



Decision

Our reference: ACM/UIT/230480
Case number: ACM/17/003870
Date: October 18th, 2017

Decision of the Authority for Consumers & Markets to impose a fine on Volkswagen AG.

1 Summary

1. The Authority for Consumers & Markets (hereinafter: the ACM) is committed to ensuring that consumers receive correct and full information about the purchases they make. Only then can consumers take informed transactional decisions and retain trust in the market. With this important objective in mind, the ACM has tested the commercial practices of Volkswagen Aktiengesellschaft (hereinafter: Volkswagen AG) against the provisions of the Dutch Unfair Commercial Practices Act (*Wet Oneerlijke handelspraktijken*.)
2. In this decision the ACM concludes that Volkswagen AG is guilty of unfair commercial practices. Volkswagen AG placed defeat device software in tens of thousands of cars of its Volkswagen, SEAT, ŠKODA and Audi brands manufactured between 2009 and 2015. This software recognized the test environment and ensured that the nitrogen oxide emissions in that environment were lower than in real driving conditions on the road. At the same time, Volkswagen AG advertised itself to customers as an environmentally-conscious and green-minded organization. It also claimed that type approval had been obtained for the affected cars, even though the terms of approval had in actual fact not been satisfied. Volkswagen AG thus violated the requirements of professional diligence and misled consumers. For this violation of the rules, the ACM has imposed a fine on Volkswagen AG of EUR 450,000 in total.

2 Reader's guide

3. In this decision the ACM describes the background and course of the investigation (Chapter 3), the content of the investigation report (Chapter 4), the legal entity involved (Chapter 5) and the relevant facts (Chapter 6). Next, Volkswagen AG's Opinion on the investigation report is outlined (Chapter 7), followed by the ACM's legal assessment in the light of Volkswagen AG's Opinion (Chapter 8). The subsequent chapters provide the justification for identifying Volkswagen AG as the offender (Chapter 9) and the justification of the imposed fine (Chapter 10). The final chapter sets out the ACM's decision (Chapter 11). The legal framework is provided in the Annex.

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3 Background and course of the investigation

4. On September 18th, 2015, news broke that Volkswagen AG had fitted some of its diesel car models with defeat device software in the 2009-2015 period in the United States.¹ Volkswagen AG then revealed on September 22nd, 2015 that this defeat device software had been installed worldwide on about 11 million cars with engine type EA189.² In its 2015 Annual Report, Volkswagen AG published the following overview.³

AFFECTED FOUR-CYLINDER DIESEL ENGINES				
2.0 L TDI		1.6 L TDI		1.2 L TDI
6,608 thsd.		3,665 thsd.		468 thsd.
.....				
VOLKSWAGEN PASSENGER CARS		AUDI	ŠKODA	SEAT
5,642 thsd.		2,410 thsd.	1,224 thsd.	695 thsd.
				VOLKSWAGEN COMMERCIAL VEHICLES
				770 thsd.
.....				
EU28		USA/CANADA		REST OF THE WORLD
8,494 thsd.		608 thsd.		1,639 thsd.
.....				

5. Kraftfahrt-Bundesamt (hereinafter: KBA), the German vehicle type approval authority, announced on September 25th, 2015 that Volkswagen AG had also used defeat device software in Europe in models with the EA189 1.2, 1.6 and 2.0 L diesel engines. This concerned the brands Volkswagen⁴, Audi, ŠKODA and SEAT.⁵ The number of affected cars in the Netherlands was reportedly just over 170,000 cars.⁶
6. On September 29th, 2016 the ACM received an enforcement request from the Dutch Consumers' Association.⁷ The Dutch Consumers' Association requested the ACM to start an investigation into the conduct of Volkswagen AG in order to establish whether Volkswagen AG was guilty of unfair commercial practices in the Netherlands. By letter of December 8th, 2016, the ACM informed the Dutch Consumers' Association that it would carry out the investigation.⁸ On December 19th, 2016, after notifying Volkswagen AG, the ACM posted a statement about this matter on its website.⁹
7. As part of the investigation, the ACM sent a request for information on February 13th, 2017 to [CONFIDENTIAL] (hereinafter: the importer).¹⁰ The importer provided the requested information by

¹ File document 7, Notice of violation Environmental Protection Agency (EPA) to Volkswagen AG and File document 8, CARB Letter to Volkswagen AG.

² File document 10, Press release Volkswagen AG.

³ File document 5, Volkswagen Annual Report 2015, p. 50.

⁴ 'Volkswagen AG' refers in this decision to the commercial practices of Volkswagen Aktiengesellschaft. The brand name 'Volkswagen' is used to refer to Volkswagen cars.

⁵ File document 26, Answer to additional questions about Volkswagen, Annex 2.

⁶ File document 21, Fourth summary letter to the House of Representatives, p. 10.

⁷ File document 20, Request for enforcement action against Volkswagen.

⁸ File document 29, Reaction to enforcement request from Dutch Consumers' Association.

⁹ File document 40, Mailing of ACM news bulletin about Volkswagen.

¹⁰ File document 54, Information request.

letter of March 8th, 2017.¹¹ On March 15th, 2017 the ACM sent the presentation of facts as gathered during the investigation to Volkswagen AG.¹² Volkswagen AG responded to this.¹³ The investigation resulted in an investigation report (hereinafter: the investigation report), which was sent to Volkswagen AG on May 4th, 2017.¹⁴

8. On July 24th, 2017 Volkswagen AG sent its written opinion on the investigation report to the ACM.¹⁵ On August 29th, 2017 a hearing was held at the ACM office, where Volkswagen AG provided an oral explanation of its opinion. A report of the hearing was made and sent to Volkswagen AG on September 26th, 2017.¹⁶ Volkswagen AG responded to this report on October 12th, 2017.¹⁷

4 The investigation report

9. The investigation report found that Volkswagen AG broke the Dutch Act on Enforcement of Consumer Protection (*Wet handhaving consumentenbescherming; hereinafter: the Act on Enforcement of Consumer Protection*) during, at least, the period from 2009 to 2015 by acting contrary to the following sections:
 - a. Section 6:193b, paragraph 2 of the Dutch Civil Code (*Burgerlijk Wetboek*): acting contrary to the requirements of professional diligence;
 - b. Section 6:193c, paragraph 1, opening lines and under (b) of the Dutch Civil Code: provision of misleading information about the main characteristics of the product;
 - c. Section 6:193g, opening lines and under (d) of the Dutch Civil Code: black list of misleading commercial practices, namely claiming that a product has been approved, while it has not or making such a claim without complying with the terms of approval.

5 Legal entity

10. The Volkswagen Group is the biggest car manufacturer in Europe. According to the description in the German Trade Register, Volkswagen AG, with its registered office at Wolfsburg (Germany), is the parent company of the Volkswagen Group, comprising numerous legal entities in Germany and beyond trading under different brand names including, in the first place, the name Volkswagen itself. For the purposes of the present case, it is important that Volkswagen AG, in its capacity as head of the group, also has interests in AUDI AG, SEAT S.A. and ŠKODA AUTO a.s. and consolidates the results of these companies in its annual figures.¹⁸
11. The worldwide revenue of Volkswagen AG in 2015 was EUR [CONFIDENTIAL].¹⁹

¹¹ File document 62, [CONFIDENTIAL] reaction to information request about Volkswagen engine software.

¹² File documents 64 and 66, Mailing of facts.

¹³ File document 70, Volkswagen AG's reaction to summary of facts.

¹⁴ File document 74, Mailing of report.

¹⁵ Reference ACM/IN/049182.

¹⁶ Reference ACM/UIT/179091.

¹⁷ Reference ACM/IN/170230.

¹⁸ File document 47, CoC extract for Volkswagen AG and File document 5, Volkswagen Annual Report 2015, p.58 and 188

ff.

¹⁹ File document 70, Volkswagen AG's reaction to summary of facts.

6 Facts

6.1 Vehicle type approval

12. Cars must have Whole Vehicle Type Approval (hereinafter: type approval) to be admitted to the European market. The type approval consists of a set of partial approvals.
13. The vehicle type approval is harmonized in the European Union under Directive 2007/46/EC (hereinafter: the Framework Directive).²⁰ The main objective of this legislation is to ensure that new vehicles, components and technical units that are brought onto the market meet high safety and environmental requirements.²¹ The type approval scheme as described in the Framework Directive is based on the principles of type approval by independent authorities and mutual recognition of this approval. A type approval issued by a competent approval authority of a European member state (in the Netherlands: the RDW) is recognized by all other European member states.
14. The vehicle manufacturer applies for type approval to an approval authority in one member state.²² The manufacturer is then responsible for all aspects of the approval procedure and must guarantee that the manufactured cars are in conformity with the base vehicle that received type approval.²³
15. Once type approval has been obtained in one EU country,²⁴ the manufacturer must issue a Certificate of Conformity (hereinafter: CoC) for every manufactured vehicle.²⁵ This certificate confirms that the vehicle adheres to the type approval requirements of the EU. With this CoC, the vehicle can be registered and sold anywhere in the EU.²⁶
16. A vehicle that has received type approval in another member state can be registered by an importer in the Netherlands at the RDW through the 'Accelerated Registration Procedure'.²⁷ The importer simply enters the vehicle's CoC into the RDW database so that it is possible to check whether the vehicle has a valid type approval. If it has, the vehicle is registered by the RDW in the Netherlands. The mutual recognition principle means that the RDW or importer does not in principle perform any additional independent tests.

6.2 Partial approval for emissions

17. A car's type approval consists of a set of partial approvals. One of these partial approvals concerns emissions, including nitrogen oxides (hereinafter: NO_x). The Framework Directive refers in this context to Regulation 715/2007 (hereinafter: the Emissions Regulation)²⁸ that sets out the technical requirements for emissions.
18. In October 2009 the Euro 5 standard came into force. The Emissions Regulation and derived regulations²⁹ also specify the limit for NO_x emissions, measured according to the New European

²⁰ Directive 2007/46/EC of the European Parliament and of the Council of September 5th, 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) (*OJEU* 2007, L 263/1).

²¹ See Recital 14 in the preamble of the Framework Directive.

²² Article 7, paragraph 1 of the Framework Directive.

²³ Article 5, paragraph 1 of the Framework Directive.

²⁴ Article 3, paragraph 33 of the Framework Directive.

²⁵ Article 3, paragraph 36 and Article 18 of the Framework Directive.

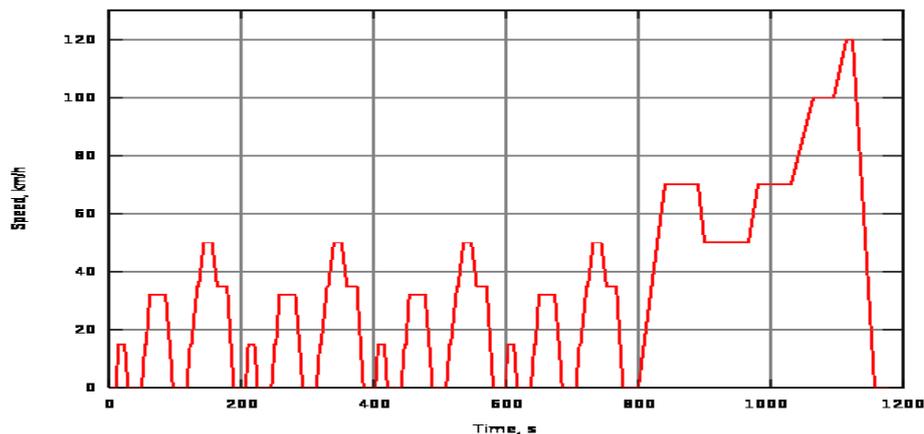
²⁶ Article 26, paragraph 1 of the Framework Directive.

