

Part I National Perspectives

France

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1 Introduction

1.1 Historical Context

Since the time of the first postwar, French motorists were encouraged by favorable tax provisions to buy diesel-powered vehicles. The government promoted transports, agriculture, and handcrafts, which massively used this technology. In particular, it is recognized that the diesel engine offers a very generous power and high efficiency. Diesel engines are used for locomotives, boats, trucks, tractors, generators, etc. The French car manufacturer Peugeot had played a pioneering role in developing diesel engines.¹ Other national car manufacturers, like Citroën² and Renault,³ will invest in diesel vehicles only later, mainly to contain the effects of the oil shock of 1973. The brand with the lion believed in the future of this technology before its competitors. This historical precedence allowed Peugeot to forge a solid reputation, giving it a prominent role on the market. This technological option explains the policy of promoting diesel of the French State, and with it, the extent of diesel car registrations. This situation, well established, appears difficult to challenge; 58 % of new cars in 2015 are equipped with diesel engines. For this

¹On the eve of the Second World War, the Sochoux company sold a dozen of its elegant car model 402. In 1959, Peugeot launched the 403 model with Indenor engine. Then, in 1960, came the 404 model. In 1960, the manufacturer offered a Peugeot 204 diesel model. Under the hood we find the smallest diesel in the world, a new aluminum block with the power of 40 bhp.

²Citroen Type H is a subcompact car, and the brand did not offer a diesel model before its acquisition by Peugeot in 1976.

³The Renault 20 diesel in 1979.

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reason, France could provide a substantial number of potential plaintiffs and the Dieselgate has a significant impact in the country. Volkswagen stated that 948,064 cars were affected (in detail: Volkswagen, 574,000; Audi, 189,322; Skoda, 66,572; Seat 93,388), almost 9 % of the total figure of VW cars affected by the Dieselgate worldwide.

1.2 Political Context

The Dieselgate broke out on 21 September 2015,⁴ on the eve of the COP21, when negotiations are ongoing with the United States on the US–EU Transatlantic Free Trade Agreement (TAFTA), which provides a chapter, one out of 23, that aims at creating a transatlantic market for cars. France is particularly concerned with these two events. The French government will, firstly, chair and host the 21st Conference of the Parties to the Framework UN Convention on Climate Change (COP21/ CMP11) to be held from 30 November to 12 December 2015. This is a crucial deadline. The meeting will result in a new international climate agreement, applicable worldwide, to keep global warming below 2 °C by 2100 and adapt our societies to the existing imbalances. The agreement will represent a success for French diplomacy but will bear the mark of US tensions between Democrats and Republicans.⁵ In France, the attention of public opinion and decision makers focuses on the environmental issue.

On the other hand, one of the chapters of TAFTA purports the creation of a transatlantic car market by unifying technical standards. German car manufacturers, already active on the American and European markets, enjoy strong positions and have an interest in the outcome of the negotiations. The French PSA does not hide its ambition to return to settle in the United States through its luxury brand DS, even as American consumers have never really welcomed the brand.⁶ The Renault brand, as such, is not marketed across the Atlantic. However, Nissan and Mitsubishi pertaining to the Renault group could help disseminate Renault products under other brand names. In this context, the standardization of technical regulations may appear desirable. The confrontation between the US Environmental Protection Agency (EPA) and VW therefore comes amid intense international gatherings, while defending the environment is at the heart of the consciences of

⁴CEO's Martin Winterkorn group reacts to the investigation by the US environmental agency and said he was "deeply sorry to have disappointed our customers and the public", ensuring full cooperation with the authorities (La Voix du Nord, 22 September 2015).

⁵The agreement is not globally binding. For President Obama, it was imperative to find a wording that did not make the outcome of the negotiations a binding treaty. The US President knew that it would never have been ratified by the Congress dominated by Republicans. Washington managed to achieve that the agreement does not render mandatory specific targets for reducing CO₂ emissions and the financing of the fight against climate change.

⁶Verdevoye (2015).

