

## ***Consumers' Environmental Expectations & Professionals' liability***

Francesca Bertelli

*francesca.bertelli@unitelmasapienza.it*

# Summary



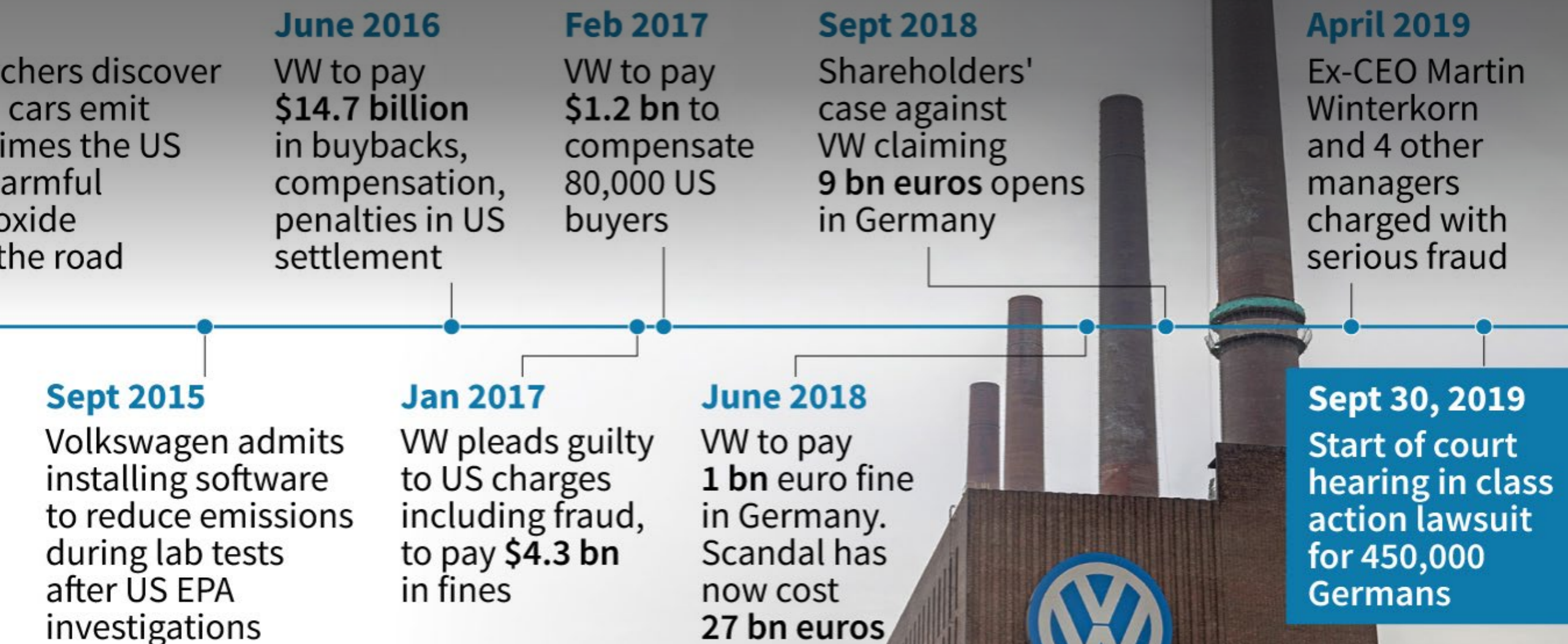
1. The **Dieselgate Scandal** Between Tort and Contract Law
  2. The EUCJ Decision C-145/20
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# Updates in 'dieselgate'

## THE DIESELGATE SCANDAL BETWEEN TORT AND CONTRACT LAW

for Volkswagen in German court over emissions cheating scandal



Source: AFP Photo/Odd Andersen

# The Dieselgate Scandal Between Tort and Contract Law



The Volkswagen (VW) dieselgate scandal involved the installation of manipulated software aimed at **misrepresenting the level of polluting emissions measured during mandatory homologation tests.**



This scandal **has triggered a large number of governmental and private actions against VW around the world addressing diverse issues such as consumer rights, competition law and environmental law** with regards to effects on air quality, caused by the high levels of nitrogen oxides (NOx) and carbonic anhydride (carbon dioxide, CO<sub>2</sub>) produced by diesel vehicles.

