

## ECLI:NL:RBNHO:2023:2556

<b>Authority</b>	North Holland District Court
<b>Judgment date</b>	22-03-2023
<b>Date of publication</b>	23-03-2023
<b>Case number</b>	318789
<b>Jurisdictions</b>	Contract law
<b>Special characteristics</b>	Bottom case
<b>Content indication</b>	Tort 6:162 BW; unfair commercial practices 6:193 BW; compensation in kind 6:103 BW; damage estimate 6:97 BW; declaration of unlawful conduct against the buyer of a car equipped with manipulation software.
<b>Locations</b>	Rechtspraak.nl YES 2023/59



[Enriched pronunciation](#)

### Pronunciation

#### COURT OF North Holland

Civil rights

Location Haarlem

Case number: C/15/318789 / HA ZA 21-408

#### Judgment of March 22, 2023

in the case of

the foundation

**VOLKSWAGEN GROUP DIESEL EFFICIENCY FOUNDATION** ,

in Amsterdam,

demanding party,

hereinafter referred to as: the Foundation,

lawyer: JH Lemstra in Amsterdam,

in return for

the legal entity under German law

**VOLKSWAGEN AKTIENGESELLSCHAFT** ,

in Wolfsburg, Germany,  
defendant party,  
hereinafter referred to as: Volkswagen AG,  
lawyer: JK van Hezewijk in Amsterdam.

## 1 The procedure

1.1. The course of the procedure is evident from:

- the summons of June 11, 2021;
- deed containing submission of exhibits 1 to 26;
- a further exhibit 27 on the part of the Foundation in the conclusion of the response in the incident;
- the judgment in the incident of March 2, 2022;
- the conclusion of the answer of August 17, 2022 with exhibits 1 to 5;
- the docket decision of July 6, 2022 and the documents referred to therein;
- the interim judgment of November 9, 2022;
- a B8 form dated February 2, 2023 with a deed of submission of supplementary production 28 dated February 13, 2023 from the Foundation;
- the oral hearing of February 13, 2023, in which the parties made use of speaking notes and of which other notes were kept by the clerk.

1.2. Finally, the verdict has been determined.

## 2 The case in brief

2.1. Mr. [A.] (hereinafter: [A.]) purchased a Volkswagen Golf TDI in 2010. In 2015, this car, like other cars with an EA diesel engine, turned out to be equipped with software that used 'switching logic' to keep nitrogen oxide (NOx) emissions artificially low during tests. The cars equipped with this manipulation software are also referred to as 'cheating diesels'. The Foundation, a claims foundation that represents the interests of consumers like [A.], is seeking a declaratory judgment that Volkswagen AG has acted unlawfully towards [A.]. This claim is granted because it concerns an unfair commercial practice and therefore unlawful conduct. The court is of the opinion that the unlawful conduct is attributable to Volkswagen AG as the designer of the EA 189 diesel engine, because it must be assumed that it deliberately included a manipulation instrument in the control software of that engine. The other requirements of relativity, damage and causation have also been met. The court estimates [A.]'s damage as the loss in value of the car (the overpaid purchase price), namely - taking into account the violated standard - an amount of € 3,000.00.

The claim for compensation in kind by taking back the car against reimbursement of the purchase price is rejected because it does not fit within the compensation system of Dutch law. Nor does the court see any reason to estimate the damage at the purchase price of the car less the residual value.

## 3 The facts

3.1. Volkswagen AG is a car manufacturer of, among others, the Volkswagen car brand.

3.2. The Foundation is a claims foundation and its aim - in short - is to represent the interests of consumers, including Mr. [A.] (hereinafter: [A.]) who have suffered or will suffer damage as a result of unlawful actions by Volkswagen AG, which damage is directly or indirectly related to (the emissions of) (among other things) the 2.0 liter four-cylinder diesel engine of, among others, the Volkswagen Golf TDI.

3.3. In July 2010, [A.] purchased a new Volkswagen Golf 2.0 TDI with an EA 189 diesel engine (hereinafter: the car) from a Dutch car dealer for € 32,949.95.

