

# Dealing with the Dieselgate Scandal in the US and EU

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### Abstract

Courts decisions following the VW diesel emissions scandal, widely known as 'dieselgate', reveal a serious lack of European harmonization in the enforcement of Consumer Law thereby undermining consumer protection and uniformity across member states. This article presents an overview of the legal implications of the cheating emission scandal in the US and EU. Focusing on the EU perspective on the 'dieselgate' scandal, the essay analyses the first Italian judgment that awarded limited compensation to the buyer of a vehicle who was misled by the emission cheating device. The outcomes of the Italian litigation, especially when compared with successful US class actions, suggest that there is a need to strengthen consumer rights in Europe. The article further suggests that sustainability declarations contained in advertisements need to be better regulated.

### I. Introduction

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 (NO<sub>x</sub>) and carbonic anhydride (carbon dioxide, CO<sub>2</sub>) produced by diesel vehicles.

This article compares the legal approaches to the scandal taken by the courts in the US and Europe.

In the US, collective redress mechanisms have been pivotal for the enforcement of consumer rights, enabling an efficient and cost-effective dispute resolution. Three partial settlements have been signed by Volkswagen and approved by the US District Court in the Northern District of California. Overall, the settlements achieved a high level of buyers' protection. The European litigation, by way of contrast, provided weaker consumer protection and revealed a lack of harmonisation between EU member States.

Additionally, from an environmental perspective, in the US two mitigation trusts were created, funded by Volkswagen pursuant to these settlements. The

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aim of creating these trusts was to financially support eligible mitigation actions to offset the excess emissions caused by the VW vehicles. These trusts implemented 'Precaution' and 'Polluter Pays' principles. In Europe, no significant mitigation measures have been required to the automaker and the general interest to a public health and a healthy environment has been neglected.

This article outlines the main features of the dieselgate case in Part II, identifying the main parties harmed by VW's misconduct. It then highlights the benefits of the adoption of the US approach in addressing the harm caused to the various claimants.

The article then offers an overview of the piecemeal EU enforcement approach in Part III, with a specific focus – in Part IV – on the different arguments used by the German Federal Court and the Italian Tribunals in order to recognize the right to compensation for damages to the owners of cars affected by the cheating-emission device. This discussion suggests that there is a dangerous lack of uniformity in dealing with the issues raised by dieselgate within the EU single market.

Lastly, the relationship established by the Unfair Commercial Practices directive between the *green claims* used by VW in commercial communications and the average consumers' reasonable expectation, encourages a broader reflection on the nature of CSR declarations disseminated by corporations.

## II. Throwback 2015: The *Abgasskandal* in the US

More than five years ago a 'pandemic' scandal concerning polluting emissions of diesel vehicles, whose echo is still noisy, exploded in the US under the name of 'dieselgate'.<sup>1</sup>

The whole story began with the analysis of the results of an independent study promoted by the International Council for Clean Transportation (ICCT), aimed at investigating the rate of fuel consumption of diesel motors. During the research, the Center for Alternative Fuels Engines and Emissions (CAFEE) of the University of West Virginia, supported by the California Air Resource Board (CARB), discovered that the levels NO<sub>x</sub> emitted by the diesel-powered vehicles object of their studies were significantly higher than the previously detected ones during test drives and didn't respect producers' declarations. Indeed, out

<sup>1</sup> M. Frigessi di Rattalma, *The Dieselgate: A Legal Perspective* (Cham: Springer, 2017), IX; G. Pedrazzi, 'Civil and Consumer Law' *ibid*, 114, who underlines the correlations between corporate and social responsibility, tort liability, environmental liability, contractual defective products, warranty, false information, and misleading advertising in the dieselgate scandal; B. Gsell and T. Möllers, *Enforcing Consumer and Capital Markets Law in Europe* (Cambridge: Intersentia, 2020) for a comparative analysis of the enforcement of consumers and competitors rights following the dieselgate scandal; G. Sonari Glinton, 'How a Little Lab in West Virginia Caught Volkswagen's Big Cheat' *NPR*, available at <https://tinyurl.com/fvkk57ew> (last visited 31 December 2021).

of the testing sequences and in ordinary driving conditions, polluting emissions exceeded legal limits.

In the first instance, Volkswagen tried to ascribe the observed inconsistencies to a technical problem and started to recall some car for a voluntary update of their software engines.

Despite this, VW recalls were not sufficient to avoid the intervention of Governmental Agencies, whose investigations ascertained the installation of a ‘defeat device’ in a series turbocharged direct injection (TDI) diesel motors produced between 2009 and 2015 – 11 million worldwide, roughly 500,000 in the United States – that, due to the manipulating software, were autonomously activating their emissions-control program after specific driving-sequences indicating the execution of a laboratory testing and deactivating it in real-word driving conditions, during which the emitted NO<sub>x</sub> was up to thirty eight times higher.

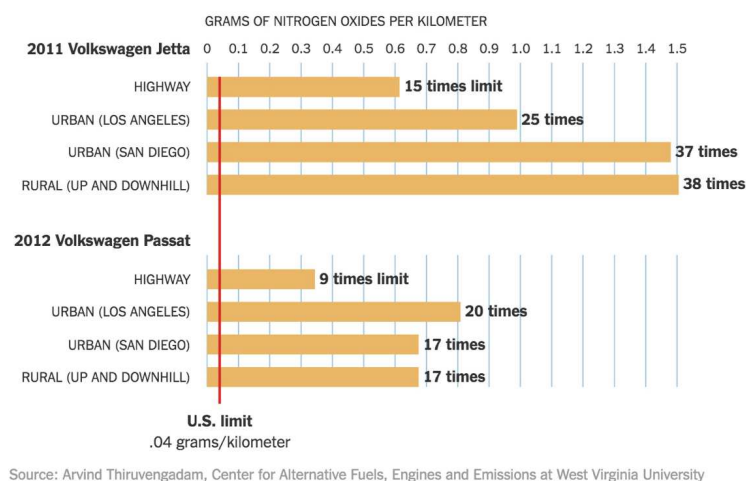


Figure 1. - Average emissions of nitrogen oxides in on-road testing.

In September 2015 the Environmental Protection Agency (EPA) issued a notice of violation of the Clean Air Act<sup>2</sup> to Volkswagen Group (Volkswagen AG, Audi AG, Dr. Ing. h.c. F. Porsche AG, Volkswagen Group of America, Inc., Volkswagen Group of America Chattanooga Operations, LLC, and Porsche Cars North America, Inc., – hereinafter referred to as ‘VW’). Shortly after, the CEO of Volkswagen AG, Martin Winterkorn, admitted the installation of the manipulating device though affirming his unawareness and, apologizing with VW stakeholders,

<sup>2</sup> The Clean Air Act (CAA - 1963) is the US federal law controlling air pollution at national level. Extended in 1970 and lastly amended in 1990, the CAA is incorporated into the US Code as Title 42, Chapter 85 (available at <https://tinyurl.com/fvxjh8ww> (last visited 31 December 2021)).

resigned.<sup>3</sup>

The criminal profiles of the emissions scandal are self-evident but, for sake of clarity, they lie outside the subject matter of the present analysis, which will be focused on the dieseltgate implications according to consumer and capital market law. Indeed, these two profiles demonstrate that, even if the case in point concerns clear violations of mandatory rules and legal limits, in more general terms the dieseltgate scandal has:

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

In the US, the multidimensional nature of interests harmed by VW misconduct brought to a ‘concert of Government and consumer claims’<sup>4</sup> and to a large number of lawsuits filed both in the form of mass and individual claims, especially with respect to the profile of deceptive practices.

Whereas the Federal Bureau of Investigation (FBI) and the Criminal Division of the United States Department of Justice pursued VW and its board for criminal behaviors, the civil suits against VW were filed by the United States Department of Justice Environment and Natural Resources Division on behalf of EPA. The US Customs and Border Protection (CPB) also started investigations for the importations of vehicles based upon false statements about the conformity with environmental laws and legal requirements for emissions<sup>5</sup> and the US Federal Trade Commission (FTC) submitted a claim for unlawful deception under the Federal Trade Act.

A coordinated multi-district and highly integrated process at the Department of Justice has obliged VW to a monetary commitment that exceeds 20 billion dollars and resolved the allegations that Volkswagen violated the Clean Air Act (‘CAA’) by the sale of diesel motor vehicles equipped with ‘defeat devices’ with

<sup>3</sup> Despite public declarations, it has been observed that the silent awareness of top-board members was one of the most shocking profiles of the scandal, highlighting the need for a reconstruction of internal assets and for better protocols. See F.J. Cavico and B.G. Mujtaba, ‘Volkswagen Emissions Scandal: A Global Case Study of Legal, Ethical, and Practical Consequences and Recommendations for Sustainable Management’ 4 *Global Journal of Research in Business and Management*, 411-433 (2016).

<sup>4</sup> A.J. Schmitz, ‘Enforcing Consumer and Capital Markets Law in the United States’, in B. Gsell and T. Möllers eds, *Enforcing Consumer and Capital Markets Law. The Diesel Emissions Scandal* (Cambridge – Antwerp – Chicago: 2020), 342.

