

## ECLI:NL:RBMNE:2023:3770

<b>Authority</b>	Central Netherlands District Court
<b>Judgment date</b>	26-07-2023
<b>Date of publication</b>	08/18/2023
<b>Case number</b>	8919584
<b>Jurisdictions</b>	Contract law
<b>Special characteristics</b>	First instance - single
<b>Content indication</b>	Volkswagen's liability towards consumers for the purchase of a car equipped with manipulation software. Unlawful actions of Volkswagen. Damage estimate; no reimbursement for purchase price minus trade-in value. Compensation of €1,500,
<b>Locations</b>	Rechtspraak.nl YES 2023/120



[Enriched pronunciation](#)

### Pronunciation

#### COURT OF CENTRAL NETHERLANDS

Civil rights  
Subdistrict judge

Place of hearing Utrecht

Case number: 8919584 \\ UC EXPL 20-10246

#### Judgment of July 26, 2023

in the case of

#### **VOLKSWAGEN GROUP DIESEL EFFICIENCY FOUNDATION ,**

Based in Amsterdam,  
demanding party,  
hereinafter referred to as: the Foundation,  
representatives: mrs. JH Lemstra, M. Hijnen and THW Korvinus,

in return for

the legal entity under German law

**VOLKSWAGEN AKTIENGESELLSCHAFT ,**

located in Wolfsburg (Germany),

defendant party,

hereinafter referred to as: Volkswagen,

representatives: mrs. JK van Hezewijk and DJ de Bock.

**1 The procedure**

1.1. The course of the procedure is evident from:

- the docket decision of July 13, 2022 with the procedural documents referred to therein;
- the conclusion of Volkswagen's response with 22 productions;
- the further production 23 from Volkswagen;
- the oral hearing of May 4, 2023, of which notes were taken by the clerk;
- the Foundation's pleadings;
- Volkswagen's pleading.

1.2. Finally, the verdict has been determined.

**2 What is the case about?**

2.1. Volkswagen is an internationally operating car manufacturer. It produces vehicles for 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. Mr [A] (hereinafter referred to as: [A]) is a consumer who, on November 29, 2013, purchased a second-hand Volkswagen Passat, type 1.6 TDI BlueMotion Comfort Line, with the license plate [license plate] (hereinafter also referred to as: the car), purchased from car dealer [company 1] for an amount of € 22,670.00. Before the purchase, [A] traded in his used Opel for an amount of € 7,000.00, so that he still has paid € 15,670.00 extra for the car. The car has an EA 189 diesel engine.

2.3. The diesel engine of the Volkswagen Passat of [A] is equipped with a so-called *Turbocharged Direct Injection* (hereinafter referred to as: TDI), which was discussed at the time of the purchase of the car by [A] on the Volkswagen website on the page about the Volkswagen. Passat Variant under the heading "Engines" stated, among other things:

*"Powerful. Beautiful. Economical. Everything is possible. The extensive range of economical engines gives you the opportunity to find the ideal engine. From powerful and economical TDI diesel engines with the latest common rail technology, compact TSI petrol engines to extra clean EcoFuel. Want to know more about all available engines?"*

(...)

*TDI.*

*The powerful, economical diesel.*

*With the Volkswagen Passat Variant you can choose from various modern TDI diesel engines. These have been developed using the most recent common rail technology. This makes these engines, which are equipped with a particulate filter as standard, more powerful, more economical and cleaner than conventional diesels."*

2.4. In a brochure for the Volkswagen Passat BlueMotion of August 2011, Volkswagen stated, among other things, under the heading "We don't think a cleaner car is anything special":

*"How do we get the most out of technology to give you the best possible ride? That is the question that has always driven us. And with BlueMotion Technologies we ensure that this can be done cleaner at the same time. By gaining energy during braking, for example, and thus charging the battery. Or by automatically switching off the engine when the car stands still for a moment and then starting it again in a fraction of a second. And our clean ambitions go further than that. (...) Because we feel responsible for the world we live in. That's why not just a few, but 350 models are cleaner. So you can drive cleaner in almost every Volkswagen, without sacrificing any power or comfort."*

