

ECLI:NL:RBNNE:2023:1285

Authority	District Court of Northern Netherlands
Judgment date	04-04-2023
Date of publication	04-04-2023
Case number	9072422\CV EXPL 21-1364
Jurisdictions	Civil rights
Special characteristics	Substantive case , First instance - single , Order for costs , Contrasting
Content indication	Volkswagen's liability towards consumers for the purchase of a 'cheating diesel car' equipped with manipulation software. Unlawful conduct by Volkswagen towards consumers. Compensation of € 3,000 awarded for lower value of the car.
Locations	Rechtspraak.nl RAV 2023/48 JA 2023/81



[Enriched pronunciation](#)

Pronunciation

COURT OF NORTHERN NETHERLANDS

Private Law Department

Location Groningen

case/dock number: 9072422 \ CV EXPL 21-1364

Judgment of the subdistrict court judge of April 4, 2023

in the case of

the foundation

VOLKSWAGEN GROUP DIESEL EFFICIENCY FOUNDATION ,

Based in Amsterdam,

plaintiff,

hereinafter referred to as: VGDES,

authorized representative: JH Lemstra, lawyer in Amsterdam,

in return for

the legal entity under German law

VOLKSWAGEN AKTIENGESELLSCHAFT ,

located in Wolfsburg (Germany),

defendant,

hereinafter referred to as: Volkswagen ,

authorized representative: JK van Hezewijk, lawyer in Amsterdam.

1 The procedure

1.1. The further course of the procedure is evident from:

- the docket decision of November 22, 2022;
- the deed of submission of further productions from VGDES;
- the official report of the oral hearing of December 21, 2022 and the attached speaking notes of the parties' representatives.

1.2. In a letter dated February 14, 2023, VGDES' representative made a substantive comment in response to the official report, to which Volkswagen did not object. The subdistrict court judge considers the aforementioned comment correct. Since there is an obvious error on this point, the report will be corrected to that extent. The aforementioned letter is attached to the official report.

1.3. The verdict has been (further) determined today.

2 The facts

2.1. Volkswagen is an internationally operating car manufacturer. It produces vehicles from the brands Volkswagen , Audi, Seat, Škoda, Bentley, Bugatti, Ducati, Lamborghini and Porsche. Volkswagen markets cars with a diesel engine, including the diesel engine with type designation EA 189.

2.2. [consumer] (hereinafter referred to as: [consumer]) is a consumer who purchased a new Volkswagen Polo, type 1.2, at the beginning of February 2011. TDI BlueMotion Comfort Line, with the license plate [license plate] (hereinafter also referred to as: the car), purchased from car dealer Vakgarage [name of garage] in Eelde for an amount of € 17,290. This car has an EA 189 diesel engine.

2.3. The diesel engine of the Volkswagen Polo of [consumer] is equipped with a so-called *Turbocharged Direct Injection* (hereinafter referred to as: *TDI*), which was stated, among other things, on the Volkswagen website at the time of the purchase of the car by [consumer] :

Turbocharged Direct Injection, abbreviated TDI, is the name Volkswagen uses for the clean power of its diesel engines. Our TDI diesel engines with common rail technology are not only economical, but also exceptionally strong. They are equipped with a closed particulate filter as standard, so you can enjoy the power of diesel while protecting the environment."

and

In addition to a particulate filter, the Blue TDI diesel engine also has a nitrogen oxide filter. This way you can drive super economically and as cleanly as a petrol engine.

2.4. In a brochure for the Volkswagen Polo BlueMotion of June 2010, Volkswagen stated, among other things:

(...)

BlueMotion through and through

The Polo BlueMotion is unique. Its average consumption of 1 liter per 30 km not only ensures an enormous range, but also maximum tax benefits for both private and business drivers. And the Polo BlueMotion is also a full-fledged, comfortable, practical and representative five-seater. From a business perspective, the Polo BlueMotion is a good investment. It is representative, comfortable, reliable, and exempt from road tax. Moreover, it is also BPM-free, which contributes to the favorable purchase price. Based on its low CO₂ emissions, the Polo BlueMotion receives an energy label A and a 14% additional tax. The Polo BlueMotion is therefore not just a car to count on - it is also something to count on. The functional comfort of the Polo BlueMotion is as limited as its fuel consumption. All in all, the special energy label A is more than deserved.

The BlueMotion versions

With the Polo BlueMotion, Volkswagen is taking a step towards a cleaner future. Its enormous economy, environmentally friendly technology and pleasant dynamics make it the most responsible choice for now and coming generations. In terms of economy, the Polo BlueMotion leaves others in its class far behind. He needs 3.3 liters of fuel per 100 kilometers. This means that the Polo BlueMotion is now able to cover more than 1,300 kilometers on one full 45 liter tank!

(...)

Sustainability and technology

Today, Volkswagen makes a demonstrable contribution to protecting our living environment and resources for tomorrow: by combining mobility with sustainability for people who care about their living environment, but do not want to compromise on the economic aspect.

'Economical' and 'clean'

To understand what BlueMotionTechnologies technologies are for, it is important to first clarify the distinction between 'economical' and 'clean'. These concepts are often confused with each other.

A 'clean' car does not always have to be 'economical'. An 'economical' car is not necessarily 'clean'. 'Clean' refers to the emission of substances that are harmful to health, such as NO_x, HC and PM (particulate matter). Particulate matter is created when diesel fuel does not burn completely. Emissions are measured in (milli)grams per kilometer. 'Economic' refers to the amount of fuel a car uses. Combustion produces CO₂, a greenhouse gas that is not harmful to health but does affect the climate.

Energy efficient technologies

The BlueMotionTechnologies brand label is a bundling of all technology that Volkswagen has to offer to save fuel, reduce CO₂ emissions and emit less particulate matter and nitrogen oxides. The basis is formed by energy-efficient and clean technologies that already form the basis for all Volkswagen models. Examples are the compact TSI petrol engines with turbo technology, TDI diesel engines with standard particulate filters, but also the DSG-7 transmissions, which provide additional fuel savings.

The Polo BlueMotion owes its type designation to the most extensive application of innovative techniques that contribute to the lowest possible fuel consumption. (...)

2.5. Volkswagen has made similar statements about the Volkswagen Polo BlueMotion on its website :

"Powerful yet economical.

With the Polo you can choose from seven different engines. From efficient TSI to powerful diesel from the common-rail TDI line. You always choose high performance in combination with low consumption. If you want a cleaner driver, there is plenty of choice in engines with innovative BlueMotion Technologies. And a comfortable, efficient DSG automatic transmission is also possible.

(...)

TDI engines

Extremely clean and quiet.

The TDI diesel engines of the new Polo are particularly clean. Moreover, they are among the quietest in their class. The power of the diesel engines varies from 55 kW to 66 kW (75-90 hp). All TDI diesel engines are equipped with a particulate filter.

(...)