²⁷ File document 45, Reply to additional questions about Volkswagen.

²⁸ Regulation (EC) No. 715/2007 of the European Parliament and of the Council of June 20th, 2007 on type approval of motor vehicles with respect to emissions from light passenger cars and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (*OJEU* 2007, L 171/1).

²⁹ Commission Regulation 692/2008 of July 18th, 2008 implementing and amending 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

Driving Cycle (NEDC). Briefly, the test method consists of a repetition of four city cycles, at a maximum speed of 50km per hour and one cycle outside the city at a maximum speed of 120km per hour. The vehicle is tested during 20 minutes on a roller dynamometer at different speeds and at different time intervals. Diagrammatically, the NEDC looks as follows:³⁰



19. The NEDC is purely based on situations in a laboratory setting. In the European type approval system, NO_x emissions are not tested in practice (on the road).

6.3 The commercial practice of Volkswagen AG

6.3.1 The diesel engine

20. A diesel engine is a self-ignition engine. Air is compressed under high pressure in the cylinder, into which fuel is then injected. Due to the high compression temperature, this mixture self-ignites, pressing the piston downwards in the cylinder. This downward force is then transferred to the crankshaft. The ignition of the air and fuel mixture causes the emission of soot/particulates and various polluting gases, including NO_x and CO₂.
21. Since the introduction of the 'Turbocharged Direct Injection' (hereinafter: TDI) technology in the 1980s, Volkswagen AG has used Exhaust Gas Recirculation systems (hereinafter: EGR systems) in its diesel engines to limit the formation of NO_x. Volkswagen has provided the following description of the operation of the EGR system, which the ACM assumes to be correct:

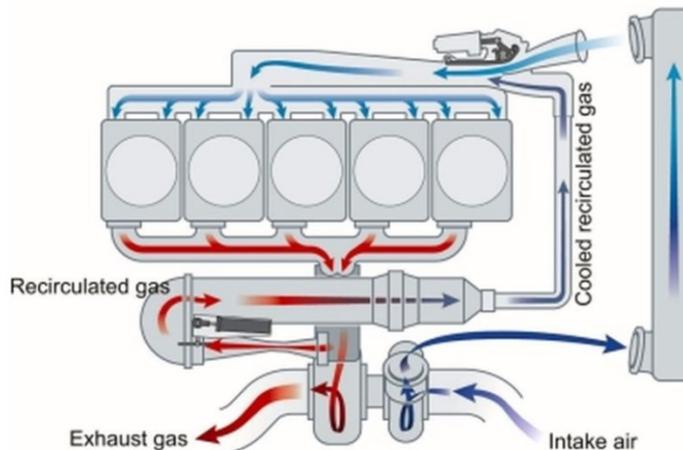
"The exhaust gases are passed through a steel pipe to the inlet manifold, via a cooler. There, the exhaust gas is mixed with air that has been drawn into the combustion chamber by suction. The exhaust gas reduces the combustion temperature, thus cutting NO_x emissions. The engine management software controls the opening and closing of the EGR valve, and the extent to which it opens. The EGR system is part of the engine. In cars with an EA189 engine, the EGR system has two positions – mode 1, which optimizes NO_x emissions and mode 2, which limits particulate emissions. Mode 1 is used when the car's speed complies with the New European Driving Cycle

and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (Implementing Regulation), and Regulation No 83 of the Economic Commission for Europe of the United Nations (UN/ECE) – Uniform provisions concerning the approval of vehicles with regard to the emission of pollutants according to engine fuel requirements (OJEU 2008, L 199/1).

³⁰ <https://www.autobahn.eu/511/zo-werkt-de-nieuwe-europese-verbruikstest/>. For more information about the NEDC, see also file document 17, TNO reports on emission tests to the House of Representatives, p. 8-9.

(NEDC). Under all other conditions, mode 2 is used. The engine management software determines which mode is used.”³¹

22. The diagrammatic representation of a diesel engine with EGR system hardware looks as follows:



6.3.2 The software

23. In response to the Euro 5 standard, Volkswagen AG manufactured cars with an EA 189 type diesel engine in the period from 2009 to 2015.³² Some of these Volkswagen, Audi, ŠKODA and SEAT models were fitted with software that used various parameters (such as movements of wheels, steering wheel, accelerator and vehicle) to sense whether the car was being tested in a test environment.
24. When the NEDC test cycle was recognized, the mixture of air and recirculated exhaust gases induced into the cylinder was modulated via the positioning of the EGR valve. This influenced the emissions from the engine. In other words, the EGR system switched to ‘mode 1’. This reduced the NO_x emission test results and kept these within the type approval requirements. If the software did not sense a test cycle, the EGR value continued to operate in ‘mode 2’. In this case, the NO_x emissions were clearly higher.³³ This dual-mode operation of the software was not disclosed to the competent approval authorities.
25. Type approval was issued for the cars that Volkswagen AG had fitted with the defeat device software described above.³⁴ The importer then imported these software-fitted cars and sold them to consumers on the Dutch market. In the relevant period, this concerned 43,376 Volkswagens, 9,179 Audis, 15,437 ŠKODAs and 14,195 SEATs. These cars are referred to below as ‘the affected cars’.

³¹ File document 70, Reaction of Volkswagen AG to summary of facts, p. 3.

³² File document 5, Volkswagen Annual Report 2015, p. 50 and File document 43, RDW documents with recall details.

³³ Volkswagen AG itself calls the difference “noticeable” (see File document 5, Annual Report 2015, p. 182). In its letter of September 30th, 2015 to the House of Representatives, the State Secretary of Infrastructure and the Environment observes that deactivation of the test mode “led to far higher nitrogen (Nox) emissions” (see File document 13, pp. 2 and 3). In the United States, the EPA (Environmental Protection Agency) established that when the test mode was deactivated emissions were 10 to 40 times higher than the standard that was met in the test mode (see File document 7, p. 4).

³⁴ This type approval was issued by the competent approval authorities in Germany (for Volkswagen and Audi), Spain (for SEAT) and Great Britain (for ŠKODA), see File document 5, Volkswagen Annual Report 2015, p. 50.

26. After learning of the defeat device software installed by Volkswagen AG, the KBA concluded that the affected cars were not in conformity with the issued type approval. Pursuant to Section 30 of the Framework Directive, the KBA instructed Volkswagen AG to recall and modify these cars in Europe.³⁵ On September 29th, 2015 Volkswagen AG issued a press release announcing its action plan to refit the affected cars.³⁶ Volkswagen AG developed a dedicated software update for each engine type, which had to be approved by the KBA.³⁷ After the software update, the EGR system has only one mode, 'mode 1', in which the emission of NO_x is limited. Switching to a different mode is no longer possible.³⁸ The recall and refitting action in the Netherlands is being coordinated by the RDW and was still ongoing at the time of this decision.

6.4 Communications about the affected cars

27. In the period from 2009 to 2015, brochures, websites, adverts and commercials were used to promote the affected cars.
28. The marketing material for the four aforementioned car brands is produced in an almost identical manner. Product information always comes from the manufacturer. Where necessary, the importer collects additional product information from the 'Technical Database'. This is a Volkswagen AG-wide online database containing detailed type-specific product information for all the car brands. The importer has access to that database. The communications about the product features of the car brands are exclusively based on the data from that database.

6.4.1 Brochures

29. The brochure design is determined by the manufacturer of the specific car brand. This manufacturer supplies an English-language template of the brochure, including the product information of the brand. The importer then has the template translated by an external translation agency. With Volkswagen, SEAT and ŠKODA, the printer gets the brochures printed after they have been translated. With Audi, the translated brochure text is sent back to Audi, which has the brochures printed centrally. The content of market specific propositions is compiled by the importer and added to the brochures.³⁹

6.4.2 Websites

30. Dutch websites with information on the individual brands and models are available for Volkswagen, Audi, SEAT and ŠKODA.⁴⁰ These websites also carry adverts for the available models.⁴¹ The www.volkswagen.nl, www.seat.nl and www.skoda.nl websites are registered in the importer's name. The website owner of www.audi.nl is Audi AG.⁴²
31. The non-vehicle specific information on these websites is determined by the importer on the basis of the manufacturer's information. The vehicle-specific technical content of the Dutch websites is derived by the importer from standard texts and technical product information supplied by the manufacturer.⁴³

³⁵ File document 26, Reply to additional questions about Volkswagen, with two letters from the KBA in the Annex.

³⁶ File document 12, Press release Volkswagen AG.

³⁷ File document 62, Reaction from [CONFIDENTIAL] to request for information on Volkswagen engine software, p. 6 and Annex 4. In the case of 1.6 L engines, the hardware is also modified, see Written Opinion, marginal 4.34.

³⁸ Written Opinion, marginal 4.33.

³⁹ File document 62, Reaction from [CONFIDENTIAL] to request for information on Volkswagen engine software, p. 3.

⁴⁰ See www.volkswagen.nl, www.audi.nl, www.seat.nl and www.skoda.nl.

⁴¹ File document 57, Official Report ('*Verslag van Ambtshandelingen*')/Analysis of digital material.

⁴² See <https://www.sidn.nl/whois>.

⁴³ File document 71. Reaction from [CONFIDENTIAL] to summary of facts, p. 2.

32. The importer determines the website design for all brands except Audi. Audi supplies standard website templates that are identical for every country. The importer is only responsible for the translation of the content. Any additional information required in the Netherlands is added to the websites by the importer.

6.4.3 Adverts

33. Adverts are developed by both the importer and the manufacturer. The importer bases the adverts on product information supplied by the manufacturer in a template. The importer is not obliged to use the templates, but the adverts must be consistent with the manufacturer's house style. If additional information is required in the Netherlands, the importer adds this to the adverts.

6.4.4 Commercials

34. The importer also produces commercials aired in the Netherlands in cooperation with an advertising agency. The product information displayed in the commercials comes from the manufacturer. Here too, the importer adds any additional information that is required by law.

6.5 Sustainability

35. As a member of the European Automobile Manufacturers Association (ACEA), Volkswagen AG has committed to the '*Automotive Industry Guiding Principles to Enhance Sustainability Performance in the Supply Chain*'.⁴⁴ Under the 'Environmental Standards' heading, this document states that member companies are expected to pursue effective environmental protection throughout the entire supply chain in order to reduce the ecological footprint of their products. Volkswagen AG also subscribes to these principles in its own '*Environmental Policy*'.⁴⁵
36. Environmental policy is high on the social agenda, both at national and international level. In this connection, the national government website www.rijksoverheid.nl asserts that:

"National Government works together with provinces and municipalities to meet the European air quality standards. One priority is to keep the levels of particulates and nitrogen dioxide in the air within bounds. Traffic is a key emitter of these pollutants. Harmful substances have a negative impact on the climate (greenhouse effect) and health."

37. Letters from the State Secretary of Infrastructure and the Environment to the House of Representatives also underline that nitrogen oxide emissions from diesel cars have been a longstanding concern in the Netherlands and that the Netherlands is actively pursuing more effective test procedures.⁴⁶ On September 24th, 2015, the European Commission put out a press release calling on the European member states to press for "*full disclosure, zero tolerance and strict compliance with EU rules on pollutant emissions*".⁴⁷

7 Opinion of Volkswagen AG

38. Volkswagen AG's reaction to the investigation report can be summarized as follows.
39. Volkswagen AG asserts that it, nor its subsidiaries, have sold any cars in the Netherlands. Volkswagen AG is a foreign holding company consisting of a group of manufacturers with no retail

⁴⁴ File document 4, ACEA CSR Automotive Industry Guiding Principles.

⁴⁵ File document 1, Environmental Policy Volkswagen 2010.

⁴⁶ File documents 13, 15, 16 and 21.