- 2.5. 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.
- 2.6. 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 Emissions Regulation sets, among other things, a limit value for NOx (nitrogen oxide) emissions. In the context of the approval for the emission of pollutants, vehicles are tested according to a (test) protocol, the parameters of which are laid down in 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.
- 2.7. In mid-September 2015, it became known that, in the period 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 predetermined parameters. The car's so-called EGR system - which could regulate nitrogen oxide emissions - switched to an economy mode during testing, temporarily and artificially influencing test results to indicate that the car's nitrogen oxide emissions were within permitted standards. When driving outside the test environment, the engine emitted significantly more nitrogen oxide. This constituted a prohibited manipulation instrument as referred to in Article 4.1 of the Emissions Regulation. 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. This action by Volkswagen is known, among other things, as "diesel fraud".
- 2.8. Volkswagen informed [A] 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.
- 2.9. 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). [A] did not have the relevant software update performed.
- 2.10. 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 **3**, the ACM imposed a fine on Volkswagen  
 €450,000.00 imposed due to unfair commercial practices, which the ACM has 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 of 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. As a result, it is not established that 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. "

- 2.11. 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.
- 2.12. The Foundation 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. The Foundation works together with the Consumers' Association.
- 2.13. [A] sold the car on January 18, 2020.
- 2.14. By deed of assignment dated September 9, 2020, [A] assigned his claims against Volkswagen related to the diesel fraud to the Foundation for an amount of € 5,000.00 plus a subsequent payment.
- 2.15. The European Court of Justice (hereinafter: the Court of Justice) ruled in a judgment of 17 December 2020 **4** that the software installed by Volkswagen in the diesel cars in question must be used as a prohibited manipulation instrument, as referred to in the Emissions Regulation. are considered.
- 2.16. In connection with the diesel fraud, the Volkswagen Car Claim Foundation has initiated collective action proceedings against Volkswagen and other car manufacturers (hereinafter referred to as: the SCC proceedings). In that case, the Amsterdam District Court ruled in a judgment of 14 July 2021 **5** that the car manufacturers in question acted unlawfully by using unfair commercial practices towards car owners 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 € 3,000.00 for consumers who had purchased a new car and an amount of € 1,500.00 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.

### 3 What is the Foundation claiming and what is Volkswagen's defense?

- 3.1. The Foundation demands that the subdistrict court judge, by provisionally enforceable judgment:

primary:

1. declares that Volkswagen has acted unlawfully towards [A];
2. Volkswagen orders the Foundation to pay the Foundation as assignee or authorized representative or as agent of [A] an amount of € 17,670.00, plus statutory interest on this amount from the date of summons until the day of payment;

alternatively:

3. If the claim under 2 is not granted, Volkswagen is ordered to pay to the Foundation as assignee or as authorized representative or as agent of [A] for the damage suffered by [A], to be assessed by state and settled in accordance with the law ;

both primary and subsidiary:

4. Volkswagen is ordered to pay the legal costs.

3.2. In summary, the Foundation bases its claims on the following. Volkswagen has acted unlawfully towards [A] as a consumer. On the one hand, because Volkswagen has been guilty of unfair commercial practices and deceit towards [A] by installing the manipulation software in the 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, the Foundation 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 the Foundation. [A] has suffered damage as a result of Volkswagen's unlawful actions. Volkswagen must compensate this damage, according to the Foundation. The Foundation primarily claims as damages the purchase price of the car minus its trade-in value. Alternatively, the Foundation requested at the hearing to estimate the damage (instead of referring to the damage assessment procedure).

3.3. Volkswagen is defending itself. In that context, in summary, she put forward the following. Volkswagen disputes that it has acted unlawfully towards [A] as a consumer. The Emissions Regulation, the violation of which [A] relies on in connection with the presence of the manipulation software in the car, does not serve to protect the financial interests of consumers. The Foundation cannot circumvent this relativity requirement by converting the violation of the Emissions Regulation into an unfair commercial practice. The current claims have already failed. Furthermore, Volkswagen disputes that it is guilty of unfair commercial practices. Volkswagen also disputes that [A] suffered damage as a result of the presence of manipulation software in the car.

3.4. The parties' statements will be discussed in more detail below, where necessary.

## **4 The assessment**

### (1 Introduction

4.1. This case essentially concerns the question of whether Volkswagen as a car manufacturer has committed an unlawful act against [A] as the buyer of a Volkswagen Passat that was equipped with manipulation software by Volkswagen, which obliges Volkswagen to pay damages. The subdistrict court judge answered this question with 'yes' and awarded damages of € 1,500.00. Why this is the case is explained below.