- 3.4. A Volkswagen brochure from June 2010 about the Volkswagen Golf (hereinafter: the brochure) states on pages 43 and 47 respectively:

*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 no less efficient TDI diesel engines with common rail technology are exceptionally economical and strong. All diesel engines are equipped with a particulate filter as standard, allowing you to enjoy high-quality technology while protecting the environment.*

- 3.5. In mid-September 2015, it became known that Volkswagen AG had equipped cars on a worldwide scale – including cars in the Netherlands containing an EA 189 diesel engine – with software that artificially reduces nitrogen oxide (NOx) emissions during tests. was kept low (hereinafter: the manipulation software). The cars equipped with manipulation software are also referred to hereinafter as 'cheap diesels'.
- 3.6. [A.] has transferred his claim(s) against Volkswagen AG related to the manipulation software to the Foundation. In addition, the Foundation has received an irrevocable power of attorney from Ten Boeke to collect the claim(s), or at least to act as agent for this purpose.
- 3.7. By decision of October 18, 2017 (hereinafter: the Fine Decision), the ACM imposed a fine of €450,000 on Volkswagen AG for unfair commercial practices.
- 3.8. Insofar as relevant to this judgment, the ACM Fine Decision reads as follows:

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

*94. Volkswagen AG engaged in a commercial practice consisting of manufacturing cars, intended inter alia for consumers, which, as shown above, were equipped with prohibited tampering software. It has used various means of communication and advertising channels in its business practices, such as websites and brochures. In the following paragraphs, ACM will address the question of whether Volkswagen AG provided misleading information as referred to above. (...)*

*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 or gives the impression that its diesel cars have sustainability have exemplary performance, 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 (...)*

*101. Furthermore, Volkswagen AG cannot claim that the diesel cars meet the Euro 5 standard, because the conditions for approval have not been met due to the presence of prohibited defeat software. At the very least, such a mention 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. (...)*

*103. The said environmental claims would allow the average consumer to take a contract decision 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 with engine type EA189 were therefore perhaps 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."*

- 3.9. By decision of 25 October 2018, the ACM declared Volkswagen AG's objections to the Fine Decision unfounded and upheld the decision, supplementing the reasons. Volkswagen has appealed against this decision, which appeal is still pending before the Rotterdam court. In the decision of October 25, 2018, the ACM considers, among other things, the following with regard to the question of whether there are unfair commercial practices:

34. *The commercial practice underlying the conduct contrary to the requirements of professional diligence concerns the installation of prohibited defeat device software in the cars concerned as part of obtaining type-approval. Obtaining type approval is a necessary preparatory action before delivery and eventual sale of the car. This means there is a direct connection with the sale or delivery of the cars involved to consumers. Such necessary preparatory actions fall within the scope of the concept of commercial practice. If this were otherwise, the entire production process prior to placing a product on the market could be excluded from the scope of a commercial practice, which would be in direct contradiction with the broad scope of this concept.*

35. *The commercial practice underlying the provision of misleading information concerns advertising for the cars concerned (...). As described in the contested decision (...), Volkswagen AG supplies, among other things, the design of brochures for Dutch-language websites, templates for advertisements and product information used in commercials on the Dutch market. These actions undoubtedly qualify as a commercial practice as they are directly related to the sales promotion of the cars concerned in the Netherlands.*

36. *The commercial practice underlying the misleading commercial practice included in the blacklist concerns Volkswagen AG's claims that all conditions for type-approvals have been met in the context of issuing a CVO to obtain a registration certificate (...). Just like obtaining a type-approval, issuing a CVO is a necessary preparatory act before placing a car on the market. Such preparatory acts are directly related to the delivery of the cars concerned to consumers.*

- 3.10. On December 17, 2020, the Court of Justice of the European Union (hereinafter: the European Court) answered preliminary questions about the interpretation of the concept of 'defeat device' in Regulation (EC) No. 715/2007 (hereinafter: the Emissions Regulation). The European Court has ruled that the manipulation software implemented by Volkswagen AG in the 'cheating diesels' is a manipulation instrument as referred to in art. 3 paragraph 10 of the Emissions Regulation.
- 3.11. The car contained the manipulation software intended for this purpose.
- 3.12. On June 20, 2018, [A.] had the update offered by Volkswagen Netherlands to the software with which the switching logic was removed from his car (hereinafter: the update).
- 3.13. [A.] still has the car in his possession, at least on February 13, 2023.
- 3.14. On July 14, 2021, the Amsterdam court rendered judgment in the case between the Volkswagen Car Claim Foundation (hereinafter: SCC) and Volkswagen AG, among others (hereinafter: the SCC proceedings). The Amsterdam District Court has ruled, among other things, that Volkswagen AG – as far as the manipulation software is concerned – has acted unlawfully towards consumers who have purchased a tampering diesel. Volkswagen AG has filed an appeal against this judgment, which appeal is still ongoing.