⁴⁷ http://europa.eu/rapid/press-release_STATEMENT-15-5713_en.htm.

or distribution presence in the Netherlands. As such, it cannot in its opinion be regarded as a ‘trader’ engaging in a relevant ‘commercial practice’ as defined in Section 3A of Title 3 of Book 6 of the Dutch Civil Code⁴⁸ (also known as the Dutch Unfair Commercial Practices Act (*Wet Oneerlijke handelspraktijken*; hereinafter: Unfair Commercial Practices Act)).⁴⁹

40. Regarding the alleged violation of Section 6:193b, paragraph 2 of the Dutch Civil Code (acting contrary to the requirements of professional diligence), Volkswagen AG states that the software it installed in the affected cars did not conflict with its environmental policy or objectives or its related communications. In addition, Volkswagen AG is of the opinion that the consumer’s purchase decision was not noticeably influenced by the application of the software.⁵⁰
41. Regarding the alleged violation of Section 6:193c, paragraph 1, opening lines and under (b) of the Dutch Civil Code (provision of misleading information), Volkswagen AG denies providing any misleading information as all its communications cited in the investigation report are factually correct. The ACM is wrong to make a connection between the EU type approval procedure and the sustainability and environmental claims made by Volkswagen AG.⁵¹ After all, it was the EU, not Volkswagen, that opted for a limited laboratory test and the affected cars passed this test. In practice, Volkswagen AG promotes sustainability on multiple fronts.
42. Regarding the alleged violation of Section 6:193g, opening lines and under (d) of the Dutch Civil Code (black list of misleading commercial practices), Volkswagen AG states that the affected cars had and have a valid type approval and complied with all terms of approval. The software applied by Volkswagen AG is, in its opinion, not a defeat device as defined in the Emissions Regulation. Moreover, there is no evidence that consumers were misled. Volkswagen AG reiterates in this connection that it has no clear understanding of what the supposedly misleading act consisted of.⁵² The mere mention of the type approval on the RDW vehicle registration cannot be construed as an environmental compliance ‘claim’ by Volkswagen AG.
43. Volkswagen AG adds that ACM failed to conduct its investigation with due diligence. It claims that the facts in this case were not adequately investigated and that no robust legal assessment was made. Volkswagen AG also believes that ACM already intended before the investigation to impose a fine in order to facilitate claims for consumers. This creates a semblance of partiality and is in conflict with the due diligence principle.⁵³
44. Volkswagen AG thus takes the view that there are no factual or legal grounds for concluding that it violated the rules. Insofar as the ACM has concluded that rules have been violated, Volkswagen AG asserts as an “extremely subsidiary” argument that it cannot be held responsible for said violations.⁵⁴
45. Finally, Volkswagen AG states that the alleged violations are factually and legally identical. Volkswagen AG asserts, as a primary argument, that the ACM can therefore not possibly conclude

⁴⁸ Section 6:193a to Section 6:193j of the Dutch Civil Code.

⁴⁹ Written Opinion, § 3.

⁵⁰ Written Opinion, § 6.

⁵¹ Written Opinion, § 7.

⁵² Written Opinion, § 5.

⁵³ Written Opinion, § 9 and 10.

⁵⁴ Written Opinion, marginals 5.33-5.42, 6.37 and 7.13.

that three separate violations of the rules took place. As a subsidiary argument, it states that it would be disproportionate to impose three maximum fines for said violations.⁵⁵

8 Legal assessment

8.1 Competence of ACM

46. Pursuant to Section 2.2 of the Act on Enforcement of Consumer Protection, the ACM is entrusted with the supervision of compliance with the legal provisions as defined in section a of the Annex to the Act on Enforcement of Consumer Protection. The provisions relating to the actions described in this decision, namely sections from the Unfair Commercial Practices Act, are mentioned in section a of the Annex to the Act on Enforcement of Consumer Protection.
47. The ACM can act in the event of actions or omissions that have or may cause damage to the collective interests of consumers as defined in Section 1.1, opening lines and under (f) of the Act on Enforcement of Consumer Protection. In the Netherlands, tens of thousands of consumers were affected by the purchase of a car fitted with defeat device software that manipulated emissions tests (see marginal 25 of this decision). In addition, the affected cars were offered to consumers by means of commercial messages via a wide range of channels, such as the internet. These channels have a large reach. This commercial practice made and makes it possible to reach and damage many consumers in an identical manner, possibly leading to a violation of collective interests of consumers as defined in Section 1.1, opening lines and under (f) of the Act on Enforcement of Consumer Protection. As will become evident hereinafter, the actions in question are of a systematic nature. They stem from the '*company policy*' and the way in which the business processes are set up within Volkswagen Group and cannot be blamed on individual deviations from these processes.
48. If there is any question of an infringement of the provisions from the Unfair Commercial Practices Act, as mentioned in Annex a to the Act on Enforcement of Consumer Protection, the ACM can, on the grounds of Section 2.9 of the Act on Enforcement of Consumer Protection, impose an order for periodic penalty payments and/or an administrative fine.

8.2 Applicability of Unfair Commercial Practices Act

49. The Unfair Commercial Practices Act is aimed at the 'trader' who engages in a certain 'commercial practice'. The ACM is of the opinion that Volkswagen AG should be regarded as such based on the following considerations.
50. Volkswagen AG is one of the world's biggest car manufacturers with factories all over the world. It manufactures vehicles to sell these to diverse customer groups, including consumers, around the world. In order to put the cars onto the Dutch market, it has the cars inspected by a foreign inspection authority within the EU and exports the cars in cooperation with the importer to the Netherlands, after which the importer resells or distributes the cars. Furthermore, Volkswagen AG provides the design, standard texts, templates and product information for marketing the affected cars in the Netherlands.
51. Both the production of and the direct role that Volkswagen AG played in the marketing had the objective of selling the affected cars to consumers or to promote these sales. In the opinion of the ACM, Volkswagen AG can therefore not credibly maintain that it does not engage in commercial

⁵⁵ Written Opinion, § 8.

practices that are directly related to the promotion of sales, sale or delivery of (diesel) cars to Dutch consumers.

52. The cooperation of Volkswagen AG with the importer – also distributor – provides additional grounds for regarding Volkswagen AG as ‘trader’ as defined in the Act on Enforcement of Consumer Protection. Volkswagen AG makes use of the importer’s knowledge of the Dutch market, ‘skills’ and dealer contacts to approach Dutch consumers (as well as business customers) to sell the affected cars.
53. Additionally, the purpose of the Unfair Commercial Practices Directive⁵⁶ (hereinafter: Unfair Commercial Practices Directive), as implemented in the Unfair Commercial Practices Act, is to achieve a high level of consumer protection. As a general rule, terms from the Unfair Commercial Practices Act must therefore be given a broad interpretation⁵⁷ and compliance with the regulations is mandatory. Effective protection of the consumer would be seriously undermined if the prohibition on unfair commercial practices exclusively applied to the last link in the sales channel to the consumer – in this case the garage or car dealer where the consumer actually purchases his car.
54. In view of the foregoing, the ACM designates Volkswagen AG as a trader as defined in Section 6:193a, paragraph 1 opening lines and under (b) of the Dutch Civil Code. Volkswagen AG is required, on the grounds of Section 8.8 of the Act on Enforcement of Consumer Protection, to observe the provisions of the Unfair Commercial Practices Act.

8.3 General points from the Opinion of Volkswagen AG

55. Before assessing the violations established in the investigation report, the ACM wishes to respond to several general points from the Opinion of Volkswagen AG.

8.3.1 Procedural aspects

56. The ACM is of the opinion that its supervisors carried out a diligent investigation. In this connection, the ACM observes first and foremost that supervisors are not obliged on the grounds of any legal provisions or good governance principles to perform specific investigative acts of their own or to apply a specific investigative method.
57. However, the ACM supervisors are obliged to exercise due diligence as defined in Section 3.2 of the Dutch General Administrative Law Act (*Awb*). They conducted their investigation accordingly. The investigation report and the documents relating to the case show that in the course of their investigation the ACM supervisors gathered the required knowledge by consulting available documents⁵⁸ and requesting information from various parties⁵⁹. According to the ACM, this resulted in an accurate picture of the relevant facts and circumstances in this case. To verify their findings, the supervisors sent the presentation of facts to Volkswagen AG.⁶⁰ Based on the reaction from Volkswagen AG⁶¹, the ACM supervisors adjusted certain factual inaccuracies or omissions in the

⁵⁶ Directive 2005/29/EG of the European Parliament and of the Council of May 11th, 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Directive 84/450/EEC of the Council, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and of Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (*OJEU* 2005, L 149/22).

⁵⁷ Cf. CBb August 25th, 2015, ECLI:NL:CBB:2015:285, r.o. 9.3 ff.

⁵⁸ See e.g. File documents 1 to 18, 21, 25, 46 to 49 and 56.

⁵⁹ See e.g. File documents 26, 43, 45 and 62.

⁶⁰ File documents 64 and 66.

⁶¹ File document 70.

investigation report.⁶² Given this approach, the ACM sees no reason to doubt the due diligence exercised during the investigation.

58. Insofar as Volkswagen AG states in its Opinion that ACM erroneously relied on reports from US supervisors or communications from Volkswagen AG about irregularities concerning the installation of software in US cars, the ACM observes that the situation in the United States is important for the context of the case, but that the ACM did not base its conclusions about the violations on the US situation. Both in the investigation report and in this decision, the ACM has restricted itself to the cars that were brought onto the Dutch market and were fitted with the defeat device software that is prohibited in the EU (referred to in this decision as ‘the affected cars’, see also marginal 25 of this decision) and the communications made by Volkswagen AG itself about this issue to Dutch consumers. The ACM sees no reason why it should not include the KBA findings and statements in its overall assessment (see also marginal 63 ff. of this decision).
59. Furthermore, Volkswagen AG asserts that the ACM failed to act with due diligence as it had already decided before the investigation to impose a fine in order to facilitate consumer claims for damages. Volkswagen AG draws this conclusion on the basis of the draft text of an ACM statement about the initiation of the investigation into Volkswagen AG that was sent to it.⁶³ Volkswagen AG was specifically alarmed by the following phrases: *“Previously this case was not a priority for us, as it looked as if other organizations and Volkswagen itself would take action. Now that this has not led to the desired results, it is incumbent upon us as the supervisor to act.”* and *“The ACM previously expected other organizations and Volkswagen itself to take action in Europe and the Netherlands and to achieve more for consumers.”*
60. The ACM points out that extensive and prolonged media attention for the ‘diesel scandal’ made it desirable to inform the public that the ACM, after weighing up the various priorities, had decided to commence an investigation. This does not imply that the outcome of the investigation was a foregone conclusion. Nor does it imply that the ACM believed that a cursory investigation would be sufficient. Moreover, the purpose of the ACM’s actions is not to facilitate consumer claims for damages, but to ensure compliance with the public laws falling within the ACM’s supervision. Accordingly, this decision shall not result in the compensation or reparation of any damage suffered by consumers.

8.3.2 Defeat device as defined in the Emissions Regulation

61. Volkswagen AG has acknowledged that it installed software in the affected cars in the period from 2009 to 2015 to specifically influence the NO_x emissions in a test environment. Outside of the test environment, the software switched to a higher-emission mode.⁶⁴ The approval authorities were not informed of this ‘switching logic’. Despite this fact, Volkswagen AG argues that this software does not, legally speaking, qualify as a forbidden defeat device as defined in the Emissions Regulation.
62. The KBA has concluded that this software constituted a prohibited defeat device as defined in Article 5, paragraph 2 of the Emissions Regulation, which entails that the affected cars were not in

⁶² Investigation Report, §3.3.

⁶³ File document 34.