French people. The country is not directly involved in the case. But, for the reasons given, the French do not feel foreign to the confrontation.

2 Technological and Economic Analyses

From the technological perspective, domestic manufacturers face the same obstacles as their competitors to fight CO₂⁷ emissions and NO_x.⁸ PSA and Renault have taken different routes to overcome them.

2.1 Analysis of the Technological Situation of the Brands

In their pursuit of virtuous engines, engineers must find a balance between consumption and pollution and between CO₂ and NO_x. It is known that the diesel engine spreads less carbon dioxide (CO₂). The air-fuel mixture is subjected to a stronger pressure to produce higher energy. Unfortunately, this high compression ratio leads to a rise in temperature that favors the formation of nitrogen oxides (NO_x). To fight against the formation of NO_x, all manufacturers have chosen the technique of the exhaust gas recirculation (EGR), which lowers the combustion temperature. This system reduces at the source 85 % of NO_x emissions.

In order to treat the remaining 15 % and reduce the rate of NO_x below the threshold permitted by the law, car manufacturers can choose between letting these molecules accumulate to catalyze them later, intermittently, and treating these molecules continuously – two distinct approaches that make all the difference between what is called a NO_x trap and the selective catalyst reduction, abbreviated SCR. Renault has adopted the first method, Peugeot the latter.

2.1.1 Analysis of the Technology Used by the Renault Group: The NO_x Trap

The Renault brand, which uses the technology of NO_x trap,⁹ is in question for some of its models with the 1.5 dCi group. The “Captur” in particular was caught out by

⁷Carbon dioxide, also called carbon or carbon dioxide gas.

⁸General term for a group of highly reactive gases, all of which contain nitrogen and oxygen in varying amounts. The nitrogen oxide is a chemical compound consisting of oxygen and nitrogen.

⁹This filter has a limited processing capacity, which forces it to periodically purge the nitrogen oxides that accumulate. The electronic computer determines the appropriate time to initiate regeneration transforming nitrogen and oxygen in nitrogen oxide. This chemical reaction demands more heat, obtained by a diesel injection for increasing the temperature of the exhaust gas. Purging the NO_x trap filter induces additional fuel consumption.

tests on benches made by UTAC¹⁰ on behalf of the Royal Commission,¹¹ following the occurrence of the VW scandal.

According to Renault, the EGR valve only works well on a certain range of ambient air temperatures.¹²

When Renault adopted this system of exhaust gas recirculation in the mid-2000s, it was deemed effective. Its disadvantages appeared later: when the ambient air is too cold, hot, or wet, there is a phenomenon varnishing soot deposits that block the EGR valve.

As the engine can be affected, the control software has been configured in order to control the rate of exhaust gas recirculation when the air temperature is not within a defined range (between 17 and 35 °C). In the case that the temperature (at the fresh air intake of the engine) is under 17 °C or above 35 °C, the computer greatly reduces the rate of exhaust gas reinjected into the combustion chambers. However, a reduced recirculation determines an increase of the temperature of the exhaust gas and therefore an increase of the NO_x rate. The amount of NO_x becomes sometimes greater than what the NO_x trap may treat. The manufacturer realized this malfunction, and from 2010 it managed to extend the operating time of the EGR and to increase the frequency of purging the NO_x trap.

These fixes reduce NO_x emissions in all circumstances. This is important because the UTAC tests have certainly proved disappointing emission rates when the vehicle is evaluated in real traffic conditions but show that, except for Captur, Renault diesel engines comply with technical standards when they are submitted to standard cycle of type approval test benches.

On 6 April 2016, the Renault group answered, through its chief engineer, Gaspar Gascon Abellan, questions from MP members of the mission with the task of informing the National Assembly on actions undertaken by the French automotive sector to overcome the difficulties encountered.

It emerged that the Renault Captur,¹³ which was tested by UTAC, did not comply with regulations. The case, however, seems of minor importance: on the one hand, the anomaly appears to affect only isolated cases; on the other hand, a recall campaign to change the management software of the system of clearance of affected models had started as early as July 2015 (Captur) and September 2015 (Kadjar), before the outbreak of the Volkswagen scandal and well before the tests by UTAC commenced.