Environmentally conscious innovation

Volkswagen is constantly developing innovative technologies that contribute to more economical fuel consumption. The popular Polo BlueMotion was developed in this regard. The model with the most recent innovations is the Polo BlueGT. The most economical Polo ever.

The Polo BlueMotion.

Further on one tank.

The Polo Blue Motion is the most economical model within the Polo range. Its official consumption is 1 liter of diesel per 30 km. This makes refueling a rarity. The Polo BlueMotion owes its economical character to a 1.2 TDI diesel engine and a variety of fuel-saving technologies such as start/stop, a streamlined vehicle floor, lowered chassis, brake energy regeneration, special tires, extra spoilers and other aerodynamic features.

(...)

- 2.6. Cars must have type approval to be admitted to the European market. The type-approval of cars has been harmonized in the European Union on the basis of the so-called Vehicle Framework Directive (hereinafter: the Framework Directive) 1 . If a type-approval has been issued by a competent inspection authority in a Member State, this approval is recognized by all other European Member States. Once type-approval has been obtained in an EU Member State, the manufacturer must issue a Certificate of Conformity (hereinafter referred to as: CoO) for each vehicle produced, declaring that the vehicle in question conforms to the results for which type-approval has been obtained. This allows the vehicle to be sold and registered anywhere in the European Union.
- 2.7. To put cars on the Dutch market, Volkswagen has the cars inspected by a foreign inspection body within the European Union and exports the cars to the Netherlands in collaboration with the importer, after which the importer resells or distributes the cars.
- 2.8. The type approval of a car consists of a number of partial approvals. One of these partial approvals concerns emissions of pollutants. In this context, the Framework Directive refers to the Emissions Regulation 2 . The Emission Regulation sets, among other things, a limit value for NOx (nitrogen oxide) emissions. In the context of approval regarding the emission of pollutants, vehicles are tested according to a protocol, the parameters of which are laid down in the regulations. This can be used to determine whether the amount of nitrogen oxide emitted is lower than the maximum threshold set in Annex I to the Emissions Regulation. With the Emissions Regulation, the so-called Euro-5 standard came into effect in Europe on 3 January 2009. From that date, diesel vehicles intended for the transport of passengers in Europe were allowed to emit a maximum of 180 mg/km of nitrogen oxide under normal conditions.
- 2.9. The EGR cooler of [consumer]'s car was replaced at the end of 2014 after a recall. Afterwards, the EGR cooler broke down and was replaced by Auto Century in January 2017. The costs of this replacement amounted to € 150 and were initially paid by [consumer].
- 2.10. In mid-September 2015, it became known that, from 2009 to 2015, Volkswagen had equipped millions of diesel cars with an EA 189 engine on a worldwide scale with software in which nitrogen oxide emissions were artificially kept low during tests (hereinafter referred to as: the manipulation software). This manipulation software made it possible to recognize that the car was in a test environment based on a number of parameters. The car's so-called EGR system switched to an economy mode during tests, temporarily and artificially influencing the test results and showing that the car's nitrogen oxide emissions were within permitted standards. When driving outside of test mode, the engine emitted significantly more nitrogen oxide. The manipulation software has been installed by Volkswagen in more than 175,000 cars in the Netherlands that have an EA 189 diesel engine. Volkswagen had submitted the cars in question for approval to the inspection authorities and obtained type approval, while concealing the presence of the manipulation software from the inspection authorities. Volkswagen 's actions in this regard are known, among other things, as "diesel fraud".
- 2.11. Volkswagen informed [consumer] in a letter dated November 3, 2015 that his car is also equipped with an EA 189 diesel engine in which Volkswagen had installed the manipulation software.
- 2.12. After the diesel fraud issue became known, Volkswagen developed an update to the software. This update has been approved by the German Kraftfahrt Bundesamt (the KBA). [consumer] had the relevant software update performed by Auto Century in October 2016.
- 2.13. Following the diesel fraud, the Netherlands Authority for Consumers and Markets (hereinafter referred to as: ACM) has launched an investigation into unfair trading practices by Volkswagen . By decision of October 18, 2017, the ACM imposed

a fine of €450,000 on Volkswagen for unfair commercial practices, which the ACM considered in this decision, among other things:

"(...) 2. In this decision, the ACM determines that Volkswagen AG is guilty of unfair commercial practices. Volkswagen AG installed manipulation software in tens of thousands of cars from the Volkswagen , SEAT, ŠKODA and Audi brands that it produced between 2009 and 2015. The software recognized the test environment and ensured that nitrogen oxide emissions in that test environment were lower than on the road. At the same time, Volkswagen profiled itself as an environmentally conscious organization that attaches great importance to sustainability and advertised this to consumers. In addition, it indicated that it had obtained type-approval for the cars involved, while in fact it had not met the conditions for this. In doing so, Volkswagen acted contrary to the requirements of professional diligence and misled consumers. The ACM imposed a fine on Volkswagen for this from total EUR 450,000.

(...)

100. With statements such as "*cleaner driving*" , "*cleanest diesel of the moment, without NOx emissions*" , "*most environmentally friendly and ecologically responsible diesel version of its kind*", Volkswagen AG suggests that its diesel cars deliver exemplary performance in terms of sustainability , or that they have a positive or no negative impact on the environment or cause less damage to the environment than other products (...). However, the environmental claims used by Volkswagen AG are not consistent with the use of software to influence emission results in a test procedure and are therefore misleading. Consumers may get the impression that the cars in question are durable and environmentally friendly, when in reality Volkswagen AG put its business interests ahead of environmental protection. After all, Volkswagen AG used software with the aim of influencing the test results with regard to NOx emissions. This means that it is not certain that the Volkswagen models were actually greener, more environmentally friendly or cleaner than diesel cars from other manufacturers, as Volkswagen AG argued in communications intended for consumers.

101. Furthermore, Volkswagen AG cannot claim that the diesel cars meet the Euro 5 standard, because the requirements for approval have not been met due to the presence of prohibited defeat software. At the very least, such a comparison is unjustified, as it has not been established that the cars in question met the conditions for approval. After all, the test results for the type-approval have been influenced in an unauthorized manner. With regard to the degree of influence, ACM recalls that there was a clear difference in emissions between the test environment (in mode 1) and during normal use on the road (in mode 2).

(...)

103. The average consumer could, as a result of the environmental claims mentioned, take a decision on a contract that he would not otherwise have taken - if he had known that the test results regarding NOx emissions had been influenced and the cars with that engine type had apparently complied with the the Euro 5 standard, and that the diesel cars may therefore have been less clean than suggested. As the ACM has already considered in paragraph 89, growing environmental awareness can influence the economic behavior of consumers and traders consciously respond to this in their advertising."