#### 4 The dispute

- 4.1. The Foundation claims by judgment, as far as possible provisionally enforceable:
- a. **primary, subsidiary and more subsidiary** : to declare that Volkswagen AG has acted unlawfully towards [A.] and;
  - b. **primary** : to order Volkswagen AG to take over the car from [A.] against payment of EUR 33,089.95 (plus the statutory collection costs in accordance with the BIK graduated scale as well as the statutory interest on this amount from the date of summons until the day of payment), to be paid within four weeks after service of the judgment, or another term to be determined in good justice, on penalty of a penalty of EUR 500 per day;
  - c. **alternatively** : order Volkswagen AG to pay the Foundation as assignee or as authorized representative or as agent of [A.] an amount of € 30,089.95 plus the statutory collection costs in accordance with the BIK scale as well as the statutory interest on this amount from the date of summons until the day of payment;
  - d. **more alternatively** : order Volkswagen AG to pay to the Foundation as assignee or as authorized representative or agent of [A.] the damage suffered by [A.], to be drawn up by statement and settled in accordance with the law;
  - e. **primary, subsidiary and more subsidiary** : order Volkswagen AG to pay the costs of these proceedings.
- 4.2. Volkswagen AG is defending itself. Volkswagen AG concludes that the Foundation is inadmissible or that the Foundation's claims are rejected, with provisionally enforceable ordering the Foundation to pay the costs of these proceedings, plus statutory interest with effect from the eighth day after service of the judgment until the day of full payment.
- 4.3. The parties' statements will be discussed in more detail below, where necessary.

## 5 The assessment

### *International jurisdiction and applicable law*

- 5.1. Because Volkswagen AG is established abroad and the claims therefore have an international character, the first question must be answered whether the Dutch court has jurisdiction and which law applies.
- 5.2. Volkswagen AG is established in Germany, so the jurisdiction of the Dutch court must be determined on the basis of Regulation (EU) No. 1215/2012 (Regulation on Brussels I *bis*). As considered in the incidental judgment, the Dutch court, on the basis of art. 7 sub 2 of Brussels I *bis* is authorized to hear the Foundation's claims against Volkswagen AG because the basis of the claims is tort and the damage occurred in the Netherlands. The Court of Justice confirmed that the damage occurs in the Member State where the car was purchased in its judgment of 9 July 2020 (case C-343/19).
- 5.3. The determination of the law applicable to the claims should be made on the basis of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), unless the legal relationship is specifically regulated by a treaty. The latter is not the case here. Under Article 4(1) Rome II, Dutch law applies, because the Netherlands is the place where the alleged damage occurred after the purchase of the car.

### Foundation position (briefly summarized)

- 5.4. The Foundation states that Volkswagen AG acted unlawfully towards [A.] 1) by putting a car on the road that did not comply with the Emissions Regulation and 2) by being guilty of unfair and/or misleading commercial practices. [A.] would not have bought the car if he had known that it was equipped with manipulation software; he wanted to buy a 'clean' car, but Volkswagen AG misled [A.] in his purchasing decision.

Volkswagen AG is liable for the damage suffered by [A.], which must be estimated (primarily, on the basis of Article 6:103 of the Dutch Civil Code (hereinafter: Dutch Civil Code) on the purchase price against the car being taken back by Volkswagen AG or (subsidiarily) on the purchase amount minus the residual value or (more alternatively) an amount of damage to be estimated on the basis of Article 6:97 of the Dutch Civil Code 1, according to the Foundation.

### Volkswagen AG position (briefly summarized)

- 5.5. Volkswagen AG argues that there is no unlawful conduct or tort. According to Volkswagen AG, violation of the Emissions Regulation does not provide grounds for a private law action, because the violated standard does not serve to protect specific property interests of [A.], so the relativity requirement is not met. According to Volkswagen AG, there are also no unfair commercial practices. In this context, Volkswagen AG argues, among other things, that the Foundation is trying to circumvent the lack of relativity by stating that the violation of the Emissions Regulation is an unfair commercial practice. In addition, there is only room for liability on the part of the manufacturer in exceptional cases, which do not arise, according to Volkswagen AG.

Furthermore, Volkswagen AG argues that there is no actual financial loss suffered. Moreover, even if this were different, the Foundation has not demonstrated that the damage is causally related to the allegedly violated standard.