⁶⁴ File document 5, Volkswagen Annual Report 2015, p. 49 ff. See also File document 56, Film on You Tube – [CONFIDENTIAL] for the interview with CEO [CONFIDENTIAL] in Momentum 2015 *“It all comes down to trust”* and File document 62, Reaction from [CONFIDENTIAL] to request for information about Volkswagen engine software (annexes) for the advert *“Schaamrood. Allesbehalve trots op onze nieuwste kleur”*.

conformity with the issued type approval. The KBA informed the other European approval authorities of this finding.⁶⁵

63. The ACM relies on the finding of the KBA in its capacity as the competent approval authority and issuer of the type approval in the first instance. If the said competent approval authority concludes that the affected cars do not meet the terms of the issued type approval, the ACM is entitled to accept this finding as correct. Contrary to what Volkswagen AG argues in this respect, a further independent investigation by the ACM into this matter is not necessary.

64. It should be noted, incidentally, that the ACM considers KBA's finding to be correct and cannot make sense of the counter arguments put forward by Volkswagen AG. The ACM shall clarify this below in the light of the elements of a defeat device as defined in Section 3, paragraph 10 of the Emissions Regulation.

65. *“Any element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter ...”*

The software used by Volkswagen AG measures (by means of sensors) various parameters to determine whether or not the car is running in a test environment. According to the ACM, this software, in combination with the various sensors, constitutes such an element of design.

66. *“...for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system ...”*

It is certain that the software's purpose was to modulate the mixture of air and recirculated emission gases induced into the cylinder through the positioning of the EGR valve. In this way, the engine's NO_x emissions could be influenced. Volkswagen AG suggests that the EGR software forms part of the engine itself and is not part of the 'emission control system' that according to Volkswagen AG exclusively relates to the exhaust purification system (such as filters and catalysts). There is, however, no basis for such a limited interpretation of the term 'emission control system', which is not defined in the Emissions Regulation or the implementing rules. According to the ACM, the emission control system must be seen as the *whole* system that controls and modulates the car's emissions. The emissions are influenced by the amount of combustion gas that is led back, via the EGR system, to the combustion chambers.

67. Recital 6 in the preamble of the Emissions Regulation states that the purpose of this Regulation is notably to reduce nitrogen oxide emissions of diesel vehicles in order to improve the air quality and comply with the air pollution limits. A limited interpretation as put forward by Volkswagen AG is irreconcilable with this purpose.

68. *“...that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use.”*

The use of the software reduces the effectiveness of the emission control system – because the system would only achieve its purpose if the emissions were also reduced in real driving conditions. In this connection, the ACM points out that Article 5, paragraph 1 of the Emissions Regulation obliges manufacturers to equip vehicles so that the components likely to affect emissions are designed, constructed and assembled so as to enable the vehicle, *in normal use*, to comply with this

⁶⁵ File document 26, Reply to additional questions about Volkswagen, Annex 2.

Regulation and its implementing measures. Whatever further measures Volkswagen AG may have taken to limit the actual emissions, the defeat device software was specifically designed to at least comply with the standard in the test environment, while higher NO_x emissions resulted in mode 2.⁶⁶

69. Volkswagen AG asserts that the Union Legislature deliberately opted for a laboratory test procedure that does not measure the emissions under real driving conditions on the road. Volkswagen AG asserts that there is basically no emissions standard for 'normal use' that it could have violated. The vehicles simply meet the Euro 5 standard as required under the prescribed NEDC test. The RDW confirmed this in reply to questions from the ACM, according to Volkswagen AG.⁶⁷ At the hearing, Volkswagen AG called this a "flaw" in European legislation, which had been the subject of much political debate.
70. However, it was precisely in order to remedy this legal "flaw", as perceived by Volkswagen AG, that defeat device software with a '*switching logic*', which switches between a detected test environment and 'normal use', has been prohibited by the Union Legislature.⁶⁸ The fact that an alternative – more realistic – test method is possible is irrelevant in this connection. In the United States, where a more realistic test is applied, the use of a *defeat device* is also prohibited. Moreover, as Volkswagen AG has confirmed, the US definition of *defeat device* corresponds with the EU definition.⁶⁹
71. Volkswagen AG cites, among other things, the passage where the RDW states that: "*There are therefore no documents on emissions transgressions: the vehicle's emissions meet the terms of type approval...*". This quotation is incomplete, however, as the RDW adds: "*... but due to the presence in the vehicle of a defeat device, the vehicle does not meet the terms of approval.*"
72. Volkswagen AG's arguments, namely that according to the *EQUA Air Quality Index* of the independent agency *Emission Analytics* and a real drive test of the ADAC⁷⁰ the affected vehicles are most definitely environmentally friendly (compared to older types and compared to competing brands)⁷¹ and that the mode 2 setting aims to achieve a better balance between NO_x and soot (particulate) emissions in real driving conditions, are beside the point.
73. ACM does not dispute that Volkswagen AG is seeking to make its production processes and products more sustainable and has introduced multiple new clean technologies for this purpose. Be that as it may, Volkswagen AG must at all times observe the statutory standards and may not substitute its own standards for these statutory standards. Given that the use of defeat devices in itself is prohibited, it is not up to the ACM to prove that the emissions in real driving conditions (in mode 2) do *not* meet the Euro 5 standard, as Volkswagen AG argues.
74. Article 5, paragraph 2 under (a), (b) and (c) of the Emissions Regulation provides for certain exceptions to the prohibition of the use of defeat devices. These relate, for instance, to the protection and safe operation of the engine. Volkswagen AG has confirmed that it has not invoked any of these limitative exceptions.⁷²

⁶⁶ File document 5, Volkswagen Annual Report 2015, p. 182.

⁶⁷ File document 45, Reply to additional questions about Volkswagen.

⁶⁸ Volkswagen AG also seems to recognize this regarding the 'defeat device': "*It is the only relevant norm where you see a connection between testing cycle and real drive.*" See Report of the hearing, p. 9.

⁶⁹ File document 7, EPA Notice of Violation, pp. 2-3 and Report of the hearing, p. 7.

⁷⁰ Allgemeiner Deutscher Automobil-Club e.V., Germany's biggest automobile association.

⁷¹ Written Opinion, marginal 6.10 and Report of the hearing, Annex 1, p. 9.

⁷² Report of the hearing, p. 7.

75. Volkswagen AG sees the fact that the KBA never withdrew the type approval as highly significant. This approval was validly obtained and remained valid, according to Volkswagen AG. In taking this stance, it ignores the fact that the KBA has established the non-conformity of the affected cars. As a consequence of this finding, the KBA can, pursuant to Section 30 of the Framework Directive, take various measures that, if necessary, can extend to the withdrawal of the type approval.⁷³ That the KBA did not in this case resort to the last-mentioned and most far-reaching measure does not alter the fundamental fact that a prohibited defeat device was used. If this had been otherwise, the KBA would not have had the authority to order a refit. Conformity with the law will only be restored once all defeat device software has been removed and replaced with approved software.
76. The ACM concludes that the software that Volkswagen AG installed in the affected cars constitutes a defeat device that is prohibited on the grounds of Article 5, paragraph 2 of the Emissions Regulation. The use of prohibited defeat device software does not in itself constitute an unfair commercial practice. But the ACM does take this finding as its starting point in assessing whether Volkswagen AG violated the provisions of the Unfair Commercial Practices Act. This assessment follows below in sections 8.4, 8.5 and 8.6.

8.4 Section 8.8a of the Act on Enforcement of Consumer Protection in conjunction with Section 6:193b, paragraph 2 of the Dutch Civil Code: acting contrary to the requirements of professional diligence

77. Under Section 6:193b, paragraph 2 of the Dutch Civil Code, a commercial practice is unfair if a trader acts contrary to the requirements of professional diligence and the ability of the average consumer to make an informed decision has been or can be noticeably impaired, so that the average consumer takes or may take a transactional decision that he would otherwise not have taken. Section 6:193a, opening lines and under (f) of the Dutch Civil Code defines professional diligence as the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practices and/or the general principle of good faith in the trader's field of activity. The term professional diligence comprises principles that were already clearly defined in the legislation of the member states before the adoption of the Unfair Commercial Practices Directive. These include 'honest market practices', 'good faith' and 'good market practices'. These principles emphasize the standards and values that apply in the specific field of business activities.⁷⁴
78. As is evident from the Explanatory Memorandum for the implementation of the Unfair Commercial Practices Directive, the definition of professional diligence contains two elements.⁷⁵ The first element is 'special skill' and the second is 'special care'. If a trader achieves a normal or higher level for both elements, he is professionally diligent. This must be determined on a case-by-case basis according to the specific circumstances in each individual case.
79. Regarding the 'special care' element, the ACM is of the opinion that the use, installation and non-disclosure of defeat device software as defined in Article 5, paragraph 2 of the Emissions Regulation is contrary to the special care that can be expected from a professional party like Volkswagen AG. The consumer must be able to fully rely on the fact that the car he or she buys or is considering buying contains no illegal or harmful components.

⁷³ It should be borne in mind that, in addition to commercial consequences, withdrawal of the type approval would also have had far-reaching consequences for the buyers of the affected cars: the cars may have been 'taken off the road'.

⁷⁴ Guidelines for the implementation of Directive 2005/29/EC concerning unfair commercial practices, SWD (2016) 163/2, p. 63, see: http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_nl.pdf.

⁷⁵ *Parliamentary Documents II* 2006/07, 30 928, 3, p. 13.

80. Regarding the 'special skill' element, the ACM observes the following. What can be considered a normal level of professional standard for the trader can be determined on the basis of various facts and circumstances. Codes of conduct can also be relevant in this connection, as these embody the normal level of professional standard in a certain sector.⁷⁶
81. What can be considered as an applicable professional standard in this case can be derived from the *Automotive Industry Guiding Principles to Enhance Sustainability Performance in the Supply Chain* of the European Automobile Manufacturers Association (ACEA) from March 2014.⁷⁷ Under the '*Environmental Standards*' heading, these principles state that the member companies are expected to pursue effective environmental protection throughout the supply chain in order to reduce the environmental footprint of their products. Volkswagen AG is a member of this Association and has committed to these sustainability principles.
82. In addition, Volkswagen AG has its own *Environmental policy* for its activities and products aimed at minimizing the environmental impact of all its activities and making a contribution towards the resolution of environmental problems at regional and global level.⁷⁸ Volkswagen AG thus projects itself as a company committed to sustainability.
83. The ACM is of the opinion that the commercial practice of Volkswagen AG conflicts with the ACEA principles as well as Volkswagen AG's own *Environmental policy*. The manipulation of the emissions of manufactured cars in a test environment, as Volkswagen AG did from 2009 to 2015, by installing software in the affected cars and failing to disclose this (see section 8.3.2 of this decision) flies in the face of the aforementioned objective to minimize the environmental impact and does not contribute to the solution for the emission of NO_x as envisaged by the Union Legislature.
84. Contrary to what Volkswagen AG asserts, the customer's behavior was influenced by the use of defeat device software and the failure to disclose the presence of this device. The absence of this information noticeably affected the average consumer's ability to make an informed decision. According to Volkswagen AG, sustainability plays a very minor role in the average consumer's vehicle purchase decision. In support of this viewpoint, Volkswagen AG refers to a survey conducted among UK consumers by Hafner, Walker and Verplanken.⁷⁹ This survey shows that the decision of fewer than 2% of the respondents depended on environmental performance. The most important factor for consumers is ease of operation, followed by such factors as the price and design of the car, so Volkswagen AG claims.⁸⁰
85. The ACM points out that the argument put forward by Volkswagen AG is at odds with the content of the website of its ŠKODA brand. On December 30th, 2011, November 6th, 2012 and January 23rd, 2013, this website claimed that consumers choose ŠKODA cars for the following reasons: "*Škoda drivers consciously choose our environmentally friendly cars with energy labels and (increasingly often) efficient engines. Because we are already looking ahead to tomorrow today. Making your driving experience as comfortable and sustainable as possible is what we strive for. Today and*

⁷⁶ See Cb August 25th, 2015, ECLI:NL:CBB:2015:285, r.o. 10.4 and 10.5 and Rb Rotterdam November 26th, 2015, ECLI:NL:RBROT:2015:8642, r.o. 5.6.2. ff.

