Mines de Potasse*.

<sup>6</sup> n.1, [24].

<sup>7</sup> Case C-364/93 *Marinari v Lloyds Bank*.

<sup>8</sup> Recital 15, Regulation No.1215/2012.

<sup>9</sup> n.9.

on the basis that the initial damage was suffered in England; any damage that occurred in Italy was consequential financial damage built upon the initial damage that happened in England. Applying this to *Volkswagen*, the manufacturing defect in Germany could be construed as initial damage, with the drop in market value experienced in Austria construed as consequential financial loss. Under this interpretation, the Austrian courts would not have jurisdiction.

However, in the present case, the court determined that the damage suffered was initial damage, on the basis that the reduction of market value 'did not exist before the purchase of the vehicle by the final purchaser'. The court's reasoning is inspired by the Opinion of Attorney-General Sanchez-Bordona (AG),<sup>10</sup> which notes that the market value of the vehicles 'did not become a reality' until the diesel scandal was exposed. Intuitively, this is a reasonable conclusion: when the defective cars were manufactured, the diesel scandal had not been revealed, and therefore the market price had not dropped - there is no 'damage' yet. Therefore, since loss of value 'did not become a reality'<sup>11</sup> until the public scandal, this damage is direct for the final purchaser before the scandal. Further, only the final purchaser is a *direct* victim, because any previous buyers would not have experienced any damage in the form of lower market value when buying/selling the car, as the scandal had not affected the valuation of the car yet. It is therefore reasonable for the CJEU to conclude that Austria (place of final purchase pre-scandal) was the place of initial damage.

## The damage in question is not purely financial

The CJEU emphasises that the damage at hand is 'material', as opposed to 'purely financial'.<sup>12</sup> This distinction is crucial because *Löber*<sup>13</sup> establishes that in cases of pure financial loss, alternative jurisdiction is only found where 'other specific circumstances' require jurisdiction to be attributed to that court (in addition to the requirement that the damage alleged must occur in the claimant's bank account held in that jurisdiction). This additional criteria of 'other specific circumstances' requires the court to engage in a fact-specific exercise of whether alternative jurisdiction should be granted on the basis of 'proximity' and 'predictability'. *Löber*, however, only involved financial loss from financial assets. The CJEU therefore circumvented the need to fulfill the 'other specific circumstances' criteria by distinguishing the present case from *Löber* on the basis that there are 'tangible assets' (the defective vehicles) involved in this case. However, the CJEU appears to substitute a fine-grained analysis of whether the damage itself was financial with a simplistic consideration of whether the case factually only involved financial instruments or not. This comment contends that the CJEU provides an incorrect interpretation of Brussels I, which requires an examination of the *nature of the damage itself*. In any case, this comment agrees with the AG, as well as the referring Austrian court, that the present case involves pure financial loss. Comparing the physical characteristics of the car before and after the public scandal, there was no physical change to the cars; the only difference was the lower market value. As such, the loss was purely financial.

Despite characterising the present case as 'material damage', the CJEU peculiarly used reasoning from purely financial loss cases to justify alternative jurisdiction based on 'proximity' and 'predictability'. The referring Austrian courts had argued that establishing Austrian jurisdiction on the basis of 'place of purchase' 'jeopardises the ability of the defendant to foresee which court will have jurisdiction', as there were second hand purchases involved, which Volkswagen may not have foreseen. In response, the AG cryptically notes that 'a vehicle manufacturer like Volkswagen is in a position to foresee with ease'<sup>14</sup> that its vehicles will be sold in Austria, and this satisfies the 'other specific circumstances' criteria in this case. The most realistic interpretation of the AG's phrase is that as a multinational corporation, Volkswagen marketed its cars in Austria, and therefore can foresee 'with ease' that vehicles will be sold there. The CJEU, however, offers a more tenuous argument that 'by knowingly contravening statutory

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<sup>10</sup> Opinion, C-343/19 *Verein für Konsumenteninformation v Volkswagen AG*.

<sup>11</sup> *Ibid.*

<sup>12</sup> n.1, [34].

<sup>13</sup> Case C-304/17 *Löber*, [36].

