

ECLI:NL:RBOBR:2023:4892

Authority	East Brabant District Court
Date of ruling	05-10-2023
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Case number	9569040 CV EXPL 21-5707
Areas of law	Civil law
Special features	Soil case First instance - single
Content Indication	Diesel fraud case against Volkswagen AG brought by a claims foundation On a claim by an individual consumer regarding a newly purchased VW Passat with an EA 189 engine. The district court awarded damages of 10% of the new price of the car.
Findings	Rechtspraak.nl

DECISION

EAST-BRABANT COURT

Civil law
Cantonal court

Place of session 's-Hertogenbosch

Case number: 9569040 CV EXPL 21-5707

Judgment of Oct. 5, 2023 (upon advancement).

in the matter of

the foundation
VOLKSWAGEN GROUP DIESEL EFFICIENCY FOUNDATION,
in Amsterdam,
plaintiff,
hereinafter referred to as: VGDES,
Agent: mr. J.H. Lemstra,

at

the company under German law

VOLKSWAGEN AKTIENGESELLSCHAFT,

at Wolfsburg, Germany,

respondent party,

hereinafter referred to as: Volkswagen,

Agent: mr. J.K. van Hezewijk.

1 Summary

1.1. This case concerns a newly purchased Volkswagen Passat with an EA 189 diesel engine, which was equipped by manufacturer Volkswagen with software that caused nitrogen oxide (NOx) emissions to be lower in test situations than in real life. This is also popularly referred to as "tampering software," "dieseldate," the "emissions scandal," or similar designations.

1.2. For a violation of the Emissions Regulation and engaging in unfair trade practices, the district court ordered the manufacturer to pay damages of 10% of the new car's price.

2 The further procedure

2.1. The further course of the proceedings is evident from:

- the interlocutory judgment of August 25, 2022, determining, inter alia, that an oral treatment would follow,
- VGDES' deed, with production 27 submitted.

2.2. The case was heard at the oral hearing on September 18, 2023. The clerk took notes of that hearing. The parties submitted speaking notes.

2.3. Finally, judgment was rendered.

3 The facts

3.1. In the (incidental) interlocutory judgment of January 27, 2022, the Subdistrict Court has already established some facts. For the sake of the readability of this judgment, they are partially repeated below.

3.2. Volkswagen is a German automobile manufacturer that markets cars of various brands, including cars with a diesel engine with type designation EA 189.

3.3. Mr. [A] (hereinafter: [A]) is a consumer who purchased a car with such a diesel engine in February 2012. [A] bought this Volkswagen Passat Variant 2.0 TDI 103 kW / 140hp Highline

BlueMotion, year 2012 with registration number [registration number] (hereinafter: the car) at car dealer [D] in [place] for a total amount of € 44,000.

- 3.4. The car in question is equipped with Turbocharged Direct Injection ("TDI"), a technology about which Volkswagen's website stated, among other things:

Turbocharged Direct Injection, TDI for short, is Volkswagen's name for the clean power of its diesel engines. Our TDI diesel engines with common-rail technology are not only economical, but also exceptionally powerful. They come standard with a sealed particulate filter, so you enjoy the power of diesel while protecting the environment.

and

The Blue TDI diesel engine has a nitrogen oxide filter in addition to a particulate filter. So you drive super economical and as clean as a gasoline engine.

- 3.5. A brochure for the Volkswagen Passat states under a heading "Blue Motion Technologies" included:

BlueTDI: the cleanest diesel of the moment, with no Nox emissions

- 3.6. In mid-September 2015, it was revealed that Volkswagen had equipped cars on a global scale with software that artificially kept nitrogen oxide (NOx) emissions low during tests, so-called manipulation software (otherwise consistently referred to by Volkswagen as "switching logic"). Volkswagen installed this software in approximately 11 million cars worldwide. In the Netherlands, it concerns more than 175,000 cars that have an EA 189 diesel engine.

- 3.7. The software could recognize from various parameters that the car was in a test environment. In that case, the so-called EGR system switched to a mode that ensured that the car's NOx emissions remained low. If the car was not driving in test mode, the engine emitted significantly more NOx.

- 3.8. Volkswagen informed [A] by letter dated Nov. 3, 2015, that his car was also equipped with an EA 189 diesel engine in which it had installed manipulation software.

- 3.9. Following the disclosure of the tampering software, the Kraftfahrt Bundesamt (KBA), the German equivalent of the RDW, ordered Volkswagen to recall and modify the cars in question. Volkswagen subsequently developed an update to the software (the "Update"). [A] had that update performed on July 6, 2016.

- 3.10. The Consumer & Market Authority ("ACM") launched an investigation in response to the diesel fraud. By decision of October 18, 2017, the ACM imposed the maximum fine of €450,000 on Volkswagen for unfair trade practices. In the fine decision, the ACM considered, among other things:

With mentions such as "cleaner driving," "cleanest diesel of the moment, with no NOx emissions," "most environmentally and ecologically sound diesel version of its kind," Volkswagen AG is suggesting that its diesel cars have exemplary performance in terms of sustainability, or that they have a positive or no negative impact on the environment, or harm the environment less than other products do (...). However, those environmental claims used by Volkswagen AG are not consistent with the use of software to influence emissions results in a test procedure and are therefore misleading. Consumers may get the impression that the cars in question are sustainable and environmentally friendly, when in reality Volkswagen AG allowed its business interests to prevail over environmental protection. After all, Volkswagen AG used software with the aim of influencing the test results regarding NOx emissions. As a result, it is not established that the Volkswagen models

were actually greener, more environmentally friendly or cleaner than diesel cars from other manufacturers, as argued by Volkswagen AG in communications intended for consumers (...)

Said environmental claims allowed the average consumer to make a decision on a deal that he otherwise would not have made - had he known that the test results with respect to NOx emissions had been influenced and the cars with that engine type had ostensibly met the Euro 5 standard due to this manipulation, and that the diesel cars might therefore be less clean than suggested

3.11. Volkswagen lodged an objection to this penalty decision with the ACM. By decision on objection dated October 25, 2018, the ACM declared the objection unfounded and upheld the fine decision with additional grounds. Volkswagen subsequently filed an appeal against the penalty decision with the Rotterdam District Court. Those proceedings were still pending at the time of this oral hearing.

3.12. High-ranking officials of Volkswagen made written and oral statements about "dieselgate" after it came out. For example, [B] , Volkswagen's CEO at the time, issued a press release with the following content:

(...) The Board of Management at Volkswagen AG takes these findings very seriously. I personally am deeply sorry that we have broken the trust of our customers and the public.