- 5.6. Below, the court will first address the question of whether Volkswagen AG is guilty of unfair commercial practices towards [A.]. It is important, among other things, whether Volkswagen AG should be regarded as a trader within the meaning of the Unfair Commercial Practices Act (Article 6:193a-j BW, hereinafter: WOH). If this is the case and it is established that there are unfair commercial practices attributable to Volkswagen AG, the declaratory judgment will be granted, unless the defense is successful that the relativity requirement has not been met. The answer to the question of whether violation of the Emissions Regulation is in itself unlawful towards [A.] can then remain open.

### *Trader within the meaning of the WOH?*

- 5.7. The court, like the ACM, is of the opinion that Volkswagen AG must be regarded as a trader within the meaning of the WOH. Given the purpose of the Unfair Commercial Practices Directive (2005/29/EC) on which the WOH is based, the term 'trader' must be interpreted broadly. It is not disputed what the ACM ruled about Volkswagen AG in the Fine Decision (under 50 and 53): "*It produces cars with the intention of selling them all over the world to consumers, among others. (...) and exports the cars to the Netherlands in collaboration with the importer, (...) Furthermore, Volkswagen AG provides the design, standard texts, templates and product information for the marketing of the cars concerned in the Netherlands.*" Although Volkswagen AG does not do business directly with consumers, in view of the above it is actively

involved in the sales process with consumers to such an extent that it is a trader within the meaning of Article 6:193a, first paragraph, opening words and (b) of the Civil Code. (hereinafter: BW) applies. The court agrees with the ACM that effective consumer protection would be seriously undermined if the ban on unfair commercial practices only applied to the last link in the sales chain to the consumer.

*Commercial practice?*

- 5.8. The court is also of the opinion, just like the ACM, that " *the installation of prohibited manipulation software in the cars involved as part of obtaining type approval*" and " *the making of advertisements for the cars involved (...). [and supplying] the design of brochures for the Dutch-language websites, templates of advertisements and product information used in commercials on the Dutch market.* " (see the quote above under 3.9) are actions that fall within the scope of the concept of commercial practice within the meaning of the WOH. After all, this concerns necessary preparatory actions for the delivery and ultimate sale of the vehicles concerned to consumers or actions directly related to the sales promotion of the cars concerned in the Netherlands.
- 5.9. Volkswagen AG's defense does not change this. It argues that for the classification as a commercial practice it is decisive whether there is conduct that is directly related to the sales promotion, sale or delivery of a product to consumers, which involves direct interaction with consumers and that - as the court understands - the case of the use of a prohibited manipulation instrument (with the 'switching logic') is not the case. However, in view of the considerations above in 5.7 and 5.8, there is conduct that is directly related to the sale or delivery of the car to a consumer, because the use of the prohibited defeat device has led to the obtaining of a type-approval that is necessary to be able to sell/deliver the car (via intermediaries) to a consumer. The defense therefore fails.

*Unfair commercial practices within the meaning of the WOH?*

- 5.10. The Foundation states that there are unfair commercial practices because Volkswagen AG acted contrary to the requirements of professional diligence and actively limited [A.]'s ability to make an informed decision (Article 6:193b paragraph 2 of the Dutch Civil Code). ), is guilty of a misleading commercial practice as referred to in art. 6:193b paragraph 3 sub a in conjunction with art. 6:193c paragraph 1 sub b of the Dutch Civil Code and misleading commercial practices as referred to in art. 6:193g sub d BW.
- 5.11. Volkswagen AG disputes that a breach of professional diligence has occurred and that Volkswagen AG's actions have noticeably influenced the average consumer's ability to make a decision. She also disputes that there is a misleading commercial practice within the meaning of Article 6:193c and 6:193g sub d of the Dutch Civil Code.
- 5.12. Since this concerns the fraudulent acquisition of a type-approval by using a defeat device, there is an intentional violation of the applicable rules, which can be regarded as an unfair commercial practice within the meaning of the WOH. After all, by marketing vehicles, such as the car, with defeat software, Volkswagen AG gave the impression that they met the legal requirements, which was formally the case, but materially not, because the type approvals had been obtained by fraud, namely by using a prohibited manipulation instrument. The court adopts the ACM's judgment that this action is contrary to the requirements of professional dedication due to a conflict with care and special skill . It also adopts the ACM's assessment that the cumulative requirement has been met that the actions of Volkswagen AG have noticeably limited the average consumer's ability to make an informed decision. The use of the manipulation software and the concealment thereof influence the behavior of the consumer. This actively limits the average consumer's ability to make an informed decision and encourages him to make a decision that he might not otherwise have made if he had been properly informed about the use of the defeat device. This means that both requirements of Article 6:193b paragraph 2 of the Dutch Civil Code have been met and this therefore constitutes an unfair commercial practice and therefore unlawful conduct. Volkswagen AG's reference to a study on consumer motivations when purchasing a car, which shows that less than 2% of consumers indicate that they purchase their vehicle for environmental reasons and that other factors such as ease of use, price and design and even color being of significantly more weight does not change that. 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 bought cheating diesels if they had known that they were equipped with manipulation software. Moreover, the statements made by Volkswagen AG itself in the brochure from June 2010 (one month before [A.] purchased the car) show that Volkswagen AG recognizes that sustainability does indeed play a role in the decision-making of the average consumer in June 2010. The brochure states on pages 43-47, among other things (underlined by the court):