<sup>14</sup> n.12.

requirements'<sup>15</sup>, Volkswagen must 'anticipate that damage will occur at the place'<sup>16</sup> where the vehicle is purchased by a customer who reasonably expects it to be compliant with statutory requirements - in this case, Austria. This idea of putting a defendant who flouts the law on constructive notice of foreseeability echoes *Kolassa*, where the court granted alternative jurisdiction on the basis that a bank which issues an unlawful, substandard prospectus in a jurisdiction is deemed to 'anticipate' that investors may as a result suffer from financial damage in that jurisdiction. Such constructive notice is rationalised as deterrence of unlawful conduct in order to 'strengthen the legal protection'<sup>17</sup> of EU citizens. If the CJEU has indeed taken inspiration from *Kolassa* in the present case, its reasoning is questionable on two grounds. Firstly, the CJEU conflates deterring unlawful conduct with satisfying the threshold of reasonable foreseeability - it is neither appropriate nor justifiable to grant alternative jurisdiction on a punitive basis. Crucially, unlike in *Kolassa* where the defendant failed to meet Austria-specific regulations, Volkswagen failed an EU-wide regulation. In *Kolassa*, by failing Austria-specific regulations, the defendant could reasonably anticipate that *Austrian* customers would suffer from harm as a result of substandard prospectuses. However, in the present case, flouting an EU-wide regulation does not allow Volkswagen to reasonably foresee that Austrian consumers would suffer harm. This exacerbates the punitive nature of alternative jurisdiction in the present case compared to *Kolassa*, and goes against the fundamental objective of the Brussels I Regulation to safeguard reasonable foreseeability for defendants regarding which jurisdiction a claim can be brought against them in. Secondly, *Kolassa* is a pure financial loss case, a characterisation which the CJEU took great lengths to distinguish this case from.

Though questioning the appropriateness of granting jurisdiction based on deterrence, this comment argues that if the CJEU were to insist on a *Kolassa*-type pure financial loss reasoning on the unlawful conduct of Volkswagen, the court ought to have followed the AG's characterisation of the case as purely financial. An even better approach would have been for the CJEU to adopt the AG's proposal that damage occurs at the place of purchase, provided that there are 'other circumstances' (per *Lober*) that support alternative jurisdiction, and those other circumstances must enable Volkswagen to reasonably foresee civil liability action. The CJEU might have been able to construe the unlawful conduct as 'other circumstances' that confirm alternative jurisdiction, alongside other factors like marketing within Austria (as strongly suggested by the AG), which would ensure that jurisdiction is properly granted where reasonably foreseeable, rather than as a remedy to deter unlawful conduct.

## Remaining ambiguities

In the present case, CJEU does not adequately address the referring courts' concern about foreseeability regarding second hand purchases. If the defective vehicles were to be sold to an ordinary consumer in country X, where it did not engage in marketing/advertising (thus the sale was not reasonably foreseeable), the Austrian courts would suggest that alternative jurisdiction in country X cannot be established on principles of proximity and foreseeability. However, the CJEU, through *Kolassa* and the present case, seems to suggest that because unlawful conduct was present, Volkswagen ought to have anticipated to be sued in country X, despite the lack of advertising, to defend the public policy of protecting EU citizens' legal rights. This reasoning ventures on constructing alternative jurisdiction punitively - although this deters unlawful conduct, the CJEU risks unfairness to the defendant by broadening the scope of when the place of damage is truly 'reasonably anticipated'. In the present case, Austria was both the place of marketing and the place of purchase, so the aforementioned hypothetical issue does not arise. However, the CJEU has yet to tackle the issue of foreseeability for the defendant where these two places are different.<sup>18</sup>

A second remaining ambiguity is that the *Lober* criteria, requires 'other specific circumstances' are needed to grant alternative jurisdiction to the Austrian courts; the mere purchase of vehicles in Austria

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<sup>15</sup> n.1, [37].

<sup>16</sup> *ibid.*

<sup>17</sup> C 375/13, *Kolassa*, [56].

<sup>18</sup> Lehmann, Remaining Questions About CJEU Judgment in *VKI v Volkswagen* (2020).

cannot itself satisfy the ‘place where the damage occurred’ criteria. However, the Attorney-General notes that there are no ‘guidelines for conducting the overall analysis’<sup>19</sup> of the ‘other specific circumstances’ test, which ‘creates the risk of non-uniform application’ of Article 7(2). Regrettably, the CJEU shied away from an opportunity to clarify what ‘other specific circumstances’ consists of, as it circumvented the entire issue by concluding that the present case did not concern pure financial loss.

## Concluding remarks

It is unclear why the CJEU insisted on characterising the present case as ‘material damage’, yet utilised logic from pure financial loss cases to respond to the referring court’s concerns on ‘proximity’ and ‘predictability’; notably, the CJEU justifies the ‘proximity’ requirement for alternative jurisdiction based on public policy of deterring unlawful conduct. Simultaneously, by characterising the case as ‘material damage’, CJEU cleverly avoids the need to define ‘other specific circumstances’ to establish alternative jurisdiction. It appears that the CJEU is trying to apply reasoning from pure financial loss cases, while avoiding clarification of what the extra ‘other specific circumstances’ requirement means. This renders the distinction between legal principles applied to material and pure financial loss cases blurry.

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<sup>19</sup> n.12.