We will cooperate fully with the responsible agencies, with transparency and urgency, to clearly, openly, and completely establish all of the facts of this case.

Volkswagen has ordered an external investigation of this matter.

We do not and will not tolerate violations of any kind of our internal rules or of the law.

The trust of our customers and the public is and continues to be our most important asset. We at Volkswagen will do everything that must be done in order to re-establish the trust that so many people have placed in us, and we will do everything necessary in order to reverse the damage this has caused. This matter has first priority for me, personally, and for our entire Board of Management.

3.13. After [B], another Volkswagen CEO, [C] , acknowledged to German media, "Das, was wir gemacht haben, war Betrug, ja!" [What we did was fraud, yes!"]

3.14. Within the European Union, car type approvals are harmonized under the Vehicle Framework Directive (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). Pursuant to Article 7(1) of this Framework Directive, the manufacturer submits an application for approval to the approval authority in one Member State. If the latter accepts an application, it issues a so-called type-approval certificate (Art. 3 (33) of the Vehicle Framework Directive). Then, pursuant to Art. 18 (1) Framework Directive, the manufacturer must provide vehicles with a so-called Certificate of Agreement ("CoA"). With the CoA, the manufacturer declares that the vehicle in question conforms to the results for which type approval has been obtained and that all relevant regulations have been complied with at that time. After granting the CoA, the car can be used anywhere in Europe.

3.15. As part of type approval, cars must also comply with the Emissions Regulation (Regulation (EC) No. 715/2007 of the European Parliament and of the Council on type approval of motor vehicles with respect to emissions from light passenger and

commercial vehicles (Euro 5 and Euro 6) and access to repair and maintenance information). Article 5 of that regulation states in paragraphs 1 and 2:

1. Manufacturers shall equip their vehicles so that the components likely to affect emissions are designed, constructed and assembled so as to enable the vehicle to comply with this Regulation and its implementing measures under normal conditions of use.

2. The use of defeat devices that reduce the efficiency of emission control systems is prohibited. This prohibition does not apply if:

a) the instrument is necessary to protect the engine from damage or accidents and to ensure the safe operation of the vehicle.

b) the instrument functions only when the engine is started, or

c) conditions were substantially included in the test procedures for verifying evaporative emissions and average exhaust emissions.

3.16. The European Court of Justice ("ECJ") by judgment of 17 December 2020 (ECJ EU 17 December 2020, Case C-693/18, ECLI:EU:C:2020:1040)

held that the software, as installed by Volkswagen in the diesel cars in question, should be considered a prohibited manipulation device within the meaning of Article 5.2 of Emissions Regulation.

3.17. In several countries, Volkswagen has reached settlements with consumers. This is not (yet) the case in the Netherlands. However, various claim foundations are active, including VGDES. VGDES is a claims foundation that aims to promote the interests of victims of - in short - the Volkswagen Group, including by conducting (collective) legal proceedings. It cooperates with the Consumers' Association.

3.18. [A] , a member of the Consumers Union, by deed of assignment dated February 22, 2021, assigned his claims against Volkswagen related to the manipulation software to VGDES for €5,000.00 plus a possible subsequent payment.

3.19. On October 22, 2021, [A] sold his car at a trade-in value of €6,000.00 to [D] .

3.20. In connection with the manipulation software, another claim foundation, the Stichting Volkswagen Car Claim against Volkswagen and other car manufacturers and a large number of car dealers instituted collective action proceedings (hereinafter: the SCC proceedings) before the District Court of Amsterdam. The latter subsequently ruled in a judgment dated July 14, 2021 (Rb Amsterdam July 14, 2021, ECLI:NL:RBAMS:2021:3617), inter alia, that the car manufacturers in question had acted unlawfully by engaging in unfair trade practices towards car owners and defrauding car owners when placing the cars in question on the market, and that the buyers of the cars had suffered damages as a result. Furthermore, the court held that the also sued car dealers sold cars that did not meet the buyers' reasonable expectations due to the presence of the manipulation device. Therefore, according to the court, the buyers were entitled to a reduction in the car's purchase price against the car dealers. The court estimated this price reduction to be €3,000.00 for consumers who had purchased a new car and €1,500.00 for consumers who had purchased a used car. The court granted a declaratory judgment to that effect. The parties have appealed this judgment to the Amsterdam Court of Appeal. Those appeal proceedings are still pending.

3.21. VGDES has brought proceedings like the present one in other courts. That

has since resulted in judgments by the District Court of Noord-Holland on March 22, 2023, ECLI:NL:RBNHO:2023:2556, by the District Court of Noord-Netherlands on April 4, 2023, ECLI:NL:RBNNE:2023:1285 and by the District Court of Midden-Nederland on July 26, 2023, ECLI:NL:RBMNE:2023:3770.

In all those proceedings it has been ruled that Volkswagen has acted unlawfully towards the consumer in question. In all those judgments it has been substantiated that (among other things) Volkswagen has been guilty of unfair trade practices. The proceedings before the North Holland and North Netherlands courts involved new cars (a Volkswagen Golf 2.0 TDI and a Volkswagen Polo 1.2. TDI) and damages of €3,000.00 were awarded in both cases. The proceedings before the Central Netherlands District Court involved a used car (Volkswagen Passat 1.6 TDI BlueMotion) and damages of € 1,500.00 were awarded.

3.22. The ECJ on March 21, 2023, in response to preliminary questions from a German court, declared for justice (ECJ EU March 21, 2023, Case C-100/21, ECLI:EU:C:2023:229, (QB/Mercedes-Benz Group AG):

1) Article 18(1), Article 26(1) and Article 46 of 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), as amended by Commission Regulation (EC) No . 385/2009 of 7 May 2009, read in conjunction with Article 5(2) of Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information,

should be interpreted as protecting, in addition to general interests, the particular interests of an individual purchaser of a motor vehicle vis-à-vis its manufacturer when that vehicle is equipped with a prohibited manipulation device within the meaning of the latter provision.

2) European Union law must be interpreted as meaning that, in the absence of relevant provisions of European Union law, it is for the Member State concerned to lay down, in its national law, the rules governing compensation for damage actually caused to the purchaser of a vehicle fitted with a prohibited manipulation device within the meaning of Article 5(2) of Regulation No 715/2007, such compensation being proportionate to the damage suffered.