***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.*

(...)

The advantages of the Golf Blue Motion Technology fit seamlessly with your energy- and environmentally-conscious lifestyle . Very friendly consumption makes this car the most economical in its class. The significantly lower CO<sub>2</sub> emissions place the Golf BlueMotion Technology in a separate class of cars. A special performance that is possible thanks to, among other things, adapted engine software, energy-saving tires and optimized aerodynamics. (...)

(...)

### **Diesel engines**

The no less efficient TDI diesel engines with common rail technology are exceptionally economical and strong. All diesel engines are equipped with a particulate filter as standard, allowing you to enjoy high-quality technology while protecting the environment . (...)

The court also does not agree with Volkswagen AG's defense that Volkswagen AG's environmental policy must be approached 'holistically' so that the manipulation software with the switching logic does not conflict with it. A holistic approach to environmental policy does not give Volkswagen AG license to use a prohibited defeat device to give the impression that the car emits less nitrogen oxide than it actually did when used outside a test environment.

The (interim) conclusion from the above is that there is an unfair commercial practice within the meaning of art. 6:193b paragraph 2 of the Dutch Civil Code and therefore of unlawful conduct.

- 5.13. In addition, there is also a misleading commercial practice that is on the blacklist as referred to in Article 6:193 g of the Dutch Civil Code, namely Volkswagen AG's claims that all conditions for type approvals have been met in the context of issuing a certificate of conformity ( CVO) to obtain a registration certificate without meeting the conditions of that type approval. This is a misleading (and therefore unfair) commercial practice under all circumstances as referred to in Article 6:193b paragraph 3 sub a in conjunction with Article 193 c paragraph 1 sub b of the Dutch Civil Code and Article 6:193g sub d of the Dutch Civil Code. Volkswagen AG's defense that the type approval has always been valid does not alter this. After all, it has been established that from a material point of view the legal requirements had not been met because the type approvals had been obtained by fraud, namely by using a prohibited defeat device. Whether and to what extent the Euro 5 standard has or has not been achieved and whether and to what extent vehicles produced by Volkswagen AG emit less nitrogen oxide than vehicles from other car manufacturers is - contrary to what Volkswagen AG argues - not relevant; After all, this cannot alter the fact that the legal requirements for type approvals were not met in material terms.

- 5.14. Because the above has established that unlawful conduct has occurred, the court will grant the requested declaratory judgment.

Below, the court will address the question of whether the other requirements of Article 6:162 of the Dutch Civil Code have been met, namely attributability, relativity, damage and causal connection.

#### *Attributability of unlawful act*

- 5.15. The Foundation states that Volkswagen AG must prove, pursuant to Article 6:193j paragraph 2 of the Dutch Civil Code, that the unfair and/or misleading commercial practices are not its fault, nor can it be attributed to it on other grounds. Volkswagen AG disputes that the burden of proof with regard to information provided and attributability lies with it. Whatever the position regarding the burden of proof, the court is of the opinion that the unlawful conduct of Volkswagen AG as designer of the EA 189 diesel engine can be attributed to fault, because it must be assumed that they deliberately committed manipulation. instrument in the control software of that engine. This establishes that there is culpable unlawful conduct.