# The Dieselgate Scandal Between Tort and Contract Law



Even if the case in point concerns clear **violations of mandatory rules** and **legal limits**, in more general terms the dieselgate scandal has:

- raised awareness over the environmental responsibility of both corporations and consumers;
- highlighted the problems surrounding the misleading use of green marketing strategies;
- emphasised the need to further explore the relationship between sustainable development and private law

# The Dieselgate Scandal

## Between Tort and Contract Law

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Private  
enforcement in  
Italy:

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Individual  
Claim,  
Tribunale  
di Avellino  
10  
December  
2020

The judgement recognised the **right to compensation** (determined according to **art. 1226 c.c.**) to the consumer who bought a defeated vehicle

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Consumer's protection relied upon **tort law**

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**Damages** were considered as a **consequence of VW misconduct representing an unfair commercial practice according to the UCPD and to its transposition in Italy** (arts. 18 ff. c. cons.), as already ascertained by the Competition Authority (AGCM)

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# The Dieselgate Scandal

## Between Tort and Contract Law

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Private  
enforcement  
in Italy:

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Class  
Action,  
Tribunale  
Venezia

7 July  
2021

The judgement recognised the **right to compensation** (determined according to **art. 1226 c.c.** – 15% average purchase price to consumers who joined the **class action**)

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Consumer's protection relied upon **tort law**

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**Damages** were considered as a **consequence of VW misconduct representing an unfair commercial practice according to the UCPD and to its transposition in Italy** (arts. 18 ff. c. cons.), as already ascertained by the Competition Authority (AGCM)

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# The Dieselgate Scandal

## Between Tort and Contract Law

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Private  
enforcement  
in  
Germany:

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Individual  
Claim,  
BGH 25  
May 2020,  
n VI ZR  
252/19

The German federal Court anchored VW liability toward consumers to § 826 BGB (intentional **damage contrary to public policy**)

The remedy consisted in **restitution to the producer + compensation** (with a sum which was equivalent to the price of the vehicle, decreased of the estimated value of its use by the consumer)

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Consumer's protection relied upon **tort law**

The undertaken path of tort liability finds its justification in a legal strategy aimed at:

enlarging the pool of subjects interested in opting-in the class action as much as possible

reinforcing the position of consumers since acting against the sole seller for a breach of contract (caused by the delivery of a good with a material defect or not in conformity with the contract) could have been less effective than affirming producer's and seller's joint liability

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The damage was considered as consisting in the conclusion of an «**undesired contract**»

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# The EUCJ Decision C-145/20



- The judgment of the European Court of Justice C-145/20 follows a **request for a preliminary ruling** under Article 267 TFEU from the Oberster Gerichtshof made in proceedings against Volkswagen

The request concerns:

- the **interpretation of Art. 5.2 of Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles** with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information and
- the **interpretation of Art. 2.2 d) and 3.6) of Directive 1999/44/EC** of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees



# The EUCJ Decision C-145/20



The request has been made in proceedings between a consumer and Porsche Inter Auto GmbH & Co. KG and Volkswagen AG concerning an **application for annulment of a sales contract for a motor vehicle with software reducing the recirculation of the vehicle's pollutant gases according, *inter alia*, to the temperature detected**

The fact:

- On December 2013 a **consumer** purchased a Volkswagen motor vehicle with a Euro 5 generation EA 189 type diesel engine from Porsche Inter Auto, an **independent authorised Volkswagen dealer**
  - That vehicle contained **software which operated the exhaust gas recirculation**
  - **EC type-approval was granted for the vehicle type at issue by the Kraftfahrt-Bundesamt** (Federal Office for Motor Vehicles; 'the KBA'), the competent authority responsible for type-approval in Germany. The presence of the switch system had not been disclosed to that authority



# The EUCJ Decision C-145/20



If the KBA had been aware of that system, it would not have granted EC type-approval to that type of vehicle.