- 2.14. Volkswagen has objected to this fine decision with the ACM. In a decision on the objection dated October 25, 2018, the ACM declared the objection unfounded and upheld the fine decision with additional grounds. Volkswagen subsequently appealed against the fine decision to the Rotterdam District Court. This procedure is still ongoing.
- 2.15. VGDES is a claims foundation that was established by notarial deed dated July 3, 2018 and aims to represent the interests of victims of Volkswagen in the diesel fraud issue, including by conducting (collective) legal proceedings. VGDES works together with the Consumers' Association.
- 2.16. The European Court of Justice (hereinafter: the Court of Justice) ruled in a judgment of 17 December 2020 **3** that the software installed by Volkswagen in the diesel cars in question must be regarded as a prohibited manipulation instrument, as referred to in the Emissions Regulation. are considered.
- 2.17. By deed of assignment dated December 22, 2020, [consumer] assigned his claims against Volkswagen related to the diesel fraud to VGDES for an amount of € 3,000 plus a subsequent payment.
- 2.18. In a collective action procedure initiated in connection with the diesel fraud by the Volkswagen Car Claim Foundation against Volkswagen and other car manufacturers (hereinafter referred to as: the SCC procedure), the Amsterdam District Court ruled in a judgment of 14 July 2021 **4** , among other things, that the car manufacturers in question have acted unlawfully by using unfair commercial practices towards and deceiving car owners when placing the cars in question on the market and that the buyers of the cars have suffered damage as a result. Furthermore, the court ruled that the car dealers who were also summoned sold cars that did not meet the reasonable expectations of the buyers due to the presence of the defeat device. According to the court, the buyers are therefore entitled to a reduction in the purchase price of the car vis-à-vis the car dealers. The court estimated this price reduction at an amount of € 3,000 for consumers

who had purchased a new car and an amount of € 1,500 for consumers who had purchased a second-hand car. The court has issued a declaratory judgment to that effect. The parties have filed an appeal against this judgment with the Amsterdam Court of Appeal. The appeal procedure is still ongoing.

2.19. [consumer] still drives the Volkswagen Polo in question. The car now has more than 150,000 km on the odometer.

2.20. [consumer] stated, among other things, the following in a written statement dated December 5, 2022 about his decision to purchase the Volkswagen Polo:

"(...) My previous car was a Mitsubishi Colt, with a small petrol engine. This car was a bit older and that is why I started looking for a new car at the beginning of 2011. I thought it was important that this new car had as little impact as possible. To orient myself, I visited car dealers of various car brands, including Volkswagen. During my visit to the Volkswagen car dealer, I used Volkswagen's brochure for the Volkswagen Polo with Bluemotion technology to read up further.

After the visit to the Volkswagen car dealer, I read the brochure for the Volkswagen Polo Bluemotion. I have sent a copy of this leaflet to the Foundation's lawyers. The Volkswagen Polo Bluemotion 1.2. TDI (Diesel) is said to be cleaner than comparable petrol cars of that time. I have the Volkswagen Polo with the 1.2. Bought a TDI diesel engine in Bluemotion version because it was said to be economical and clean. This was on pages 6/7 and 22/23 of the brochure. The Volkswagen had an Energy Label A (p. 6/7) and would combine low emissions of NOx (nitrogen), HC (hydrocarbon) and particulate matter (such as soot) with limited fuel consumption. Ultimately, the low emissions of harmful substances for people and the environment (especially NOx, HC and particulate matter) and for the climate (the limited CO₂ emissions), as described in the brochure, were the deciding factor for me. A car with lower emissions logically has a smaller impact on the environment than a car with higher emissions.

I therefore do not agree with the research into environmental considerations when purchasing a car that Volkswagen refers to in its response. The main reason why I bought the car is because the car would be economical and clean. (...) In short, based on the information from Volkswagen I understood that the Volkswagen Polo was economical and clean. That was the decisive reason for purchasing the car. (...)"

3 The dispute

3.1. VGDES demands that the subdistrict court judge, by provisionally enforceable judgment:

primary:

1a. declares that Volkswagen has acted unlawfully towards [consumer];

1b. Volkswagen orders VGDES to pay VGDES as assignee or authorized representative or as agent of [consumer] an amount of € 15,890, plus the statutory interest on this amount from the date of summons until the day of payment;

alternatively:

2. if the claim under 1b. is not granted, orders Volkswagen to pay VGDES as assignee or as authorized representative or as agent of [consumer] for the damage suffered by [consumer], to be drawn up by state and settled in accordance with the law;

both primary and subsidiary:

3. Volkswagen is ordered to pay the legal costs.

3.2. VGDES bases its claims, in summary, on the following.

3.2.1. Volkswagen has acted unlawfully towards [consumer] as a consumer. On the one hand, because Volkswagen has been guilty of unfair commercial practices and deception by installing the manipulation software in [consumer's] car, and on the other hand, because Volkswagen has violated the Emissions Regulation by putting a car equipped with manipulation software into circulation. Volkswagen's unfair commercial practices consist, first of all, of acting contrary to the requirements of professional diligence. Secondly, Volkswagen has been guilty of misleading business practices. In this context, VGDES points out that Volkswagen put a car on the market in which manipulation software was installed, while at the same time Volkswagen proclaimed that the car was 'economical', 'strong' and 'clean'. The car was therefore clean in test situations, but emitted more nitrogen than permitted outside of it. On each of these grounds, viewed separately and in combination, Volkswagen's actions can be regarded as unlawful according to VGDES.

- 3.2.2. [consumer] has suffered damage as a result of Volkswagen 's unlawful actions . [consumer] would not have bought the car if he had known that the car was equipped with defeat software and did not have the sustainability, economy and environmental properties that Volkswagen attributed to the car. When determining the extent of the damage, the starting point must therefore be that [consumer] is returned to the situation he would have been in without purchasing the car. The damage suffered by [consumer] must therefore be estimated at the purchase price of the car (€ 17,290) less the current trade-in value of the car (€ 2,000), being an amount of € 15,290. [Consumer]'s further damages consist first of all of the costs of repairs that he had to have carried out as a result of the diesel fraud, namely the costs of the software update (€ 48.22) and the costs of replacing the EGR cooler (€150). [Consumer] also has to deal with costs for increased fuel consumption as a result of the necessary software update. These costs are currently estimated at €400. This brings the claim against Volkswagen , primarily, to a total amount of € 15,890. Alternatively, according to VGDES, the damage must be estimated at a reduction in the purchase price to be determined by the court, or at least at this point reference must be made to the damage assessment procedure.
- 3.3. Volkswagen is defending itself. In that context, in summary, she put forward the following.
- 3.3.1. Volkswagen disputes that it has acted unlawfully towards [consumer] as a consumer. The Emissions Regulation, the violation of which [consumer] relies on in connection with the presence of the manipulation software in the car, does not serve to protect the financial interests of consumers. VGDES cannot circumvent this relativity requirement by turning the violation of the Emissions Regulation into an unfair commercial practice. As a result, the present claims have already failed. Furthermore, Volkswagen disputes that it is guilty of unfair commercial practices.
- 3.3.2. Volkswagen disputes that [consumer] has suffered damage as a result of the presence of manipulation software in the car. The purchase price paid for the car cannot be regarded as damage. In order to determine any damage, according to established case law, a capital comparison must be made between the purchase price of the car paid by [consumer] on the one hand and the actual value of the car on the other. However, VGDES has not demonstrated that the market value of [consumer]'s car has decreased after the presence of the manipulation software in the car became known in 2015. VGDES has also not provided sufficient evidence to establish a causal link between Volkswagen 's alleged unlawful actions and the alleged damage, in the sense that [consumer] would not have purchased the car if Volkswagen had not made the offending statements. In the event that [consumer] is entitled to reimbursement of the full purchase price of the car, according to Volkswagen , the benefit enjoyed by [consumer] must be offset. Finally, Volkswagen also disputes [consumer]'s other damage claims.
- 3.4. The parties' statements will be discussed in more detail below, where necessary.