### (2) Jurisdiction and Applicable Law

4.2. This case has an international character, because Volkswagen is located in Germany. In the interim judgment of April 6, 2022, the subdistrict court has already decided that the subdistrict court has jurisdiction to hear the dispute and that Dutch law applies to this case.

### (3) Tort – general

4.3. The Foundation accuses Volkswagen of having acted unlawfully towards consumers such as [A]. According to the Foundation, Volkswagen did this by being guilty of unfair commercial practices and deception by installing the manipulation software in the car and because Volkswagen violated the Emissions Regulation by putting a car equipped with manipulation software into circulation.

4.4. When assessing Volkswagen's alleged unlawful conduct, the subdistrict court judge generally sets the following as the following. Pursuant to Article 6:162 paragraph 1 of the Dutch Civil Code (hereinafter: BW), anyone 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.

(4) Tort - the violation of the Emissions Regulation

- 4.5. Based on the judgment of the Court of Justice of 17 December 2020 mentioned above (under 2.15), the starting point is that the manipulation software is a prohibited manipulation instrument within the meaning of the Emissions Regulation. Volkswagen now also recognizes this. This means that Volkswagen acted contrary to a legal requirement and therefore acted unlawfully.
- 4.6. The question that must then be answered is whether the foregoing also means that Volkswagen has acted unlawfully towards [A] as a car owner/consumer. In its response, Volkswagen argued that the Emissions Regulation does not cover the protection of the interests of consumers who have purchased a car equipped with manipulation software and therefore does not serve to protect against the damage that [A] claims to have suffered.
- 4.7. On March 21, 2023, after Volkswagen submitted its statement of defense, the Court of Justice delivered a judgment. **6** In that case, the question was - among other things - 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 paragraph 2), should be explained 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 in the affirmative by the Court of Justice in paragraph 85 of the judgment:
- "In view of the foregoing, the answer to the first and second questions must be that Article 18(1), Article 26(1) and Article 46 of the Framework Directive, read in conjunction with Article 5(2) of Regulation No 715/2007 must be interpreted as meaning that, in addition to 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 that latter provision."*
- 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 (paragraph 77). Under the Framework Directive, manufacturers are obliged to issue a CoC to an individual buyer of a vehicle (legal consideration 78). This document is required for registration and sale or putting into service of the vehicle. Furthermore, it provides assurance that the vehicle complies with all regulations at the time of manufacture (paragraph 79). The CoO therefore offers the individual buyer of a vehicle protection in particular against the danger that a manufacturer does not fulfill its obligation to place a vehicle on the market that complies with the Emissions Regulation (legal consideration 82). 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.
- 4.9. In the context of estimating the damage suffered by the individual buyer, the Court of Justice again considers in a general sense that the Framework Directive in conjunction with the Emissions Regulation (also) relates to the protection of the (property) interests of an individual buyer who purchases a vehicle that is equipped with a prohibited defeat device (legal consideration 88). The Court of Justice then considers that an individual purchaser of a motor vehicle may require the manufacturer of that vehicle not to equip that vehicle with a prohibited defeat device within the meaning of Article 5(2) of the Emissions Regulation (paragraph 89). According to the Court of Justice, if a vehicle is equipped with a prohibited defeat device, Member States must ensure that the purchaser of that vehicle is entitled to compensation from the manufacturer of that vehicle if that purchaser has suffered damage as a result of that device ( legal consideration 91).
- 4.10. Volkswagen argued at the oral hearing on May 4, 2023 that the Court of Justice meant that the Framework Directive in conjunction with the Emissions Regulation only concerns the protection of the interests of the individual buyer who purchases a vehicle that is equipped with a prohibited tampering device. instrument *insofar as* the vehicle in question cannot be registered or resold because the EC type-approval is no longer valid or has been withdrawn and the consumer has suffered damage as a result. In the opinion of the subdistrict court judge, this argument is based on an incorrect (because: too limited) reading of the considerations of the Court of Justice.
- 4.11. In support of its position, Volkswagen refers to legal considerations 83 and 84 of the judgment of the Court of Justice. In these legal considerations, the Court of Justice examines in more detail the situation in which the approval authority has granted an EC type-approval without that authority being aware of the presence of a defeat device. The Court of Justice first explains that this may lead to withdrawal of the EC type-approval by the approval authority or the granting of a new EC type-approval (paragraph 83). It may also affect the validity of the EC type-approval and, by extension, that of the CvO (legal consideration 84). Finally, the Court of Justice considers that, in view of this, a prohibited defeat device may " *in particular* " create uncertainty as to the possibility of registering, selling or putting into service the vehicle and that this uncertainty may entail damage ( legal consideration 84). The subdistrict court judge reads legal considerations