By decision of 15 October 2015 the **KBA ordered Volkswagen to withdraw the switch system** in order to **re-establish conformity of Euro 5 generation EA 189 engines** with Regulation No 715/2007



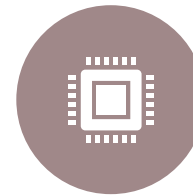
In December 2016, the **KBA informed Volkswagen that the software update proposed by VW was suitable for re-establishing that conformity.**



Subsequently, **the EC type-approval for the vehicle type at issue was not withdrawn or revoked by the KBA**



In February 2017, the consumer **had the software update carried out on the vehicle**



That update replaced the switch system with a programme under which the **emission-reducing mode was activated not only during the approval test, but also when the vehicle was used on a road. However, the EGR was fully effective only when the external temperature was between 15 and 33 °C ('the temperature window')**

# The EUCJ Decision C-145/20



The dispute:

- The consumer brought an action before the Landesgericht Linz (Regional Court, Linz, Austria) seeking:
  - a) principally, the reimbursement of the purchase price of the vehicle at issue against return of that vehicle
  - b) in the alternative, a reduction in the price of the vehicle
  - c) in the further alternative, a declaration that Porsche Inter Auto and Volkswagen are liable for damages as a result of the presence of a prohibited defeat device within the meaning of Article 5.2) of Regulation No 715/2007
- By judgment of 12 December 2018, that court dismissed the action
- By judgment of 4 April 2019, the Oberlandesgericht Linz (Higher Regional Court, Linz, Austria) upheld that judgment.



# The EUCJ Decision C-145/20



The claimant brought **an appeal on a point of law** ('Revision') against that judgment before the Oberster Gerichtshof (Supreme Court, Austria), **on the ground that the vehicle at issue was defective** because the switch system constituted a prohibited defeat device, within the meaning of Article 5.2 of Regulation No 715/2007



According to the consumer, **since the software update had not remedied that defect, there was a risk that the vehicle would decrease in value and be damaged as a result of that update**



Porsche Inter Auto and Volkswagen submit that the temperature window constitutes a permissible defeat device under Article 5.2 of Regulation No 715/2007. The KBA agrees with that assessment

# The EUCJ Decision C-145/20



The judgment of the European Court of Justice C-145/20 establishes that:

1. Art. 2.2 sub d) of Directive 1999/44 must be interpreted as meaning that a **motor vehicle that falls within the scope of Regulation 715/2007 does not show the quality which is normal in goods of the same type and which the consumer can reasonably expect where, although it is covered by a valid EC type-approval and may, consequently, be used on the road, that vehicle is fitted with a defeat device**, the use of which is prohibited under Art. 5.2 of that Regulation.



# The EUCJ Decision C-145/20



The judgment of the European Court of Justice C-145/20 establishes that:

2. Art. 5.2 a) of Regulation 715/2007 must be interpreted as meaning that a **defeat device, which guarantees**, in particular, **compliance with the emission limits laid down by that regulation only where the outside temperature is between 15 and 33 °C, can be justified under that provision only where it is established that that device strictly meets the need to avoid immediate risks of damage or accident to the engine**, caused by a malfunction of a component of the exhaust gas recirculation system. A defeat device which, under normal driving conditions, operated during most of the year in order to protect the engine from damage or accident and ensure the safe operation of the vehicle could not fall within the exception provided for in Art. 5.2 a) of Regulation No 715/2007



# The EUCJ Decision C-145/20



The judgment of the European Court of Justice C-145/20 establishes that:

