

“After Dieselgate”. Situation in Italy. Part I

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The so called “Dieselgate Scandal” as a mass-harm case

- EU Commission’s Work Programme 2018, 'A new Deal for Consumers':
- mass-harm cases need to be tackled by **effective legal means of consumer protection**

The consumers' right to an effective remedy

Indeed:

- - Art. 38 of the EU **Charter of Fundamental Rights** compels the Union (and its Member States) to ensure a high level of consumer protection (consumers' right to enjoy effective remedies).

Ways to tackle mass-harm cases

- Both **private and public means of legal enforcement** should be made available to consumers
- There is a need for a **combination of individual and collective remedies**

Two main goals: deterrence and redress

- Main item of debate:
- whether and to what extent the various legal systems of Member States are able to provide consumers with **adequate legislation** and to **enforce such a legislation in an effective manner**, having regard to:
 - - **deterrence** (to prevent mass-harm cases)
 - - **redress** (to ensure appropriate protection)

Shortcomings of public and private law regimes

The Dieselgate scandal stressed the fragilities in the implementation and enforcement of the existing EU rules on:

- - **approval and market surveillance of motor vehicles** (see EU Parliament proposal (C8-0015/2016) to amend current Framework Directive 2007/46/EC)
- - **consumer protection, notably, deterrence of unfair commercial practices** and redress for victims (see 2018, 'A new Deal for Consumers').

Need for a strengthening of those rules (see legislative initiatives started by the EU)

Shortcomings of public and private law regimes: Italy

- The Italian legal system does not include entirely effective remedies.
- The very same conclusion applies to several other European legal systems (see initiatives and debates raised by the Dieselgate scandal).

Public enforcement: Italian Competition Authority

- October 2015: the **Italian Competition Authority** started a **proceeding** against the German parent company, Volkswagen AG, and its Italian subsidiary, Volkswagen Group Italia S. p. a., based on the alleged infringement of:
 - the **Unfair Commercial Practices Directive 2005/29/EC** of the European Parliament and of the Council of 11 May 2005 (hereafter: UCP Directive)
 - the **Italian Consumer Code** (Articles 20-27 enacted to implement the UCP Directive)

Public enforcement: Italian Competition Authority (ctd)

➤ The Italian Competition Authority

- - can exercise **inquisitorial powers** to gather evidence of wrongdoing
- - the **burden of discharging from liability is placed** by the law **on traders**

Public enforcement: Italian Competition Authority (ctd)

- Italian Competition Authority's decision of 2016:
- The Authority issued a 5 million Euro fine, imposed jointly on both companies and ...
- ...it forbade them to continue to resort to unfair commercial practices.

Green claims

- **Commercial practices addressed by the 2016 Authority's Decision:**
 - installing the «defeat device» in the vehicles and
 - resorting to the so-called '**green claims**' in its advertising
- Green claims by VW included reference to the company's doing good for the environment or to the fact that specific car models are more environmentally friendly

Green claims (ctd)

- **Green claims:**

- **assertions made by traders to represent their products as environmentally-friendly**
- **if untruthful, they can mislead consumers, affecting the transactional decision**

Green claims (ctd)

- With regard to the use of green claims made by VW, the Competition Authority took a very **strict stance**, finding that:
 - ✓ - today's consumers pay great attention to the environmental-friendliness of the products
 - ✓ - the green claims, though generic and vague, such as the ones made by VW, are capable of distorting the behaviour of the average consumer, which is a requisite set out by the UCP Directive.

EU policy on green claims

- They are the expression of a collaborative economy
- They boost sustainable consumption
- Recourse to unlawful, deceptive green claims shall be prevented (see EU Guidance on the implementation of the UCP Directive (Sec (2009)1666)).

Private enforcement

- Individual and collective remedies are available to consumers (and non-consumers) affected by VW's unfair practices, under the Italian legal system.
- Focus on individual remedies:
 - - Contract law remedies
 - - Tort law remedies

Contract law remedies (vices of consent)

- Contract law remedies are of little, if any, use, when it comes to ensuring proper protection to consumers.
- Avoidance of the sale contract available only where the unfair commercial practice **consists in fraud or amounts to other vices of consent (such as mistake or threats)**.
- E.g.: fraud requires:
 - -purposefulness of the swindle and
 - - its adequacy to induce the aggrieved party to the conclusion of the contract.

Contract law remedies (ctd)

- The principle of “**privity of contract**” represents an additional challenge, where the **unfair commercial practice is perpetrated by a manufacturer who is not the contracting party**.
- It follows that:
 - - in the Dieselgate case the individual consumer (or non consumer) who purchased the car equipped with the defeat device cannot enjoy any form of protection against the car manufacturer or its Italian subsidiary.

Contract law remedies (ctd)

- **The very same conclusion applies to other types of contractual claims** theoretically available, such as the claims grounded on the rules comprised in the Directive on the sale of consumer goods (**Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999**).
- Indeed, those rules require:
- non conformity of the vehicles sold (because of their non compliance with the pollutant emissions limits) to the qualities agreed in the contract
- and knowledge of the lack of conformity by the seller

Tort law remedies

- **Individual tort law claims** are admissible under the **general rule on civil liability** (Art. 2043 Italian Civil Code):
 - **against the cars manufacturer** (and the Italian subsidiary)
 - **to any aggrieved individual or legal person** (cars' owners, lessees, etc.)

Tort law remedies (ctd)

- On condition that the aggrieved individual gives evidence of the following requirements:
 - **malice** (or **fault**) by the VW Company (and/or its Italian subsidiary)
 - a resulting **damage**, either **pecuniary or non-pecuniary**.

Malice (or fault) by the VW Company (and/or its Italian subsidiary)

Any aggrieved individual can rely on the Italian Competition Authority's finding of infringement:

- - VW knowingly installed the defeat device in the affected vehicles and marketed those vehicles as environmentally conscious, deceiving consumers by using the so-called green claims.

Assesement of damage: hurdles

- Giving evidence of a damage (either pecuniary or non-pecuniary) related to the VW' unlawful conduct, poses several, complex questions.
- Italian tort law does not set out any explicit rule on punitive damage; hence, VW can only face compensatory damage claims.

Assesment of damage: hurdles (ctd)

- **The 2016 Italian Competition Authority's finding does not constitute evidence of the existence of a damage.**
- **The aggrieved individual bears the burden of proving damage.**

Pecuniary damage

- German Federal Transport Authority's order imposing recall and updating of the affected vehicles (2015).
- Compensation only in case of evidence that, after the recall and updating, the vehicle has reduced its performance or has lost its value (in case of reselling)
 - Survey conducted by consumers associations in 2017: in 45% of the cases
 - - reduced performance
 - - increase in the level of fuel consumption

Non-pecuniary damage

- Individual tort claims grounded on the claimants' personal injury
- Hurdles:
 - - the **increased level of tolerated pollutant emissions** has made onerous demonstrating the VW's unlawful conduct (EU Regulation n. 646 of 2016)
 - - even more onerous is giving **evidence of a causal link** between pollutant emissions and claimant's health injury

Conclusion of part I

- Ultimately, in the case at hand, obtaining damages for unlawful act may prove extremely difficult because of:
 - - the **complexity of the legal issues** at stake and
 - - the **high costs** to which the individual claimant is subject (the so-called small claims issue).

Conclusion of part I (ctd)

- Individual remedies available are not capable of ensuring appropriate protection in cases such as the Dieselgate scandal.
- They lack adequate dissuasive effects