83 and 84 as meaning that the Court of Justice - after the general explanation that leads to the conclusion in legal consideration 82 - gives examples of uncertainties/obstacles that consumers may encounter if their vehicle is equipped with a prohibited defeat device. If the Court of Justice had meant that consumers can only derive protection from the Framework Directive and the Emissions Regulation if one of the specifically mentioned risks occurs (the risk of not being able to register or resell the vehicle because the type-approval is no longer valid and /or has been withdrawn), it would be obvious if the Court of Justice had explicitly considered this in its assessment. That is not the case. *Moreover, at the time of the purchase of the car by [A], there was also the "uncertainty" mentioned by the Court of Justice about the admission of the car as a result of the presence of the defeat device, so that it was ruled by the Court of Justice The example outlined (also) occurred here.*

- 4.12. In view of the foregoing, 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 therefore fails and does not preclude a claim for damages.

(5) Tort - cheating

- 4.13. 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 [A], with its conduct. This 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!*" **Z**.

(6) Tort - unfair trade practices

*Does the law on unfair commercial practices apply here?*

- 4.14. The subdistrict court judge considers that the regulation on unfair commercial practices in the Dutch Civil Code applies to commercial practices of 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). **8**

- 4.15. 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. According to Article 6:193a paragraph 1 sub d of the Dutch Civil Code, a commercial practice is 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.

- 4.16. 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. This commercial practice consists of manufacturing cars that were equipped with prohibited tampering software for the purpose of obtaining a type-approval, subsequently issuing a CoO and then placing the cars on the market (in Europe, including the Netherlands) so that they could be sold and delivered to buyers. Volkswagen has used various means of communication to market 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. Volkswagen was therefore actively involved in the sales process. These are commercial practices as referred to in the legal regulations on unfair commercial practices. The fact that Volkswagen did not sell the cars in question directly to consumers, but through the intermediary of car dealers/importers, does not alter this.

*Unfair commercial practices: the legal framework*

- 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 second 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, insofar as relevant here, 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 [A] as a consumer*

4.19. The subdistrict court judge is of the opinion that Volkswagen is guilty of unfair commercial practices towards [A] as a consumer and has therefore acted unlawfully towards [A]. This is based on (a) the general requirements of Article 6:193b paragraph 2 of the Dutch Civil Code, (b) Article 6:193c of the Dutch Civil Code (misleading commercial practice in general), and (c) Article 6:193g of the Dutch Civil Code (black list of misleading commercial practices). This concerns three separate grounds, each of which (separately) leads to the conclusion that Volkswagen has carried out a commercial practice that is unfair. This is explained below.

*(a) Unfair commercial practice pursuant to 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.

4.21. According to Article 6:193a paragraph 1 sub f of the Dutch Civil Code, professional diligence is defined as: "[the] normal level of special skill and care that can reasonably be expected of a trader towards consumers, in accordance with the responsibility resting on him, arising from the professional standards and fair market practices applicable to that trader." In the opinion of the subdistrict court, the installation, use and concealment of prohibited manipulation software in (diesel) cars produced for the consumer market is clearly contrary to the careful conduct that can be expected of 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 parts. By placing the cars in question on the market, Volkswagen gave consumers the impression that they met the legal requirements. However, that was not the case, because the type approvals were only obtained through the use of a prohibited defeat device. Approval was therefore obtained fraudulently.