¹⁰UTAC (Union Technique Automobile and Motorcycle Cycle) is working with French, British, Dutch, and Romanian authorities to the European Commission and the United Nations. It conducts tests for the type approval of vehicles and their equipment in accordance with regulations issued respectively by the EU and UNECE. The French authorities have also delegated to UTAC the monitoring of production conformity (COP) (Source: newspaper "20 minutes" of 1 October 2015).

¹¹The "Royal Commission" takes its name from the person who is in the lead. Ms Royal is the Minister of Environment, Energy and the Sea, in charge of International Relations on climate.

¹²Bergerolle (2016).

¹³115,000 Renault Captur vehicles are affected by the recall that started on July 2015.

Good faith of the old board could not be questioned. According to Gaspar Gascon Abellan, an internal misunderstanding took place and, in any case, Renault never had the will to cheat or violate any regulations. According to the chief engineer, the specimen of the Captur tested by UTAC was among those that were not corrected at the factory. Its software was incorrectly set: there was an error in the set of the temperature at which the NO_x trap must proceed with the desulfurization cycle. The firm of Ile Seguin was slow to detect the wrong setting because the audits concern new vehicles. The vehicle must travel several dozen kilometers before the sulfur accumulates in the NO_x trap. In any case, the figure of vehicles recalled is relatively small, a fact that greatly circumscribes the impact of the defect both economically and environmentally. Renault is committed to expand the maximum operating range between 5 and 40 °C and make the purge of the NO_x trap more frequent. Furthermore, the new generation of Renault diesel engines will use SCR.¹⁴

2.1.2 Analysis of the Technology Used by the PSA Group: SCR

PSA is in a different situation. The group is completely foreign to the Dieseldate scandal. PSA diesel engines emit less NO_x in real driving conditions because they adopt a continuous catalytic process (SCR), not just a periodic one. The SCR is able to handle a higher volume of exhaust gas and is less sensitive than the NO_x trap to lower gas recirculation rates. The increase in the rate of NO_x in the exhaust gas is not enough to overcome its management capabilities. The SCR equipment is more expensive but is also more satisfactory in terms of preservation of the environment. These circumstances did not prevent ADAC¹⁵ from challenging the premium DS5 Hybrid4 4×4 model, a competitor of the most famous German models.

2.2 Analysis of the Economic Situation of French Groups

The various national European car markets reacted to the Dieseldate differently from the car market of the United States. While American consumers seem very susceptible to cheating, the Wolfsburg group resists in the old continent.

¹⁴It is noteworthy that in September 2015, a study by the German Federation of Motorists challenged car models manufactured by the Renault–Nissan Alliance (Nissan X-Trail 1.6 dCi, Renault Espace dCi 160 Energy, Renault Grand Scenic Energy dCi 130, and Renault Energy dCi 130 Kadjar) for alleged noncompliance with Euro 6 standards (Bonnebas V., Renault-Nissan, European champion pollution, Reporterre, 30 September 2015, available on <https://reporterre.net/Renault-Nissan-champion-d-Europe-de-la-pollution>).

¹⁵The ADA (Allgemeiner Deutscher Automobil-Club) is a federation of automobile clubs in Germany. With 18.73 million members in July 2013, it is the largest in Europe and the second worldwide (after the American Automobile Association).

2.2.1 Analysis of the Used-Cars Market in France

The used-car market is growing at a less sustained rate than the market of new vehicles (+3 % against +7.9 % in the first four months of 2016). To our knowledge, there are no statistics on the impact of the Dieselpgate on sales volumes and prices of the vehicles. Automotive professionals affirm that, for the time being, the Dieselpgate did not determine any significant change on the prices of used cars or on the trading volumes. No drops in sales were reported by car dealers. Moreover, the ease of car resale would not have suffered the impact of the Dieselpgate.