4 The dispute

4.1. After reducing its claim, VGDES claims for a judgment, enforceable on a provisional basis:

1. Primary:

a. rule that Volkswagen acted unlawfully against [A] .

b. order Volkswagen to pay to VGDES as assignee or as authorized representative or as agent of [A] an amount of € 38,000.00 plus the legal collection costs in accordance with the BIK graduated scale as well as the legal (commercial) interest on this amount from the date of summons to the day of payment.

2. In the alternative: if the claim under 1b. is not granted, order Volkswagen to pay to VGDES as assignee and/or as attorney-in-fact or agent of [A] the damages suffered by [A], to be made out by state and to be settled according to law.

3. Order Volkswagen to pay the costs of these proceedings.

- 4.2. VGDES bases its claims, in summary, on the following. Volkswagen acted unlawfully towards [A] because Volkswagen was guilty of unfair trade practices by using manipulation software, and because Volkswagen violated the Emissions Regulation.

With respect to the unfair trade practices, VGDES thereby concurs with what the ACM considered in that regard in the aforementioned penalty decision. In short, this means that (a) Volkswagen should be regarded as a trader, (b) the manipulation software should be regarded as a manipulation device within the meaning of Section 5(2) of the Emissions Regulation, (c) Volkswagen has acted contrary to the requirements of professional diligence, (d) Volkswagen is guilty of a misleading trading practice as referred to in Section 6:193b subsection 3(a) of the Dutch Civil Code and (e) Volkswagen is guilty of a misleading trading practice as referred to in Section 6:193g opening words under (d) of the Dutch Civil Code. In that context, VGDES points out that Volkswagen put a car on the market in which manipulation software was installed, while at the same time Volkswagen proclaimed the message that the car was 'economical', 'powerful' and 'clean'. As a result, the car was clean in test situations but emitted more nitrogen outside. On each of these grounds considered separately and in conjunction, VGDES argues that Volkswagen's actions were unlawful. [A] suffered damages as a result of Volkswagen's unlawful actions. Volkswagen must compensate that damage, according to VGDES. Primarily, VGDES claims as damages the purchase price of the car (€ 44,000.00) minus its trade-in value (€ 6,000.00). In the alternative, VGDES requested at the hearing that the damages be estimated (instead of referring to the damage assessment procedure), taking into account a percentage of the purchase price. In doing so, it said, a purchase price reduction of 16.75% should then apply as a minimum.

- 4.3. Volkswagen raises a defense. In essence, it disputes that it acted unlawfully towards [A] as a consumer. According to it, the Emissions Regulation does not serve to protect consumers' property interests. VGDES cannot circumvent this relativity requirement by labeling the violation of the Emissions Regulation as an unfair trade practice. Volkswagen further disputes that it was guilty of unfair trade practices. Volkswagen also disputes that [A] suffered damages as a result of the presence of manipulation software in the car. Finally, according to Volkswagen, the causation requirement has not been met.

5 The Assessment

Jurisdiction and applicable law

- 5.1. In the interlocutory judgment of January 27, 2022, it has already been considered that the Subdistrict Court has jurisdiction over the dispute. The Subdistrict Court has yet to determine which law applies to this case. In that context, it is considered that the claims are based on wrongful acts of Volkswagen towards [A] as a consumer. Pursuant to Article 4(1) Rome II Regulation (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), the law applicable to a tort is the law of the country where the damage occurs.
- 5.2. With regard to the presence of manipulation software in diesel cars manufactured by Volkswagen, the Court of Justice has ruled (CJEU July 9, 2020, Case C-343/19, ECLI:EU:C:2020:534 (Verein für Konsumenteninformation/Volkswagen AG)) that where vehicles have been unlawfully fitted with software manipulating emissions data by their manufacturer in one Member State before being purchased from a third party in another Member State, the place where the damage occurs is in the latter Member State. Because [A] purchased the Volkswagen Passat from a car dealer in the Netherlands ([D]),

in the opinion of the Subdistrict Court, the alleged injury in the present case occurs in the Netherlands. This entails that Dutch law is applicable in assessing VGDES' claims.

Framework: tort

5.3. Article 13 of the Unfair Commercial Practices Directive states the following:

Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. Those penalties shall be effective, proportionate and dissuasive.

5.4. The Consumer Protection Modernization Directive (2019/2161) amended the Unfair Commercial Practices Directive. It added a new Article 11a:

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1. consumers harmed by unfair commercial practices shall have access to proportionate and effective remedies, including compensation for the harm they have suffered and, where relevant, a reduction in price or termination of the contract. Member States may determine the conditions of application and legal effect of these remedies. Member States may take into account, as appropriate, the gravity and nature of the unfair commercial practice, the harm suffered by the consumer and other relevant circumstances.

2. These remedies are without prejudice to the application of other remedies available to consumers under Union or national law.

5.5. The most recent Guidelines on the Interpretation and Application of Directive 2005/29/EC (OJEU 2021, C 526/01) write that:

1.4.3. Consumer redress

Directive (EU) 2019/2161 added a new Article 11a to the Unfair Commercial Practices Directive. This article requires Member States to ensure that consumers who have been harmed by breaches of the Unfair Commercial Practices Directive have access to proportionate and effective remedies, in particular damages and, where relevant, a price reduction and termination of the contract, subject to the terms and conditions established at national level. Consumer redress in the Unfair Commercial Practices Directive thus includes both contractual and non-contractual remedies.

The conditions for the application of the remedies are to be determined by the Member States and may include factors such as the gravity and nature of the unfair commercial practice, the harm suffered and other relevant circumstances, if any. The detailed legal effect of the remedies should also be determined by Member States, such as whether the termination of the contract results in the nullity of the contract as of its conclusion (with the obligation for both parties to return to the pre-contractual situation) or only in the elimination of its future effects, provided that the principles of adequacy and effectiveness are respected and the usefulness of the Directive is ensured.

5.6. In the Explanatory Memorandum to the Modernization of Consumer Protection Directive Implementation Act, the legislator said (albeit somewhat hidden in the transposition tables) that Article 11a of the amended Unfair Commercial Practices Directive does not require implementation: Is already adequately regulated. If the consumer is harmed by an unfair commercial practice, the trader can be sued in tort (Art. 6:193j para. 2 BW and Art.

6:162 BW). The consumer can also annul the contract (Art. 6:193j (3) BW).

Insofar as there is a breach of contract, the contract can be dissolved in whole or in part (Art. 6:265 and 6:270 of the Civil Code). Price reduction can be considered a form of partial dissolution. Art. 7:22 paragraph 1 part b BW regulates the price reduction if there is a consumer purchase.