#### *Relativity*

- 5.16. There is no obligation to pay compensation if the violated standard does not serve to protect against the damage suffered by the injured party (Article 6:163 of the Dutch Civil Code). Volkswagen AG argues that this relativity requirement has not been met, because the Emissions Regulation does not protect vehicle buyers against financial damage. They cannot directly rely on (the violation of) the Emissions Regulation and the Foundation cannot avoid the lack of relativity by stating that the violation of the Emissions Regulation is an unfair commercial practice, according to Volkswagen AG.
- 5.17. This defense fails. The unfair commercial practices at issue here are not so much a violation of the Emissions Regulation as a violation of the standard for protecting the interests of an individual buyer of a motor vehicle under Directive 2007/46 2, in particular the interest not to acquire a vehicle equipped with a prohibited defeat device as referred to in Article 5(2) of the Emissions Regulation. The court agrees with the conclusion of the Advocate General of the Court of Justice of 2 June 2022 in case C-100/21 in response to preliminary questions about, among other things, Directive 2007/46 in conjunction with the Emissions Regulation. Although the Emissions Regulation as such and in particular Article

5(1) and (2) thereof do not directly aim to protect the interests of an individual purchaser of a motor vehicle equipped with a prohibited defeat device, the Emissions Regulation should be considered in the context of Directive 2007/46. The aim of this directive is to protect the interests of the individual buyer of a vehicle equipped with a prohibited defeat device. It follows from various provisions of Directive 2007/46 (cited by the Advocate General) that, in the context of an EC type-approval, the manufacturer must, among other things, comply with the requirements relating to the requirements set out in Article 5(1) and (2) of the Defeat instruments referred to in the Emissions Regulation. Only in that case may this manufacturer issue a CVO to the buyer of a vehicle that enables him to register or sell the vehicle. This certificate, which constitutes a guarantee, is therefore intended to protect the purchaser against failure by the manufacturer to fulfill its obligation to place on the market vehicles that comply with the applicable Union regulations. Because Volkswagen AG equipped the car with a prohibited defeat device, it violated a standard designed to protect the interests of the individual buyer, in this case the interest of [A.] not to acquire a vehicle equipped with a prohibited defeat device instrument as referred to in Article 5(2) of Regulation No 715/2007 which therefore does not have a correct (obtained) certificate. Contrary to what Volkswagen AG argues, as far as material interests are concerned, this is not just about the consumer's interest in being protected against (merely) the risk that a car cannot be registered or resold; In the court's opinion, this concerns broader protection, namely against loss of value of the car resulting from the fact that the car exhibits a defect following the disclosure of the manipulation software. The foregoing leads to the conclusion that the relativity requirement has been met for unfair commercial practices. The answer to the question of whether violation of the Emissions Regulation is in itself unlawful towards [A.] can remain open, as considered under 5.6.

#### *Injury*

5.18. The Foundation claims compensation for the damage that [A.] claims to have suffered as a result of the unfair commercial practices of Volkswagen AG and the violation of Article 5(2) of the Emissions Regulation. According to the Foundation, the damage should primarily be estimated at the amount of the purchase price (€ 32,949.95) and the higher fuel costs (€ 140.00) that [A.] had to incur. The Foundation primarily demands repossession of the car by Volkswagen AG against reimbursement of the purchase price on the basis of Article 6:103 of the Dutch Civil Code. In the alternative, the Foundation claims payment of damages in money in an amount of € 30,089.95, whereby the current trade-in value (€ 3,000.00) is offset against the amount of the purchase price and higher fuel costs. In a further alternative, it claims an estimate of the damage under art. 6:97 last sentence of the Dutch Civil Code, or reference to the damage assessment procedure.

Volkswagen AG disputes that [A.] suffered damage as a result of the manipulation software with the switching logic. She also disputes that there is a right to compensation other than in money and argues that [A.] has no interest in compensation other than in money that justifies the consequences thereof.

5.19. The court states first and foremost that establishing unlawful conduct does not mean that damage has been suffered as a result. Apart from causality (which will be discussed below in 5.28), the question of whether actual damage has been suffered as a result of the conduct must be answered by making a comparison between the actual situation and the hypothetical situation in which [A.] would have wrong when the unlawful conduct of Volkswagen AG is ignored. It is up to the Foundation to concretize the situations to be compared and to state the facts (and if necessary to prove) from which it can be deduced that damage has been suffered. No strict requirements may be imposed on the injured party's obligation to provide information regarding the extent of the damage (compare Supreme Court 9 December 2011, ECLI:NL:HR:2011:BR5211 and Supreme Court 17 February 2017, ECLI:NL:HR: 2017:273). Finally, the basic principle is that if the extent of the damage cannot be determined accurately, the court, notwithstanding the uncertainties associated with establishing the hypothetical situation that the car did not contain a defeat device at the time of purchase, will assess the damage on the basis of Article 6:97 BW will have to estimate or refer to the damage assessment procedure. Pursuant to Article 612 of the Code of Civil Procedure, the intention is for the damage to be determined as directly as possible in this procedure.