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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 Foundation has pointed out that Volkswagen is a member of the European trade association for car manufacturers (ACEA) and has therefore committed to the sector code *Automotive Industry Guiding Principles to Enhance Sustainability Performance in the Supply Chain* from March 2014. Volkswagen has the applicability in this procedure of these *Guiding Principles* is not disputed. The subdistrict court judge is of the opinion that the professional standard applicable in this case can be derived from these *Guiding Principles*. This states, among other things, that car manufacturers strive to reduce their ecological footprint. It is also established that Volkswagen applies an *Environmental policy* with regard to its activities and products. It expressly sets the goal of minimizing the environmental impact in all its activities and contributing to solving environmental problems at both a regional and global level. 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* and the *Environmental policy* of Volkswagen itself and cannot be reconciled with the stated aim of Volkswagen to reduce its carbon footprint and impact on the environment. The conclusion is therefore that Volkswagen 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. By its actions regarding the use of the manipulation software, Volkswagen has deprived consumers of the opportunity to make a fully informed choice. Volkswagen's position that, in summary, environmental and sustainability considerations play a very subordinate role for the average consumer when purchasing a car, cannot help it in this context. The question of whether and to what extent consumers are guided by environmental considerations in their purchasing decisions is different from the question of whether consumers would also have purchased the cars in question if they had known that they were equipped with defeat software. Moreover, the subdistrict court judge is of the opinion that this position of Volkswagen is not valid, as it has been contradicted by the Foundation and Volkswagen has insufficiently substantiated this position in the light of this. The subdistrict court judge explains this in further detail in legal consideration 4.41



(where the subdistrict court judge further discusses the causal link between the unlawful act and the damage suffered by [A]).

(b) *Misleading commercial practices pursuant to Article 6:193c paragraph 1, opening words and (b) of the Dutch Civil Code*

- 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. This may involve the general presentation of information regarding the main characteristics of the product, such as benefits, design, composition, suitability for use, possible uses, specification, results to be expected from its use or the results and essential characteristics of tests or checks carried out on the product, as a result of which the average consumer makes or may make a decision about a contract that he would not otherwise have taken. 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. **10**
- 4.27. In the opinion of the subdistrict court, misleading information can also include environmental claims or 'green claims'. Such claims 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. **11** 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. **12** 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. An environmental claim can even be misleading if the information is factually correct, but the claim deceives or is likely to deceive the average consumer in any way, including through its 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. **13**
- 4.28. Against this background, the subdistrict court judge is of the opinion that Volkswagen, with its statements as shown above under 2.3 and 2.4, has given the impression that its diesel cars equipped with an EA 189 engine deliver exemplary performance in terms of the environment and sustainability, or at least cause less damage to the environment than other cars do. With regard to the point 2.3. Although Volkswagen has argued that the statements mentioned do not specifically relate to [A]'s car, the Foundation has argued that the technology of the engine mentioned there (TDI) is the same as the engine of [A]'s car. A . The subdistrict court judge considers this sufficiently plausible and [A] was therefore entitled to rely on those statements. However, in the opinion of the subdistrict court judge - as the ACM has ruled - the environmental claims made by Volkswagen 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 **14** . However, 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.
- 4.29. 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.
- 4.30. In view of the above, the subdistrict court concludes that Volkswagen provided information to consumers - and therefore also to [A] - 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, which enabled the average consumer to make a contract decision that he would not otherwise have taken.
- (c) *Misleading commercial practice pursuant to Article 6:193g, opening words and under d, Dutch Civil Code*
- 4.31. 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 of the Dutch Civil Code that it is misleading under 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 claim such a thing without meeting the condition for the recommendation, recognition or approval has been fulfilled. This is by definition an unfair commercial practice.

- 4.32. 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.
- 4.33. 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, because the type approval was obtained on the basis of incorrect information.

(7) Conclusion of unlawful conduct

- 4.34. Volkswagen is guilty of (a) violation of the Emissions Regulation, (b) fraud and (c) unfair commercial practices towards [A]. Volkswagen acted unlawfully towards [A] on each of those (separate) grounds. The unlawful conduct can also be attributed to Volkswagen, which has not been a subject of debate between the parties.

(8) Did [A] suffer damage as a result of Volkswagen's unlawful actions?