5.7. It follows from this representation that the Dutch legislature has chosen to classify unfair business practices by merchants as a tort, with the corresponding penalty translating into damages.

There is no reason to think otherwise in the case of a violation of the Emissions Regulation. In *QB v. Mercedes-Benz Group AG* (see above, under 3.22), the Court of Justice ruled that in the absence of relevant provisions of Union law, it is up to the Member State concerned to establish in its national law the rules regulating compensation for damage actually caused to the purchaser of a vehicle equipped with a prohibited manipulation device within the meaning of Article 5, paragraph 2, of the Emissions Regulation. Since the Netherlands has not adopted specific regulations in this regard, the Subdistrict Court holds that a buyer of a car equipped with manipulation software must sue the manufacturer in tort under civil law. Thus, the assessment framework is the same for both the violation of the Unfair Commercial Practices Directive and the Emissions Regulation.

Unlawful act general

5.8. Pursuant to article 6:162 paragraph 1 of the Dutch Civil Code (hereafter: BW) the person who commits an unlawful act towards another, which can be attributed to him, is obliged to compensate the damage the other person suffers as a result thereof. An unlawful act is defined as, among other things, an infringement of the right of another person, an act or omission in violation of a statutory duty, or with what is customary in society according to unwritten law (paragraph 2). An unlawful act may be imputed to the perpetrator if it is due to his fault or to a cause for which he is responsible by virtue of the law or generally accepted practice (paragraph 3). Article 6:163 BW stipulates that there is no obligation to pay compensation if the violated standard does not serve to protect against the damage as suffered by the injured party.

Violation of the Emissions Regulation

5.9. Based on the Court of Justice judgment of December 17, 2020 mentioned above (under 3.16), the starting point is that the manipulation software is a prohibited manipulation device within the meaning of the Emission Regulation. The Subdistrict Court understands that Volkswagen has its own view on this, but that it acquiesces to that judgment. This entails that Volkswagen has acted in violation of a statutory provision and therefore has acted unlawfully.

5.10. According to Volkswagen, however, the Emissions Regulation does not contemplate the protection of the interests of consumers who have purchased a car equipped with manipulation software and, therefore, does not extend to protection against the harm as VGDES claims [A] has suffered.

5.11. The Subdistrict Court rejected that defense. After all, in the judgment reproduced above under 3.22, the Court of Justice came to the conclusion that the relevant provisions of the Framework Directive (Article 18(1), Article 26(1) and Article 46) read in conjunction with the Emissions Regulation (Article 5(2)) must be interpreted as protecting, in addition to the general interests, the special interests of an individual purchaser of a motor vehicle vis-à-vis its manufacturer, where that vehicle is equipped with a prohibited defeat device within the meaning of the Emissions Regulation.

- 5.12. To this end, the ECJ considers that all vehicles must be EC type-approved 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). Manufacturers are thereby required by the Framework Directive to issue a CoE to an individual purchaser of a vehicle (Recital 78). This document is required for the registration and sale or entry into service of the vehicle. In addition, it provides assurance that the vehicle complies with all regulations at the time of manufacture (Recital 79). The CoE thus provides the individual purchaser of a vehicle with particular protection against the risk that a manufacturer may fail in his obligation to market a vehicle that complies with the Emissions Regulation (Recital 82). In short, according to the ECJ, the Framework Directive in conjunction with the Emissions Regulation thus (also) sees to the protection of the (asset) interests of an individual buyer who purchases a vehicle equipped with a prohibited defeat device.
- 5.13. In the context of assessing the damages of the individual purchaser, the ECJ again considers in general terms that the Framework Directive in conjunction with the Emissions Regulation (also) envisages the protection of the (property) interests of an individual purchaser who purchases a vehicle equipped with a prohibited manipulation device (paragraph 88). Next, the Court of Justice 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 (Recital 89). According to the Court of Justice, if a vehicle is indeed fitted with a prohibited defeat device, the Member States must ensure that the purchaser of that vehicle has a right to compensation from the manufacturer of that vehicle where that purchaser has been harmed by that device (paragraph 91).
- 5.14. Volkswagen argued at the oral hearing on September 18, 2023 that the Court of Justice meant that the Framework Directive in conjunction with the Emissions Regulation relates exclusively to the protection of the interests of the individual purchaser who purchases a vehicle that is equipped with a prohibited manipulation device 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, this argument is based on an incorrect (because: too limited) reading of the considerations of the ECJ.
- 5.15. Volkswagen refers in support of its position to paragraphs 83 and 84 of the ECJ judgment. Therein, the Court of Justice elaborates on the situation where the approval authority granted an EC type-approval without that authority being aware of the presence of a manipulation 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 CoE (paragraph 84). Finally, the ECJ considers that, in view of this, a prohibited manipulation device may "in particular" create uncertainty as to the possibility of registering, selling or putting the vehicle into service and that this uncertainty may cause harm (paragraph 84). The Subdistrict Court reads paragraphs 83 and 84 as meaning that the Court of Justice - after the general exposition leading to the conclusion in paragraph 82 - gives examples of uncertainties/obstacles that consumers may encounter if their vehicle is equipped with a prohibited manipulation device. If the ECJ 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 have been obvious if the ECJ had explicitly considered that in its assessment. However, it did not do so. Precisely if it should be

assuming, as Volkswagen itself argues, that in answering the preliminary questions, the Court of Justice abstracted from the nuances of the question posed by the German court in question and, in the process, reformulated some of the questions into a general question, a limited reading as advocated by Volkswagen is not obvious.

- 5.16. The Subdistrict Court therefore finds that the relativity requirement set by Section 6:163 of the Dutch Civil Code has been met. Volkswagen's defense on this point therefore fails and does not stand in the way of a claim for damages.

Tort - unfair trade practices

- 5.17. Volkswagen argued that the starting point in Dutch and European consumer law is that there is room for manufacturer's liability only in exceptional cases. To the extent that this is already correct, it is irrelevant to these proceedings, because within VGDES's contentions the Subdistrict Court only has to assess whether Volkswagen can be regarded as a trader within the meaning of the Unfair Commercial Practices Regulations and whether it has carried out an unfair or misleading commercial activity. If so, Volkswagen is liable for damages (if any).

Is Volkswagen a dealer?

- 5.18. According to Volkswagen, what is decisive for qualification as a trade practice is whether direct interaction with consumers takes place. Insofar as Volkswagen means by this to argue that it does not do so and is therefore not a trader within the meaning of the statutory regulation in the Civil Code on unfair trade practices (hereinafter: the WOH), the Subdistrict Court considered as follows.