3. Art. 3.6 of Directive 1999/44 must be interpreted as meaning that a lack of conformity consisting of the presence, in a vehicle, of a defeat device, the use of which is prohibited under Art. 5.2 of Regulation No 715/2007 is not to be classified as ‘minor’ even where the consumer would still have purchased that vehicle if he or she had been aware of the existence and operation of that device





# The EUCJ Decision C-145/20



The Court states that:

- Under Article 2.3 of Directive 1999/44 **there is not a lack of conformity if, at the time the contract was concluded, the consumer was aware or could not reasonably be unaware of the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer**
- It is not disputed that, at the time of the sale of the vehicle at issue **the consumer was not aware of the alleged lack of conformity and could not reasonably have been aware of that defect**
- The fact that, after having purchased a good, a consumer admits that he or she would have purchased that good even if he or she had been aware of such a lack of conformity is not relevant for the purposes of determining whether a lack of conformity must be classified as ‘minor’ in order to establish if the consumer is not entitled to rescind the contract



# Dir. 1999/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees

## Key points:

- Sellers must **deliver goods** to customers **that conform with the sales contract** (art. 2.1)
- To conform, goods must (art. 2.2):
  - comply with the sales description;
  - be fit for the purpose for which the good was intended;
  - demonstrate the quality and performance that can reasonably be expected
- Consumers have the **right to ask for faulty goods to be repaired or replaced free of charge** within a reasonable time and minimum inconvenience (art. 3.2-3.4)
- Consumers may instead ask for an **appropriate price reduction** if repair or replacement is not done on time or without significant inconvenience to the consumer (art. 3.5)

# Dir. 2019/771/UE on Certain Aspects Concerning Contracts for the Sale of Goods

Dir. 2019/771/UE of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods:

- repeals Dir. 1999/44/EC
- aims to ensure proper functioning of the internal market, while providing consumers with a high level of protection.
  - It does so by *targeted maximum harmonisation*

The scope of the directive covers:

- conformity of goods;
- remedies if there is a lack of conformity;
- ways to exercise these remedies;
- commercial guarantees

# Dir. 2019/771/UE on Certain Aspects Concerning Contracts for the Sale of Goods

## Key points:

- **Sellers must ensure goods delivered to the consumer conform with the sales contract by:**
  - **complying with what was contractually agreed** (e.g. fit the description, type, quantity, quality and possessing the features required by the contract, being fit for the agreed purposes) (art. 6 - Subjective requirements for conformity)
  - **complying with objective conformity criteria** (e.g. be fit for the purposes for which similar goods are normally used; correspond to the sample or model shown to the consumer; be delivered with the accessories, instructions and packaging that the consumer can reasonably expect and; possess the qualities and features that the consumer may reasonably expect) (art. 7 - Objective requirements for conformity)

# Dir. 2019/771/UE on Certain Aspects Concerning Contracts for the Sale of Goods

## Key points:

- If there is **lack of conformity** consumers are entitled to the following **remedies** (art. 13)
- 1<sup>st</sup> degree: choice between **repair and replacement of the goods, free of charge, within a reasonable time and without any major inconvenience.**
  - The seller can give the alternative remedy if the one chosen is impossible or involves disproportionate costs for the seller;
- 2<sup>nd</sup> degree: a **proportionate reduction in price; termination of the contract, except if the defect is only minor.**

# Dir. 2019/771/UE on Certain Aspects Concerning Contracts for the Sale of Goods

## Key points:

- Consumers are entitled to immediately obtain either a proportionate reduction of the price or the termination of the sales contract in accordance **if the lack of conformity is of such a serious nature as to justify an immediate price reduction or termination of the sales contract** (art. 13.4 c.)
- The **reduction of price shall be proportionate to the decrease in the value of the goods which were received by the consumer** compared to the value the goods would have if they were in conformity (art. 15)
- The consumer shall exercise **the right to terminate the sales contract by means of a statement to the seller expressing the decision to terminate the sales contract** (return of the good + reimbursement)
- **EU countries must not apply measures, including more or less stringent consumer protection provisions, divergent from those in the directive** (art. 4 – so called «targeted maximum harmonisation»)

## ... Toward a Renewed Concept of Conformity

Unsustainability  
and lack of  
conformity?