The impact of the scandal would have been much more severe if it had challenged the reliability and safety of the affected car models. In any case, at the time when this book is printed, we do not yet have sufficient data concerning the evolution of prices and thus a reservation on this issue is necessary. The plaintiffs in turn will probably ask for compensation in case of resale of the vehicle at a low price. This argument, if evidenced by relevant market data, will be legally relevant. Buyers wish to purchase quality products and pay them accordingly. As the VW group's reputation is tainted, it is possible that the value of used cars and the ease of car resale reflect this situation. Any economic difficulty of VW would worsen this situation.

2.2.2 Analysis of the New Car Market in France

The analysis of the consequences of the Dieselpgate on the volume of sales cannot be completed at the current state of information. The Dieselpgate has implications on the new car market, but they are less important than one might have expected.¹⁶ Sales of gasoline and hybrid cars increase, but this trend was established well before the outbreak of the scandal. The share of diesel cars in total car sales decreased from 71 % in 2013 to 64 % in 2014 and to 52.32 % in April 2016.¹⁷ To date, no consumer panic that would drive consumers to shift in mass from diesel to gasoline cars has been observed. At most, the previous trend is confirmed. PSA does not seem to take advantage of its more environmentally friendly technological choices to increase its market share. Renault does not suffer from the challenging of some of its models.¹⁸

¹⁶François-Xavier Castille, President of SNLVLD (Syndicat national des Loueurs de Véhicules Longue Durée), workshop organized on 14 October 2015 for the Observatoire du véhicule d'entreprise (Quelles énergies pour aujourd'hui et pour demain?, Flotte automobile, 20th January 2016).

¹⁷CCFA, Lettre d'information, 1 July 2016 (www.ccfa.fr).

¹⁸For example, before the outbreak of the scandal, in the first six months of 2015 the market grew by 6.1 %. During the same period, the overall results of the French car makers, with the exception of Peugeot, were down: Peugeot: +8.1 %, Citroën: -0.5 %, DS: -14.5 %, Renault: -6.8 %, Dacia: -7.5 %. During the same period, the results of VW were hardly better: +5.5 %. During the period immediately following the outbreak, the market was growing more significantly.

VW's difficulties benefit French car manufacturers too irregularly, to affirm that a trend has emerged. There is no evidence that potential customers of the German group have changed their mind after the scandal and have preferred a French model. The months of December 2015 and May 2016 were very favorable for French groups, but the months of October and November 2015 and from January to March 2016 have not allowed them to open a gap. The results are jerky.

2.2.3 Analysis of the European Car Market

French manufacturers did not take advantage in terms of shares of the European car market from the commercial difficulties affecting the VW group.¹⁹

Again, PSA did not take advantage of its good technology choices. Organic growth (increase of the market share) is choppy, and acquisition opportunities (through the acquisition of competitors) are rare. By contrast, the diesel technology as a whole could suffer damage to its image as an effect of the Dieselgate. In any case, European car makers, federated in the ACEA (European Automobile Manufacturers Association), were at the time of the breakup of the Dieselgate waging a strong pro-diesel campaign as a means to achieve CO₂ targets for 2020, arguing that diesel fuel contains more energy than gasoline and produces less CO₂ emissions. PSA would probably have benefited from the promotion of diesel. The group of Sochaux risks instead of suffer from this hostile environment.

It is noteworthy that, as mentioned above, the Dieselgate involved also Renault and that despite this the Renault–Nissan Alliance might gain control of Mitsubishi at a cheap price. The latter confessed that it had lied about the consumption of its vehicles for 25 years and the value of its shares dropped 40 % in a few days. Nissan would consider to exploit this situation and to purchase 34 % of the stake of the Japanese competitor. It would become Mitsubishi's largest shareholder. The alliance would include four manufacturers with the French Renault and the Russian Avtovaz. The investment would allow the alliance to produce 10 million cars per year, rising the production of one million vehicles per year.