- 5.19. The WOH constitutes the implementation of the European Directive on unfair business-to-consumer commercial practices (Directive No. 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market). A trader, according to the definition of Section 6:193a (1) (b) of the Dutch Civil Code, is a natural or legal person acting in the exercise of a profession or business. Given the purpose of the Unfair Commercial Practices Directive, the term "trader" should be interpreted broadly.

- 5.20. VGDES correctly argues that although Volkswagen generally does not do business directly with consumers, it has been actively involved in the sales process with consumers such as [A] . Indeed, Volkswagen manufactured the cars, exported them, and resold them to car dealers in cooperation with the Dutch importer [E] B.V. (¹¹ [E]¹¹). It provided these car dealers, including [D] (where [A] bought the car), with standard materials for marketing purposes, such as a brochure. Volkswagen itself has also (in the Netherlands and in other countries) very actively advertised its brand and cars on television, the Internet and through other channels. In view of the foregoing, in the opinion of the Subdistrict Court, Volkswagen is indeed so actively involved in the sales process with consumers that it is to be regarded as a trader within the meaning of Section 6:193a (1) (b) of the Dutch Civil Code. Also in view of the fact that the Court of Justice ruled in the judgment mentioned in section 3.22 that the Framework Directive read in conjunction with the Emission Regulation is aimed at protecting the interests of an individual buyer of a motor vehicle *vis-à-vis its manufacturer*, an effective protection of a car-buying consumer would be seriously undermined if the prohibition of unfair commercial practices would only apply to the last link in the sales chain to the consumer.

Is there any trade practices involved?

- 5.21. The follow-up question is whether there is a trade practice by Volkswagen towards consumers like [A] . According to Section 6:193a(1)(d) of the Dutch Civil Code, a trade practice is any act, omission, conduct, representation or commercial communication, including advertising and marketing, by a trader directly related to the

sales promotion, sale or delivery of a product to consumers.

5.22. The Subdistrict Court held that Volkswagen had engaged in a trade practice in the present case, consisting of manufacturing cars equipped with prohibited manipulation software for the purpose of obtaining a type approval, subsequently issuing a CoE, and then marketing the cars (in Europe, including the Netherlands) so that they could be sold and delivered to buyers. As considered above, Volkswagen used various means of communication to market the cars, such as publishing information on websites and preparing consumer brochures. In the opinion of the Subdistrict Court, Volkswagen's production and related marketing of the cars were aimed at selling and delivering the cars in question to consumers, or at least at promoting the sale of the cars. These do constitute trade practices as referred to in the WOH.

Unfair trade practices in the WOH

5.23. According to Section 6:193b (1) of the Civil Code, a trader acts unlawfully towards a consumer if he performs a commercial practice that is unfair. The second paragraph of this section of the law provides 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 or may be appreciably impaired, by which the average consumer makes or may make a decision about a contract that he would not otherwise have made.

5.24. Furthermore, paragraph 3 of the aforementioned section of the law, insofar as relevant here, provides that a commercial practice is particularly unfair if a trader engages in a misleading commercial practice as referred to in Sections 6:193c to 6:193g of the Dutch Civil Code.

Is Volkswagen guilty of unfair trade practices?

5.25. The Subdistrict Court answered this question in the affirmative, on the basis of (a) the general requirements of Section 6:193b (2) of the Dutch Civil Code, (b) Section 6:193c of the Dutch Civil Code (misleading trade practice in general), and (c) Section 6:193g of the Dutch Civil Code (black list misleading trade practice). These are three separate grounds, each of which (separately) leads to the conclusion that Volkswagen has engaged in a trade practice that is unfair and has therefore acted unlawfully vis-à-vis [A]. The Subdistrict Court explains.

(a) Unfair trade practice pursuant to Section 6:193b(2) of the Civil Code

5.26. In the opinion of the Subdistrict Court, in the given circumstances, Volkswagen acted as a dealer in violation of the requirements of professional diligence, as referred to in Section 6:193b (2) (a) of the Dutch Civil Code.

5.27. According to Section 6:193a subsection 1 (f) of the Dutch Civil Code, professional diligence means "[the] normal level of special skill and care that may reasonably be expected of a trader with respect to consumers, in accordance with the responsibility incumbent upon him, arising from the professional standard and fair market practices applicable to that trader." The installation, use and concealment of prohibited manipulation software in (diesel) cars produced for the consumer market is, in the opinion of the Subdistrict Court, plainly contrary to the prudent conduct to be expected of a professional car manufacturer such as Volkswagen. Consumers must be able to trust that the car they buy or are considering buying does not contain prohibited parts. By marketing the cars in question, Volkswagen gave consumers the impression that they met the legal requirements. However, this was not the case, as the type approvals were obtained by

use of a prohibited instrument of manipulation, or, in [C]'s words by "Betrug" (deception).

5.28. With regard to the special professional standard applicable to Volkswagen, the Subdistrict Court considers the following. What constitutes the professional standard applicable to a dealer depends on the circumstances of the case. The level of standard applicable to a trader may be inferred, for example, from the trade customs in a particular sector, a code of conduct or an oath or promise taken.

5.29. VGDES pointed out that Volkswagen is a member of the European Automobile Manufacturers' Association (ACEA) and it has therefore committed to the *Automotive Industry Guiding Principles to Enhance Sustainability Performance in the Supply Chain* industry code. This includes a commitment to reducing the environmental footprint of car manufacturers. In addition, VGDES points to Volkswagen's own sustainability policy (*Environmental policy*), in which it aims to minimize its impact on the environment and contribute to

solutions to environmental problems, both regionally and globally.

Volkswagen has not disputed the applicability of the *Guiding Principles* in these proceedings. Nor has it disputed the accuracy of the stated objective from its own *Environmental policy*. According to Volkswagen, however, its commitment to reducing its impact on the environment manifests itself in a broad and comprehensive environmental policy with a holistic approach. That environmental policy does not only cover emissions from the vehicles it produces: at its core is the continuous improvement of manufacturing processes and facilities, environmentally friendly use of materials

and the development of (new) sustainable technologies.

5.30. The Subdistrict Court can be brief about this: it does not see in what way the deliberate deployment of manipulation software - as a result of which, under normal conditions of use, millions of cars manufactured by it emit much more environmentally harmful nitrogen oxides than in a test situation - can in any way be reconciled with Volkswagen's widely publicized efforts to reduce its impact on the environment. It therefore concludes that it acted contrary to the normal standard of special professionalism.