- 4.35. The unlawful conduct of Volkswagen towards [A] as a consumer, as established above, obliges Volkswagen to compensate the damage suffered by [A] as a result. It must be assessed whether [A] actually suffered damage and, if so, whether there is a causal link between Volkswagen's unlawful actions and the damage. The subdistrict court judge considers the following in this regard.
- 4.36. When assessing the damage and the causal link, a comparison must be made between the financial situation that the injured party is actually in and the financial situation that he would have been in if the unlawful act were ignored. In principle, the injured party must state and, if necessary, prove that he has suffered damage and that that damage is the result of the unlawful act. But strict requirements may not be imposed on the injured party in this context, because the perpetrator of the tort has deprived the injured party of the opportunity to provide certainty about what would have happened in the hypothetical situation. The Supreme Court has expressly ruled this way before in a case about income damage as a result of reduced work capacity after an accident. **15** The subdistrict court judge sees no reason to rule differently in the present case. **16** In short, a reduced standard of proof applies (no strict requirements) and an assessment of expectations based on a weighing of good and bad probabilities is sufficient for proof. The judge has a considerable degree of freedom in this assessment.
- 4.37. The damage suffered by [A] and the causal link between this damage and Volkswagen's unlawful actions must therefore be determined by making a comparison between the actual situation in which [A] is and the situation in which he (presumably) would have been if Volkswagen's unlawful conduct had not occurred (i.e. if the car had not been equipped with the (prohibited) manipulation software and no deception had occurred). The factual situation is known and consists of the fact that [A] purchased a car equipped with defeat software, of which [A] was not and could not have been aware. What matters is establishing the hypothetical situation in this specific case. The subdistrict court judge must answer the question in what situation [A] would (presumably) have been in if the car did not contain manipulation software at the time of purchase and the actual (environmental) performance of the car was known. In that case, two main scenarios are conceivable.
- 4.38. In the first scenario, [A] would not have bought the car at all. Whether and, if so, how much damage he suffered depends on what he would have done in that situation. The alternatives that [A] had should be taken into account. For example, he could have bought a different car or he could not have bought a car (for the time being).
- 4.39. In the second scenario, [A] would still have been willing to buy the car, but at a lower price. It must be assumed that the seller would also have agreed to that lower price.
- 4.40. The Foundation primarily argued that the first scenario would have occurred in the hypothetical situation. If [A] had known when purchasing the car that the car did not meet the characteristics that were presented to him - namely that the car was strong, economical and clean at the same time - he would never have bought the car. [A] also stated at the hearing that environmental considerations played a role in his choice to purchase the car. He said he bought the car because of the combination of strength, power and durability. If he had been aware of the actual environmental performance of the car, he would not have bought the car, according to [A].

- 4.41. The subdistrict court judge assumes that the car in the hypothetical situation would have had other – less favorable – properties than in the actual situation, at least with regard to its environmental performance. After all, the manipulation software was designed to make the car appear cleaner than it was. Following the Amsterdam District Court in the SCC proceedings, the subdistrict court judge, together with the ACM, assumes that the environment and sustainability can play a role in a purchase decision and that (also in the years in which the car was purchased) there is a “*growing environmental awareness*”. The fact that consumers view environmental pollution as undesirable does not automatically mean that consumers are prepared to give (heavy) weight to that aspect in their own purchasing decision. However, it does mean that if they had the choice between two cars, one of which was cleaner and more environmentally friendly than the other, but which were otherwise exactly the same, most consumers would choose the cleaner and more environmentally friendly car. The ACM has also considered that traders consciously respond with their advertising to the growing environmental awareness that influences the economic behavior of consumers. Such expressions are reflected in Volkswagen's sales information at the time. Although Volkswagen has relied on a study submitted by it which allegedly shows that environmental considerations hardly play a role for consumers in the purchasing decision of a car, the Foundation has rightly argued that the study was only carried out among 36 car buyers in the Netherlands. British city[.]. This means that there is no question of a thorough and representative investigation and the subdistrict court judge therefore attaches only limited value to this. In addition, Volkswagen has also responded to the “growing environmental awareness” among potential car buyers in its marketing activities by explicitly pointing out that its engines are clean and gentle on the environment. This indicates that Volkswagen itself also believes (or was) that environmental considerations can play a role for consumers when purchasing a car.
- 4.42. Now that the environment and sustainability can play a certain role in the purchasing decision of a car, the subdistrict court judge considers it sufficiently plausible that [A] would not have bought the car if the car did not contain manipulation software and the actual (environmental) performance of the car was known, as [A] also stated at the hearing. In short, there is a causal link between Volkswagen's unlawful actions and the damage suffered by [A] to be discussed below.
- 4.43. The next question is whether and if so, [A] would be in a more favorable financial position in the hypothetical situation than in the actual situation. This is decisive for determining (the extent of) [A]'s damage. When determining the extent of the damage, according to settled case law, no stringent requirements may be imposed on the injured party's obligation to provide damages. The injured party only needs to state the facts from which it can be concluded that he has suffered damage. It is important that the judge estimates the damage in the manner that is most consistent with its nature and that the extent of the damage is estimated if that extent cannot be determined accurately (Article 6:97 of the Dutch Civil Code). The judge has a large degree of freedom in this regard.
- 4.44. According to the Foundation, the damage suffered by [A] should be estimated at:  
€17,670.00, an amount equal to the purchase price of the car minus the trade-in value. The subdistrict court judge does not follow the Foundation in this. When determining the extent of the damage, it is not only important what [A] would not have done (bought the car), but also what he would have done in the hypothetical situation (if he had not bought the car). . At the hearing, [A] indicated that he would have bought another car in that case. Assuming that this is correct, the concrete determination of the comparison situation remains surrounded by uncertainty (for example, questions arise such as: which car had [A] bought? And at what purchase price? How does that car compare to the car he bought in the actual situation?). Due to this uncertainty and the lack of sufficiently clear starting points, the subdistrict court judge refrains from concretely determining the comparison situation. The subdistrict court judge instead considers it appropriate - and possible on the basis of Article 6:97 of the Dutch Civil Code - that the damage suffered by [A] is estimated at the difference between the purchase price paid by [A] and the market value that the car had at the time of purchase. moment of purchase in the actual situation (i.e. with the manipulation software). **17**
- 4.45. Until the moment the defeat device was discovered and could be removed with the help of the update, [A] had a car that formally, but materially did not, meet the requirements of the Emissions Regulation and which was therefore wrongly granted a type-approval had obtained. The car purchased by [A] therefore had a defect and a car that has a defect will be valued less than a car that does not have that defect **18**. This single fact already causes damage. After all, anyone who can choose between a product that does not meet the legal requirements and the same product that does meet those requirements, will be willing to pay less for the product that does not meet the legal requirements than for the product that does meet them. The subdistrict court judge therefore considers it plausible that the market value of the car at the time of purchase was lower than the purchase price that [A] paid for the car.
- 4.46. According to Volkswagen, the market value of the car is not lower than the purchase price that [A] paid for the car. In support of its position, it refers to a study carried out on its behalf by [company 2], which allegedly shows that the residual value of the EA189 vehicles on the second-hand market did not decrease after it became known that the vehicles were equipped with the manipulation software. **19** The price development was examined from the moment the presence of the manipulation software became known (mid-September 2015). However, the damage must be calculated at the time that [A] concluded the purchase agreement (November 2013). The report from [company 2] therefore concerns the

