

Judgment of Madrid Companies Court No. 1 ordering Volkswagen to pay damages in a class action brought by OCU. ‘Dieselgate’ case.

Ainara Rentería Tazo

Counsel and Head of the Automotive Group at Gómez-Acebo & Pombo

The judge finds that Volkswagen’s conduct was contrary to good faith and misleading, declaring it to have standing to be sued and upholding the actions for injunction to restrain and restore and for compensatory damages against the company.

Madrid Companies Court No. 1 has ordered VOLKSWAGEN-AUDI ESPAÑA S.A. and VOKSWAGEN GROUP ESPAÑA DISTRIBUCIÓN, S.A. to pay damages to the affected consumers represented by *Organización de Consumidores y Usuarios* (OCU) in the claim filed by the same. The value of the compensation amounted to that requested by OCU, a grand total of EUR 3,000 per affected person represented (EUR 1,500 for material damage and a further EUR 1,500 for non-material damage), bringing the total to more than EUR 16 million.

We set out below the most important aspects of the judgment, which will undoubtedly mark a turning point in collective actions in the automotive sector in line with the recent Directive 2020/1828 on representative actions for the protection of the collective interests of consumers, which we analysed in the previous GA_P Analysis and which aims to homogenise consumer and user actions for damages in the European Union.

- 1) The judge declares the facts to be as found, by virtue of the documentation provided or, as stated, because they are “judicially noticed facts” in the terms set out in Article 281(4) of the Spanish Civil Procedure Act (LEC). In this regard, it is deemed an established fact that VOLKSWAGEN AG installed in vehicles with EA 189 Euro 5 diesel engines software capable of detecting the performance of emission approval tests and activating an engine operating mode which falsified the results of the NOx test. In order to reinforce that these are judicially noticed and established facts, inter alia the Supreme Court (SC) judgment of 11 March 2020 is cited, in which SEAT was held liable on the basis of the falsification of emissions of engines of the same origin as VOLKSWAGEN, granting compensation for non-material damage of EUR 500 to a buyer. Similarly, settlements reached by VOLKSWAGEN AG in Germany with the owners of affected vehicles are cited, committing itself to pay between 1350 and 6250 euros per affected person. With the specific review of numerous official documents and court decisions of various kinds in Spain or in German courts regarding *dieselgate* and VOLKSWAGEN’s own communications at the time of the events, among others, the Judge considers that “it cannot be expected that in each trial, the claimant is required to take complex, costly and very difficult to execute expert evidence regarding facts that are already judicially noticed worldwide”. On the basis of this, the Court declared the facts to be as found.
- 2) As regards the points of law, OCU brings, for the first time with this approach, **declaratory actions for unfairness, for injunction to restrain or restore, and for compensatory damages, as well as for adverse publicity, based on Articles 4 and 5 of the Unfair Competition Act 3/1991 of 10 January 1991 (LDC)**. This approach is novel because the other actions for damages in Spain for the *dieselgate* case, that had been brought individually by those affected, were addressed from a civil point of view and brought before civil courts on the basis of contractual actions (either claiming vitiated consent or relying on consumer and user protection legislation for non-conformity of the product).

The articles of the LDC that cover OCU’s action and that are upheld by the Judge are detailed below:

- a) **Article 4 LDC provides that any conduct contrary to good faith is considered unfair.** The claimant stresses that this is an open provision, which is intended to cover a changing classification. Article 4 “classifies an act of unfair competition *stricto sensu*, endowed with substantivity in respect of acts of unfair competition that the law has deemed to classify in concrete terms” and which are expressly included in the following articles of the LDC. In this way, it is clear that, following the changes introduced by Article 1(4) of Act 29/2009 of 30 December, amending the rules concerning unfair competition and advertising in order to improve consumer and user protection, it is clarified that the standard according to which these unfair acts should be judged is “professional diligence”, understood as the level of competence and special care that can be expected of a businessman in accordance with “honest market practices”, which distorts or could

significantly distort the economic behaviour of the average consumer. It is clear from the interpretation of the article that the widespreadness or otherwise of a practice will in no way exclude its unfairness.