5.31. Finally, in the opinion of the Subdistrict Court, the cumulative requirement that Volkswagen's actions have noticeably restricted the average consumer's ability to make an informed decision, as referred to in Section 6: 193b (2) (b) of the Dutch Civil Code, has been met. When purchasing a product, consumers may assume that a manufacturer meets all the conditions for marketing the product. When a manufacturer offers a product that does not comply with the conditions for marketing it, or at least the determination that it complies has been manipulated, and is less clean than suggested, there is by definition an appreciable restriction of the consumer's ability to make an informed decision. Volkswagen's conduct regarding the use of the manipulation software deprived consumers of the ability to make a fully informed choice. Volkswagen's position that, in summary, environmental and sustainability considerations play a very minor role among the average consumer when purchasing a car cannot help it in this regard. After all, the question whether and to what extent consumers are guided by environmental considerations in their purchase decision is a different one than the question whether consumers would also have bought the cars in question if they had known that they were equipped with manipulation software. Incidentally, this position of Volkswagen also does not hold water, since it has been refuted by VGDES and Volkswagen has insufficiently substantiated this position in light of this. The Subdistrict Court explains this further in legal consideration 5.45 and further, (where the causal connection between the wrongful act and [A]'s damage is discussed).

(b) Misleading trade practices pursuant to Section 6:193c (1) opening words and (b) of the Dutch Civil Code

5.32. In the opinion of the Subdistrict Court, there is also a misleading trade practice as referred to in Section 6:193b (3) (a) of the Dutch Civil Code.

5.33. A commercial practice is misleading pursuant to Section 6:193c (1), opening words and under b, of the Dutch Civil Code if information is provided that is factually incorrect or that misleads or is likely to mislead the average consumer. This may concern the general presentation of information regarding the main characteristics of the product, such as, for example, benefits, execution, composition, suitability for use, possibilities of use, specification, results to be expected from the 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 made. The issue is whether an average consumer may be misled by the (incorrect) information and whether that information is such that it may lead the average consumer to take a decision on a transaction that he would not otherwise have taken. In the case of a misleading commercial practice, it is not necessary to additionally consider whether the commercial practice in question also violates the requirements of professional diligence (CJEU April 16, 2015, Case C-388/13, ECLI:EU:C:2015:225 (Nemzeti v UPC).

5.34. In the opinion of the Subdistrict Court, misleading information may include environmental or "green claims. VGDES referred in this context to the Guidelines for the Implementation of Directive 2005/29 EC on Unfair Commercial Practices. Such claims give the impression that a product has a positive or no negative impact on the environment or that the product does less harm to the environment than other products do. Consumers should be able to trust environmental claims made by merchants. Therefore, in order not to be misleading, environmental claims should be presented in a clear, specific, unambiguous and correct manner. According to Article 6 of the Unfair Commercial Practices Directive, an environmental claim can be misleading if it is accompanied by false information and is therefore based on untruths. An environmental claim can also be misleading if the information is factually correct, but the claim deceives or is likely to deceive the average consumer in any way, including by its general presentation. Likewise, when environmental claims are based on vague and general statements regarding environmental benefits such as "environmentally friendly," "ecological," "sustainable," "good for the environment," "climate-friendly," or "friendly to the environment," environmental claims can also be misleading. Such claims may constitute unfair trade practices when they may deceive the average consumer and cause him to make a decision about a transaction that he would not otherwise have made.

5.35. VGDES provided examples of the claims made by Volkswagen on the Volkswagen

Passat and the technologies implemented in that type of car, such as "Powerful. Clean. Economical. Anything goes."; "Economical Engines. Better for the environment."; "BlueMotion Technology. Economical and environmentally friendly driving."; "TDI. The powerful, economical diesel."; "Less CO2 emissions"; "Cleanest diesel of the moment, with no NOx emissions."

With these expressions, Volkswagen, in the opinion of the Subdistrict Court, made it appear that its diesel cars (equipped with an EA 189 engine) are exemplary in terms of environmental and sustainability performance, or at least cause less damage to the environment than other cars.

5.36. Volkswagen argues that in support of its examples, VGDES submitted screenshots from its website from 2013 and not from 2012 (the year when [A] bought the car), and which also do not refer to [A]'s model. Volkswagen further does not find it plausible that [A] saw the 2011 Passat's marketing materials, which are over a year old. However, none of this is relevant to the district court, because Volkswagen does not deny that, at the time [A] purchased the car, it made these, or similar, statements or claims about the TDI-

engine (and technology) with which that car is equipped.

- 5.37. In the opinion of the Subdistrict Court, the environmental claims made by Volkswagen are inconsistent with the installation and use of manipulation software to influence the emission results of the cars in question in a test environment. Reports on the influence on those test results have been submitted by both parties: VGDES submitted a report from TNO and Volkswagen submitted a report from the Umwelt Bundesamt (the German Environmental Agency). Volkswagen's interpretation of those reports misses the point that the issue is not that, as it claims, its cars were cleaner or more sustainable compared to previous models and competitor models. The issue is that, despite its claims, its cars emitted much more NOx than the 180 mg/km allowed by the Euro 5 standard (787 mg/km according to Umwelt Bundesamt's report and 738 mg/km according to TNO). In light of those reports, Volkswagen therefore failed to prove the accuracy of its claims in the statements cited above. The statements must therefore be considered misleading.
- 5.38. In addition, the Subdistrict Court held that by concealing from the consumer that the test results had been manipulated through the use of manipulation software, Volkswagen withheld vital information from the consumer that was relevant to his purchase decision.
- 5.39. In view of the foregoing, the Subdistrict Court concludes that during the period of [A]'s purchase, Volkswagen provided information that was factually inaccurate or misleading or likely to mislead the average consumer as to the main characteristics of the product, thereby enabling the average consumer to make a decision on a contract that he would not otherwise have made.

(c) Misleading trade practice pursuant to Section 6:193g, opening words and under d, of the Civil Code

- 5.40. Finally, in the opinion of the Subdistrict Court, there is also a misleading trade practice by Volkswagen as referred to in Section 6:193g opening words and under d of the Dutch Civil Code. It follows from Section 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 something similar without the condition for the recommendation, recognition or approval having been met. This is an unfair trade practice by definition.
- 5.41. 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 ECJ found, this involved the use of a manipulation device prohibited by the Emissions Regulation. By installing and using the software in the cars in question, Volkswagen did not, in the opinion of the Cantonal Court, comply with the conditions for the type approval received and type approvals were wrongly issued for these cars. Afterwards, Volkswagen falsely provided the cars with a CoE and resold/delivered them to importers, as the cars were not in compliance with EU type-approval requirements. This constituted a misleading trade practice.
- 5.42. Insofar as Volkswagen relies on the fact that the type approval issued was not withdrawn by the CBA, in the opinion of the Subdistrict Court that defense cannot avail it. This defense of Volkswagen ignores the fact that the CBA ordered Volkswagen to recall and modify the cars in question because the type approval was obtained on the basis of incorrect information.