¹⁹For example, in December 2015, the Volkswagen Group saw its sales fall 8.9 %, while Renault's sales jumped 26.7 % and PSA Peugeot Citroen rose by only 7.7 %. Also, May was quite encouraging for the French industry. In May 2016, the market for new light-duty vehicles increased by 22.3 % on year and French carmakers were doing much better than their foreign competitors (French sales went up 29.3 %, while foreign manufacturers' sales increased 14.9 %). In detail, in France, Dacia, the "low-cost brand" of Renault, saw its sales jump very high in a month (+39.3 %). Behind, Renault achieved the second best performance, with an increase of 32.6 %. While Citroën followed closely (+30 %), DS and Peugeot displayed smaller, but in any case exceptional, increases (+25.6 % and +23.1 % respectively).

3 Political and Legal Analysis

The legal analysis of the developments in France is paradoxical: while the reaction of the French government to the scandal is quite immediate, private lawsuits against VW, collective or individual, are relatively prudent. It is true that collective actions are a bit new for French lawyers. Moreover, the various potential proceedings raise many questions that are difficult to answer. Which cause of action should be chosen by the plaintiff as the basis for his claim (legal guarantee of conformity, false advertising, false commercial practice, contractual or tort liability, etc.)? How should the amount of the damages suffered by the claimant be quantified?

Moreover, three types of actions, public and private, are evoked as a result of the scandal in France: governmental reaction (control of the vehicles, repayment of the ecological bonus), criminal prosecution toward responsible individuals, and various civil proceedings by customers against VW.

3.1 *Governmental Initiatives*

While the reaction of the French government is immediate, the consequences of its approach are not necessarily univocal. The diesel car manufacturers (Renault and PSA) and their suppliers (Plastic Omnium and Faurecia) seem, at first, relatively unscathed by the scandal, which perhaps explains the immediacy of the governmental reaction. Moreover, random testing of the vehicles will later confirm the gap between Volkswagen vehicles and French vehicles in terms of emissions.²⁰ However, the scandal unfortunately feeds the idea that all car manufacturers cheat. Beside this, the actions of aggrieved consumers accumulate.

3.1.1 Vehicle Control

Finance Minister Michel Sapin has reacted promptly to the occurrence of the scandal. He said that investigations were necessary “at European Union level” after the outbreak of the scandal about pollution tests deliberately falsified by Volkswagen.²¹ While the European Commission considered it premature to establish specific immediate surveillance measures, French manufacturers have taken up the wish of the Minister. The opening of an investigation was aimed at confirming that French car manufacturers comply with type approval procedures in every country where they operate.²² CCFA (the French Automobile Manufacturers

²⁰Experts, according to Ms. Royal, have established that while Volkswagen vehicles exceed five times the regulatory limit of nitrogen dioxide, French cars exceed it from half to two times.

²¹Chevalier and Maroselli (2015).

²²Ibid.

Committee) also ensured that its members supported “the establishment of European tests [...] which will validate, on the road, in 2017, the laboratory measurements.”²³

Two French automotive suppliers take leading positions: Faurecia, whose performance will be greeted a few months later by VW,²⁴ said that the products it develops do not contain embedded fraudster software. Plastic Omnium said that it does not equip any pollution control systems for affected vehicles of the Volkswagen group.²⁵

Minister of Ecology Ségolène Royal announced a thorough investigation.²⁶ She asked the French manufacturers to ensure that such fraud would not progress.²⁷ She seized the US Federal Agency for Environmental Protection [EPA] to get all relevant information, to assess the nature of the fraud and the means implemented to detect it.²⁸ She also invited the UTAC²⁹ (Technical Union of automotive, motorcycle and cycle) to get closer to the US agency in order to understand the mechanisms of falsification and make proposals for action.³⁰ The Minister wanted to ensure that vehicles type approved in France comply with current regulations and standards. She asked UTAC, on the basis of information forwarded to it by the US agency, to prepare a protocol of investigation aimed at guaranteeing to consumers full compliance with the emissions regulations. On 24 September 2015, three days after the outbreak in the US of the scandal, she announced that random tests would be started to ensure that vehicles put into circulation in France comply with current standards.