<sup>5</sup> A.J. Schmitz, n 4 above, 344; Custom and Border Protection Statement 12 January 2017 ‘CBP Joins DOJ, FBI, and EPA in Announcing a Settlement Against Volkswagen as a Result of Their Scheme to Cheat U.S. Emissions Test’, available at <https://tinyurl.com/ts3zukps> (last visited 31 December 2021); J.C. Cruden et al, ‘Dieseltgate: How The Investigation, Prosecution, and Settlement of Volkswagen’s Emissions Cheating Scandal Illustrates the Need for Robust Environmental Enforcement’ 36 *Virginia Environmental Law Journal*, 134, 118 -184 (2018).

three partial settlements, avoiding the issue of multiplication of civil enforcement claims against VW.<sup>6</sup> A first partial settlement, the so-called ‘2.0 liter partial settlement’, was approved by the United States District Court (USDC) for the District of Northern California in October 2016. Shortly after, in 2017, the USDC for the District of Northern California also approved a second and a third settlement, respectively addressing vehicles containing 3.0 liter diesel engines (the ‘3.0 liter partial settlement’) and setting out civil penalties, mitigation measures as well as injunctive relief to prevent future violations of environmental law.

Along with the aforementioned agreements, the following measures have been established:

a) a Civil Penalty, imposing Volkswagen to pay 1.45 billion dollars for the alleged civil violations of the Clean Air Act, whose final aim is to protect human health and the environment by reducing harmful emissions from mobile sources of air pollution;

b) a complex operation composed of buyback; trade it; approved software update with extension of warranties covering the emissions control system; early lease termination at no cost; restitution – to which eligible consumers could join using an online portal.<sup>7</sup> The eligibility criteria and main choices available for car owners and lessees were therein summarized in ‘Buyback of your car (or early lease termination) + Cash’ or ‘Modification to your car to improve emissions. Keep your car + Cash (Modification must be approved by EPA and CARB)’. With the buyback-update operation VW undertook the duty to retire defeated cars or perform an approved emissions modification on the eighty five percent or more of the affected TDI vehicles, with a dedicated eighty five percent recall rate for California. Additionally, in order to ensure that the threshold was met, the settlement also established a penalty for each percentage point failed. This penalty comprised a payment to the created mitigation trusts (see *infra* sub c), swinging from 85 million dollars for the national recall target of 2.0 TDI engines to 13.5 million dollars for the recall target specifically established for California;

c) mitigation measures, consisting of strategies of environmental remediation through the creation of dedicated funds. Under the ‘2.0 liter partial settlement’ VW funded with \$2.7 billion 2 established mitigation trusts<sup>8</sup> and, under the ‘3.0

<sup>6</sup> To access timeline and documents leading to the signed settlements, see US Environmental Protection Agency ‘Volkswagen Clean Air Act Civil Settlement’, available at <https://tinyurl.com/y3wnk273> (last visited 31 December 2021).

<sup>7</sup> See Volkswagen/Audi/Porsche Diesel Emissions Settlement Program, available at <https://tinyurl.com/2zmtvp3c> (last visited 31 December 2021).

<sup>8</sup> Two mitigation trust agreements have been created pursuant to the settlements and administered by an independent trustee, one for US states, Puerto Rico, and the District of Columbia and one for federally recognized Indian tribes. For more information about the trusts, see the Environmental Mitigation Trust Agreements for the Volkswagen Clean Air Act Settlement, available at <https://tinyurl.com/yysc5x43> (last visited 31 December 2021).

liter partial settlement', gave an additional \$225 million contribution to the to the mitigation trust funds, whose purpose is to offer financial support to eligible actions aimed at replacing diesel emission sources with cleaner technology, such as

'projects to reduce NOx from heavy duty diesel sources (...) replacement or repower of medium and heavy-duty trucks, school and transit buses (...) engine repower for freight switcher locomotives, ferries, tugs, forklifts, and port cargo handling equipment (...) ocean going vessel shorepower (...) charging infrastructure for light duty zero emission passenger vehicles'<sup>9</sup>;

d) investments in Zero Emission Vehicles (ZEV) – quantified in 2 billion dollars investments for ZEV charging infrastructure and in the promotion of ZEV – as reparation measures to restore the harm caused to consumers who purchased defeated vehicles under the mistaken belief that such vehicles were produced by a company more environmentally friendly than others;

e) internal restructuring and adoption of protocols to prevent future violations, leading to the replacement of top level VW executives and to a deep remodeling of the internal processes. This included, among other things, the establishment of a steering committee to ensure compliance with the Clean Air Act; the creation of a 'whistleblower system' to allow everyone to signal anomalies in vehicles production and-or homologation procedures; and periodical audit of employees to gauge (also) environmental compliance.

*A latere*, a separate settlement agreement and a specific order intervened at the Federal Trade Commission (FTC) and VW agreed to pay compensation for damages – repairing, in total, more than 14 billion dollars – for 'deceptive acts or practices affecting commerce' causing the misrepresentation in consumers' beliefs that the offered cars were conform to emissions standards and more sustainable than others, in breach of Section 5(a) FTC Act 15 USC § 45(a).<sup>10</sup>

In its complaint, the FTC affirmed that Volkswagen marketing campaigns promoted the supposedly 'clean' attributes of its cars through advertisements, online ads and social media campaigns targeting ethical-environmentally friendly consumers.<sup>11</sup>

According to § 22 ff of the FTC complaint, 'Volkswagen USA targeted much

<sup>9</sup> US Environmental Protection Agency, n 6 above.

<sup>10</sup> F. Henning-Bodewig, 'Corporate Social Responsibility, the VW Scandal and the UCP Directive' 5 *Journal of European Consumer and Market Law*, 153-154 (2016); A.J. Schmitz, n 4 above, 345; *Federal Trade Commission v Volkswagen Group of America, Inc.*, Case 3:16-cv-01534, N.D. Cal., whose materials are available at <https://tinyurl.com/3hwy3pxu> (last visited 31 December 2021).

<sup>11</sup> *Federal Trade Commission v Volkswagen Group of America, Inc.* n 10 above, especially FTC complaint, available at <https://tinyurl.com/4c97dyet> (last visited 31 December 2021). See also N. Mansouri, 'A Case Study of Volkswagen Unethical Practice in Diesel Emission Test' 5 *International Journal of Science and Engineering Applications*, 211-216 (2016).

of its 'Clean Diesel' advertising at 'progressive' and 'environmentally-conscious' consumers. Volkswagen USA's marketer studied their targets' psychology, concluding that such consumers 'rationalize themselves out of their aspirations and justify buying lesser cars under the guise of being responsible'. According to Volkswagen USA, such consumers understood purchasing an eco-conscious vehicle as part of being 'responsible'. For example, Volkswagen promotional materials repeatedly claimed that its 'Clean Diesel' vehicles have low emissions, including that they reduce nitrogen oxides (NOx) emissions by ninety percent and have fewer such emissions than gasoline cars'.

Overall VW communication about its diesel vehicles falsely claimed that diesel cars (later discovered affected by the device) were in compliance with federal emission standards – with claims such as '50-state compliant clean diesel'; 'Clean Diesel (...) meet the strictest EPA standards in the U.S.'; were low-emissions vehicles and were also 'green' choices for consumers, induced to believe in a serious commitment of the auto-maker in building eco-conscious product.

Considering the damage suffered by consumers as a result of VW violations of the FTC Act consisting in unlawful acts and practices, which also unjustly enriched the defendant, the Court was asked to grant injunctive relief in order to avoid the prosecution of the unjust enrichment to the detriment of consumers and public interests, as well as equitable jurisdiction ancillary reliefs – rescission; reformation of contracts; restitution and price refunding; disgorgement of profits – to prevent further misconducts and offer a redress for the wrongs provoked by the violations of the enforced legal provisions.

In addition to governmental actions, consumers sued Volkswagen with individual claims. Consumers claims have been as much consolidated as possible in order to avoid an inefficient multiplication of lawsuits.<sup>12</sup> The amount of the compensation paid to VW customers varies between 12,500 dollars and 44,000 dollars, depending on age and distance driven for each vehicle.

Investors and shareholders also promoted class actions against VW, claiming that the company was liable for securities fraud related to the cheating emission device, since the omission of the material fact of the installation of the manipulation software misled their investment choices.

Anyhow, one of the two shareholders class actions against VW was dismissed by the Court because claimants 'failed to prove they relied on allegedly misleading

<sup>12</sup> A.J. Schmitz, n 4 above, 347; J.C. Cruden, n 5 above, 131; *Fiol v Volkswagen Group of America, Inc.*, no 15-cv-04278-CRB (N.D. Cal.), available at <https://tinyurl.com/tm366mpc> (last visited 31 December 2021), following which lawsuits have been brought in seven different jurisdictions; as well as *US v Volkswagen*, 16-CR-20394 -SFC-APP (E.D. Mich.), available at <https://tinyurl.com/s2v4nem> (last visited 31 December 2021). See also House of Representatives One Hundred Fourteenth Congress 'Preliminary transcript of the Hearing Before the Subcommittee on oversight and investigations of the Committee on Energy and Commerce' - Volkswagen's Emissions Cheating Allegations: Initial Questions, 8 October 2015, available at <https://tinyurl.com/398x9rjb> (last visited 31 December 2021).

statements'; while the other is still pending.<sup>13</sup>

The outcome obtained by consumers through collective redress' instruments show how class actions may be powerful in the US. They also testify that class actions are an integral means for *stakeholders* (including a wider range of beneficiaries than the ones protected by consumers law in EU)<sup>14</sup> to obtain remedies in mass business-to-consumer claims, allowing individuals belonging to the 'class' to obtain remedies without the need to actively join the litigation, and making enforcement as cost-effective as possible.<sup>15</sup>

The overseas eruption of the dieselpgate<sup>16</sup> did not preclude its loud explosion in Europe nor has it hidden the global dimension.