Conclusion unlawful conduct

- 5.43. In conclusion, Volkswagen was guilty of violating the Emissions Regulation and engaging in unfair trade practices toward [A]. In doing so, it has

Volkswagen acted unlawfully toward [A].

Attribution

5.44. The wrongful act can also be imputed to Volkswagen. It does not dispute that either (rightly).

Damages and causation

5.45. Volkswagen's wrongful conduct vis-à-vis [A] as a consumer obliges Volkswagen to compensate the damage suffered by [A] as a result. It must be assessed whether [A] has actually suffered damage and, if so, whether a causal connection exists between Volkswagen's wrongful conduct and the damage.

5.46. The basic principle for calculating the extent of a legal obligation to pay damages is that the injured party should be put in the situation in which he would have been if the event causing the damage had not occurred as far as possible. It follows that, in principle, damages must be calculated taking into account all the circumstances of the concrete case. On practical grounds and for reasons of fairness, one or more circumstances of the case may be abstracted from in special cases (cf. HR February 21, 2020, ECLI:NL:HR:2020:315).

5.47. In assessing damages and causation, a comparison must be made between the injured party's actual state of assets and the state of assets that he would have been in if the wrongful act were eliminated. In principle, the injured party must state and, if necessary, prove that he has suffered damage and that this damage is the result of the wrongful act. But no strict requirements may be imposed on the injured party in this regard, because the perpetrator of the wrongful act has deprived the injured party of the opportunity to provide certainty as to what would have happened in the hypothetical situation. The Supreme Court has expressly ruled this way before in a case about income damage due to reduced working capacity after an accident (HR Feb. 17, 2017, ECLI:NL:HR:2017:273, para. 3.2). The Subdistrict Court sees no reason to rule differently about this in the present case (cf. the opinion of May 28, 2021, ECLI:NL:PHR:2021:532, margin number 3.49, in which AG Valk argues for a general (evidence) rule in this regard). In short, a reduced standard of proof applies (no strict requirements) and for proof an estimation of expectations based on a weighing of good and bad chances is sufficient. This view is also consistent with the principles of adequacy and effectiveness that must be observed to ensure the useful operation of the Unfair Commercial Practices Directive.

5.48. The damage suffered by [A] and the causal connection between this damage and Volkswagen's unlawful conduct must therefore be determined by making a comparison between the actual asset situation in which [A] found himself as a result of the purchase of the car and the situation in which he (presumably) would have found himself if Volkswagen's unlawful conduct had been omitted (i.e., if the car had not been equipped with the (prohibited) manipulation software and no deception had taken place).

5.49. The factual situation is known and consists of [A] having bought a car equipped with manipulation software, of which [A] was not and could not have been aware. In which, moreover, the car did not meet the environmental performance claimed by Volkswagen in marketing statements.

5.50. The Subdistrict Court must then answer the question in which situation [A] would (presumably) have been 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 scenarios are broadly conceivable.

- 5.51. In the first scenario, [A] would not have bought the car at all. He would then have still had the amount of the purchase price of the car in his assets. But since [A] needed a car he would then in all likelihood have spent that amount (partly) on the purchase of another car. It must be held that the purchase price of that car would not have been affected by unfair trade practices. Thus, in that situation, [A] would not have bought a car that was actually worth less than the purchase price.
- 5.52. In the second scenario, [A] would still have been willing to buy the car, but without that car being afflicted with shoemaking software and without falsely made green claims promoting the car that could not be fulfilled.
- 5.53. VGDES primarily argued that in the hypothetical situation, the first scenario would have occurred. In that regard, VGDES argues that [A] would have refrained from purchasing if he had known that Volkswagen had equipped the car with manipulation software and the car did not have the durability, fuel economy and environmental properties that Volkswagen had wrongly attributed to the car. [A] confirmed at the oral hearing that he stands behind the contentions made in that context by VGDES.
- 5.54. The Subdistrict Court assumes that the car (in both scenarios outlined above) in the hypothetical situation would have had different - less favorable - characteristics than in the actual situation, at least with respect to its environmental performance. At least, no better environmental performance could be attributed to the car in that situation, (partly) because the test results would not have been manipulated in that case. Following the Court of Amsterdam in the SCC proceedings, the Subdistrict Court 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 see environmental pollution as undesirable does not automatically mean that consumers are also willing to (heavily) factor that aspect into their own purchase decision. However, it does mean that if they had a choice between two cars, one of which is cleaner and more environmentally friendly than the other, but which are otherwise exactly the same, most consumers would choose the cleaner and more environmentally friendly car. Thus, a more environmentally friendly car may command a higher purchase price.
- 5.55. Although Volkswagen has relied on a study submitted by it which would show that environmental considerations hardly play a role for consumers in the decision to buy a car, VGDES has rightly pointed out that this study was carried out among only 36 people in the British city of Bath, a city the size of Alkmaar. There is thus no question of a thorough and representative survey and the Subdistrict Court therefore attaches little value to it. Moreover, in its marketing activities Volkswagen has also capitalized on the "growing environmental awareness" among potential car buyers by explicitly pointing out that its engines are clean and spare the environment. This suggests that Volkswagen itself also believes (or was) that environmental considerations can play a role for consumers when purchasing a car.
- 5.56. Since environment and durability may play a certain role in the decision to buy a car, the Subdistrict Court 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 confirmed at the hearing. In short, there is a causal connection between Volkswagen's wrongful acts and [A]'s damages to be discussed below.
- 5.57. The follow-up question is whether [A] would be in a more favorable state of assets in the hypothetical situation than in the actual situation. And if that question should be answered in the affirmative, the next question is the amount at which the capital difference between those two situations should be set. According to established case law, when determining the extent of the damage, the burden of proof on the injured party may not be raised.

asserted. The injured party need only state the facts from which it can be deduced that he has suffered damage. It is important that the court estimates the damage in the manner most consistent with its nature and that the extent of the damage is estimated if that extent cannot be accurately determined (Article 6:97 BW). The judge has a large degree of freedom in this regard.