#### *Claim for payment of compensation other than in money by taking back the car*

5.20. The Foundation's claim for repossession of the car in combination with reimbursement of the purchase price is compensation that does not fit within the compensation system of Dutch law. Moreover, this is not a recent consumer purchase, but a car that was purchased more than twelve years ago and has driven approximately 200,000 km. Compensation for actual damage is also the starting point for compensation in kind within the meaning of Article 6:103 of the Dutch Civil Code. The court is of the opinion that the Foundation has not sufficiently substantiated the statement that compensation in kind must be paid in this case. The claim for repossession of the car against reimbursement of the purchase price will therefore be rejected. The court explains this in more detail below.

#### *Purchase price refund*

5.21. The statement that estimating the damage upon return of the car against payment of the purchase price is a sound approach that actually helps a consumer like [A.] does not convince the court. The Foundation also does not substantiate why the court should take into account the judgment of the Federal Trade Commission in the United States - a different jurisdiction than the Dutch - when assessing damages. Nor does the court follow the Foundation's argument that [A.]'s



damage consists of the purchase price, because he was misled when purchasing the car. Also, contrary to what the Foundation argues, it has not emerged that this method of damage assessment has previously been used in the Netherlands. The ruling of the Gelderland District Court to which the Foundation refers **3** concerns a completely different case, namely the annulment of a purchase agreement. That is not the case here. The fact that that ruling considers that any benefit enjoyed by the injured party should not be included in the damage calculation is also insufficient to assume in the case of [A.] that the damage would be equal to the purchase price. To the extent that the Foundation refers to the judgment of the Court of Appeal in 's-Hertogenbosch in the 'Staatsloterij case' **4** to substantiate its position, the court does not follow it either. Even if it were established that [A.] would not have bought the car if the facts were correct, the damage is not automatically equal to the purchase price. In that situation too, a comparison must be made between the hypothetical situation in which the car did not contain defeat software at the time of purchase and the actual situation in which this is the case.

5.22. Insofar as the Foundation states that consumers like [A.] must be effectively protected against 'this type of deception' by estimating their damage at the amount for which they purchased or leased the car, and that the compensation must be sufficiently deterrent, the court follows after all, neither does that argument. The terms "effective, proportionate and dissuasive" are terms used in administrative law when imposing administrative fines, for example. It is not clear why this should also be taken into account when estimating the damage in a civil procedure such as this. In the opinion of the court, the interests of the consumer are sufficiently protected by obtaining compensation that corresponds to the actual damage suffered by the consumer. To the extent that the Foundation relies on the Unfair Commercial Practices Directive and Article 46 of the Framework Directive in this context, it ignores the fact that directive provisions do not have horizontal effect and therefore do not operate between private individuals.

5.23. In view of the above, there is no legal basis to determine the damage upon taking back the car against reimbursement of the purchase price. This primary claim will be dismissed.

*Damage estimate equal to the purchase price of the car minus the residual value?*

5.24. For the same reasons as discussed above in 5.21 to 5.23, the court also sees no reason to estimate the damage at the purchase price of the car less the residual value. The subsidiary claim for damages will therefore also be rejected.

*Compensation for depreciation?*

5.25. The parties have extensively debated the question of whether and to what extent [A.] has suffered damage due to the unlawful actions of Volkswagen AG. The court notes that both parties have submitted general documents, such as research reports, and have referred to general information. The parties did not debate whether and to what extent specifically [A.] suffered damage, with the exception of the claimed damage of € 140.00 for (alleged) additional fuel costs after installation of the update. The court will therefore, on the basis of the more subsidiary claim, estimate the damage as referred to in the last sentence of Article 6:97 of the Dutch Civil Code. Here too, the starting point is that a comparison must be made between the actual situation and the hypothetical situation in which no prohibited defeat device was installed in the car. As considered under 5.17, in this case and as far as material damage is concerned, the WOH aims to protect the consumer against loss of value of the car resulting from the fact that the car shows a defect following the disclosure of the manipulation software. Considering the purpose of the violated standard, to protect the consumer when making his purchasing decision, the court will estimate the loss of value of the car as an overpayment of the purchase price. The court also notes that no market price can be determined for the value of a car that does not meet the legal requirements, because no cars that are known to not meet the legal requirements come onto the market. The court estimates the overpaid purchase price by [A.], taking into account the violated standard, at € 3,000.00.