⁷⁷ File document 4, ACEA CSR Automotive Industry Guiding Principles.

⁷⁸ File document 1, Environmental Policy Volkswagen 2010.

⁷⁹ R.J. Hafner, I. Walker, B. Verplanken, *Image, not environmentalism: A qualitative exploration of factors influencing vehicle purchasing decisions, Transportation Research Part A*, 2017, p. 89-105.

⁸⁰ Written Opinion, p. 32.

every day.⁸¹ The ACM concludes from this that Volkswagen AG itself also acknowledges that sustainability most certainly plays a role in the average consumer's decision.

86. Alongside the survey among UK consumers to which Volkswagen AG refers, various other consumer surveys suggest that sustainability is a factor that influences consumer purchase decisions. For instance, the Social Image Monitor that was conducted annually between 2009 and 2015 shows that in that period some 22% of Dutch residents said they paid a lot of attention to whether the products and services they purchased were beneficial for people, society and the environment. They think that companies, more than themselves, are responsible for this. 84% of the respondents found it important that companies devote attention to sustainability. They also judge companies on this factor, as is evident in, for instance, Volkswagen AG's lower social image rating.⁸²
87. Even if it is true that, as Volkswagen AG claims, sustainability is the primary factor in the vehicle purchase decision of less than 2% of consumers, the ACM believes that, given the number of affected cars, this still adds up to a large number of consumers. Moreover, the assumption that sustainability is subordinate to other factors (such as the price and color of the car) in the vehicle purchase decision of 98% of the consumers does not mean that sustainability plays no role whatsoever in their decision.
88. In addition, Volkswagen AG exclusively speaks of the role of sustainability at the time of purchase, thereby ignoring that a transactional decision not only concerns whether to purchase the product, but also other factors such as how and on what terms to purchase, make payment in whole or in part for that product, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting.
89. Due to the actions of Volkswagen AG, the average consumer might have taken a transactional decision that he would not have taken had he been properly informed about the manipulation of the emissions of the affected cars and the failure to disclose these emissions. A growing environmental awareness can influence the economic behavior of consumers. Claims regarding innovations and product characteristics that protect nature and the environment ('*green claims*') have become a key competition parameter and advertising instrument. The knowledge that software was used to manipulate emissions and pollution tests could put off environmentally-conscious consumers, particularly if the manipulated values concern the NO_x emissions that the Union Legislature is so keen to reduce in the course of future years.⁸³ The fact that large numbers of consumers responded to the recall action to have their car refitted as required by law underlines that consumers had genuinely taken a different transactional decision from what they would otherwise have done.
90. In view of the above, the ACM concludes that Volkswagen AG systematically acted contrary to the requirements of professional diligence in, at least, the period that it installed defeat device software in the affected cars. This results in a violation of Section 8.8 of the Act on Enforcement of Consumer Protection in conjunction with Section 6:193b, paragraph 2 of the Dutch Civil Code.

⁸¹ File document 57, Annexes 12, 14 and 16, ŠKODA Website December 30th, 2011, November 6th, 2012 and January 23rd, 2013.

⁸² File document 18, Maatschappelijk Imago Monitor 2016.

⁸³ Cf. Decision of the Italian competition authority AGCM concerning Volkswagen AG and Volkswagen Group Italia SpA of August 4th, 2016, marginals 74 and 75. See: http://agcm.it/component/joomdoc/allegati-news/PS10211_Volkswagen_ENG.pdf/download.html.

8.5 Section 8.8 of the Act on Enforcement of Consumer Protection in conjunction with Section 6:193c, paragraph 1, opening lines and under (b) of the Dutch Civil Code: provision of misleading information about the main characteristics of the product

91. Section 6:193b, paragraph 1 of the Dutch Civil Code stipulates that a trader who engages in an unfair commercial practice acts unlawfully towards a consumer. It follows, in particular, from Section 6:193b (3), opening lines and under (a) of the Dutch Civil Code that a commercial practice is unfair if a trader engages in a commercial practice as defined in Sections 6:193c to g of the Dutch Civil Code. Section 6:193c, paragraph 1, opening lines and under (b) of the Dutch Civil Code stipulates that a commercial practice is misleading if the information provided is factually incorrect or misleads or could mislead the average consumer, either through the general presentation of that information or otherwise, such as in relation to the main characteristics of the product, including the benefits, execution, composition, fitness for purpose, specifications, results to be expected from its use or the results and material features of tests or checks carried out on the product.
92. Misleading information may also consist of environmental or green claims. Such claims suggest or otherwise create the impression that a product has a positive or non-harmful effect on the environment or causes less harm to the environment than other products.⁸⁴
93. The Unfair Commercial Practices Directive does not set out specific rules about environmental claims, but does offer a basis for ensuring that traders do not present environmental claims in an unfair manner for consumers. According to Section 6 of the Unfair Commercial Practices Directive, an environmental claim can be misleading if it “*contains false information and is therefore untruthful or ‘in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct’*”. Even vague or general environmental claims about environmental benefits can be misleading. Think, for instance, of claims such as ‘environmentally friendly’, ‘green’, ‘ecological’, ‘sustainable’, ‘good for the environment’ or ‘climate friendly’. Any such claims that may induce the average consumer to take a transactional decision that he would otherwise not have taken also fall within the scope of the Unfair Commercial Practices Directive.⁸⁵
94. Volkswagen AG engaged in a commercial practice, consisting of the manufacture of cars for, among others, consumers, which, as shown above, were fitted with prohibited defeat device software. In its commercial practices, it made use of various means of communication and advertising channels, such as websites and brochures. In the following sections, the ACM addresses the question whether Volkswagen AG provided misleading information as defined above in the course of these communications.
95. Information is provided on the www.volkswagen.nl website about the car models that Volkswagen AG manufactures of the Volkswagen brand. An explanation is also provided of specific technologies that stand for sustainability and emission reductions, such as Blue Motion and Blue TDI. For instance, on January 1st, 2015 the website stated that: “*Turbocharged Direct Injection (TDI) is the name used by Volkswagen for the clean power of its diesel engines. Our TDI diesel engines, equipped with common-rail technology, are not just efficient, but also extremely powerful. They are all fitted with a closed soot filter, so that you can enjoy the power of diesel while protecting the environment.*” And: “*In addition to the standard soot filter, the Blue TDI diesel engine also contains a*

⁸⁴ Guidance for the implementation of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices, SWD (2016) 163/2, p. 117 under 5.1, see: http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_nl.pdf.

⁸⁵ Guidance for the implementation of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices, SWD (2016) 163/2, p. 117 to 123, see: http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_nl.pdf.

*nitrogen oxide filter. Giving you a super-economical engine that is just as clean as a petrol-driven engine.*⁸⁶

96. On March 31st, 2009 the www.seat.nl website stated that: *“Some engines have been radically altered and all feature better performance, reduced fuel consumption and lower emissions. In terms of energy labels, the entire range can be said to be a lot ‘greener’.*⁸⁷ A month later, the same website claimed that *“the even lower emission and fuel consumption values”* make the SEAT Ibiza *“one of the most ecological cars in its segment”.*⁸⁸ On November 11th, 2009 SEAT posted a message on its website claiming that its commitment to the environment went beyond *“producing cars with lower emissions”.* According to SEAT, it does this by *“reducing the impact on the environment at every stage of the production, development and recycling of its products”.*⁸⁹ On September 14th, 2014 the website reported: *“Not only our cars are leading the way in sustainability, so are our production processes”* and *“In addition to using solar panels at our plant, we are also extremely proud of our efforts to develop clean and efficient cars. [...] are all part of our ambition to manufacture superior, comfortable and clean cars. That is TECHNOLOGY TO ENJOY.”*⁹⁰
97. On December 30th, 2011, November 6th, 2012 and January 23rd, 2013, the www.skoda.nl website stated that *“pleasant driving and environmental awareness”* is possible with the *“green, fuel-efficient cars of ŠKODA”.*⁹¹ ŠKODA offers Greenline models aimed at sustainability. According to information on the website, Greenline stands for optimal sustainability and green cars, with slogans such as *“green driving with pleasure”.*⁹²
98. In brochures, too, Volkswagen AG stresses the sustainability credentials of its car models. The brochure for the Volkswagen Passat from August 2011, for instance, carries the heading *“A cleaner car is nothing special to us”* and adds: *“How do we make the most of technology to give you the most comfortable driving experience possible? That has always been the question that drives us. And with our BlueMotion Technologies it is also cleaner”.* Under the ‘BlueMotion Technologies’ heading, it says: *“BlueTDI: the cleanest diesel of today, without NO_x emissions”.*⁹³ The brochures for the Volkswagen Jetta and Volkswagen Tiguan claim that the ‘BlueMotion Technologies’ brand label brings together the entire range of *“innovative energy-saving technologies that Volkswagen offers to cut fuel consumption, reduce CO₂ emissions and cut emissions of particulate matter and nitrogen oxides. These energy-efficient and clean technologies can already be found in all Volkswagen models.”* This same brochure states that this: *“represents the most environmentally friendly and ecologically responsible diesel model of its kind. In addition to the standard soot filter, a Volkswagen with the BlueTDI label has a nitrogen oxide filter. That reduces nitrogen emissions by up to 90%.”*⁹⁴
99. Volkswagen AG also notes in brochures of the Volkswagen, Audi, SEAT and ŠKODA brands that its cars meet the Euro 5 standard.⁹⁵

⁸⁶ File document 57, Annex 8, Volkswagen website January 1st, 2015.

⁸⁷ File document 57, Annex 31, SEAT website March 31st, 2009.

⁸⁸ File document 57, Annex 32, SEAT website April 28th, 2009.

⁸⁹ File document 57, Annex 33, SEAT website November 11th, 2009.

⁹⁰ File document 57, Annex 40, SEAT website September 14th, 2014.

⁹¹ File document 57, Annexes 12, 14 and 16, ŠKODA website December 30th, 2011, November 6th, 2012 and January 23rd, 2013.

⁹² File document 57, Annexes 11, 17 and 18, ŠKODA Website October 14th, 2011 and March 30th, 2013.

⁹³ File document 57, Volkswagen Passat Brochure August 2011, p. 19.

⁹⁴ File document 57, Annex 4, Volkswagen Jetta Brochure dated January 1st, 2014, p.4 and Annex 5, Volkswagen Tiguan Brochure dated January 1st, 2014, p. 3.