market situation almost two years later. In this context, the Foundation has rightly pointed out that the mere fact that there was no downward trend in the market value of the vehicles on the second-hand market after the presence of the manipulation software became known in mid-September 2015 does not mean that [A] has suffered damage. According to the Foundation, there are other factors (for example the scarcity of second-hand models at a certain time) that can influence the market value. These factors were not included in [company 2]'s research. The Foundation, in turn, has submitted an expert report by Mr [B] to the proceedings as substantiation, in which Mr [B] concludes that the power comparison made in Volkswagen's research is incorrect, partly for these reasons. **20** Mr [B] further explains why, in his opinion, [company 2]'s research contains insufficient information to reach reliable conclusions about price developments. In light of this, the subdistrict court judge is of the opinion that Volkswagen has not sufficiently substantiated the existence of damage in the form of a lower market value at the time of purchase.

4.47. Finally, it must be assessed what the market value of the car was at the time of purchase. In the given circumstances, the subdistrict court judge estimated [A]'s damage at € 1,500.00. 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. **21** In the opinion of the subdistrict court judge, a damage amount of € 1,500.00 does sufficient justice to the violation of the Emissions Regulation, Volkswagen's unfair commercial practices and the personal circumstances of [A] and is therefore sufficiently effective, deterrent and proportionate.

#### (9) Conclusion

4.48. The declaratory judgment sought by the Foundation will be granted. In addition, Volkswagen is ordered to pay the Foundation compensation of € 1,500.00, plus the statutory interest claimed from the day of summons until the day of full payment.

#### (10) Litigation costs

4.49. Volkswagen, as the largely unsuccessful party, will be ordered to pay the legal costs. The legal costs on the part of the Foundation are estimated at:

€100.89 in costs for the summons, €996.00 in court fees and €464.00 (2 points x €232.00) in representative's salary. That is a total of € 1,560.89.