From the random tests ordered by the Minister, two important information emerged:

1. The vehicles of all tested car manufactures exceeded the relevant emissions standards. This conclusion, in itself, obscured the government’s message and condoned Volkswagen. An uninformed person might consider that if all car manufacturers are at fault, VW’s behavior is not serious in itself.³¹

²³Ibid.

²⁴Faurecia has been awarded in Berlin on 1 June 2016 the “Volkswagen Group Award 2016,” an annual distinction awarded by the Volkswagen Group, which honors its best global suppliers (source: Auto Strategies International, 29 June 2016).

²⁵Chevalier and Maroselli (2015).

²⁶Ségolène Royal lance une enquête approfondie, *Le Point*, 22nd September 2015, available on http://www.lepoint.fr/economie/affaire-volkswagen-segolene-royal-lance-une-enquete-approfondie-22-09-2015-1967067_28.php.

²⁷Chevalier and Maroselli (2015).

²⁸Chevalier and Maroselli (2015).

²⁹UTAC is the technical service designated by the French government to the European Commission for conducting approval tests, said the ministry.

³⁰Chevalier and Maroselli (2015).

³¹At the commission Royal, Jacques Rivoal, the president of VW France, argued that Volkswagen models were polluting less than those of competitors. VW stressed the results of its five vehicles tested in France by UTAC. None of the tested models (Polo, Golf, Sharan, Tiguan, and the Audi Q3)

2. UTAC-Ceram has not detected in the other tested vehicles software comparable to that which was used by VW. This element is perhaps less well understood by the population. One thing is to seek to optimize the results of tests performed in the laboratory (while the results are different if the tests are performed on the road), quite another to falsify tests, mislead authorities and consumers through clearly fraudulent methods.

The government initiative that aimed at a clarification ultimately led to making the situation perhaps less clear than it was before in the eye of the public opinion. An additional difficulty is that even considering conventional certification tests made in the laboratory, there are cases, according to UTAC, where the results exceeded two and a half times the ceiling provided by the law. This poses the question of the responsibility of certification bodies, their competition, and the lack of postaudit. How can indeed, in these conditions, these vehicles have been type approved?³²

Out of 15 evaluated brands (including Jeep, Kia, Nissan, Toyota, and Fiat), Peugeot is among the best, Renault among the largest emitters of NO_x. These differences are mainly due to the pollution control system that is used. There are those, like Peugeot employing the SCR process (selective catalytic reduction) and others, the majority, as Renault that use the less efficient "NO_x trap."

3.1.2 Exclusion of Bonus Repayment

The eco-claim bonus or eco-tax is a method of struggle against the emission of greenhouse gases and to steer consumption toward the purchase of less polluting vehicles by granting a bonus and, conversely, taxing the purchase of high CO₂ emission vehicles.

Ms Royal,³³ minister of the environment, evoked in September 2015 the repayment of the environmental bonus by the State to the buyer of a cleaner vehicle. Diesel engines, theoretically small emitters of CO₂,³⁴ often seemed to meet the

had breached during road tests the NO_x emission ceiling (nitrogen dioxides) set by the board, as they did not exceed by more than five times the established standard. In the worst case, one of the models displayed exceeding 4.7 times the standard. The results were better for Polo (1.2 times) and for Sharan (0.9). The president argued that performances of many competitors were well above five times the allowed threshold.

³²Parliamentary Office for Evaluation of Scientific and Technological Choices, Senate Commission, 13 November 2015 (www.senat.fr).

³³On 1 October 2015, the government confirmed the execution of random tests in France on hundred diesel vehicles. Ségolène Royal announced the results in November. The tested Volkswagen vehicles exceeded five times the NO_x emission standard, a circumstance, according to the Minister of Ecology, that confirmed the cheating. The test on other manufacturers revealed that the emissions exceeded from a half to two times the standard, an excess that would correspond to the difference, already known, between tests on rollers and real driving tests.