- 5.58. According to VGDES, [A] actually suffered damages and those damages must be estimated at € 38,000.00, as being the difference between the purchase price of the car of € 44,000.00 and the trade-in value of € 6,000.00. The subdistrict court does not follow VGDES in this. Such an approach to damages would seem to be based on annulment of the purchase agreement with respect to the car, but such a claim is not at issue here, since VGDES is claiming damages in tort from Volkswagen as manufacturer of the car, whereby the Subdistrict Court (only) has to assess what damage the wrongful act of Volkswagen caused for [A] at the time when the damage occurred, and that is here at the time of purchase of the car.
- 5.59. The Subdistrict Court also did not follow VGDES in its argument that only an award of damages in the amount of the purchase price paid guarantees effective consumer protection against unfair commercial practices and that only in this way will the principle be met in the event of a violation of the Unfair Commercial Practices Directive that an award of damages must be effective, proportionate and dissuasive. In the opinion of the Subdistrict Court, this is based on an incorrect reading of the Unfair Commercial Practices Directive: it only obliges Member States to ensure that action can be taken against violations of the Directive. In principle, it does not matter how: this can be done through administrative law, private law, or criminal law. The Subdistrict Court did not read in Article 13 of the Unfair Commercial Practices Directive that - if the private law path is followed - any damages to be awarded must by definition be extra high. What matters is that a trader knows that he will not get away with it if he engages in unfair commercial practices (and thus refrains from doing so), because he can then expect (among other things) claims for damages. It does not follow from Union law that (civil law) damages must be extra high for violations of Union law. Dutch civil law does not have such a system of "punitive damages" either.
- 5.60. As mentioned above, [A]'s damage must be determined by comparing the actual situation in which unlawful action was taken with the hypothetical situation, in which that is not the case. The Subdistrict Court considers it appropriate in the given circumstances - and possible under Article 6:97 of the Dutch Civil Code - that the damage suffered by [A] be estimated.
- 5.61. In the actual situation, [A] was supplied with a car that formally complied with the requirements of the Emissions Regulation, but materially did not, and had therefore wrongly obtained a type approval. The car purchased by [A] was therefore defective, and a car that is defective will be valued less than a car that is not defective. This mere fact already produces injury. 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. Moreover, as previously cited, Volkswagen thus used green claims in its marketing communications that were unjustified because the test results were manipulated by the manipulation software. It is sufficiently plausible that the purchase price of the car was therefore higher than it would have been without that misleading marketing and without the tampering software. The Subdistrict Court therefore considers it plausible that the value of the car at the time of purchase was lower than the purchase price that [A] paid for the car.
- 5.62. According to Volkswagen, the value of the car is not less than the purchase price that [A] paid for the car. In support of its position, it refers to an estimate made on its behalf

conducted by Autodata that would show that the residual value of EA189 vehicles on the used market did not decrease after it became known that the vehicles were equipped with the manipulation software. This looked at price trends from the time the presence of the manipulation software became known (mid-September 2015). However, the damages must be calculated at the time [A] concluded the purchase agreement (in February 2012). For this reason alone, Autodata's report is not useful. VGDES thinks so too, by the way, and has submitted a report by Mr. [F] in support of its position. He substantiated that and why in his opinion Autodata's study does not contain sufficient information to be able to come to reliable conclusions about the price development. In the light of this, the Subdistrict Court 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.

5.63. Finally, it must be assessed how much lower (than the purchase price) the value of the car was at the time of purchase. The Subdistrict Court will estimate that lesser value, as announced. In doing so, he will somewhat abstract from the concrete case. After all, what the effect of Volkswagen's conduct has been on the purchase price is - certainly for a consumer like [A] - impossible to fathom, but that this conduct has led to a higher price than if this conduct had been omitted, is sufficiently clear, in view of what the Subdistrict Court has considered earlier. Furthermore, this concerns manipulation software that has not only been used in the Passat of [A], but - as is evident from the already mentioned judgments of other courts - in many more models of Volkswagen. Given the fact that the new price of those models varies considerably (in the proceedings before the Noord-Nederland District Court it concerned a Volkswagen Polo with a new price of € 17,290.00 and in the proceedings before the Noord-Holland District Court it concerned a Volkswagen Golf with a new price of € 32,949.95), in the opinion of the Subdistrict Court it does not fit to assume - irrespective of the new price of the model - a '1 fixed'¹ compensation of € 3,000.00. The Subdistrict Court will therefore estimate the damages in this case, which involves a newly purchased car, at 10% of the purchase price. Here, this amounts to €4,400.00. The Subdistrict Court sees no reason to assume a higher percentage. Since these damages were suffered at the time of purchase, there is no reason to take into account a user fee or any other form of benefit allocation within the meaning of Article 6:100 of the Civil Code.

5.64. The declaratory judgment claimed by VGDES will be granted. In addition, Volkswagen will be ordered to pay damages to VGDES in the amount of €4,400, to be increased by the statutory interest claimed thereon from the day of summons to the day of payment in full. Because this is a damages claim in tort, the statutory interest within the meaning of Section 6:119 of the Dutch Civil Code is awarded.

Extrajudicial collection costs

5.65. The collection costs claimed by VGDES according to the BIK graduated scale are rejected because VGDES has not sufficiently substantiated its claim on this point. More specifically, it has not even claimed that it incurred extrajudicial collection costs.

Litigation Costs

5.66. Volkswagen will be ordered to pay the costs of the proceedings as the largely unsuccessful party. The legal costs are estimated on the side of VGDES at:

€ 103.83 in costs for the summons, € 1,013.00 in court fees and € 528.00 (2 items x € 264.00) in attorney's fees. This amounts to a total of € 1,644.83. In determining the attorney's salary, the Subdistrict Court sought to tie in with the principal sum awarded.

6 The decision

The district judge:

6.1 declares that Volkswagen acted unlawfully against [A];

6.2 Orders Volkswagen to pay to VGDES (as assignee of [A]) the amount of €4,400.00, to be increased by the statutory interest within the meaning of Section 6:119 of the Civil Code on this amount from March 31, 2021, being the day of the summons, until the day of full payment;

6.3 Orders Volkswagen to pay the costs of the proceedings, estimated on the part of VGDES up to this judgment at € 1,644.83;

6.4. declares this judgment to be provisionally enforceable as far as convictions are

concerned; 6.5. dismisses the more or otherwise claimed.

This judgment was rendered by Mr. K.A. Maarschalkerweerd and pronounced in open court on October 5, 2023, at an earlier date.