### III. The Rise (and Fall?) of the Dieselpgate in EU

On the European side, a few months after the EPA notification concerning the violation of the Clean air Act, a Resolution of the European Parliament, strongly condemned cheating manufactures that deceived and misled consumers regarding polluting emissions,<sup>17</sup> pointing out that

<sup>13</sup> See N. Iovino, *VW Scores Win in Emissions Cheating Securities Suit* *Courthouse New Service*, 2 March 2018, available at <https://tinyurl.com/drwj969s> (last visited 31 December 2021). Additionally, see also A.J. Schmitz, 'Addressing the Class Claim Conundrum with Online Dispute Resolution' *Journal of Dispute Resolution*, 361 (2020), available at <https://tinyurl.com/7yeaycum> (last visited 31 December 2021), whose view suggests that the dichotomy between the structure of EU and US class actions should inspire the re-framing of class action and renew the consideration of a global online dispute resolution (ODR) to promote mass claims and an effective consumer protection on a worldwide level.

<sup>14</sup> Cf, inter alia the Order Granting Final Approval of the 2.0-Liter TDI Consumer and Reseller Dealership Class Action Settlement, US District Court Northern District of California, In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, And Products Liability Litigation, MDL no 2672 CRB, 25 October 2016, available at <https://tinyurl.com/2skzxy54> (last visited 31 December 2021), 6, *FTC v Volkswagen Group of America, Inc.*, no 3:16-cv-01534, MDL no 2672 CRB (JSC), available, together with technical details, at <https://tinyurl.com/3hwy3pxu> (last visited 31 December 2021) where the beneficiaries of the agreement are indicated as: Eligible Consumers, meaning 'any Eligible Owner, Eligible Lessee, Eligible Former Owner, or Post-September 2015 Purchaser, as defined by this Order, who has not excluded himself or herself from the 3.0L Settlement Program'; Eligible Owner; Eligible Lessee; Eligible Former Lessee and Owner, meaning the person who has bought or leased an Eligible Vehicle from a Covered Lessor as of 18 September 2015, and/or 2 November 2015, and who surrendered the Leased Eligible Vehicle on or before 31 January 2017.

<sup>15</sup> See A.J. Schmitz, 'Addressing the Class Claim Conundrum' n 13 above, 363.

<sup>16</sup> For an overview of the enforcement after the cheating-emissions scandals, in Latin America, Australia and China, see the contribution of C.L. Marques et al eds, n 4 above, 291, 257 and 315; for a first comparison of the US and EU consequences of the dieselpgate, see also E Mujkic and D Klingner (2019), 'Dieselpgate: How Different Approaches to Decentralization, the Role of NGOs, Tort Law and the Regulatory Process Affected Comparative U.S. and European Union Outcomes in the Biggest Scandal in Automotive History' *International Journal of Public Administration*, available at <https://tinyurl.com/5ey4434t> (last visited 31 December 2021).

<sup>17</sup> See European Parliament Resolution of 27 October 2015 on 'Emission Measurements in the Automotive Sector' (2015/2865(RSP), available at <https://tinyurl.com/pwcp2ssy> (last



‘air pollution causes over 430.000 premature deaths in the EU yearly and costs up to an estimated EUR 940 billion annually as a result of its health impacts (...) NO<sub>x</sub> is a major air pollutant which causes, inter alia, lung cancer, asthma and many respiratory diseases, as well environmental degradation such as eutrophication and acidification’.<sup>18</sup>

The EU Parliament immediately underlined the urgency for companies ‘to take full responsibility for their actions and to cooperate fully with the authorities in any investigations’ and declared to support the EU Commission in further investigations and interventions plans.

An EU-wide action plan agreed by VW and the EU Commissioner Vera Jourová in 2016 was established. It was based on an information, recall and update procedure – to be executed according with the solutions approved by the German Federal Motor Transport Authority (KBA), that *illo tempore* was responsible for the homologation of VW vehicles in EU – based on the installation of a flow transformer for the reduction of polluting emission and their realignment with legal standards.

A ‘Trust Building Measure’ was also signed, through which Volkswagen declared its commitment to solve any possible problem in terms of fuel consumption or performances encountered by owners after the update/removal of the cheating software.

Investigations in Member States were warmly encouraged and supported at the European level both by the European Parliament and the European Commission, which is still monitoring the mandatory and voluntary recall procedure and publishing regularly its progressive follow-up.<sup>19</sup>

The Commissioner for Justice and Consumers, Didier Reynders, has recently experimented some ‘moral suasion’ technique to encourage VW to offer fair compensation to all the affected EU consumers, stressing out that ‘there is a strong interest in a fair and comparable treatment of all affected consumers throughout the Union’, but it has been fruitless so far.<sup>20</sup>

visited 31 December 2021).

<sup>18</sup> About the impact of diesel engines polluting emission on air quality and public health, see J.E. Jonson et al, ‘Impact of Excess NO<sub>x</sub> Emissions From Diesel Cars on Air Quality, Public Health and Eutrophication in Europe’ 12 *Environmental Research Letters*, 18 September 2017, available at <https://tinyurl.com/369y2b3h> (last visited 31 December 2021); E. Rajneri, ‘Illeciti lucrativi, efficacia dissuasiva dei rimedi e responsabilità sociale d’impresa. Riflessioni a margine del “dieselgate”’ *Rivista critica di diritto privato*, 402 (2017).

<sup>19</sup> According to the latest version of the Report of the European Commission on the ‘State of play of the recall actions related to NO<sub>x</sub> emissions - Revision 16’ – updated on the 27 January 2021 – EU wide total of recall rates for the VW EA189 engines shifts from eighty four percent for VW cars to seventy seven percent for Skoda cars using the same engine. The latest report, as well as its previous versions, are available at <https://tinyurl.com/ats6kkry> (last visited 31 December 2021).

<sup>20</sup> See Letter from Commissioner Reynders to Volkswagen on Compensation, 18 August 2020, Ares(2020)s4604327, available at <https://tinyurl.com/5jh82y7w> (last visited 31 December

The European Consumer Organisation (BEUC) has bitterly noted that

‘With a few exceptions, Dieseltgate has been a failure of public enforcement (...) only few authorities had fined Volkswagen: the Italian Competition and Market Authority imposed a €5 million fine on Volkswagen AG and Volkswagen Italia in 2016 for unfair commercial practices. In November 2017, the Dutch Authority for Consumers and Markets also fined VW €450,000. Volkswagen appealed, and the case is currently reviewed by the Rotterdam Court. In December 2019, the Rotterdam Court decided to suspend the proceedings to wait for the CJEU decision in case C-693/18 seeking clarifications on the notion of ‘defeat device’.

In January 2020, the Polish Office of Competition and Consumer Protection (UOKiK) imposed a € 27 million (PLN 120 million) fine against Volkswagen Poland for issuing false information in advertising materials’.<sup>21</sup>

The main Belgian consumers associations launched a collective action against the VW in 2016, declared admissible in late 2017 and shaped as an ‘opt-out’ proceeding in which all the consumers-owners of defeated vehicles are automatically represented in the class action unless they requested to drop out.

In Austria, the *Verein für Konsumenteninformation* collected the interest of 10,000 consumers and sued VW in front of 16 different regional courts. The Austrian proceedings are still pending since they were suspended after the request for a preliminary ruling, referred in March 2019, by the Landesgericht Klagenfurt to the European Court of Justice in order to seek for clarification concerning international jurisdiction according to point 2 of Art 7 of the European Parliament and Council Regulation (EU) 1215/2012. The EU Court of Justice has finally established, in July 2020, the competency of the Austrian judge, confirming previous rulings on that point.<sup>22</sup> According to the EUCJ, the recalled norm should be interpreted considering that the concept of the ‘place where the harmful event occurred’ used as connecting factor is intended to cover both the place where the damage occurred and the place of the event

2021).

<sup>21</sup> See BEUC – The European Consumer Organisation, *Five Years of Dieseltgate: A Bitter Anniversary 2015-2020: A Long and Bumpy Road towards Compensation for European Consumers*, 6, available at <https://tinyurl.com/2y4d8fv9> pointing out the weakness of the European public and private enforcement systems and the discrepancies between the generous compensation received by US consumers and the very poor one awarded in EU; BEUC – The European Consumer Organisation, *Volkswagen Dieseltgate Four Years Down the Road. An Overview of Enforcement Actions And Policy Work By Beuc and its Members since the Dieseltgate Scandal*, 17 September 2019, available at <https://tinyurl.com/uk9s6e6w> (both last visited 31 December 2021).

<sup>22</sup> Cf case C-343/19, preliminary ruling under Article 267 TFEU from the Landesgericht Klagenfurt; case C-189/08 Zuid-Chemie; case C-451/18 Tibor-Trans, available at [www.eur-lex.europa.eu](http://www.eur-lex.europa.eu).

giving rise to it. Thus, the defendant may be sued, at the option of the applicant, either in Germany or in the member state where the car was bought.