5.26. In this context, the court notes that although the switching logic has been removed with the update, this does not alter the fact that the diesel issue / scandal has left a 'blemish' on the car. The extensive debate between parties about whether or not the update fixed the car illustrates this. The court will not comment further on that debate because it has estimated the damage as an excess purchase price paid.

5.27. The Foundation has claimed an additional amount of € 140.00 for (alleged) additional fuel costs after installation of the update. However, in light of the substantiated contestation of this amount by Volkswagen AG, the Foundation has not sufficiently substantiated this amount. The court will therefore reject this part of the claim.

*Causality*

5.28. Volkswagen AG is only liable for the damage suffered by [A.] if there is a sine qua non-connection between the unlawful act and the damage suffered. In addition, compensation is only eligible for damage that is so related to the event on which the debtor's liability is based that it can be attributed to him, also in view of the nature of the liability and the damage, as a consequence of this event (causality).

5.29. In view of the facts and circumstances stated by the Foundation and the nature of the violated standard (protecting [A.] against a purchase decision based on misleading information), the court assumes that if [A.] were known with the unlawful conduct of Volkswagen AG, namely putting a car into service without correct type approval by installing a prohibited defeat device, he would not have purchased the car, at least not under the same conditions. The evidentiary presumption is therefore that the sine qua non-connection is present.

Volkswagen AG's defense that this connection does not exist, or at least that the Foundation has not sufficiently stated and proven this, fails. The court also does not follow the argument of Volkswagen AG, which is in line with the conclusion of AG Hartlief in the Staatsloterij case 5 because the evidentiary position of a buyer of a state lottery ticket is different from that of a car and the violated standard in the present case is also different from that in the Staatsloterij case. The market research conducted by Volkswagen AG on the (general) motives of consumers when purchasing a car also does not alter this assessment, because it does not concern the motives of an average consumer, but those of [A.]. In this case, [A.] clearly stated that he would not have made the purchase if he had been aware of Volkswagen AG's unlawful conduct.

5.30. In addition, compensation is only eligible for damage that is so related to the event on which the debtor's liability is based that it can be attributed to him as a consequence of this event, partly in view of the nature of the liability and the damage. Volkswagen AG's argument that [A.] has not suffered any damage other than damage in connection with the purchase price cannot be taken into account because the court has estimated the damage as an overpayment of the purchase price. In this context, the court notes that damage is the direct and foreseeable consequence of unlawful actions by Volkswagen AG, so that these consequences arose within the meaning of Article 6:162 of the Dutch Civil Code and are attributable within the meaning of Article 6:98. BW.

#### *Extrajudicial collection costs*

5.31. The Foundation claims reimbursement of extrajudicial collection costs in accordance with the BIK scale. Because it has not been stated or proven that extrajudicial collection activities have taken place, the claim will be rejected.

#### *Process costs*

5.32. Volkswagen AG is the party that is largely wrong and will therefore be ordered to pay the legal costs. Until this judgment, the legal costs on the part of the Foundation will be determined as follows:

- costs of the summons	€	103.83	
- court fees	€	2,076.00	
- lawyer's salary	€	1,016.00	(2.00 points × €508.00)
Total	€	3,195.83	

## **6 The decision**

The court

- 6.1. declares that Volkswagen AG has acted unlawfully towards [A.],
- 6.2. orders Volkswagen AG to pay the Foundation damages of € 3,000.00, plus the statutory interest referred to in Article 6:119 of the Dutch Civil Code on the awarded amount, with effect from June 11, 2021 until the day of full payment,
- 6.2. orders Volkswagen AG to pay the legal costs, on the part of the Foundation, with this judgment set at € 3,195.83,
- 6.3. declares this judgment provisionally enforceable,
- 6.4. rejects the more or otherwise advanced.

This judgment was delivered by HA Pott Hofstede, JJ Dijk and PM Wamsteker and pronounced in public on March 22, 2023.

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1 Although the Foundation claims, in a more subsidiary manner, that compensation be drawn up by the state, it has written in its explanation that it would prefer that the damage in these proceedings be estimated on the basis of Article 6:97 of the Dutch Civil Code (summons under 8.14), which is also in agreement. on the basis of Article 612 of the Code of Civil Procedure (Code of Civil Procedure) that the damage is determined as directly as possible in this procedure.

2 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 (framework directive)

3 ECLI:NL:RBGEL:2019:760.

4 ECLI:NL:GHSHE:2020:1199

5 ECLI:NL:PHR:2022:217

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