In this case, in view of the above, the Judge considers that VOLKSWAGEN's actions were a dishonest practice and "that its concealment was likely to distort the economic behaviour of the average consumer as regards the decision to choose VOLKSWAGEN's offer". If the "rig" had been known, any average consumer would have seriously considered buying "because of the obvious risk that the regulator might later adopt rules penalising or even banning highly polluting vehicles which, thanks to this scheme, were able to pass the tests". VOLKSWAGEN's actions are therefore considered to fall under Article 4 LDC.

- b) **Article 5 LDC considers unfair, inasmuch as misleading, any conduct containing false information or information which, although truthful, because of its content or presentation misleads or is likely to mislead the addressees and is likely to alter their economic behaviour, provided that it relates to any of the following aspects:** (i) the existence or nature of the good or service; (ii) **the main characteristics of the good or service**, such as its availability, its benefits, its risks, its performance, its composition, its accessories, the process and date of its manufacture or supply, its delivery, its appropriateness, its use, its quantity, its specifications, its geographical or commercial origin or the results to be expected from its use, or the results and essential characteristics of tests or checks carried out on the good or service; (iii) after-sales customer support and complaint handling; (iv) the extent of the commitments of the seller or supplier, the reasons for the commercial conduct and the nature of the commercial transaction or contract, as well as any statement or symbol indicating that the seller or supplier or the good or service is the subject of direct or indirect sponsorship or approval; (v) the price or the manner in which it is set, or the existence of a specific price advantage; (vi) the need for a service or part, replacement or repair, and the modification of the price initially reported, unless there is a subsequent agreement between the parties agreeing to such modification; (vii) the nature, characteristics and rights of the seller or supplier or his agent, such as his identity and solvency, his qualifications, status, approval, affiliation or connections and his commercial or intellectual property rights, or the awards and distinctions he has received; (viii) the statutory or contractual rights of the consumer or the risks that the consumer may be exposed to.

It is understood in this case that VOLKSWAGEN communicated false or misleading information when it advertised that its main concern is the environment, while it was marketing polluting vehicles by misrepresenting the results. Moreover, such misleading conduct falls within those elements set out in Article 5, such as, in this case, for example, the main characteristics of the good. To that end, VOLKSWAGEN's claim that the deception would only have existed if emissions test results had been disseminated which differed from those which the tests had actually produced is inadmissible. Rather, in the

judge's view, there is deception from the moment that VOLKSWAGEN advertises a firm and unwavering commitment to the environment and at the same time manipulates the vehicles in order to falsify the results of the emissions tests.

It is not necessary in this case, due to the type of action brought (which is not that of contractual voidness or unfit product due to deceit or vitiation of consent), to determine whether consumers were provided with false "essential" information on what constitutes an essential element of the contract (as occurred in other civil judgments against the claimant in our country which were along these lines and in which it could not be proven that the deceit had essentially affected the consumer's intention to purchase except in very specific cases of highly ecological awareness on the part of the consumer). It is sufficient that the consumer has been deceived, in this case, by a false commitment to environmental protection.

- c) VOLKSWAGEN GROUP ESPAÑA DISTRIBUCIÓN, S.A., argued that it did not have standing to be sued because it was not responsible for VOLKSWAGEN AG's practices and had its own legal personality, not being a "branch" of the manufacturer. However, **Article 34 LCD attributes standing to be sued to those who have cooperated in the conduct**; in this case, the decisive collaboration of the defendant company in the distribution and sale of the vehicles in which the unlawful manipulation took place. Furthermore, it is considered that the defendant had a high level of access to and knowledge of the operation of the mechanics and control unit of the vehicles, as is evidenced by the fact that it is precisely the defendant that has assumed responsibility for the implementation of the remedial measures, as the defendant admits.