A second interpretation of the EU Court of Justice has been requested by the Vice-President responsible for investigation at the Tribunal de grande instance de Paris. This preliminary ruling concerned the possibility of considering the cheating software installed on VW involved vehicles according to the definition of ‘defeat device’ and ‘emission control system’ provided by Arts 3, point 10 and 5, point 2 of the European Parliament and Council Regulation (EC) no 715/2007.

Other pending proceedings – such as that promoted by Dutch Consumentenbond in the Netherlands - have been suspended pending the decisions of the EU Court of Justice. Therefore, at present it is still impossible to have a final EU perspective on the *enforcement* of VW scandal, whose definition remains uncertain. The lack of uniformity in proceedings and approaches adopted across the member states, anyhow, already gives rise to some concerns about the effectiveness of consumer protection in EU.

For this reason, the German decision of the *Bundesgerichtshof*<sup>23</sup> (BGH), which is the very first EU High Court pronouncing its judgement and the decision of the Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato, hereinafter AGCM), whose prompt reaction anticipated other EU public authorities, offer some suggestions and deserve deeper analysis.

In particular, a comparison between the German landmark decision, the qualitative content of US settlements and the Italian two-rails of enforcement – administrative through the intervention of the AGCM; private with the first decision following an individual claim and according compensation for damages to a consumer – is useful. Indeed, it clearly allows to identify some urgent needs to be addressed in EU in order to ensure an effective consumers protection,<sup>24</sup> but also scratches some other profiles that should be taken into consideration when Private Law meets the concept of ‘sustainability’.

#### IV. The Italian Case

##### a) Public Enforcement

After the approval of the program of intervention and the procedure for the update of the installed cheating software by the German Federal Motor Transport Authority (KBA),<sup>25</sup> Volkswagen started with a recall and update of the involved engines. The intention of this was to ensure the compliance with the class of emission for which homologation was released, but whose impact

<sup>23</sup> BGH, 25 May 2020, n VI ZR 252/19, available at [www.dejure.org](http://www.dejure.org).

<sup>24</sup> *ibid* 476.

<sup>25</sup> See KBA Press Release, 16 October 2015, available at <https://tinyurl.com/jda8xzuk> (last visited 31 December 2021).

on other performances of the vehicles – such as fuel consumption; power and durability – is still debated, regardless of Volkswagen reassuring messages and declarations.

According to each national consumer legislations, claims against the auto-maker started flourishing across Member States.<sup>26</sup> In Italy, initiatives following the emission scandal have been developed both through public and private enforcement. Private enforcement has occurred at collective and individual level. The AGCM, solicited by an Italian consumers association, was responsible for public enforcement.

The national discipline of unfair commercial practices, as implemented by the Italian legislator when Directive of the European Parliament and of the Council of 11 May 2005 no 29 (UCPD) came into force, has substantially transposed the EU source into the Italian system. B2c unfair commercial behaviors are now regulated by Arts 20-27 of the Italian Consumer Code.

Actually, the slowness encountered on the side of private enforcement in the collective judicial proceeding, as well as in individual tort lawsuits, didn't affected the binary of public enforcement and the pronouncement of the AGCM has been the first administrative decision on the dieselpgate in EU.

In its ruling, the AGCM has considered *de plano* the installation of the manipulating device as misleading according to Art 20, para 2, of the Italian Consumer Code, but it has also given a sharp interpretation of the whole marketing strategy adopted by VW and of its collateral benefits on the Italian importer. Specifically, ascertained the violation of rules for homologation procedures, the advertisement and public communications in which VW presented the company as environmentally friendly, socially responsible and characterized by a keen interest in selling and producing eco-sustainable products, have been judged as behaviors conflicting with the general duty of good faith and fair dealing imposed to professionals. Thus, the whole conduct has been considered for its distorting potential on the economic determinations of consumers, with regard to the specific product and the average consumer, who could be – in the opinion of the AGCM and in accordance with recent behavioral studies – a

<sup>26</sup> J.M. Carvalho and K. Nemeth, '«Dieselpgate» and Consumer Law: Repercussions of the Volkswagen scandal in the European Union' 6 *Journal of European Consumer and Market Law*, 35 (2017); *ivi* also S. Passinhas, '«Dieselpgate» and Consumer Law: Repercussions of the Volkswagen Scandal in Portugal', 42; T. Riehm and L. Lindner, '«Dieselpgate» and Consumer Law: Repercussions of the Volkswagen Scandal in Germany', 39; as well as C.A. Caine, '«Dieselpgate» and Consumer Law: Repercussions of the Volkswagen Scandal in the United Kingdom', 85; C. Dybus and J. Lemmen, '«Dieselpgate» and Consumer Law: Repercussions of the Volkswagen Scandal in the Netherlands', 91; E. Camilleri, 'Consumatore - qualità pubblicizzate e affidamento del consumatore. Spunti per il caso dieselpgate?' *Nuova giurisprudenza civile commentata*, 704 (2016); E. Rajneri, n 16 above, 397; I. Garaci, 'Il dieselpgate. Riflessioni sul private e public enforcement nella disciplina delle pratiche commerciali scorrette' *Rivista di diritto industriale*, 61 (2018); I. Garaci and E. Montinaro, 'Public and Private Law Enforcement in Italy of EU Consumer Legislation after Dieselpgate' 8 *Journal of European Consumer and Market Law*, 29 (2019). For a quick overview on the enforcement in EU, see also BEUC reports, n 18 above.

‘critical consumer’.<sup>27</sup>

Taking into account the nature, the potential misleadingness of the conduct leading to the manipulation of polluting emission by the defeat device, as well as the multinational character and economic power of Group, the AGCM underlined the seriousness of VW misconduct.

In any case, the final determination of the amount of the administrative fine has not been consistent with the need for an effective penalty, neither in a sanctioning nor in a deterring perspective, due to the monetary limitations imposed by Art 27 Consumer Code. As a consequence, a group whose annual billing in 2015 was roughly 215 billion has been marginally hit by the public enforcement remedy, since the AGCM was only enabled to establish the inhibitory measure and condemn VW to pay the administrative fine of 5 million euros, the maximum possible amount for the case in point according to the aforementioned legal provision.

Regardless of the criticalities represented by efficacy, effectivity and efficiency connected to administrative-public remedies, in more general terms the arguments followed by the AGCM during the explanation of its ratio decidendi showed some unresolved issues in consumer and capital market law. With specific regard to the casus decisis, instead, the ruling represented an important logical premise for structuring the Italian private enforcement through collective actions and individual claims.

The wide range of remedies available in Italy to react to behaviors collectable under the name of ‘unfair commercial practice’ is a consequence of the EU legislative policy of the legislator of directive 2005/29, who has deliberately left member States free to lay down penalties for infringements of national provisions adopted in application of the Directive and to take all necessary measures to ensure their effective, proportionate and dissuasive enforceability (Art 13).

The definition of ‘unfair commercial practice’ appears now as an umbrella term grouping all those activities or omissions in contrast with professional

<sup>27</sup> Cf L. Becchetti and L. Paganetto, *Finanza etica. Commercio equo e solidale* (Roma: Laterza, 2003) 121; F. Forno and P. Graziano, *Il consumo critico* (Bologna: il Mulino, 2016); F. Forno and P. Graziano eds, ‘Il consumo responsabile in Italia’ 3 *Social Cohesion Papers*, 2 (2018); F. Forno and P. Graziano eds, ‘Il consumo responsabile in Italia. I primi dati dell’indagine 2020’, 1 (2020); more generally, on the phenomena of ethical consumerism, see J.H. Antill, ‘Socially Responsible Consumers: Profile and Implications for Public Policy’ *Journal of Macromarketing*, 18 (1984); A. Attalla and M. Carrigan, ‘The Myth of the Ethical Consumer – Do Ethics Matter in Purchase Behaviour?’ *Journal of Consumer Marketing*, 560, (2001); EU Commission, *Behavioural Study on Consumers’ Engagement in the Circular Economy*, 2018, available at <https://tinyurl.com/v9akxu9x> (last visited 31 December 2021); IBM Institute for Business Value, *Meet the 2020 Consumers Driving Change*, 2020, available at <https://tinyurl.com/zvzpf5vz> (last visited 31 December 2021); The Nielsen Company, *The Sustainability New Insights On Consumer Expectations*, October 2015, available at <https://tinyurl.com/yc75wnsj> (last visited 31 December 2021).

‘diligence’ as defined by Art 2, sub lett h) of the UCPD.<sup>28</sup> Consequently, the UCPD allowed to advocate consumers rights threatened by VW conduct through a second binary of purely private enforcement.<sup>29</sup> In turn, it has been split in two branches in which the qualification of VW conduct as unfair and misleading behavior ex Art 20 and following of the Italian Consumer Code was crucial to the demonstration of the wrong suffered by other market players.

#### b) Private Enforcement

On the one hand, the first branch of private enforcement has been carried on by Altroconsumo – as representative association of consumers’ interests – through a class action, which has recently been defined by the Tribunal of Venice.<sup>30</sup> The Tribunal, in admitting the collective claim,<sup>31</sup> relied upon the evaluation made by the AGCM. After the appeal presented by the defendant, the Court of Appeal of Venice has confirmed the position of the Tribunal, whose pronouncement has concluded the class action in July 2021.