4 The assessment of the dispute

Introduction

- 4.1. The central question in this case is whether Volkswagen as a car manufacturer has committed an unlawful act against [consumer] as the buyer of a Volkswagen Polo that was equipped with manipulation software by Volkswagen , which obliges Volkswagen to pay damages. The subdistrict court judge will hereafter answer this question in the affirmative and award compensation of € 3,000. In the considerations below, the subdistrict court judge explains this decision.

The applicable law

- 4.2. This case has an international character because Volkswagen is located in Germany. The fact that the subdistrict court has jurisdiction to hear the dispute has already been decided in the judgment in the referral incident of December 21, 2021. The subdistrict court now has to determine which law applies to this case.
- 4.3. The present claims are based on unlawful actions by Volkswagen towards [consumer] as a consumer. Pursuant to Article 4(1) of Rome II Regulation **5** , the applicable law for a tort is the law of the country where the damage occurs. With regard to the presence of manipulation software in diesel cars produced by Volkswagen , the Court of Justice ruled in the VKI v Volkswagen judgment **6** that when vehicles have been unlawfully fitted with software by their manufacturer in a Member State that manipulates the emission data before these vehicles are purchased by a third party in another Member State, the place where the damage occurs is in the latter Member State. Because [consumer] purchased the Volkswagen Polo in question from a car dealer in the Netherlands, the alleged damage in the present case occurred in the Netherlands, in the opinion of the subdistrict court judge. This means that Dutch law applies when assessing the claims.

- 4.4. VGDES accuses Volkswagen , in short, of having acted unlawfully towards consumers such as [consumer] because Volkswagen, by installing the manipulation software in [consumer's] car, was guilty of unfair commercial practices and deception towards him - as was stated during the oral hearing. explained in more detail – and because Volkswagen has violated the Emissions Regulation by putting a car equipped with manipulation software into use. The subdistrict court judge will address these accusations separately below.

Tort - general

- 4.5. When assessing Volkswagen 's alleged unlawful conduct, the subdistrict court judge states the following. Pursuant to Article 6:162 paragraph 1 of the Dutch Civil Code, a person who commits an unlawful act against another that can be attributed to him is obliged to compensate the damage that the other suffers as a result. An unlawful act is, among other things, an infringement of the rights of another, an act or omission in conflict with a legal obligation, or with what is appropriate in society according to unwritten law (paragraph 2). An unlawful act can be attributed to the perpetrator if it is due to his fault or to a cause for which he is responsible under the law or prevailing views (paragraph 3). Article 6:163 of the Dutch Civil Code stipulates that there is no obligation to pay compensation if the violated standard does not serve to protect against the damage suffered by the injured party.

Is the violation of the Emissions Regulation unlawful towards [consumer] as a consumer?

- 4.6. The subdistrict court judge considers that on the basis of the judgment of the Court of Justice of 17 December 2020 mentioned above (under 2.16.), the starting point - Volkswagen now also recognizes this - is that the software that Volkswagen uses in cars with an EA 189 diesel engine, including [consumer]'s car had installed a prohibited defeat device within the meaning of the Emissions Regulation. Volkswagen has thus acted contrary to a legal requirement and therefore unlawfully. The question that must then be answered is whether this also means that Volkswagen has acted unlawfully towards [consumer] as a car owner/consumer, given Volkswagen 's argument that the Emissions Regulation does not concern the protection of the interests of consumers who provide a car with have purchased manipulation software and therefore does not provide protection against the damage that [consumer] claims to have suffered.
- 4.7. The subdistrict court judge does not follow Volkswagen in this. In the opinion of the subdistrict court, the Emissions Regulation - considered in conjunction with the Framework Directive **Z** - does serve to protect the interests of individual consumers. In this context, the subdistrict court judge refers to the ruling of the Court of Justice EU of 21 March 2023. **8** In that case - among other things - the question was whether the relevant provisions of the Framework Directive (Article 18 paragraph 1, Article 26 paragraph 1 and Article 46) read in conjunction with the Emissions Regulation (Article 5(2)), must be interpreted as meaning that, in addition to the general interests, they protect the special interests of an individual purchaser of a motor vehicle vis-à-vis its manufacturer, when that vehicle is equipped with a prohibited defeat device within the meaning of the Emissions Regulation. This question is answered affirmatively by the Court of Justice - in line with the conclusion of AG Rantos **9** on which both parties expressed themselves during the oral hearing.
- 4.8. To this end, the Court of Justice considers that all vehicles must have an EC type-approval in accordance with the Framework Directive and that this approval can only be granted if the vehicle in question complies with the provisions of the Emissions Regulation. Manufacturers are obliged under the Framework Directive to issue a certificate of conformity to an individual buyer of a vehicle. This document is required, among other things, for the vehicle to be put into circulation. In addition, it provides assurance that the vehicle complies with all regulations at the time of manufacture. The certificate of conformity therefore offers the individual buyer of a vehicle protection against a manufacturer who fails to fulfill its obligations to place a vehicle on the market that complies with the Emissions Regulation. In short, according to the Court of Justice, the Framework Directive in conjunction with the Emissions Regulation (also) concerns the protection of the (property) interests of an individual buyer who purchases a vehicle that is equipped with a prohibited defeat device. Furthermore, the Court of Justice considers that Member States must ensure that the purchaser of a motor vehicle equipped with a prohibited defeat device is entitled to compensation from the manufacturer of that vehicle where that purchaser has suffered damage as a result of that device. It is up to the individual Member States to determine the method of calculating compensation.
- 4.9. In view of the above, in the opinion of the subdistrict court judge, the relativity requirement set by Article 6:163 of the Dutch Civil Code has been met. Volkswagen 's defense on this point fails and does not preclude a claim for damages. But apart from that, in the present case there is also unlawful conduct on the part of Volkswagen because Volkswagen 's behavior can be qualified as fraud and as an unfair commercial practice, as shown below. The regulation regarding unfair commercial practices is intended to protect consumers, so that the relativity requirement is also met in that context.