### **5 The decision**

The subdistrict court judge:

- 5.1. declares that Volkswagen has acted unlawfully towards [A];
- 5.2. orders Volkswagen to pay the Foundation (as assignee of Mr [A]) damages of € 1,500.00, plus statutory interest on this amount from September 15, 2020, being the day of the summons, until the day of full payment;
- 5.3. orders Volkswagen to pay the legal costs on the part of the Foundation until this judgment is estimated at € 1,560.89;
- 5.4. declares this judgment provisionally enforceable with regard to the convictions referred to under 5.2 and 5.3;
- 5.5. rejects the more or otherwise advanced.

This judgment was delivered by Mr. HJ ter Meulen and pronounced in public on July 26, 2023.

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- 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 Regulation (EC) No. 715/2007 of the European Parliament and of the Council of 20 June 2007 on the type-approval of motor vehicles with regard to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and access to repair and maintenance information.
  - 3 ACM decision of October 18, 2017, case no. ACM/17/003870.
  - 4 CJEU 17 December 2020, case C-693/18, ECLI:EU:C:2020:1040 (*X/CLCV and others*).
  - 5 Rechtbank Amsterdam, 14 juli 2021, ECLI:NL:RBAMS:2021:3617 (*Stichting Volkswagen Car Claim - Volkswagen c.s.*).
  - 6 HvJ EU 21 maart 2023, zaak C-100/21, ECLI:EU:C:2023:229, (*QB/Mercedes-Benz Group AG*).
  - 7 Zie het door de Stichting in de spreekantekeningen onder randnummer 1.1. aangehaalde artikel uit de Süddeutsche Zeitung van 9 juli 2019.
  - 8 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.
  - 9 vgl. Rechtbank Amsterdam, 14 juli 2021, ECLI:NL:RBAMS:2021:3617 (*Stichting Volkswagen Car Claim - Volkswagen c.s.*) en de rechtbank Noord-Nederland van 4 april 2023 (ECLI:NL:RBNNE:2023:1285), r.o. 4.21 e.v.
  - 10 HvJ EU 16 april 2015, zaak C-388/13, ECLI:EU:C:2015:225 (*Nemzeti/UPC*).
  - 11 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.
  - 12 Richtsnoeren OHP, p. 121.
  - 13 Richtsnoeren OHP, p. 122/123.
  - 14 Rapport TNO (productie 17 de Stichting) en rapport Umwelt Bundesamt (productie 2 en 3 Volkswagen).
  - 15 HR 17 februari 2017, ECLI:NL:HR:2017:273, r.o. 3.2.
  - 16 Zie ook A-G Valk in zijn conclusie van 28 mei 2021, ECLI:NL:PHR:2021:532, randnummer 3.49, waarin hij pleit voor een algemene (bewijs)regel in dit verband.
  - 17 Een dergelijke schatting is eerder toegepast door het hof 's-Hertogenbosch in een arrest van 9 maart 2021, ECLI:NL:GHSHE:2021:690, r.o. 3.4.7. Zie hierover ook A-G Valk in zijn conclusie van 28 mei 2021, ECLI:NL:PHR:2021:532, randnummer 3.57. Zie verder de uitspraken van de rechtbank Noord-Holland van 22 maart 2023 (ECLI:NL:RBNHO:2023:2556) en de rechtbank Noord-Nederland van 4 april 2023 (ECLI:NL:RBNNE:2023:1285) in soortgelijke zaken tussen de Stichting en Volkswagen, waarin de schade op gelijke wijze wordt begroot.
  - 18 Zie ook HvJ EU 9 juli 2020, C-343/19, EU:C:2020:534 (*VFK/Volkswagen AG*), rov. 34, en Rechtbank Amsterdam, 14 juli 2021, ECLI:NL:RBAMS:2021:3617 (*Stichting Volkswagen Car Claim - Volkswagen c.s.*), rov. 16.3.
  - 19 Productie 5 van Volkswagen.
  - 20 Productie 23 van de Stichting.
  - 21 Zie Rechtbank Amsterdam, 14 juli 2021, ECLI:NL:RBAMS:2021:3617 (*Stichting Volkswagen Car Claim - Volkswagen c.s.*), rov. 18.29. Zie in gelijke zin (maar dan voor nieuw aangeschafte auto's) ook rechtbank Noord-Holland 22 maart 2023, ECLI:NL:RBNHO:2023:2556, en rechtbank Noord-Nederland 4 april 2023, ECLI:NL:RBNNE:2023:1285.
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