⁹⁵ File document 57, Annex 1, Volkswagen Caddy Brochure of October 2010, pp. 9, 42 and 47, Annex 4, Volkswagen Jetta Brochure of January 1st, 2014, p. 16, Annex 5, Volkswagen Tiguan Brochure of January 1st, 2014, p. 21, Annex 6, Volkswagen Golf Blue Motion Brochure of June 2014, p. 15 and Annex 7, Volkswagen Touran Van Brochure of January

100. With claims such as “cleaner driving”, “cleanest diesel of today, no NO_x emissions”, “most environmentally friendly and ecologically sound diesel engine of its type”, Volkswagen AG suggests or creates the impression that its diesel cars deliver an exemplary sustainability performance or have a positive or non-harmful impact on the environment or inflict less damage on the environment than other products (see also marginal 92 of this decision). These environmental claims as put forward by Volkswagen AG cannot be reconciled with the use of software to influence emissions results in a test procedure and are therefore misleading. Consumers could get the impression that the affected cars are sustainable and environmentally friendly, whereas in actual fact Volkswagen AG puts its commercial interests before the protection of the environment. This is clear from the fact that Volkswagen AG uses software to influence the NO_x emission test results. As a result, it is not certain that the Volkswagen models were genuinely greener, environmentally friendlier or cleaner than diesel cars of other manufacturers, as claimed by Volkswagen AG in communications directed at consumers.
101. In addition, Volkswagen AG cannot claim that the diesel engines meet the Euro 5 standard, as the presence of prohibited defeat device software means that the terms of approval have not been met. At the very least, such a claim is not justified. After all, the fact that the type approval test results were influenced in an unlawful manner means that it is not certain that the affected cars satisfied the terms of approval. Regarding the extent of the manipulation, the ACM reiterates that a clear difference was found between the emissions in the test environment (in mode 1) and during normal use in real driving conditions (in mode 2).⁹⁶
102. The ACM rejects Volkswagen AG’s factually unsubstantiated argument that consumers could not be misled because it is commonly known that a car produces more emissions in real driving conditions than in the laboratory. According to the ACM, consumers cannot simply be assumed to have such technical knowledge of the test methods.
103. The average consumer may have taken a transactional decision based on the aforementioned environmental claims that he would not have taken had he known that the NO_x emission test results had been influenced and that, due to this manipulation, cars with this engine type had seemingly met the Euro 5 standard and that the diesel cars with engine type EA189 might therefore be less clean than claimed. As already mentioned in marginal 89, the ACM believes that growing environmental awareness may influence the economic behavior of consumers and traders consciously respond to this in their commercial communications.⁹⁷
104. In view of the foregoing, the ACM concludes that Volkswagen AG provided information in, at least, the period from February 2009 to February 23rd, 2015⁹⁸ which was factually incorrect or which

2015, p. 13, Annex 39, SEAT Leon SC Brochure of March 2014, p. 21, Annex 38, SEAT Leon Brochure of January 1st, 2014, p. 21, Annex 37, SEAT Leon Brochure of June 1st, 2013, p. 16, Annex 35, SEAT Leon Brochure of January 1st, 2012, p. 7, Annex 36, SEAT Alhambra Brochure of October 1st, 2012, p. 7, Annex 34, SEAT Alhambra Brochure of June 1st, 2011, p. 6 and 7, Annex 41, SEAT Alhambra Brochure of January 1st, 2015, p. 22, Annex 13, ŠKODA Octavia Businessline Brochure of July 2012, p. 9, Annex 19, ŠKODA Yeti Brochure of January 2015, pp. 12-13, Annex 20, ŠKODA Superb hatchback Brochure of January 2015, p. 13, Annex 24, ŠKODA Octavia Brochure of February 23rd, 2015, p. 13, Annex 21, ŠKODA Rapid Spaceback Brochure of February 3rd, 2015, p. 12, Annex 23, ŠKODA Rapid Hatchback Brochure of February 3rd, 2015, p. 12 and Annex 15, ŠKODA Fabia Brochure of January 1st, 2013, pp.17-18, Annex 27, Audi A1 Brochure of May 2010, p. 29, Annex 28, Audi A1 Brochure of October 2011, p. 29 [p. 15 in the PDF], Annex 26, Audi A4 allroad quattro Brochure of February 2009, p. 34 [p. 10 in the PDF] and Annex 29 Audi A5 Coupé Brochure of April 2012, pp. 127-128.

⁹⁶ See also footnote 33 of this decision.

⁹⁷ One example of this is contained in marginal 85 of this decision.

⁹⁸ See footnote 95. This footnote indicates that the infringement started in February 2009 with the brochure for the Audi A4 allroad quattro (see File document 57, Annex 26) and continued until February 23rd, 2015 with the brochure for the ŠKODA Octavia (see File document 57, Annex 24).

misled or could have misled the average consumer regarding the main characteristics of the product, so that the average consumer may have taken a transactional decision that he would otherwise not have made. Volkswagen AG thus acted contrary to Section 6:193c, paragraph 1, opening lines and under (b) of the Dutch Civil Code. This results in a violation of Section 8.8 of the Act on Enforcement of Consumer Protection. As the violation was committed on the www.volkswagen.nl, www.seat.nl and www.skoda.nl websites and in brochures for the Volkswagen, Audi, SEAT and ŠKODA brands, it was clearly of a systematic nature and thus constitutes an infringement of the collective interests of consumers as defined in the Act on Enforcement of Consumer Protection.

8.6 Section 8.8 of the Act on Enforcement of Consumer Protection in conjunction with Section 6:193g, opening lines and under (d) of the Dutch Civil Code: black list of misleading commercial practices

105. Section 6:193g, opening lines and under (d) of the Dutch Civil Code stipulates that it is misleading in all circumstances to claim that a trader or a product has been recommended, recognized or approved by a public or private institution, whereas this is not the case, or to make such a claim without meeting the conditions for obtaining the recommendation, recognition or approval.
106. This provision is on a black list of concrete misleading behaviors that constitute an unfair commercial practice in all circumstances.⁹⁹ The words 'in all circumstances' entail that to bring a claim in tort based on an infringement of Sections 6:193g and 6:193i of the Dutch Civil Code, it is only necessary to assert and prove that the trader has performed one of the commercial practices mentioned in any of these Sections. A trader who is found guilty of such a commercial practice is deemed to have committed an unlawful act.¹⁰⁰
107. As noted in marginal 61 of this decision, Volkswagen AG has admitted that, in the period from 2009 to 2015, it installed software in the affected cars to influence the NO_x emissions in a test environment, whereas this mode was switched off during real driving conditions on the road. The ACM assumes that Volkswagen AG did this to secure type approval without needing to limit the actual emissions that have a significant impact on air quality.
108. The use of defeat devices that reduce the effectiveness of emission control systems is forbidden on the grounds of Article 5, paragraph 2 of the Emissions Regulation. The installation and use of the software in the affected cars in itself already means that Volkswagen AG did not comply with the terms of the obtained type approval.
109. The NO_x emission test results of car models that Volkswagen AG fitted with the software were manipulated. Due to the manipulation, it is impossible to say with certainty whether the test results would have remained within the limits without this software. That is another reason why it is not certain that the cars comply with the terms of emissions type approval.
110. Due to the use and installation of software, the affected cars wrongly received type approval based on incorrect or, at least, manipulated test results. Volkswagen AG then wrongly provided the affected cars with a CoC and delivered them to the importer. This CoC was wrongly issued, as the affected cars did not comply with the EU type approval requirements.

⁹⁹ *Parliamentary Documents II* 2006/07, 30 928, 3.

¹⁰⁰ *Parliamentary Documents I* 2007/08, 30 928, C, p. 2.

111. The importer in turn registered the affected cars with the RDW and put them onto the Dutch market. The European approval number is stated on the registration certificate that the consumer receives on purchasing a car.¹⁰¹
112. Volkswagen AG emphasizes in its Opinion that the type approval was not withdrawn by the KBA and concludes that this type approval was therefore validly obtained and always remained valid. As previously noted in marginal 71, Volkswagen AG holds that the reaction from the RDW to questions from the ACM corroborates its opinion. Volkswagen AG thus maintains that the type approval as stated on the registration certificate is valid and means nothing other than that the affected cars are safe and suitable for normal use on the road.
113. Volkswagen AG denies that the KBA explicitly established non-conformity and on this ground ordered the recall of the affected cars (see above: marginals 26, 62 and 75). The recall action was by no means voluntary. The RDW clarifies: *“The repair of the vehicles was therefore necessary to bring the vehicles back into compliance with the regulations. The software update includes the removal of the dual-mode software from the vehicle. The vehicle is again subjected to the type approval test. If it meets the standards, the vehicle is compliant with the terms of approval, this time without the forbidden defeat device.”*¹⁰² In other words, conformity is only restored after the entire update operation is completed and only then is the validity of the type approval definitely reinstated. If Volkswagen AG fails to complete this update in time, the KBA could still decide to withdraw the type approval.
114. It follows, in the opinion of the ACM, that there is no justification for claiming that the issued registration certificate provided the buyer with proof that the car met *all* requirements.
115. Volkswagen AG’s pledge to perform the update without causing additional soot development or any negative consequences for the driving characteristics in no way detracts from this conclusion. In fact, it actually raises the question why the harmful ‘mode 2’ was installed in the affected cars in the first place.
116. By using software that manipulated the NO_x emission test results and/or led to the issuance of type approval based on unreliable results, which was then mentioned on the registration certificate of the affected cars, Volkswagen AG engaged in a commercial practice that is misleading in all circumstances. Because Volkswagen AG thus claimed to have obtained type approval for the affected cars without actually meeting the relevant terms of approval.
117. This case centered on a large number of affected cars for which a registration certificate was issued. The use of the software and the incorrect statement of the type approval on the registration certificate lasted for a period of almost seven years. The ACM states on the grounds of the foregoing that, in the period from 2009 to 2015, Volkswagen AG systematically acted contrary to Section 6:193g, opening lines and under (d) of the Dutch Civil Code. This leads to an infringement of Section 8.8 of the Act on Enforcement of Consumer Protection.

8.7 Final conclusion relating to the infringements

118. In view of the above and with reference to marginals 90, 104 and 117, the ACM concludes that Volkswagen AG acted in breach of the provisions of Section 8.8 of the Act on Enforcement of Consumer Protection in conjunction with Section 6:193b, paragraph 2 of the Dutch Civil Code

¹⁰¹ File document 48, Examples of registration certificate 2014 until present.

¹⁰² File document 45, Reply to additional questions about Volkswagen.

(acting contrary to the requirements of professional diligence), Section 8.8 of the Act on Enforcement of Consumer Protection in conjunction with Section 6:193c, paragraph 1, opening lines and under (b) of the Dutch Civil Code (provision of misleading information) and Section 8.8 of the Act on Enforcement of Consumer Protection in conjunction with Section 6:193g, opening lines and under (d) of the Dutch Civil Code (black list of misleading commercial practices). Volkswagen AG has thus infringed the collective interests of consumers.

9 Offender

119. The ACM designates the legal entity Volkswagen AG as the offender as defined in Section 5:1, paragraph 2 of the Dutch General Administrative Law Act (Awb).
120. This provision defines offender as: the party committing or participating in the violation. According to the third paragraph, violations can be committed by natural persons and legal entities. Section 51, paragraphs 2 and 3 of the Dutch Penal Code applies *mutatis mutandis*.
121. The offender is in the first place the party who physically commits the prohibited act. In certain cases, a party who does not physically commit the violation, but to whom the act can be attributed, can be held responsible for the violation and thus be designated as offender.¹⁰³
122. Case law generally takes the so-called slurry ruling (*'drijfmestarrest'*) of the Dutch Supreme Court as its starting point.¹⁰⁴ According to the case history of Section 51 of the Dutch Penal Code and Section 15 of the Economic Offences Act (*Wet Economische Delicten*), acts committed by persons connected with or belonging to the sphere of the legal entity, who cannot be individually but can be collectively perceived as having committed the described offense, can be attributed to the legal entity and can lead to the determination of the latter as the offender. The ACM will scrutinize the relationships within the Volkswagen Group in the light of the cited ruling (*'drijfmestarrest'*).¹⁰⁵
123. Regarding the affected cars of the Volkswagen brand, Volkswagen AG has not disputed its responsibility for the behaviors in question. Regarding the other brands, it has pointed out that these subsidiaries operate as legally independent companies. In the ACM's opinion, this does not take away from the fact that the subsidiaries all committed the identified violations within the sphere of the legal entity.
124. Volkswagen AG is at the head of the Volkswagen Group and is able to exercise decisive influence over AUDI AG, SEAT S.A. and ŠKODA AUTO a.s.¹⁰⁶ This, in itself, confirms that Volkswagen AG was in control. Volkswagen AG has not put forward any arguments and the ACM has not found any circumstances of a factual or legal nature that could have impeded Volkswagen AG from intervening to prevent its subsidiaries from making large-scale use of prohibited defeat device software.
125. In annual reports and other communications Volkswagen AG emphatically presents the various brands as belonging to a single group (together with other brands such as Bentley, Porsche, Scania and MAN): *"Twelve brands with an individual identity and a common goal: mobility."* The fact that the various brands have their own identity, as is expressed in their operational and, of course, marketing

¹⁰³ ABRvS January 22nd, 2014, ECLI:NL:RVS:2014:90; ABRvS February 4th, 2015, ECLI:NL:RVS:2015:288, r.o. 3.1; ABRvS October 15th, 2008, ECLI:NL:RVS:2008:BF8999.