Deception

- 4.10. Following the Amsterdam District Court in its judgment in the SCC proceedings, the subdistrict court judge is of the opinion that Volkswagen has misled consumers, including [consumer], with its conduct, which is contrary to what is

appropriate in society according to unwritten law. When purchasing a product, the consumer may assume that a producer has met all conditions for placing the product on the market, including not only formally but also materially complying with the applicable emission requirements. However, this was clearly not the case here due to the installation, use and concealment of the manipulation software in the cars in question. Volkswagen has also publicly acknowledged that it has committed fraud, through its CEO, who stated in an interview: " *Das, was wir gemacht haben, war Betrug, yes!* " **10**

4.11. The subdistrict court now comes to assess the question of whether there are unfair commercial practices by Volkswagen towards consumers.

Unfair trade practices

Does the law on unfair commercial practices apply here?

4.12. The subdistrict court judge considers that the regulation on unfair commercial practices in the Civil Code applies to commercial practices by traders towards consumers. This legal regulation implements the European directive on unfair commercial practices by companies towards consumers (hereinafter also referred to as: OHP Directive). **11**

4.13. According to the definition of Article 6:193a paragraph 1 sub b of the Dutch Civil Code, a trader is a natural or legal person who acts in the exercise of a profession or business. It is not in dispute that Volkswagen is such a trader. The dispute is whether there is a commercial practice by Volkswagen towards the consumer. Article 6:193a paragraph 1 sub d of the Dutch Civil Code defines a commercial practice as any act, omission, conduct, representation or commercial communication, including advertising and marketing, of a trader that is directly related to the sales promotion, sale or supply of a product to consumers.

4.14. The subdistrict court judge, following the ACM in its fine decision and the Amsterdam District Court in its judgment in the SCC proceedings, is of the opinion that Volkswagen has engaged in a commercial practice in the present case, consisting of manufacturing cars that were equipped with prohibited manipulation software. for the purpose of obtaining type approval, subsequently issuing a Certificate of Conformity and subsequently placing the cars on the market (in Europe, including the Netherlands) in order to be sold and delivered to buyers. For the aforementioned activities, Volkswagen has used various means of communication for the marketing of the cars, such as publishing information on websites and preparing brochures for consumers. In the opinion of the subdistrict court, the purpose of the production and related marketing of the cars by Volkswagen was to sell and deliver the cars in question to consumers, or at least to promote the sale of the cars. These are commercial practices as referred to in the legal regulations on unfair commercial practices. This cannot be affected by the fact that Volkswagen did not itself sell the cars in question directly to consumers, but through the intermediary of car dealers/importers.

4.15. The conclusion is therefore that the legal regulation on unfair commercial practices fully applies to Volkswagen 's actions .

Unfair commercial practices: the legal framework

4.16. The legal framework for the assessment of Volkswagen 's alleged unfair commercial practices is, in summary and to the extent relevant here, as follows.

4.17. According to Article 6:193b paragraph 1 of the Dutch Civil Code, a trader acts unlawfully towards a consumer if he carries out a commercial practice that is unfair.

The 2nd paragraph of this article of law stipulates that a commercial practice is unfair if a trader acts:

- a. contrary to the requirements of professional diligence, and
- b. the average consumer's ability to make an informed decision is appreciably limited or could be limited, as a result of which the average consumer makes or can make a decision about an agreement that he would not otherwise have made.

4.18. Furthermore, paragraph 3 of the aforementioned article of law stipulates that a commercial practice is particularly unfair if a trader carries out a misleading commercial practice as referred to in Articles 6:193c to 6:193g of the Dutch Civil Code.

Volkswagen has been guilty of unfair commercial practices towards [consumer] as a consumer

4.19. The subdistrict court judge is of the opinion that Volkswagen is guilty of unfair commercial practices towards [consumer] as a consumer and has therefore acted unlawfully towards [consumer]. To this end, the subdistrict court judge considers the following.

- *Unfair commercial practice under Article 6:193b paragraph 2 of the Dutch Civil Code -*

- 4.20. In the opinion of the subdistrict court judge, in the given circumstances, Volkswagen as a trader has acted contrary to the requirements of professional diligence, as referred to in Article 6:193b paragraph 2 part a of the Dutch Civil Code. Professional dedication consists of care and skill.
- 4.21. In the opinion of the subdistrict court, the installation, use and concealment of prohibited tampering software in (diesel) cars produced for the consumer market, as part of obtaining type approval that is necessary for placing the cars on the market, is clearly contrary to the careful conduct that can be expected from a professional car manufacturer such as Volkswagen . The consumer must be able to trust that the car he buys or is considering buying does not contain prohibited components, such as defeat software. By placing the cars in question on the market, Volkswagen gave consumers the impression that they met the legal requirements, which was formally the case, but materially not, because the use of a prohibited defeat device resulted in type-approvals being revoked. had been obtained. Approval was therefore obtained fraudulently. **12**
- 4.22. With regard to the special expertise applicable to Volkswagen, the subdistrict court judge considers the following. The professional standard applicable to a trader depends on the circumstances of the case. The level of the standard applicable to a trader can, for example, be derived from trading practices in a particular sector, a code of conduct or an oath or promise taken.
- 4.23. The subdistrict court judge is of the opinion that the professional standard applicable in this case can be derived from the so-called *Automotive Industry Guiding Principles to Enhance Sustainability Performance in the Supply Chain* of the European trade association for car manufacturers (ACEA) from March 2014. **13** Volkswagen has in these proceedings the applicability of these *Guiding Principles* is also not disputed. It is also established that Volkswagen applies an *Environmental Policy* with regard to its activities and products, in which it expressly aims to minimize the environmental impact in all its activities and to contribute to solving environmental problems at both regional and national level. as a global level. **14 In the opinion of the subdistrict court,** Volkswagen 's actions with regard to the installation and use of the manipulation software in cars it manufactures are contrary to both the aforementioned *Guiding Principles* of the ACEA and the *Environmental policy* of Volkswagen itself and cannot be reconciled. with Volkswagen 's stated aim to reduce its ecological footprint and impact on the environment, as a result of which it has acted contrary to the normal level of special expertise.
- 4.24. Finally, in the opinion of the subdistrict court, the cumulative requirement has been met that Volkswagen 's actions have noticeably limited the average consumer's ability to make an informed decision, as referred to in Article 6:193b paragraph 2 part b of the Dutch Civil Code. When purchasing a product, the consumer may assume that a producer meets all the conditions for placing the product on the market. When a producer offers a product that does not meet the conditions for placing it on the market, or at least for which the determination that it complies has been manipulated, and is less clean than suggested, there is by definition a noticeable limitation of the ability of the consumer to make an informed decision. Consumers have been deprived of the opportunity to make a fully informed choice due to Volkswagen 's actions with regard to the use of the manipulation software. Volkswagen 's argument that, in summary, environmental and sustainability considerations play a very subordinate role for the average consumer when purchasing a car **15** cannot help it in this context. Due to Volkswagen 's actions, the average consumer has made a decision about an agreement that he would not have made if he had been informed in advance about Volkswagen 's manipulation of the emissions of the cars in question .