As far as the *causa petendi* is concerned, the class action has its roots in the same wrongful behaviors investigated and ascertained by the AGCM. Indeed, Altroconsumo claimed for damages contesting the overall conduct of the automaker and its subsidiaries which, obtaining the homologation of their vehicles with fraud during the mandatory tests of polluting emissions and advertising at the same time their environmental vocation in marketing strategies and commercial communications, has harmed collective interests of consumers to a free self-determination.<sup>32</sup>

<sup>28</sup> According to the provision, 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 practice and/or the general principle of good faith in the trader’s field of activity’.

<sup>29</sup> The reluctance of the Italian legislator in regulating the binary of private enforcement has been criticized by many authors, see, eg C. Granelli, ‘Le «pratiche commerciali scorrette» tra imprese e consumatori: l’attuazione della direttiva 2005/29/CE modifica il codice del consumo’ *Obbligazioni e contratti*, 778 (2007). In more general terms, on the usage of private remedies see M.R. Maugeri, ‘Violazione della disciplina sulle pratiche commerciali scorrette e rimedi contrattuali’ *Nuova giurisprudenza civile commentata*, 477 (2008); C. Camardi, ‘Pratiche commerciali scorrette e invalidità’ *Obbligazioni e contratti*, 408 (2010); G. De Cristofaro, ‘Le conseguenze privatistiche della violazione del divieto di pratiche commerciali sleali: analisi comparata delle soluzioni accolte nei diritti nazionali dei Paesi UE’ *Rassegna di diritto civile*, 880 (2010); A. Gentili, ‘Pratiche sleali e tutele legali: dal modello economico alla disciplina giuridica’ *Rivista di diritto privato*, 37 (2010); N. Zorzi, ‘Le pratiche scorrette a danno dei consumatori negli orientamenti dell’Autorità Garante della Concorrenza e del Mercato’ *Contratto e impresa*, 433 (2010); A. Fachechi, *Pratiche commerciali scorrette e rimedi negoziali* (Napoli: Edizioni Scientifiche Italiane, 2012).

<sup>30</sup> Tribunale di Venezia 7 July 2021, available at <https://tinyurl.com/5dzb4wk7> (last visited 31 December 2021), on which Al. Palmieri and C. Sacchi offer a first overview in their comment ‘Condotta illecita plurioffensiva e danni risarcibili nell’azione di classe relativa al Dieselpgate’.

<sup>31</sup> Tribunale di Venezia 25 May 2017, *Il Foro Italiano*, I, 2432 (2017).

<sup>32</sup> Statement of Claim - Altroconsumo, 26, available at <https://tinyurl.com/s7k4zt4j> (last visited 31 December 2021)

The petitum is the hold liable VG AG and VGTI to pay for a compensation based on the pecuniary and non-pecuniary losses suffered by consumers as the result of their unlawful conducts, said to be clearly in conflict with constitutional rights and duties.<sup>33</sup>

The pivotal issues to address and the main criticalities to tackle were related, since the submission of the class action, to the determination of the exact amount of the compensation, whose request was made asking for:

a) the restoration of economic and non-economic interests wounded by VW misconduct. To determine the amount of the due compensation equity rules were recalled: the claim suggested to apply the provision of Art 1226 of the Italian Civil Code and pay back to consumers the fifteen percent of the purchase price, taking into consideration the economic damage consisting in the negative impact of the scandal on the market value of VW vehicles and its supposed degrowth with respect to the original purchasing request after the cheating emission scandal;

b) the non-pecuniary damage suffered by consumers due to (i) the threatening to which their contractual freedom and right of economic self-determination were exposed and (ii) the prejudice consequent to the infringement of some fundamental human rights (such as freedom, justice, health and environment).<sup>34</sup>

The claimant also affirmed that VW misconduct was still producing negative consequences on consumers with regard to the impairment of their freedom to contract and right of self-determination. In fact, on the technical side, VW group couldn't immediately fix the manipulating device on the vehicles and, at informational level, the automaker didn't produce any evidence of the real levels of polluting emissions produced by the involved engines, nor proof of the consequences of the update on other performances, with the result that comprehensively cars had a poorer quality than reasonably expectable.

Thus, the monetary redress has been requested estimating the higher price paid for the involved vehicles in consideration of the legitimate trust arisen by VW professional statements. Indeed, public declarations advertising environmental and ecological qualities allowed to hypothesize that, if consumers had known the real polluting impact of VW tdi cars, they would have paid less for them or they would have decided to buy a good with the same features, but for a lower price. Overall, with transparent information materials, consumers could also have taken different purchase choices, buying from a producer respecting higher environmental

<sup>33</sup> *ibid* 32.

<sup>34</sup> *ibid* 27; S. Dadush, 'The Law of Identity Harm' *Washington University Law Review* 96, 803 (2019). On the Italian enforcement of the dieselgate scandal, see also M. Gaboardi, 'Italy' *Enforcing Consumer and Capital Markets Law*, in B. Gsell and T.M.J. Möllers eds, *Enforcing Consumer And Capital Markets Law* (Cambridge (UK): Intersentia, 2020), 151; G. Bevivino, 'L'impatto sul mercato delle regole, legali e convenzionali, relative ai rapporti fra imprese e stakeholders' *Mercato Concorrenza Regole*, 491 (2019).

standards.<sup>35</sup>

The claimants has referred to the inconsistency between the legitimate expectations of the average consumer on the environmental qualities of the commercialized vehicles and the real levels of polluting emission detected in ordinary driving conditions on the delivered goods only incidentally and ad adiuvandum to the main argument, which has been based on tort law in order to affirm the joint liability of the seller and the producer, rather than on the seller's breach of contract because of the lack of compliance with requirements for conformity of goods.<sup>36</sup>

The choice to consider VW responsibility toward consumers through the lens of tort law has been followed by the BGH as well, which has anchored VW responsibility toward consumers to § 826 BGB, regulating intentional damage contrary to public policy. It is self-evident that the undertaken path of tort liability finds its justification in a legal strategy aimed both at enlarging the pool of subjects interested in opting-in the class action as much as possible, and at 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.<sup>37</sup>

Nevertheless, the undertaken path of tort liability is not straight and the right to obtain compensation for damage has met some hurdles related to the vague formulations of claimant's requests and, to a major extent, to the need to recognize the non-patrimonial interests involved in the case.

Defining the class action, indeed, the Tribunal of Venice<sup>38</sup> has focused its attention on the economic damage, which has been equitably estimated in 3000 euros – the 15 percent of the average price of VW cars with the cheating-emission device sold in Italy – for each owner of a defeated vehicle who joined the class action and no space has been given to the wound provoked on consumers' freedom of self-determination in purchase choices.

At individual level, consumers' interest in buying a sustainable good must be subject to an economic evaluation in order to ensure the access to an

<sup>35</sup> *ibid* 29.

<sup>36</sup> *ibid*.

<sup>37</sup> In Italy, joint liability for torts is regulated by art 2055 of the Italian Civil Code. See, *ex multis*, M. de Acutis, 'La solidarietà nella responsabilità civile' *Rivista di diritto civile*, 525 (1975); M. Orlandi, *La responsabilità solidale Profili delle obbligazioni solidali* (Milano: Giuffrè, 1993), 104; Id, 'Obbligazioni soggettivamente complesse ed equivalenza tra le prestazioni' *Rivista di diritto civile*, 2006, *Atti del convegno per il cinquantenario della rivista. Il diritto delle obbligazioni e dei contratti: verso una riforma? Le prospettive di una novellazione del Libro IV del Codice Civile nel momento storico attuale*, Treviso – Palazzo dell'Università. 23-24-25 marzo 2006 (Padova: CEDAM, 2006) 182; A. D'Adda, *Le obbligazioni plurisoggettive* (Milano: Giuffrè, 2019) 47 and 65; Id, 'La solidarietà risarcitoria nel diritto privato europeo e l'art. 2055 c.c. italiano: riflessioni critiche' *Rivista di diritto civile*, 279 (2006).

<sup>38</sup> Tribunale di Venezia, 7 July 2021, n 30 above.



effective remedy and to properly address the essence of the wrong suffered by consumers who expected the regularity of the homologation procedure carried out and who trusted seller's declarations on their low environmental impact. The mentioned harm, indeed, affects fundamental rights and constitutional freedoms.

At super-individual level, the public interest in a safe and healthy environment and the need to promote sustainable development empowering consumers ethical choices could be protected by strengthening consumers protection when their purchase choices are misled by greenwashing strategies such as the ones involved in VW scandal.<sup>39</sup>

The reasoning of the decision of the AGCM have been used also in the first Italian decision on an individual claim against VW AG and VW Italia, in which the judge has motivated the existence of a ground for compensation literally recalling and transplanting some of the arguments on which the decision of the Competition Authority was based.<sup>40</sup>

Both the collective and the individual action, then, are built on the contested unlawfulness of VW behaviors, reconstructed in terms of unfair commercial practice, but the conceptual efforts required to the Judges appear inseparably linked with the need to understand what kind of damage could and should be compensated once ascertained that criteria for the affirmation of the extra-contractual liability of the producer and the national seller are met.