- Many claims of non conformity related to sustainability can already be based on the general conformity criteria of art. 2.2 d) dir. 1999/44/CE according to which the delivered good must:
  - **show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristic of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling**
- However, the CSGD 2019/771/UE provides more detailed objective conformity criteria which can assist consumers who claim that sustainability characteristics of a purchased good do not-conform with the sale contract
  - Particularly important in this regard are the **open-ended criteria** of art. 7.1 d), which refers to **reasonable expectations of the consumer based on the nature of the good or public statements made by or on behalf of persons in the supply chain**

## ... Toward a Renewed Concept of Conformity

With the start of the Commission under President von der Leyen, the European Union has committed itself to sustainability: this covers not only climate change, but also the life cycle of goods...

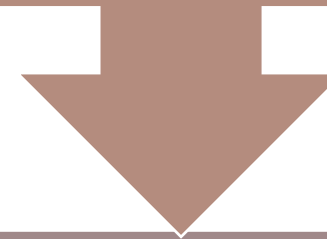
### Sustainable remedies?

- Arts 13 to 16 dir. 771/2019/UE sets out the hierarchy of remedies consisting in
  - **rectification of defects**
  - **replacement**
  - **price reduction**
  - **termination of the contract**
- Priority is given to rectification of defects and replacement, with the **consumer choosing between these two types of remedy** (Art. 13.2)
- The seller may reject these options if the costs are disproportionate (Art. 13.3)
- Dir. 771/2019/UE in Recital 48 sentence 2 to “encourage sustainable consumption and [...] contribute to greater durability of products.”



# The EUCJ Decision C-100/21

The case concerns the **action for damages** brought by a purchaser



The request has been made in proceedings between QB and Mercedes-Benz Group AG, a car manufacturer, concerning the right to compensation invoked by QB and the calculation of the amount of damages he may be owed on account of his purchase of a diesel vehicle equipped with software which **reduces the recirculation of pollutant gases of that vehicle depending on the outside temperature and which does not comply with the requirements of EU law.**

# The EUCJ Decision

## C-100/21



The request for a preliminary ruling concerns

- the interpretation of Article 18(1), Article 26(1) and Article 46 of Directive 2007/46/EC establishing a framework for the approval of motor vehicles
- the interpretation of Article 5(2) of Regulation (EC) No 715/2007 of on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information

# The EUCJ Decision C-100/21



The EUCJ concludes that:

- the Framework Directive establishes a direct link between the car manufacturer and the individual purchaser of a motor vehicle intended to guarantee to the latter that that vehicle complies with the relevant EU legislation.
- the provisions of the Framework Directive, read in conjunction with those of Regulation No 715/2007, protect
  - public interests
  - the specific interests of the individual purchaser of a motor vehicle vis-à-vis the manufacturer of that vehicle where that vehicle is equipped with a prohibited defeat device



# The EUCJ Decision C-100/21



The EUCJ concludes that:

- o EU law must be interpreted as meaning that it is for the law of the Member State concerned to determine the **rules concerning compensation for damage actually caused to the purchaser of a vehicle equipped with a prohibited defeat device**, within the meaning of Article 5(2) of Regulation No 715/2007, **provided that compensation is proportionate and adequate with respect to the damage suffered.**



# The EUCJ Decision C-873/19



- The judgment of the European Court of Justice C-873/19 follows a **request for a preliminary ruling** under Article 267 TFEU from the Schleswig-Holsteinisches Verwaltungsgericht (Administrative Court, Schleswig-Holstein, Germany)

The request concerns:

- the **interpretation of Article 9.3 of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention)**
- the **interpretation of the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union**
- the **interpretation of** Art. 5.2 a) of Regulation 715/2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6)