- *Deceptive business practices* -

- 4.25. In the opinion of the subdistrict court judge, there is also a misleading commercial practice as referred to in Article 6:193b paragraph 3 sub a of the Dutch Civil Code.
- 4.26. A commercial practice is misleading under Article 6:193c paragraph 1, opening words and (b) of the Dutch Civil Code if information is provided that is factually incorrect or that misleads or may mislead the average consumer, whether or not through the general presentation of the information, such as with regard to of the main characteristics of the product, such as advantages, design, composition, suitability for use, possibilities of use, specification, results to be expected from use or the results and essential characteristics of tests or checks carried out on the product, which enable the average consumer makes or may make a decision about an agreement that he would not otherwise have made. The point is whether an average consumer can be misled by the (incorrect) information and whether that information is of such a nature that it can cause the average consumer to make a decision about a transaction that he would not otherwise have made. . In the event of a misleading commercial practice, it is not necessary to additionally investigate whether the commercial practice in question also conflicts with the requirements of professional diligence. **16**
- 4.27. In the opinion of the subdistrict court, misleading information can also include environmental claims or 'green claims'. Such claims somehow give the impression that a product has a positive or no negative impact on the environment or that the product causes less damage to the environment than other products do. **17** Consumers must be able to trust

environmental claims made by traders. Environmental claims should therefore, in order not to be misleading, be presented in a clear, specific, unambiguous and correct manner. **18** According to Article 6 of the OHP Directive, an environmental claim can be misleading if it is accompanied by incorrect information and is therefore based on untruths or, even if the information is factually correct, deceives or is likely to deceive the average consumer in any way, including through the general presentation. Environmental claims can also be misleading when environmental claims are based on vague and general statements of environmental benefits such as "environmentally friendly", "ecological", "sustainable", "good for the environment", "climate friendly" or "friendly to the environment". Such claims may constitute unfair commercial practices if they are likely to deceive the average consumer and lead him to make a transactional decision that he would not otherwise have taken. **19**

4.28. Against this background, the subdistrict court judge considers the following.

4.29. The subdistrict court judge is of the opinion that Volkswagen with its statements as shown above under 2.4, 2.5 and 2.6. it has made it appear that its diesel cars equipped with an EA 189 engine deliver exemplary environmental and sustainability performance, at least have a positive or no negative impact on the environment or cause less damage to the environment than other cars. However, in the opinion of the subdistrict court judge - as the ACM has ruled **20** - these environmental claims are not consistent with the installation and use of manipulation software to influence the emission results of the cars in question in a test environment. In this context, reports have been submitted by both parties. **21** In light of those reports, Volkswagen has not been sufficiently successful in demonstrating the correctness of its claims in the statements cited above. The statements must therefore be regarded as misleading.

4.30. In addition, the subdistrict court judge is of the opinion that , by concealing from the consumer that the test results have been manipulated through the use of manipulation software, Volkswagen has withheld essential information from the consumer that is important for his purchase decision . In this context, Volkswagen has stated that it has not been established that the cars in question did not meet the Euro5 standard, but that is not the point. What matters is that Volkswagen manipulated the test results in order to obtain type approval, making it unclear to what extent the cars in question actually met the applicable standards.

4.31. In view of the above, the subdistrict court concludes that Volkswagen provided consumers with information in the period 2009-2015 that was factually incorrect or that misleads or could mislead the average consumer with regard to the main characteristics of the product, as a result of which the average consumer could make a decision about an agreement that he would not otherwise have taken.

- Misleading commercial practice - incorrect information about type-approval -

4.32. Finally, in the opinion of the subdistrict court judge, there is also a misleading commercial practice by Volkswagen as referred to in Article 6:193g, opening words and under d, of the Dutch Civil Code. It follows from Article 6:193g that it is misleading in all circumstances to claim that a trader or a product has been recommended by a public or private institution when this is not the case, or to make such a claim without satisfying the condition for the recommendation, recognition or approval has been met. This is by definition an unfair commercial practice.

4.33. In the period 2009 - 2015, Volkswagen installed manipulation software in diesel cars with an EA 189 engine to influence nitrogen oxide emissions in a test environment, while this mode was disabled during normal road use. As the Court of Justice has established, this involved the use of a defeat device prohibited by the Emissions Regulation. In the opinion of the subdistrict court , due to the installation and use of the software in the cars in question, Volkswagen did not meet the conditions for the type approval received and type approvals were wrongly issued for these cars. Afterwards , Volkswagen wrongly provided the cars with a CO and resold/delivered them to the importers, as the cars did not comply with the EU type-approval regulations. This constitutes a misleading commercial practice.

4.34. Insofar as Volkswagen relies on the fact that the issued type approval was not withdrawn by the KBA, that defense cannot benefit it in the opinion of the subdistrict court judge. This defense from Volkswagen ignores the fact that the KBA has instructed Volkswagen to recall and modify the cars in question. Volkswagen then developed an update that, after installation, should ensure that the car could only operate in economical mode. The KBA has approved this update. Only after carrying out the updates was the conformity of the cars in question restored and the validity of the type approval definitively established.

Conclusion

4.35. Volkswagen is guilty of violation of the Emissions Regulation, fraud and unfair commercial practices towards [consumer], by which it has acted unlawfully towards him. The unlawful conduct can also be attributed to Volkswagen , which has not been a subject of debate between the parties.

Has [consumer] suffered damage as a result of Volkswagen 's unlawful actions ?