Actually, a claim based on the patrimonial loss and therefore on the economic damage could barely be accepted and, in any case, it would hardly offer an effective compensation to the consumer especially considering that:

- the KBA has officially approved the modification and update of the engine;

<sup>39</sup> For the analysis of the greenwashing and CSR communication on consumers behaviors, see eg B. Sjaafjell, 'Internalizing Externalities in EU Law: Why Neither Corporate Governance nor Corporate Social Responsibility Provides the Answers' *The George Washington International Law Review*, 977 (2010), 189; Y. Chen and C. Chang, 'Greenwash and Green Trust: The Mediation Effects of Green Consumer Confusion and Green Perceived Risk' *Journal of Business Ethics*, 489 (2013); P. Seele and I. Lock, 'Instrumental and/or Deliberative? A Typology of CSR Communication Tools' *Journal of Business Ethics*, 401 (2015); A. Beckers, 'The Regulation of Market Communication and Market Behaviour: Corporate Social Responsibility and the Directives on Unfair Commercial Practices and Unfair Contract Terms' *Common Market Law Review*, 475 (2017); J.P. Nehf, 'Regulating Green Marketing Claims in the United States', in A. do Amaral Junior, L. de Almeida and L. Klein Vieira eds, *Sustainable Consumption The Right to a Healthy Environment* (Cham: Springer, 2020), 189.

With more specific regard to consumers empowerment in transition to sustainability through a real disclosure of 'green' information, see V. Mak and E. Terryn, 'Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment Through Consumer Law' *Journal of Consumer Policy*, 22 (2020); H.W. Micklitz, 'Squaring the Circle? Reconciling Consumer Law and the Circular Economy' *Journal of European Consumer and Market Law*, 229 (2019); E. Van Gool and A. Michel, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis' *Journal of European Consumer and Market Law* (2021), in course of publication.

<sup>40</sup> Tribunale di Avellino 10 December 2020 no 1855, unpublished at the time of the drafting of this essay.

- VW has guaranteed that the update is not going to influence negatively other performances of the involved vehicles;  
– the market value of VW cars – new and used – has not shown signs of a lasting or persisting decrease as consequence of the dieseltgate scandal.

The minor gravity of the strictly economic damage suffered after the purchase of a defeated car, which has always been suitable for its main purpose, which has been updated –aligning polluting emissions with legal standards without apparently compromising other qualities – together with the need to recover the real injury provoked by the fraud, instead, suggest moving a step further.

In this perspective, an effective EU enforcement could be ensured if the right of self-determination, the non-economic interest of the average consumer as well as the public interest to a safe environment are adequately balanced. The non-patrimonial interests involved have their roots in fundamental rights and appear as the key factor through which an effective remedy could be granted in the case in point.<sup>41</sup>

The heart of the legal provisions aimed at avoiding those professional conducts and declarations could materially distort, with regard to the product, the economic behavior of the average consumer whom they reach or to whom they are addressed – assumes a key role in the determination itself of the required remedy.

If the purchase choice has been made relying on VW declarations concerning polluting emissions, class of homologation and sustainability of the car, the conclusion of the sale contract has wounded the consumer in a permanent way: the limited rationality and knowledge of the consumer have been abused and, altering the ‘integrity’ of the final purchase decision the professional conduct has undermined consumers’ private autonomy and, in so doing, their constitutional freedom.

Only starting from the observation – duly pointed out by the pronouncement of the BGH –<sup>42</sup> according to which the final aim of the whole legislation prohibiting unfair b2c commercial practices in the internal market is to protect the value of the human being and its fundamental rights, the perspective shifts and become fruitful: Personal freedom is also expressed through the authenticity of

<sup>41</sup> P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, IV, *Attività e responsabilità* (Napoli: Edizioni Scientifiche Italiane, 2020) 321, 326 and 334, who affirms that environmental damages should be read in a solidarity and sustainability perspective that balances values and principles involved and highlights that the environment is a fundamental element of human development and an integral mean of the human being, to whose protection everyone should be entitled ((*s)e l'ambiente è aspetto essenziale dello sviluppo della persona e se ciascuno ha diritto ad un habitat che garantisca la qualità della vita, a ciascuno va riconosciuto il diritto di agire affinché ciò si realizzi. L'interesse è protetto dalla stessa Carta costituzionale: la protezione dell'ambiente riguarda la qualità della vita in quanto diritto che è parte integrante dello status personae*).

<sup>42</sup> BGH, 25 May 2020, n 23 above

economical choices,<sup>43</sup> whose defense encompasses the duty of the professional to behave according to good faith and fair dealing when ‘playing’ on the market-field.<sup>44</sup> Thus, the non-pecuniary prejudice suffered by consumers who - relying on the lawfulness of its homologation and on public declarations coming from professionals operators – bought a car supposedly less polluting than others available from VW’s competitors, could ensure the award of an adequate monetarily compensation.

The recalled need to ensure the protection of consumers right to self-determination and to offer an effective remedy to react to its undue compression has inspired the ratio of the decision of the German Federal Court (BGH) of the 25<sup>th</sup> May 2020,<sup>45</sup> that can be considered the European milestone of the dieselpgate scandal.

On the contrary, the essence of consumers legislation, as well as the main interests involved in the case in point and their nature have not been completely understood by the first Italian decision awarding compensation to a consumer who bought one of the defeated vehicles. Despite being a victory for Italian consumers, the achieved remedy is partial and the followed arguments have some downsides as they prevent a complete restoration of the suffered harm. Moreover, without a careful reading ‘between the lines’, the decision risks creating a dangerous misunderstanding about the possibility to consider and quantify the non-patrimonial damage.

The decision of the Tribunal of Avellino is the first Italian pronounce on a buyer’s individual claim. Its content is not groundbreaking and its possible, if not desirable, that the decision will be overruled.<sup>46</sup>

<sup>43</sup> See N. Irti, *L’ordine giuridico del mercato* (Roma-Bari: Laterza, 1998), 78, with reference to the ‘autenticità della scelta negoziale’ protected by consumer law; A. Gentili, n 27 above, 65.

<sup>44</sup> On pre-contractual liability in Italy see, *ex multis*, L. Mengoni, ‘Sulla natura della responsabilità precontrattuale’ *Rivista di diritto commerciale*, 360 (1956); F. Poliani, ‘La responsabilità precontrattuale della banca per violazione del dovere di informazione’ *I Contratti*, 450 (2006); V. Roppo and G. Afferni, ‘Dai contratti finanziari al contratto in genere: due punti fermi della Cassazione su nullità virtuale e responsabilità precontrattuale’ *Danno e responsabilità*, 29 (2006); C. Scognamiglio, ‘Regole di validità e regole di comportamento: i principi e i rimedi’ *Europa e diritto privato*, 599 (2008); Id, ‘Responsabilità precontrattuale e «contatto sociale qualificato»’ *Responsabilità civile e previdenza*, 1950 (2016); C. Amato, *Affidamento e responsabilità* (Milano: Giuffrè, 2012), 92; G. Capaldo, ‘Tutela del cliente e gestione d’impresa nei contratti bancari, in A.R. Adiutori ed, *Governo dell’impresa e responsabilità dei gestori. Giornata di studio in ricordo di Salvatore Pescatore*, Roma 15 maggio 2009 (Padova: CEDAM, 2012), 359; Id, ‘L’informazione’, in A. Colavolpe and M. Prosperetti eds, *Il mercato e il risparmio* (Padova: CEDAM, 2012), 73 and 81; F. Piraino, *La buona fede in senso oggettivo* (Torino: Giappichelli, 2015), 5 and 192; Id, ‘La natura contrattuale della responsabilità precontrattuale (ipotesi sull’immunità)’ *I Contratti*, 35 (2017); Id, ‘La responsabilità precontrattuale e la struttura del rapporto prenegoziale’ *Persona e mercato*, 126 (2017); A. Zaccaria, ‘«Contatto sociale» e affidamento, attori protagonisti di una moderna commedia degli equivoci’ *Jus civile*, 185 (2017).

<sup>45</sup> BGH, 25 May 2020, n 23 above.

<sup>46</sup> See I. Garaci and E. Montinaro, n 26 above.

However, the decision is symptomatic that, so far, the Italian legal system has not included entirely effective remedies to enforce consumers rights after the dieseltgate scandal, especially considering that neither the individual claim, nor the collective action have led judges to pay attention to the non-economic loss suffered by consumers and that no importance has been given to the environmental damage.

The same conclusion can be transposed to several other European legal systems. Anyhow, the discrepancies among the Italian and the German solution, together with the need to empower consumers position within the European single market, suggest a few reflections on the principle of 'sustainable development' and the interpretative function it may assume.

The Italian leading case affirmed the joint liability of VW AG – as producer – and VW Italia – as importer –, and awarded compensation for patrimonial damages, determined in the 20 percent of the purchase price, to the buyer-consumer of a car involved in the emission scandal.

As has happened in Germany in the lawsuits filed against the producer – thus bypassing the direct contractual relationship between the buyer and the seller – throughout the motivation, the judge repeats several times that the ground on which VW liability can be established shouldn't be found in the provisions of the Italian Consumer Code regulating the lack of conformity of the delivered good (Arts 128 et seq of the Italian Consumer Code) but, rather, it must be found in the unlawfulness of the complex of behaviors which has led the AGCM to punish VW for unfair commercial practices (Art 20 et seq of the Italian Consumer Code).

Some profiles of the motivation and the broader or narrower extension given to the main issues involved are surprisingly naïve and disclose in advance the weakness of a decision which has not taken a firm position on the main problem arisen by the prejudice provoked by VW unfair behaviors: the non-patrimonial interests hurt by VW conducts in the case in point.