With regard to the standing to be sued, the reference made by the Judge to various **court decisions impinging on the automotive sector, which interpret the criterion of relativity of contracts in a broad manner**, is relevant. Firstly, the judgment of the SC of 11 March 2020 against Seat in the *dieselgate* case, in which the SC argues that "the particularities of contracting in the automotive sector justify limiting or exempting the principle of the relativity of contracts in certain cases, given the special links created between the manufacturer, dealers and buyers, the importance of the manufacturer's brand, the buyer's loyalty to that brand, its influence on the buyer's decision and the massive involvement of a number of buyers". As a second example, court decisions on damages arising from antitrust infringements are highlighted, which allow the possibility of suing the cartel's subsidiary company without having participated in or allegedly known about the anti-competitive practices, although the court admits that there is no established case law in this second case and mentions the question referred for a preliminary ruling to the Court of Justice of the European Union by the Barcelona Audiencia Provincial (15th Chamber) in order to clarify "whether the doctrine of economic unity, which emanates from the European Court itself, justifies the extension of the parent company's liability to the subsidiary or whether this doctrine is only applicable to extend the subsidiaries' liability

to the parent company”. However, the Judge concludes that the doubts in the second case may be understandable in the absence of an express legal provision, which in the case in question is not the case, as Article 34 LDC provides it by including cooperators.

The decision does exclude from the finding of liability those vehicles included in OCU’s claim but which belonged to makes not distributed by VOLKSWAGEN GROUP ESPAÑA DISTRIBUCIÓN, as well as vehicles not imported by VOLKSWAGEN, vehicles not involved in the EA 189 and vehicles with a repeated VIN. Therefore, OCU’s claim of 7,542 affected persons is finally reduced to 5,444 affected persons. VOLKSWAGEN’s claim that vehicles used for commercial purposes are excluded on the grounds that they are not consumers and users is not upheld. In this regard, the judge establishes that no evidence is provided which reliably proves that the purchasers acted at the time of purchase with a clear purpose of carrying out a commercial activity and this conclusion cannot be drawn from the vehicle model or its features (Judgment of the Madrid Audiencia Provincial (18th Chamber) dated 29 May 2020).

d) On the damage

VOLKSWAGEN argued in its reply to the complaint that there is no damage to consumers to be compensated, since VOLKSWAGEN had completely stopped the manipulation and had launched a free-of-charge campaign for all affected vehicles.

The Companies Court concludes that, as the action brought is not a redhibition or price reduction action for latent defects or a claim for non-conformity or any other action that could have a contractual basis, the argument as to whether or not the damage existed because it had been removed by the campaign on the vehicle is not admissible. It is also irrelevant whether or not the defendant has been able to successfully prove, in individual claims brought by vehicle owners in Spain, that the purchasers of the vehicles are not entitled to have the contract terminated or to obtain financial compensation for contractual fault.

e) Limitation period

VOLKSWAGEN also invoked the limitation period. The limitation period in this case is governed by Article 35 LCD, which provides that such shall expire one year from the time when the action could have been brought and the party entitled to bring the action had knowledge of the person who carried out the act of unfair competition. And in any event after three years have elapsed from the time the conduct ended. The second paragraph includes, however, a peculiarity in the case of consumer associations: the limitation period for actions in defence of the general, collective or diffuse interests of consumers and users, which is governed by the provisions of Article 56 of the Consumer and User Protection (Recast) Act.