¹⁰⁴ HR October 21st, 2003, ECLI:NL:HR:2003:AF7938.

¹⁰⁵ HR October 21st, 2003, ECLI:NL:HR:2003:AF7938, r.o. 3.4.

¹⁰⁶ File document 5, Volkswagen Annual Report 2015, p.58 and 188 ff. At the hearing of August 29th, 2017, Volkswagen AG confirmed that it was directly or indirectly 100% owner of SEAT and ŠKODA and virtually 100% owner of AUDI. See Report of the hearing, p. 4.

activities, stems from a central strategy and must be seen in the light of the desire within the group to offer the broadest possible spectrum of cars to a diverse range of customer groups.

126. The fact that the EA189 diesel engines together with the EGR system and accompanying software were built into diverse types of cars of all four brands proves that Volkswagen, AUDI, SEAT and ŠKODA worked together to develop and manufacture this new generation of diesel engines in anticipation of the introduction of the Euro 5 standard in 2009. These concerted efforts fitted into the normal operational pattern at Volkswagen AG and were beneficial to the operations of Volkswagen AG, as the income that proceeded from the required investments also flowed back to Volkswagen AG.
127. In short, it is clear that the group management had a clear overall view of the operations and also carried the ultimate responsibility for these operations. This responsibility extended to the fulfilment of all obligations in relation to the type approval procedure and assuring conformity in all EU member states. According to its own communications, Volkswagen AG also emphatically took this responsibility by leading the handling of – what it calls – “*the diesel issue*”.
128. That the group management of Volkswagen AG may not have been aware of what was happening is no reason for the ACM not to hold Volkswagen AG fully responsible. First of all, in view of the scale of the use of diesel engines with defeat device software – about 11 million vehicles worldwide – a substantial number of individuals within the Volkswagen Group must have known of and been involved in this practice. Secondly, Volkswagen AG failed to exercise concrete and adequate supervision to prevent the use of the defeat device software. Volkswagen AG thus failed to exercise the due diligence that can be reasonably required from the legal entity in the given circumstances.

10 Fine

10.1 Imposition of fine by the ACM

129. Pursuant to Section 2.9 of the Act on Enforcement of Consumer Protection, the ACM is authorized to impose an administrative fine on Volkswagen AG¹⁰⁷. Under Section 2.15 of the Act on Enforcement of Consumer Protection, as applicable at the time of the infringement, the maximum fine is EUR 450,000 per infringement.
130. Volkswagen AG has asserted that, even assuming that an infringement had been committed, fines can exclusively be imposed as defined in Article 13 of the Emissions Regulation, and that this is outside the ACM’s authority. It is however not clear to the ACM why this provision should prevent the imposition of fines for the violation of consumer protection laws. The actions of the ACM (or other regulators such as the Italian authority AGCM) do not in any way obstruct the KBA and actually enhance the effective enforcement of the European emissions standards.
131. Pursuant to Sections 5:41 and 5:46 of the Dutch General Administrative Law Act, the size of the proposed fine is determined on the basis of the offender’s culpability, the seriousness of the infringement and the circumstances in which the infringement was committed. In addition, the proportionality principle as laid down in Section 3:4 of the Dutch General Administrative Law Act must also be observed.

¹⁰⁷ In view of the ongoing recall action, the ACM does not consider an order for periodic fine payments appropriate.

10.2 Culpability

132. The picture that emerges from all the foregoing facts is that the Volkswagen Group chose to install the prohibited defeat device software in the affected cars. Volkswagen AG evidently put financial motives before a clean environment and before transparency on this subject towards consumers.
133. Point 5 of the *Environmental policy* of Volkswagen AG contains the following sentence: “*The Volkswagen Board of Management shall, at regular intervals, check that the company’s environmental policy and objectives are being observed and that the Environmental Management System is working properly.*” The facts show that the Board of Management of Volkswagen AG failed to ensure the proper implementation of this policy. Volkswagen AG’s work processes were not fit for purpose.
134. Whether the Board of Management of Volkswagen AG was aware, at the time of the infringements, of the development and installation of the software is irrelevant as it has been established that the decision to fit the affected cars with the defeat device software was taken by employees of Volkswagen AG (members of the ‘*powertrain development division*’). Moreover, in this connection, ACM also considers it relevant that the observed commercial practice was of a systematic nature.
135. No oral, written or other evidence has been found or produced to demonstrate that Volkswagen AG did everything that was reasonably possible to prevent infringements. It was only after the infringements had occurred and been made public that Volkswagen AG took measures to prevent such commercial practices.¹⁰⁸
136. In its Opinion¹⁰⁹ Volkswagen AG points out that Section 6, paragraph 1 of the Unfair Commercial Practices Directive uses the term ‘deceive’ whereas the relevant implementing articles use the term ‘mislead’. In this light, Volkswagen AG claims that the ACM would have to plausibly demonstrate that Volkswagen AG made ‘deceptive’ claims to the consumer and acted with deliberate intent in order to establish culpability on the part of Volkswagen AG.
137. This assertion does not exonerate Volkswagen AG either. Though the term ‘deceive’ occurs several times in the Unfair Commercial Practices Directive, the directive nowhere explicitly requires in this context that the trader acted with ‘deliberate intent’.¹¹⁰ Recital 14 of the Preamble to the Unfair Commercial Practices Directive and Article 6 of that Directive make it clear that the Union Legislature had the opposite in mind and was thinking along the same lines as the legal doctrine for misleading commercials, where deliberate intent is not required. What matters here is not whether the act was conscious or deliberate, but the normative principle of ‘remaining silent instead of speaking up’.¹¹¹ The parliamentary history of the implementation of the Unfair Commercial Practices Directive in the Dutch Civil Code shows that the Dutch legislator devoted explicit attention to this aspect.¹¹² The Dutch legislator takes the view that the term ‘misleading’ comes closer to the Union Legislature’s intention. According to the ACM, the substitution of the word ‘deceive’ with ‘mislead’ corresponds precisely with the Union Legislature’s intention. In this light, the ACM does not need to demonstrate ‘deliberate intent’ in order to demonstrate culpability on the part of Volkswagen AG.

¹⁰⁸ File document 5, Volkswagen Annual Report 2015, p. 51.

¹⁰⁹ Written Opinion, marginals 5.33-5.42.

¹¹⁰ Cf the Recommendation of the Netherlands Advertising Law Association about the implementation of the UCP Directive, March 7th, 2007, pp. 11 – 15. See: http://vvr.nl/pdfs/advies_ohp.pdf.

¹¹¹ Cf *Oneerlijke handelspraktijken jegens consumenten*, Monografiën BW nr. B49a, 2016/37, May 1st, 2016, D.W.F. Verkade.

¹¹² *Parliamentary Documents II*, 30 928, 3, p.15, *Parliamentary Documents II* 30 928, 10, p. 3 and *Parliamentary Documents I* 30 928, C, p.11.

138. Volkswagen AG furthermore denies¹¹³ culpability on the grounds that the KBA only concluded in retrospect that the installation of the software in the affected cars represented a violation of the Emissions Regulation. According to Volkswagen AG, it was entitled, at the time of obtaining the type approval, to assume that the affected cars with the software could be lawfully brought onto the market.
139. The ACM also finds this assertion unconvincing. The KBA had no knowledge of the installed software when it issued the type approval. It was only after the KBA was informed of the software that it was able to express an opinion on the matter and take action. The KBA could not be expected to investigate the software before performing the test. Volkswagen AG cannot shift its responsibility to the KBA.
140. Finally, the ACM emphasizes that Volkswagen AG can also not avoid its responsibility by invoking an alleged ‘flaw’ in European legislation, namely the failure to set specific limits for the actual emissions in real driving conditions.¹¹⁴ The ACM refers in this connection to marginal 69 ff. of this decision. This stance in the present legal proceedings is hard to maintain, incidentally, given Volkswagen AG’s public admission that it has seriously violated the trust of its customers.¹¹⁵
141. On the grounds of the above, the ACM concludes that Volkswagen AG is fully culpable for the infringements set out in sections 8.4, 8.5 and 8.6.

10.3 Setting of fine

142. The Fining Policy Rule ACM 2014¹¹⁶ applicable in this case (hereinafter: Fining Policy Rule) came into effect on August 1st, 2014. The Fining Policy Rule contains further rules outlining how the ACM exercises its authority to impose administrative penalties. The general objective in determining the size of the fine is that the fine must be proportionate with the committed infringement. In this connection the ACM takes the view that the imposed fine must be sufficiently dissuasive for both the offender and prospective other offenders.
143. The maximum statutory limits for fines were raised on July 1st, 2016.¹¹⁷ The Fining Policy Rule ACM 2014 was amended as a consequence of this.¹¹⁸ However, as the infringements in this case were committed in the period from 2009 to 2015, the increase in the maximum limits has no consequences for this decision.¹¹⁹
144. Pursuant to Section 2.7, paragraphs 1 and 2 of the Fining Policy Rule, the ACM sets the basic fine within the bandwidth of the fining category applicable to the infringement. The infringements of the statutory provisions and their related fine categories (I to IV) are summarized in Annex 2 to the Fining Policy Rule. The more serious the infringement, the higher the fine category.

¹¹³ Written Opinion, marginals 6.37 and 7.13.

¹¹⁴ Written Opinion, e.g. marginal 4.11 and Report of the hearing, p. 2.

¹¹⁵ See the communications as cited in footnote 64. See also File document 56, Film on You Tube – [CONFIDENTIAL].

¹¹⁶ Policy rule of the Minister of Economic Affairs of July 4th, 2014, no. WJZ/14112617 relating to the imposition of administrative penalties by the Authority for Consumers & Markets (Fining Policy Rule ACM 2014), Official Gazette, *Stcrt.* 2014, 1976.

¹¹⁷ Act of December 23rd, 2015 amending several laws pertaining to the Ministry of Economic Affairs and the Ministry of Infrastructure and the Environment, entailing an increase in the maximum fines applicable for the Authority for Consumers & Markets (hereinafter: Act on Increase in Maximum Fines ACM), Dutch Bulletin of Acts and Decrees, *Stb.* 2016-22.

¹¹⁸ Policy rule of the Minister of Economic Affairs of June 28th, 2016, No. WJZ/16056097, amending the Fining Policy Rule ACM 2014, Official Gazette, *Stcrt.* 2016, 34630.

¹¹⁹ See Section XIV of the Act on the Increase in Maximum ACM Fines and p. 20 of the explanatory memorandum with the amended Fining Policy Rule 2014 (Official Gazette, *Stcrt.* 2016, 34630).