Across the articulation of the main points on which the decision is based, the juxtaposition between the virtuosity used to tackle some false (or already extensively discussed) problem and the 'brevitas' characterizing the exclusion of compensation for non-patrimonial loss is self-evident.

The Tribunal, in particular:

a) redundantly establishes that a person who has a professional activity can be considered 'consumer' when acting for purposes which are outside his trade, business, craft or profession and, in so doing, goes over the debate on the meaning of 'consumer'. This forgetting that the tension between a notion of consumer bound to a subjective status has been overcome for years in favor of another concept, giving relevance to the function underpinning the 'act of consumption';<sup>47</sup>

<sup>47</sup> On the definition of 'consumer', see eg, G. Benedetti, 'Tutela del consumatore e autonomia contrattuale' *Rivista trimestrale di diritto e procedura civile*, 17 (1998); N. Irti, n 41 above, 49; E. Gabrielli, 'Sulla nozione di consumatore' *Rivista trimestrale di diritto e procedura civile*, 1149

b) unnecessarily clarifies that the compensation for damages consequent to the unfair commercial practices can be awarded regardless of the existence of a contractual obligation between the plaintiff and the defendant;

c) superfluously specifies that no relevance should be given to who materially elaborated and disseminated misleading information, given that the unfairness of the commercial behaviors is the summatory of a complex of intersecting conducts;

d) needlessly reconstructs the ratio that under some circumstances, according to the Italian legal system, recognizes the possibility to award compensation according to an equitable evaluation of the judge.

Without any reconstructive effort and laying the assessment of the AGCM, the decision affirms that the dissemination of false and misleading information concerning the environmental impact, as well as the contradictions and misalignments between the discovered unlawful conducts and the green claims used by VW advertisement, allow to qualify without any reasonable doubt VW conduct as unfair and thus, due to the negative way in which they affected consumers' right to self-determination, justify the right to compensation.

Almost no space is given to the single voices of the compensatory remedy. The existence of an economic loss is stated considering that the involved vehicle, in judge's view, will certainly have a lower value on market due to the installation of the cheating device. The compensation for non-patrimonial damage has been denied even if it has been affirmed that the consumer has been injured in its free self-determination by misleading messages (literally, in the decision 'leso nella sua libera determinazione da messaggi ingannevoli') or held up on informative omissions connected with the installation of the defeat device. The rejection of the non-patrimonial request for compensation has been hastily motivated recalling a fragment of a 'precedent' (Corte di Cassazione 11 November 2008 no 26972)<sup>48</sup> deciding on compensation for existential damage,

(2003); Id, 'I contraenti', in P. Sirena ed, *Il diritto europeo dei contratti d'impresa. Autonomia negoziale dei privati e regolazione del mercato* (Milano: Giuffrè, 2006), 113; R. Alessi, 'Diritto europeo dei contratti e regole dello scambio' *Europa e diritto privato*, 939 (2000); S. Mazzamuto, *Il contratto di diritto europeo* (Torino: Giappichelli, 3<sup>rd</sup> ed, 2017), 104 ss.; F. Bartolini, 'Il consumatore: chi era costui?' *Danno e responsabilità*, 388 (2019).

<sup>48</sup> Many Italian authors have dedicated their attention to the case, see eg, F.D. Busnelli, 'Le Sezioni Unite e il danno non patrimoniale' *Rivista di diritto civile*, 97 (2009); F. Gazzoni, 'Il danno esistenziale, cacciato, come meritava, dalla porta, rientrerà dalla finestra' *Diritto di famiglia*, 73 (2009); S. Landini, 'Danno biologico e danno morale soggettivo nelle sentenze della Cass. SS. UU. 26972, 26973, 26974, 26975/2008' *Danno e responsabilità*, 19 (2009); E. Navarretta, 'Danno non patrimoniale: il compimento della «Drittwirkung» e il declino delle antinomie' *Nuova giurisprudenza civile commentata*, 81 (2009), also published online in *Persona e mercato*, 3 April 2009, available at <https://tinyurl.com/2hnmv7w> (last visited 31 December 2021); P. Perlingieri, 'L'onnipresente art. 2059 c.c. e la «tipicità» del danno alla persona' *Rassegna di diritto civile*, 520, 2009, who underlines that non-patrimonial damages must be compensated everytime the unlawful conduct has injured an interest or a value inherent the the human being which has not an immediate monetary value.

whose appropriateness in the concrete case can be easily questioned.

Neither the nature of recognized damage, nor the entity of the awarded monetary compensation are, indeed, fully convincing, especially when it is clearly stated that the will to protect the authenticity of consumers' choice is the final purpose of the legislator.

The limited dimension of the awarded compensation and the total lack of any evaluation of the contractual repercussions of VW conduct look somehow hasty, when not superficial. This is especially true considering the effects of the decision of the BGH – recognizing VW liability according to the provision of § 826 (intentional damage contrary to public policy)<sup>49</sup> – on the sale contract between the re-seller and the buyer-consumer, as well as the impact that the transposition of the recent EU directive 27 November 2019 no 2161 will possibly have on the private enforcement following unfair commercial practices.

Precisely, recital 16 of the new Directive, recommending that Member States 'ensure that remedies are available for consumers harmed by unfair commercial practices in order to eliminate all the effects of those unfair practices', suggests that

'(a) clear framework for individual remedies would facilitate private enforcement. The consumer should have access to compensation for damage and, where relevant, a price reduction or termination of the contract, in a proportionate and effective manner. Member States should not be prevented from maintaining or introducing rights to other remedies such as repair or replacement for consumers harmed by unfair commercial practices in order to ensure full removal of the effects of such practices. Member States should not be prevented from determining conditions for the application and effects of remedies for consumers. When applying the remedies, the gravity and nature of the unfair commercial practice, damage suffered by the consumer and other relevant circumstances, such as the trader's misconduct or the infringement of the contract, could be taken into account, where appropriate'.

Moreover, its Art 3, amending Directive 2005/29/EC, introduces a provision dedicated to individual redress, according to which

'1. Consumers harmed by unfair commercial practices, shall have access to proportionate and effective remedies, including compensation for damage suffered by the consumer and, where relevant, a price reduction or the termination of the contract. Member States may determine the

<sup>49</sup> § 826 BGB is one of the main provisions regulating German tort law. According to the norm 'A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage' (*'Wer in einer gegen die guten Sitten verstößenden Weise einem anderen vorsätzlich Schaden zufügt, ist dem anderen zum Ersatz des Schadens verpflichtet'*).

conditions for the application and effects of those remedies. Member States may take into account, where appropriate, the gravity and nature of the unfair commercial practice, the damage suffered by the consumer and other relevant circumstances. 2. Those remedies shall be without prejudice to the application of other remedies available to consumers under Union or national law.’

The neglect of the contractual dimension characterizing the Italian decision, therefore, goes beyond the necessary choice to abandon the provisions regulating the obligation of the seller to deliver goods in conformity with the sale contract, and embraces a broad evaluation of the value of precontractual information.

Anyhow, if the argument connected to the threatened (non-pecuniary, but certainly economically evaluable) right to self-determination had been adequately developed – following the example of the German federal court - and the interests in conflict had been properly compound, there could have been more effective solutions even through the path of extra-contractual liability. An appropriate valorization of the non-patrimonial profiles affected by a misconduct that injured economic actors due to the relevance acquired by public declarations on the market tempers the risk for an inadequate remedy and enhances the polyfunctional nature of tort liability within the Italian legal system.<sup>50</sup>

On the contrary, the probable fear for an overestimation of the non-economic prejudice suffered by consumers has led, in the case in point, to its opposite: to the complete abnegation of the non-patrimonial damage.

The ratio of the exclusion is unhappy and allows to wish the judge who will decide upon the class action could, instead, weight and balance the nature and kind of the involved rights differently, especially considering that the international

<sup>50</sup> See P. Perlingieri, ‘La responsabilità civile tra indennizzo e risarcimento’ *Rassegna di diritto civile*, 1061 (2004); Id, ‘Riflessioni sul danno risarcibile per lesione di interessi legittimi’ *Rivista giuridica del Molise e del Sannio*, 115 (2004); Id, ‘Le funzioni della responsabilità civile’ *Rassegna di diritto civile*, 115 (2012); F. Addis, ‘Risarcimento del danno contrattuale. Riflessioni su «sistema e prospettive nell’interazione fra gli ordinamenti tedesco e italiano in Europa» secondo Stefan Grundmann’, in P. Pollice and L. Gatt eds, *I Processi di armonizzazione nel diritto privato europeo. Riflessioni e colloqui su taluni recenti tendenze nel sistema tedesco* (Napoli: Edizioni Scientifiche Italiane, 2008), 1; P. Pardolesi, ‘La responsabilità civile 3.0 e l’insostenibile leggerezza del suo DNA polifunzionale’ *Rivista di diritto privato*, 121 (2018); Id, ‘Danno non patrimoniale, uno e bino, nell’ottica della Cassazione, una e Terza’ *Nuova giurisprudenza civile commentata*, 1344 (2018); C. Scognamiglio, ‘Principio di effettività, tutela civile dei diritti e danni punitivi’ *Responsabilità civile e previdenza*, 1120 (2016); Id, ‘I danni punitivi e le funzioni della responsabilità civile’ *Corriere giuridico*, 912 (2016); G. Ponzanelli, ‘Polifunzionalità tra diritto internazionale privato e diritto privato’ *Danno e responsabilità*, 419 (2017); M. Astone, ‘Responsabilità civile e pluralità di funzioni nella prospettiva dei rimedi. Dall’«astreinte» al danno punitivo’ *Contratto e impresa*, 276 (2018); L.E. Perriello, ‘Polifunzionalità della responsabilità civile e atipicità dei danni punitivi’ *Contratto e impresa. Europa*, 432 (2018); F. Di Ciommo, ‘Tanto tuonò che piovve. La cassazione abbandona le tabelle milanesi ritenendole inadeguate a considerare il danno morale’ *Foro italiano*, I, 2022 (2020).

principle of sustainable development is immediately linked to VW scandal and could play a hermeneutical role in the composition of interests of the economic actors involved in the lawsuit.