The defendant claimed that the *dies a quo* began to run from 24 September 2015, the date of VOLKSWAGEN's public statement acknowledging the facts, although in that communication VOLKSWAGEN itself said "at this time we cannot specify which models are affected, nor the data on the year of manufacture", with the result that at the alleged *dies a quo* not even the defendant knew the extent of the fraud nor when it would be able to provide definitive information. It is also considered that the mediation and conciliation brought by OCU on this same issue interrupted the limitation period, based on the judgments of the SC of 5 February 2018, 7 November 2000, 9 July 2003 and 12 June 2007. Similarly, it is established that no evidence has been provided regarding the absolute disappearance of all the manipulations in the vehicles' control units, this being a continuous act which it is not known whether it has ceased in its entirety and in any case is not time-barred by the interruption of the aforementioned limitation period.

f) Order to restrain and restore

The action seeking the restraining of the unlawful conduct and restoration, requiring the defendant to remove the software used for the deception from the control unit of all the vehicles concerned, without any time limit and free of charge, is also upheld. **The defendant is thereby deprived of the possibility at any time of claiming that the free inspection campaign for the vehicles concerned has already concluded.**

g) Compensation

As regards the action for damages, VOLKSWAGEN denies the possibility, under Spanish law, of collective actions for damages being brought through a consumer association. However, Article 33 LDC itself refers to the exercise of the action for damages by consumer associations, so this argument is not accepted. The Judge considers that OCU would have overreached if it had claimed that the defendant should compensate all owners of EA 189 diesel vehicles in Spain, but this is not the case, as compensation is only requested for OCU members who have been affected by the unfair conduct and who have been clearly identified.

VOLKSWAGEN also argues that it is not possible to claim **uniform compensation** for all those affected, but that the harm, fault and causation should be proven individually. The judge refers to the standards for liability arising from traffic accidents, or the liability of airlines in the event of an accident, to justify that it is possible for a number of persons to suffer a homogeneous harm arising from the same harmful act when this is permitted. In this regard, the Judge refers to the recent **Directive 2020/1828 on representative actions for the protection of the collective interests of consumers**, which must be transposed in Spain before December 2022 and will be mandatory as of June 2023, Articles 9 and 10 of which (as we commented in the previous GAP Analysis) provides for a collective mechanism to claim redress for consumers and users with a homogeneous outcome, with a case such as

dieselgate being the one the European legislator has in mind, expressly mentioning it in the explanatory notes and basis documents. Therefore, the judge concludes that “given that on the date on which the judgment was handed down the Directive was already in force, an obligation arises for the national court to interpret national law in accordance with the Directive, even if the transposition period has not yet expired, as soon as it enters into force”.

In order to determine the damage, the doctrine of “ex re ipsa” is applied, supported, *inter alia*, by the judgments of the Supreme Court of 8 April 2014, 17 July 2008, 12 June 2007 and 22 June 2006, which determine that **the reality of the damage may be considered to exist when it is evident or when it is “evidenced as a logical and unfailing consequence of the conduct being judged”**. Here, there is at least the inconvenience due to the loss of time associated with the need to take the vehicle to the manufacturer’s technical service for the reprogramming of its control unit and other personal inconveniences, as well as the concern/uncertainty of the consumer as to what other type of unlawful software may have been included in the vehicles of this make. All such harm or inconvenience that is considered not to have to be proven in each specific case, taking into account that the harm indicated will not be mere conjecture when in other countries it has given rise to much higher compensation. All the more so since there has been an extremely rapid development in recent years in terms of vehicle pollution characteristics, with vehicles being classified according to pollutant levels for access to areas or cities. The amounts of compensation requested by OCU are therefore accepted, considering that the inconvenience and discomfort caused cannot be less than the amount requested by OCU, which is considered to be very reasonable.

In order to fix the amount of compensation, account is taken of the fact that in Germany, Volkswagen has reached an agreement on compensation of between EUR 1350 and 6257 per affected consumer, and therefore it is considered that the amounts requested comply with the requirements of prudence and moderation insofar as it is in the lower range of the compensation chosen for German consumers, and also taking into consideration the amounts of between EUR 5000 and 10000 euros per affected person that the same manufacturer has paid in the United States according to judicially noticed information.

The foregoing is a summary of the judgment in respect of which we do not make any considerations in this Analysis.