# The EUCJ Decision C-873/19



The request has been made in proceedings between Deutsche Umwelthilfe (a recognised environmental association) and the Bundesrepublik Deutschland (Federal Republic of Germany), represented by the Kraftfahrt-Bundesamt (Federal Motor Transport Authority, Germany; KBA), concerning the decision by which the KBA authorised the use of software reducing the recirculation of gaseous pollutants (EGR) according to outside temperature for the vehicles involved in the emissions scandal



The fact:

Volkswagen marketed motor vehicles with a Euro 5 generation diesel engine. Those vehicles had a **valve for exhaust gas recirculation ('the EGR valve')**, which is one of the technologies used by car manufacturers to control and reduce NOx emissions. Some vehicles originally had software installed in the electronic engine controller to manipulate polluting emissions. In the EC type-approval procedure for those vehicles, Volkswagen did not notify the KBA of the existence of such software

**the KBA ordered Volkswagen to remove that device and to take the necessary measures to ensure that the vehicles complied with the national legislation concerned and the EU legislation**

**Following that decision, Volkswagen updated the software.** The effect of that update was to set the EGR valve to regulate the EGR rate in a way that the exhaust-gas purification by that recirculation system was fully effective only if the external temperature was higher than 15 °C ('the so called temperature window').

# The EUCJ Decision C-873/19



- By decision of 20 June 2016, **the KBA authorised the software update**
- **On 15 November 2016, Deutsche Umwelthilfe** lodged an administrative appeal against that authorisation

The dispute:

- **On 24 April 2018, Deutsche Umwelthilfe brought an action before the Schleswig-Holsteinisches Verwaltungsgericht** (Administrative Court, Schleswig-Holstein, Germany) seeking annulment of the contested decision

It submits that:

- **the vehicles were still equipped with an unlawful defeat device, within the meaning of Article 5.2 of Reg. 715/2007**, since that device becomes active when the average temperatures recorded in Germany are reached
- **car manufacturers are able to design engines which do not require a reduction, for technical reasons, of the performance of emission control systems at average temperatures**





## The EUCJ Decision C-873/19

The referring court considers that:

- the admissibility of the action in the main proceedings depends on whether **Deutsche Umwelthilfe** may derive standing to bring proceedings directly from EU law, resulting from the application of **Article 9.3 of the Aarhus Convention** in conjunction with the first paragraph of **Art. 47 of the Charter**





# The EUCJ Decision C-873/19



The judgment of the European Court of Justice C-873/19 establishes that:

1. Art. 9.3 of the Aarhus Convention, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding a situation where an environmental association, authorised to bring legal proceedings in accordance with national law, is unable to challenge before a national court an administrative decision granting or amending EC type-approval which may be contrary to Art. 5.2) Reg. 715/2007



# The EUCJ Decision C-873/19



The judgment of the European Court of Justice C-873/19 establishes that:

2. Art. 5.2 a) Reg. No 715/2007 must be interpreted as meaning that a defeat device can be justified under that provision only where it is established that that device strictly meets the need to avoid immediate risks of damage or accident to the engine, caused by a malfunction of a component of the exhaust gas recirculation system, of such a serious nature as to give rise to a specific hazard when a vehicle fitted with that device is driven. Furthermore, the ‘need’ for a defeat device, within the meaning of that provision, exists only where, at the time of the EC type-approval of that device or of the vehicle equipped with it, no other technical solution makes it possible to avoid immediate risks of damage or accident to the engine



# Final remarks



The EUCJ decisions reveal the possibility to **address greenwashing**



1) Recalling the **UCPD** for the misleading use of green claims



2) Enforcing consumers' rights through the **CSGD**



3) Affirming the direct **liability of the producer** for the violation of EU law



The EUCJ **highlights the importance of Private Law** in ensuring a **high level of protection of (ethical) consumers and the environment**



The **environmental and economic impact of private enforcement** shows how the concept of sustainability is reshaping **private remedies**, as well as on the concept of **justice** itself

Thanks for your attention



FRANCESCA.BERTELLI@UNITELMASAPIENZA.IT