The installation of the cheating device, indeed, is not simply conflicting with the superindividual interest to a healthy environment, which is by the way protected, *inter alia*, by Arts 2 and 9 of the Italian Constitution. It also obstacles the achievement of a true sustainable development, which is engaging public and private actors in the implementation of strategies capable of combining economic, social and environmental growth ‘without compromising the ability of future generations to meet their own needs’, and that can be interpreted as a post-modern derivation of the constitutional principle of solidarity.<sup>51</sup>

## V. Concluding Remarks

The analysis of the EU dimension of the dieselpgate scandal, with a specific focus on the Italian case-law – read in connection with the different conclusions

<sup>51</sup> See WCED, *Report of the World Commission on Environment and Development: Our Common Future*, available at <https://tinyurl.com/5njm356j> (last visited 31 December 2021), whose definition of sustainable development states that:

‘1. Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:

- the concept of ‘needs’, in particular the essential needs of the world’s poor, to which overriding priority should be given; and
- the idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs.

2. Thus the goals of economic and social development must be defined in terms of sustainability in all countries - developed or developing, market-oriented or centrally planned. Interpretations will vary, but must share certain general features and must flow from a consensus on the basic concept of sustainable development and on a broad strategic framework for achieving it’ and ‘15. In essence, sustainable development is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development; and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations’.

See also the well-known art 3.3 TUE, stating that ‘3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance’.

For further implications of the meaning of sustainable development from an historical, political and legal perspective, see M. Pieraccini and T. Novitz, *Legal Perspectives on Sustainability* (Bristol: Bristol University Press, 2020). See also R. Gerlagh and A. Keyzer, ‘Sustainability and the Intergenerational Distribution of Natural Resource Entitlements’ *Journal of Public Economics*, 315 (2001); R. Hiskes, *The Human Right to a Green Future. Environmental Rights and Intergenerational Justice* (Cambridge: Cambridge University Press, 2009); M. Libertini, ‘Concorrenza e coesione sociale’ *Persona e mercato*, 71 (2015); N. Lipari, ‘Il ruolo del terzo settore nella crisi dello Stato’ *Rivista trimestrale di diritto e procedura civile*, 637 (2018); M.S. Richter, ‘Long-Termism’, a study for *Scritti in onore di Vincenzo Di Cataldo*, 2020.



reached by the German Federal Court in recognizing a consumer's right for compensation – stress out the urgent need for a more uniform enforcement of consumers and capital markets law in Europe.

Indeed, on the one hand, the ineffectiveness of the penalties imposed to VW in EU, considering that VW was the main car producer in the world at the time of dieselgate testifies that the public enforcement-remedies currently available in the EU fail to perform a deterring function, nor has a reparative and precautional one. Additionally, an overview of the arguments followed by the Courts in order to affirm VW liability highlights that the main public interest involved in the case, which is the environmental one – functional to the protection of human beings has been neglected. This means that the accorded remedies have only marginally kept into consideration the environmental damage and the need to repair it. No implementation of environmental law principles such as the Polluter Pays and Precaution ones has been given.

Beyond individual rights and homogeneous collective interests, the Dieselgate has a public relevance that should be addressed in a restorative and precautionary perspective, in order to mitigate the environmental harm caused VW misconduct and protect general interests.<sup>52</sup>

On the other hand, the lack of harmonization between the remedies awarded so far to EU consumers certainly represents the other critical issue in European law uncovered by the emissions scandal. This deficit undermines the effectiveness of the advocacy of consumers' rights, exposing them to the risk of discriminations within Member States on the mere ground of the jurisdiction that, case by case, will decide upon the consequences of same wrongful conduct. This, therefore, threatens the coherence of the whole EU private law system.<sup>53</sup>

Thirdly, the grey zone in which greenwashing is still confined requires a positive intervention to regulate the use of green claims in order to prevent market failures based on the abuse of sustainability information as a market strategy.

A wise hermeneutical use of the principle of sustainable development could help in challenging all these criticalities.

Indeed, the principle has potentialities far greater than a merely programmatic function. If used as interpretative criteria, it could represent a hermeneutical tool through which the full and 'integral development' of people can be pursued,<sup>54</sup>

<sup>52</sup> See the famous Report of the World Commission on Environment and Development: *Our Common Future*, 1987, available at <https://tinyurl.com/5njm356j> (last visited 31 December 2021).

<sup>53</sup> See B. Gsell and T. Möllers 'The Diesel Emission Scandal – Perspectives of Consumer Law and Capital Markets Law Enforcement: An Intradisciplinary Analysis', in B. Gsell and T. Möllers eds, n 1 above, 472.

<sup>54</sup> See N. de Sadeleer, 'Environmental Principles: From Political Slogans to Legal Rules', in N. de Sadeleer ed, *Environmental Principles, Modern and Post-Modern Law. Principles of European Environmental Law* (Oxford: Oxford University Press, 2002); V. Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' *The*

as well as a key concept able to explicit the relationship existing between economic freedom, private autonomy, and social purposes of economic activities.<sup>55</sup>

It has been widely noticed and, during the pandemic, it has become crystal-clear that the sustainability is a challenge that starts from the roots of the economic system and requires to abandon traditional models. Legal professionals are invested with the duty to analyze the criticalities of the contemporary reality and to offer concrete solutions to tackle them, trying to drive what has already been called ‘difficile e fertile tempo di transizione’ (difficult but fruitful time of transition).<sup>56</sup>

The need to balance the three pillars of sustainable development, ensuring economic growth, environmental conservation and social progress is a major challenge in which consumers and business activities are fundamental characters, but also where jurists shouldn’t avoid their responsibilities for the achievement of a greater welfare.<sup>57</sup> Non-economic or sustainability information disclosure and their communication through various channels, in this perspective, can represent a first *trait-d’union* to introduce the non-economic interest to sustainable development in contractual relationships between private actors.

The dieselgate scandal offers an example of a concrete case in which the integration of the concept of sustainability in the evaluation of professional behaviors could lead to a stronger enforcement of consumer rights and, at the same time, to the implementation of the principle of sustainable development through private law.<sup>58</sup>

*European Journal of International Law*, 347 and 393 (2012), who notes that ‘Sustainable development may thus have a hermeneutical function whether as a customary principle or as a conventional rule, and its characteristics make it a particularly useful interpretative tool. The more flexible and vague the content of the rule used as a hermeneutical reference, the wider the margin of appreciation for the judge in determining the sense of the rule interpreted. Because sustainable development is a notion the content of which varies, its elasticity grants the judge an appreciable degree of liberty, authorizing value, or circumstantial choices to be made. It is therefore a valuable hermeneutical tool weighing upon the interpretation of other rules’; Papa Francesco, *Fratelli tutti. Lettera enciclica sulla fraternità e l’amicizia sociale*, 2020, spec. §§ 66, 107, 110, 114.

<sup>55</sup> On the origins and function of Art 41 of the Italian constitution and on its relationship with the economic model and with the European system, see eg N. Irti, n 41 above, spec. 18, 28, 68; as well as the collected work *Il dibattito sull’ordine giuridico del mercato* (Roma-Bari: Laterza, 1999), with particular attention to the essays *ivi* collected of L. Elia, 17; M. Draghi, 81. See also M. Nuzzo, *Utilità sociale e autonomia privata* (Napoli: Edizioni Scientifiche Italiane, 1975), spec. 26 and 84.

<sup>56</sup> P. Grossi, *Ritorno al diritto* (Roma-Bari: Laterza, 2015), 95; see also G. Benedetti, ‘«Ritorno al diritto» ed ermeneutica dell’effettività’ *Persona e mercato*, 3 (2017), also published in *Rivista internazionale di filosofia del diritto*, 512 (2017) and in *Rivista trimestrale di diritto e procedura civile*, 763 (2018).

<sup>57</sup> See L. Bruni and S. Zamagni, *L’economia civile* (Bologna: il Mulino, 2015) 118; A. Punzi, *Diritto certezza sicurezza* (Torino: Giappichelli, 2017), 127; N. Lipari, n 49 above, 642 and 644; G. Capaldo, ‘Linee evolutive in tema di soggetti per una società sostenibile’ *Persona e mercato*, 335 (2020).

<sup>58</sup> A clear illustration of the opportunity to contribute to sustainable development through civil law is offered by a recent judgement of The Hague District Court (The Hague District Court, 26 May 2021, case C/09/571932 / HA ZA 19-379 Vereniging Milieudefensie et al v