- 4.36. The unlawful conduct of Volkswagen towards [consumer] as a consumer, as established above, obliges it to compensate the resulting damage suffered by [consumer]. It must then be assessed whether [consumer] has actually suffered damage as a result of Volkswagen 's unlawful actions and, if so, to what extent. In that context, the subdistrict court judge considers the following.
- 4.37. VGDES primarily advocates that the extent of the damage in this specific case should be determined based on the purchase price of the car, less the current trade-in value of the car. To this end, VGDES first argues that if [consumer] had known at the time of purchase that the car did not comply with legal requirements and was more polluting than was suggested to him, he would never have purchased the car. The damage must therefore be estimated at the purchase price minus the residual value. The subdistrict court judge does not follow VGDES in this. The damage approach by VGDES appears to be based on annulment of the purchase agreement with regard to the car **22** , but such a claim is not present here, as VGDES is claiming damages from Volkswagen as manufacturer of the car on the basis of tort, in which the subdistrict court judge (merely) must assess what damage Volkswagen 's unlawful actions have caused to [consumer]. The basic principle here is that the damage must be calculated in concrete terms. Contrary to what VGDES believes, this does not mean that a restoration to the old condition must take place, but that a power comparison must take place. Why a different method of estimating damages would be appropriate in this case has not been adequately substantiated or explained by VGDES. Also in the ruling of the Den Bosch Court of Appeal to which VGDES refers, the subdistrict court judge sees no grounds for using a different method of estimating damages, because there too the damage is based on asset comparison. **23**
- 4.38. The subdistrict court judge also does not follow VGDES in its argument that only the award of compensation equal to the purchase price paid guarantees effective consumer protection against unfair commercial practices and that only this meets the basic principle in the event of violation of the European Unfair Commercial Practices Directive and violation of the Emissions Regulation in connection with the Framework Directive, that any compensation to be awarded must be effective, proportionate and dissuasive. In this context, the subdistrict court judge considers that the choice of sanctions rests with the individual Member States, but they must be effective, proportionate and dissuasive. It further follows from the case law of the Court of Justice that, as regards the form and method of calculating damages, compensation for the damage caused to individuals by violations of Union law must be adequate in relation to the damage suffered, so that effective protection their rights are assured. The Dutch legislator has chosen to classify unfair commercial practices by traders as an unlawful act, with the associated sanctions translating into compensation. When it comes to violation of the Emissions Regulation, sanctions also apply through tort action because there is action contrary to a legal provision. It has not been shown that in this case only compensation of the purchase price is an effective and proportionate sanction.
- 4.39. In view of the above, the subdistrict court judge sees no reason to estimate the damage at the purchase price of the car less the residual value, as primarily claimed.
- The claim made by Volkswagen in this context for the settlement of benefits received therefore does not require discussion
- 4.40. The following assessment framework applies when determining the extent of that compensation. Pursuant to Article 6:97 of the Dutch Civil Code, the judge must estimate the damage in a manner that is consistent with the nature of the damage. The starting point for calculating the extent of the obligation to pay compensation is that the injured party is placed as much as possible in the position he would have been in if the event causing the damage had not occurred, taking into account all the circumstances of the specific case. This means that the extent of the damage suffered by [consumer] must be determined by comparing the situation he is now in with the situation he would (presumably) have been in if Volkswagen 's unlawful actions had not occurred. **24** , therefore the situation in which Volkswagen would not have been guilty of using the manipulation software in [consumer's **1**] car for the purpose of obtaining type approval. The obligation to state and, if necessary, prove the existence and extent of the damage rests with the injured party. If the extent of the damage cannot be determined, it is estimated.
- 4.41. VGDES has argued that [consumer] - in the hypothetical situation that the car did not contain tamper software for the type-approval and the actual (environmental) performance was known - would not have purchased the car, which is substantiated by a statement from [consumer]. The subdistrict court judge considers this substantiation sufficiently plausible. As regards the actual situation, the subdistrict court judge is of the opinion that it is likely that the car at the time of purchase by [consumer] had a lower value than the purchase price paid by [consumer]. This loss of value results from the installation of software that manipulates the emissions data, resulting in the car incorrectly receiving type approval. The car purchased by [consumer] therefore had a defect and a car that has a defect will be valued less and therefore has a lower value. **25** The difference between the price paid for the car by [consumer] and the actual value of the car leads to a decrease in [consumer]'s assets, which occurred during the purchase of the car (but which was only discovered later). This decrease in power would not have occurred if [consumer] had not purchased the car. The damage suffered by [consumer] therefore consists of what he paid too much for a car that was worth less due to the lack thereof. The fact that, as Volkswagen has pointed out, the manipulation software was later removed with the help of the update, does not alter the fact that the car did not meet the legal requirements and the claimed (environmental) performance at

the time of purchase and for some years afterwards. In addition, the ongoing discussion shows that it is still unclear whether the car now meets the legal requirements.

- 4.42. The subdistrict court judge sees reason to estimate the extent of the damage suffered by [consumer] in application of Article 6:97 of the Dutch Civil Code. VGDES has also indicated that it prefers an estimate instead of referring to the damage assessment procedure, which is also in accordance with Article 612 DCCP. Although both parties have submitted expert reports to substantiate the damage, these are party reports in a general sense, which have been criticized by both parties. In addition, no specific market price can be determined for the value of cars that do not meet the legal requirements, as there are no known cars on the market that do not meet the legal requirements. In the given circumstances, the subdistrict court judge estimates the damage suffered by [consumer] at € 3,000. In this estimate, the subdistrict court judge sought to tie in with the determination of the overpaid purchase price in connection with the price reduction used by the Amsterdam District Court in the judgment in the SCC proceedings. In the opinion of the subdistrict court judge, a damage amount of € 3,000 does sufficient justice to both the violation of the Emissions Regulation and Volkswagen 's unfair commercial practices and the personal situation of [consumer] and is therefore sufficiently effective and proportionate.

Causality

- 4.43. The subdistrict court judge is of the opinion that the causal link between the unlawful act and the alleged damage suffered by [consumer] (the purchase of the car) has been sufficiently established. In view of the main rule, [consumer] must state and, if necessary, prove that if he had correctly represented the facts, he would not have bought the car (the sine qua non-connection). It is likely that [consumer] would not have purchased the 'cheating diesel' in question if he had known at the time of purchase about the installation and use of manipulation software in his car, which means that the car formally but materially does not meet the legal conditions for met type approval and is actually more polluting than the manufacturer made it appear. The written statement of [consumer] (mentioned above under 2.20.) and his additional statement at the hearing further show that environmental considerations did indeed play a (major) role in [consumer's] choice to purchase the VW Polo. The fact that environmental considerations are not important to [consumers] is not convincingly refuted by Volkswagen with a general report on consumers' reasons for purchasing. **26** Moreover, in the opinion of the subdistrict court, imposing too strict requirements on the causal link would not be in accordance with the principle of effectiveness. The damage as estimated above can also be attributed to Volkswagen , within the meaning of Article 6:98 of the Dutch Civil Code.

Other damage items

- 4.44. The subdistrict court judge will now assess the other damages suffered by [consumer].

The software update

- 4.45. The first damage item concerns an amount of € 48.22 in costs in connection with having the software update performed. To substantiate this, VGDES has submitted an invoice from Auto Century dated October 31, 2016.
- 4.46. Volkswagen disputes this damage item. According to Volkswagen, the update was carried out free of charge for [consumer] via his car dealer and the invoice submitted is only a pro-forma invoice for the car dealer in order to be able to charge the costs for carrying out the update to the importer and therefore ultimately to Volkswagen . There is nothing to show that [consumer] paid the invoice himself.
- 4.47. The subdistrict court judge rejects this claim because VGDES - partly in light of Volkswagen 's defense - has not substantiated that [consumer] actually paid the costs for carrying out the software update. No proof of payment has been provided. It is also striking in this context that the invoice submitted by VGDES is not in the name of [consumer], but states "claim warranty". In the opinion of the subdistrict court, this mention supports Volkswagen 's defense .

Replacement EGR cooler

- 4.48. The second damage item concerns an amount of € 150.00 in costs for replacing the EGR cooler. VGDES argues that [consumer] experienced problems with the car's EGR cooler shortly after performing the software update. This EGR cooler is part of the EGR system that has been given an adjusted function due to the update. Volkswagen Customer Care informed [consumer] that free repair of the EGR cooler was not possible because the warranty period had expired and referred him to car dealer Auto Century. Auto Century then offered [consumer] to carry out the repair for a reduced rate of € 150.00, which offer [consumer] accepted.
- 4.49. Volkswagen also disputes this damage item. According to Volkswagen, [consumer] ultimately did not incur any costs for this repair. Although [consumer] initially had to pay an amount of € 150.00 for the repair in question, he was fully compensated seven months later. VGDES has also not substantiated the causal link between these costs and any violation of standards on the part of Volkswagen .