145. According to the Explanatory Memorandum to the Fining Policy Rule, the appropriate fine category for the infringement is determined with due regard to the interest that is protected by the relevant statutory provision in relation to the Act to which this provision belongs. The greater the weight attached to this interest, the higher the fine for infringements of the statutory provision protecting this interest. This approach makes it possible to impose an appropriate fine.
146. Under Section 2.2 of the Fining Policy Rule, the ACM sets the basic fine within the relevant bandwidth on the basis of, at least, three different factors, namely: the seriousness of the infringement, the circumstances in which the infringement was committed, and the duration of the infringement.
147. After determining the basic fines, the ACM assesses on the grounds of Section 2.8, paragraph 1 of the Fining Policy Rule whether there are any aggravating or mitigating circumstances. Section 2.9 and 2.10 of the Fining Policy Rule sets out the aggravating or mitigating circumstances that shall in all cases lead to a higher or lower fine. Finally, ACM checks the proportionality of the fines to be imposed.

10.3.1 Determination of the basic fine

148. The ACM is of the opinion that it can impose a fine for each of the infringements set out in sections 8.4, 8.5 and 8.6 of this decision. However, Section 2.1, paragraph 1 of the Fining Policy Rule provides for the option of imposing a single administrative fine for all the infringements jointly. In view of the connection between the various infringements, the ACM considers it appropriate in this case to impose a single fine for all the infringements jointly. The ACM has taken this into account in determining the size of the basic fine.
149. The infringements set out in sections 8.4 and 8.5 of this decision (acting contrary to the requirements of professional diligence and provision of misleading information) fall within fine category III (see Annex 2 with the Fining Policy Rule). The infringements set out in section 8.6 of this decision (black list of misleading commercial practices) fall within fine category IV. In accordance with the bandwidths belonging to these categories on the grounds of Section 2.7 of the Fining Policy Rule, the ACM sets the basic fine between, respectively, EUR 100,000 and EUR 300,000 (acting contrary to the requirements of professional diligence and provision of misleading information) and between EUR 150,000 and EUR 450,000 (black list of misleading commercial practices).
150. The first relevant aspect to be considered in determining the seriousness of the infringements is that the Unfair Commercial Practices Act aims to achieve a high level of consumer protection. Unfair commercial practices can cause substantial damage to individual consumers, but also to consumer trust in general. Consumers can lose trust in sectors, products or sales channels. Among other things, consumers may become less willing to respond to commercial offers, even from companies that do adhere to the consumer protection laws. In addition, consumers may refrain entirely from buying certain goods or services. Fines imposed for unfair commercial practices must properly reflect these factors.
151. A more particular consideration in this specific case is that consumers were misinformed and misled by Volkswagen AG about the sustainability of their purchases. The average consumer has a considerable information disadvantage regarding the technical information that a manufacturer provides about the cars it manufactures. Consumers trust manufacturers to provide them with reliable information on technical and sustainability aspects, as they generally have insufficient knowledge and expertise to make their own assessment of this information. So when a car

manufacturer provides incorrect or incomplete information, it is often impossible for the average consumer to find this out. This is a serious offense, as it may undermine the consumer's trust in the car industry as a whole when the truth comes out.

152. Apart from the general damage of trust in the sector, consumers suffered specific inconvenience as a result of Volkswagen AG's commercial practice: they had to take their car to the garage for a software update in order to make their car compliant with the type approval. This costs time and effort. In addition, consumers may worry that the software-update has reduced the effectiveness or value of their car (regardless of whether this is true or not).
153. A further relevant factor, according to the ACM, is that Volkswagen AG is one of the biggest car manufacturers with a worldwide revenue in 2015 of EUR [CONFIDENTIAL]. The total value of the sale of the affected cars runs to billions of euros.
154. Regarding the duration of the infringements, the ACM has established that Volkswagen AG installed the software in the affected cars in the period from 2009 to 2015 (see marginal 23 of this decision). Volkswagen AG's communications about the affected cars were made in the period from February 2009 to February 2015 (see footnote 98 of this decision). This means that the infringement lasted for at least seven years.
155. In view of the foregoing, the ACM considers it appropriate and necessary in this case to set a basic fine for the joint infringements set out in sections 8.4, 8.5 and 8.6 equal to the maximum penalty of EUR 450,000 as mentioned in Section 2.15 of the Act on Enforcement of Consumer Protection. In the ACM's opinion, a penalty of this level is the least that is necessary in the given circumstances to have a dissuasive effect.

10.3.2 Aggravating or mitigating circumstances

156. No evidence was found of mitigating facts or circumstances that might cause the ACM to reduce the fines imposed on Volkswagen AG. Nor were any aggravating circumstances found.

10.3.3 Conclusion in relation to the fine

157. In view of the seriousness of the infringements, the circumstances in which the infringements were committed, the duration of the infringements, and the absence of aggravating or mitigating circumstances, ACM imposes a penalty of EUR 450,000 on Volkswagen AG for violating Section 8.8 of the Act on Enforcement of Consumer Protection in conjunction with Section 6:193b, paragraph 2 of the Dutch Civil Code (acting contrary to the requirements of professional diligence), Section 8.8 of the Act on Enforcement of Consumer Protection in conjunction with Section 6:193c, paragraph 1, opening lines and under (b) of the Dutch Civil Code (provision of misleading information) and Section 8.8 of the Act on Enforcement of Consumer Protection in conjunction with Section 6:193g, opening lines and under (d) of the Dutch Civil Code (black list of misleading commercial practices). Taking all circumstances into consideration, the size of the aforementioned fine is, in the ACM's opinion, proportionate.

11 Decision

The Authority for Consumers & Markets imposes a fine of EUR 450,000 on Volkswagen AG, with its registered office at Wolfsburg (Germany).

Authority for Consumers & Markets,
on its behalf,

Signed
C.M.L. Hijmans van den Bergh
Member of the Board

Objection

Interested parties who disagree with this decision can object, within six weeks after the day on which this decision was notified, to the Authority for Consumers & Markets. The mailing address is: Authority for Consumers & Markets, attn Legal Affairs Board, P.O. Box 16326, 2500 BH The Hague. The objection must be signed and must at least state the name and address of the objecting party, the date and a description of the decision to which the objection relates. In addition, the objection must set out the grounds for the objection.

The ACM calls your attention to the fact that, under the General Administrative Law Act, the objecting party has the option of requesting the ACM to pass over the objection phase. If the ACM complies with your request, your objection will be forwarded to the court where it will be dealt with as an appeal. This can shorten the procedure. If the ACM does not honor your request, you cannot appeal against this decision and your objection will be dealt with by the ACM.

Annex 1 – Legal framework

European regulations for type approval

1. The type approval for cars is harmonized in the European Union on the grounds of Directive 2007/46/EC (hereinafter: the Framework Directive).¹²⁰
2. Article 30, paragraph 1 of the Framework Directive reads as follows:

“If a Member State which has granted an EC-type approval finds that new vehicles, systems, components or separate technical units accompanied by a certificate of conformity or bearing an approval mark do not conform to the type it has approved, it shall take the necessary measures, including, where necessary, the withdrawal of type-approval, to ensure that production vehicles, systems, components or separate technical units, as the case may be, are brought into conformity with the approved type. The approval authority of that Member State shall advise the approval authorities of the other Member States of the measures taken.”
3. Regulation 715/2007¹²¹ (hereinafter: the Emissions Regulation) contains the technical requirements for obtaining partial approval for the emissions.
4. Article 3, opening lines and under (10) of the Emissions Regulation reads as follows:

“For the purposes of this Regulation and its implementing measures the following definitions shall apply:

[...]

10. defeat device means any element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use;”
5. Article 5, paragraph 2 of the Emissions Regulation reads as follows:

“The use of defeat devices that reduce the effectiveness of emission control systems shall be prohibited. That prohibition shall not apply where:

 - a) the need for the device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle;*
 - b) the device does not function beyond the requirements of engine starting,*
or
 - c) the conditions are substantially included in the test procedures for verifying evaporative emissions and average tailpipe emissions.”*

¹²⁰ Directive 2007/46/EC of the European Parliament and of the Council of September 5th, 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) (OJEU 2007, L 263/1).

¹²¹ Regulation (EC) No 715/2007 of the European Parliament and of the Council of June 20th, 2007 on type approval of motor vehicles with respect to emissions from light passenger cars and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (OJEU 2007, L 171/1).

6. Article 13 of the Emissions Regulation reads as follows – insofar as relevant here:

“1. Member States shall lay down the provisions on penalties applicable for infringement by manufacturers of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. [...]

2. The types of infringements which are subject to a penalty shall include:

[...]

d) the use of defeat devices;”

Unfair commercial practices

7. Directive 2005/29/EC¹²² (hereinafter: Unfair Commercial Practices Directive) protects consumers against unfair commercial practices of companies. The provisions of the Unfair Commercial Practices Directive have been implemented in the Unfair Commercial Practices Act¹²³ (hereinafter: Unfair Commercial Practices Act). With this Act, provisions relating to unfair commercial practices have been incorporated into Section 3A of Title 3 of Book 6 of the Dutch Civil Code (Article 6:193a to 6:193j).
8. Section 6:193a, paragraph 1 under (a) to (f) of the Dutch Civil Code reads as follows:

“1. For the purposes of this Section:

a. ‘consumer’ means any natural person acting for purposes which are outside his trade, business, craft or profession.

b. ‘trader’ means any natural or legal person acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader;

c. ‘product’ means any goods, including electricity, or service;

d. ‘business-to-consumer commercial practices’ (hereinafter also referred to as commercial practices) means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers;

e. ‘transactional decision’ means any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting;

f. ‘professional diligence’ means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practices and/or the general principle of good faith in the trader’s field of activity;”

¹²² Directives 2005/29/EC of the European Parliament and of the Council of May 11th, 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Directive 84/450/EEC of the Council, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and of Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’) (OJEU 2005, L 149/22).

¹²³ Act of September 25th, 2008 adjusting Books 3 and 6 of the Dutch Civil Code and other laws to the Unfair Commercial Practices Directive concerning the behavior of companies towards consumers in the internal market. Dutch Bulletin of Acts and Decrees, Stb. 2008, 397.

9. Section 6:193b of the Dutch Civil Code reads as follows:

“1. A trader acts unlawfully towards a consumer if he engages in a commercial practice that is unfair.

2. A commercial practice shall be unfair if it:

a. is contrary to the requirements of professional diligence, and

b. noticeably impairs or may impair the ability of the average consumer to make an informed decision, so that the average consumer takes or may take a transactional decision that he would otherwise not have taken.

3. A commercial practice is particularly unfair if a trader engages in:

a. a misleading commercial practice as defined in Sections 193c to 193g, or

b. an aggressive commercial practice as defined in Sections 193h and 193i.

4. The accepted and lawful advertising practice of making exaggerated claims or claims that should not be taken literally do not in themselves make an advert unfair.”

10. Section 6:193c, paragraph 1 of the Dutch Civil Code – insofar as relevant here – reads as follows:

“A commercial practice shall be regarded as misleading if it contains factually incorrect information or if it misleads or can mislead the average consumer, either through the overall presentation of the information or otherwise, such as in respect of:

[...]

b. the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin, the results to be expected from its use, or the results and material features of tests or checks carried out on the product;

[...]

so that the average consumer takes a transactional decision that he would not have taken otherwise.”

11. Pursuant to Section 6:193g of the Dutch Civil Code, a number of commercial practices are misleading in all circumstances. These are referred to as ‘the black list of misleading commercial practices’. Section 6:193g of the Dutch Civil Code – insofar as relevant here – reads as follows:

“The following commercial practices shall be regarded as misleading in all circumstances:

[...]

d. claiming that a trader or a product has been approved, endorsed or authorized by a public or private body when he/it has not, or making such a claim without complying with the terms of the approval, endorsement or authorization;”

12. Section 8.8 of the Dutch Act on Enforcement of Consumer Protection reads as follows:

“A trader as defined in Section 193a, paragraph 1 under (b) of Book 6 of the Dutch Civil Code is not permitted to engage in unfair commercial practices as defined in Section 3A of Title 3 of that book.”