4.50. The subdistrict court judge also rejects this claim, as [consumer] has not substantiated Volkswagen 's defense that he was subsequently fully compensated for the repair costs initially incurred. In this state of affairs it must be assumed that [consumer] has not suffered any financial disadvantage in this regard.

Increased fuel consumption

4.51. The third damage item concerns an amount of € 400.00 in connection with increased fuel consumption of [consumer]'s car. To this end, VGDES argues that the car has started to consume more fuel due to the software update. Usage has gone from an average of 1:26 to 1:23. Since the update, [consumer] has driven the car approximately 54,000 kilometers. Based on the increased fuel consumption, this means that [consumer] had to refuel approximately 300 liters of extra diesel compared to the situation before the update. Based on the average liter price for diesel of € 1.38 in the period 2017-2020, this means approximately € 400.00 in additional fuel costs, according to VGDES.

4.52. VGDES disputes this damage item. According to Volkswagen, VGDES has provided no evidence of the alleged increase in fuel consumption of the car and, if there is any, that there is a causal link between the increased fuel consumption and the software update.

4.53. The subdistrict court judge also rejects this damage item, as VGDES has not sufficiently substantiated its underlying statements. That there would be an increased fuel consumption of [consumer's] car is only a bare assertion by VGDES, of which it has not provided proper evidence. Partly in view of the dispute on Volkswagen 's part, this would have been appropriate. In addition, assuming that there would be increased fuel consumption of [consumer's] car, VGDES has not sufficiently substantiated that the software update of the car is specifically the cause of this. Facts and circumstances that specifically point to this have not been provided.

Conclusion

4.54. Compensation in the amount of € 3,000, plus the statutory interest claimed from the day of summons, can be awarded.

Process costs

4.55. Volkswagen , as the largely unsuccessful party, will be ordered to pay the legal costs, which will be determined on the part of VGDES as follows:

- summons costs € 100.89
- court fee € 1,013.00
- representative's salary €464.00 (2 points x €232.00)

€1,577.89

5 DECISION

The subdistrict court judge:

- 5.1. declares that Volkswagen has acted unlawfully towards [consumer];
- 5.2. orders Volkswagen to pay VGDES (as assignee of Mr [consumer]) damages of **€3,000** , plus statutory interest on this amount from December 23, 2020, being the day of summons, until the day of full payment;
- 5.3. orders Volkswagen to pay the legal costs, determined on the part of VGDES
€1,577.89;
- 5.4. declares the verdict with regard to the convictions mentioned under 5.2. and 5.3. available from stock;
- 5.5. rejects the more or otherwise advanced.

This judgment was pronounced by Mr. IF Clement, subdistrict judge, and pronounced in public in the presence of Mr. M. Postma as clerk on April 4, 2023.

-
- 1 Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers and of systems, components and separate technical units intended for such vehicles.
 - 2 Verordening (EG) Nr. 715/2007 van het Europees Parlement en de Raad van 20 juni 2007 betreffende de typegoedkeuring van motorvoertuigen met betrekking tot emissies van lichte personen- en bedrijfsvoertuigen (Euro 5 en Euro 6) en de toegang tot reparatie- en onderhoudsinformatie.
 - 3 HvJ EU 17 december 2020, zaak C-693/18, ECLI:EU:C:2020:1040 (*X/CLCV e.a.*).
 - 4 Rechtbank Amsterdam, 14 juli 2021, ECLI:NL:RBAMS:2021:3617 (*Stichting Volkswagen Car Claim - Volkswagen c.s.*).
 - 5 Verordening (EG) Nr. 864/2007 van het Europees Parlement en de Raad van 11 juli 2007 betreffende het recht dat van toepassing is op niet-contractuele verbintenissen ("Rome II").
 - 6 HvJ EU 9 juli 2020, zaak C-343/19, ECLI:EU:C:2020:534 (*Verein für Konsumenteninformation/Volkswagen AG*).
 - 7 Met ingang van 1 september 2020 is de Kaderrichtlijn ingetrokken, maar de Kaderrichtlijn is voor de beoordeling van dit geschil temporeel nog van belang.
 - 8 HvJ EU 21 maart 2023, zaak C-100/21, ECLI:EU:C:2023:229, (*QB/Mercedes-Benz Group AG*).
 - 9 A-G A. Rantos 2 juni 2022, zaak C-100/21, ECLI:EU:C:2022:420, (*QB/Mercedes-Benz Group AG*) r.o. 39-50.
 - 10 Zie het door VGDES in de spreekantekeningen onder randnummer 1.2. aangehaalde artikel uit de Süddeutsche Zeitung van 9 juli 2019.
 - 11 Richtlijn nr. 2005/29/EG van het Europees Parlement en de Raad van 11 mei 2005 betreffende oneerlijke handelspraktijken van ondernemingen jegens consumenten op de interne markt.
 - 12 vgl. het vonnis van de rechtbank Amsterdam in de SCC-procedure, r.o. 8.29.
 - 13 Vgl. besluit ACM van 18 oktober 2017, zaaknr. ACM/17/003870, randnummer 80 e.v.
 - 14 Door VGDES als productie 15 ingebracht.
 - 15 Door Volkswagen wordt in dit kader verwezen naar het als productie 4 overgelegde onderzoek.
 - 16 HvJ EU 16 april 2015, zaak C-388/13, ECLI:EU:C:2015:225 (*Nemzeti/UPC*).
 - 17 Verwezen wordt naar de Richtsnoeren voor de tenuitvoerlegging van Richtlijn 2005/29 EG betreffende oneerlijke handelspraktijken (hierna: Richtsnoeren OHP), SWD (2016) 163/2, p. 117.
 - 18 Richtsnoeren OHP, p. 121.
 - 19 Richtsnoeren OHP, p. 122/123.
 - 20 Besluit ACM van 18 oktober 2017, zaaknr. ACM/17/003870, randnummer 100.
 - 21 Rapport TNO (productie 16 VGDES) en rapport Umwelt Bundesamt (productie 2 en 3 Volkswagen).
 - 22 In dat kader verwijst VGDES onder randnummer 7.6. van de dagvaarding onder meer naar een uitspraak van de Rechtbank Gelderland van 20 februari 2019, waarin de koper van een auto de koopovereenkomst vernietigde in verband met liegen van de verkoper over het schadeverleden van de auto.
 - 23 Gerechtshof Den Bosch 7 april 2020, ECLI:NL:GHSHE:2020:1199.
 - 24 HR 22 februari 2019, ECLI:NL:HR:2019:269.
 - 25 See also CJEU 9 July 2020, C-343/19, EU:C:2020:534 (*VFK / Volkswagen AG*, ov. 34)
 - 26 In this context, Volkswagen refers to Exhibit 4 submitted in its response.
-