³⁴CO₂ is the sole pollutant that comes into account for the calculation of the eco bonus criteria.

criteria allowing their owners to gain from the tax benefit. The scandal changed the situation. Indeed, some petrol engines, as well as some diesel engines, were accused of emitting more CO₂ than the amount indicated by their specifications. The VW Group initially recognized that its vehicles exceeded the limit. This admission was later denied on 9 December 2015 by a statement of the Wolfsburg group.³⁵ It follows that, as the scandal ultimately concerns NO_x emissions, which were not included in the calculation for obtaining the environmental bonus, VW may not be concerned about the repayment of the bonus.

The fact remains that the communication of the VW group on this issue was hesitant. In any event, it seems unlikely that the fraud will be detrimental to consumers and that they will be requested by the French government to repay the bonus, as consumers are the first victims of the scandal. If we correctly interpret the intention of the government, it would be surprising if the affected vehicles would be submitted to new type approval procedures. The car manufacturers shall propose methods to make them compliant with the law.

3.2 *Criminal Law Aspects*

Several criminal cases were started.³⁶ Several hundred individual complaints have already been filed. According to the victims, the conduct of VW's responsible managers is likely to be characterized as organized fraud,³⁷ endangering the lives of others,³⁸ aggravated deception about sold goods,³⁹ misleading and deceptive advertising,⁴⁰ forgery and use of false statements.⁴¹

³⁵On 9 December 2015, Volkswagen published a statement. The group stated that cheating on CO₂ emissions was not ultimately confirmed. The figure of about 800,000 vehicles, originally published by Volkswagen Group, was denied. The differences in the figures related exclusively to nine models and represent only a few grams of CO₂ on average; they matched the cycle NEDC consumption increase (new European driving cycle) of about 0.1–0.2 l for 100 km. With an annual production of about 36,000 vehicles, these models accounted only for 0.5 % of the overall production volume of Volkswagen. Following significant internal investigations and comprehensive measurements, it was clear that for almost all models, actual CO₂ emissions corresponded to the values initially indicated. This meant that these vehicles could be marketed and sold without any limitations. The suspicion that the fuel consumption figures had been illegally modified was not confirmed. Internal measurements revealed only slight differences on nine models of Volkswagen (five marketed in France).

³⁶See Husson (2015).

³⁷Art. 313-1 Criminal Code.

³⁸Art. 223-1 Criminal Code, because of the severity of the pollution caused by the fraud.

³⁹Art. L213-1 Consumer Code.

⁴⁰Art. L12-1 Consumer Code (Loi 2008-776 of 4 August 2008).

⁴¹Art. 441-1 Criminal Code.

In detail:

- The NGO Ecologie Sans Frontières has filed a complaint with the Paris prosecutor against X for endangering the lives of others and aggravated deception.⁴²
- The AVIFA (Association of International Automobile Fraud Victims) decided to go to Court for misleading commercial practice, false advertising, deception, fraud, endangering the lives of others, forgery and use of forgeries.
- The CLCV (Consumption, Housing and Living Environment) filed on 5 October 2015 a claim for misrepresentation of the product and unfair commercial practice.⁴³
- The vice president of the Ile-de-France in charge of transport, Pierre Serne, filed a complaint with the Paris prosecutor concerning the fraud masking of the emissions of the Volkswagen diesel vehicles. The elected ecologist draws on Article 40 of the Criminal Procedural Code, which requires any public authority to report any criminal offense to the competent public prosecutor.
- The DGCCRF (Directorate General for Competition, Consumption and Repression of Fraud) has commissioned an administrative investigation on the relevant facts.

3.2.1 *Tromperie aggravée* (Aggravated Deception)

From September 2015, the DGCCRF (Directorate General for Competition, Consumption and Fraud Control) conducted an administrative investigation that confirmed deception on VW vehicles marketed in France. The research of the Directorate General revealed that there was evidence that the installed software could intentionally skew the results during the tests of polluting emissions.⁴⁴ This investigation also covered 13 further automakers. The French automakers were acquitted.

The public prosecutor, meanwhile, launched on 2 October 2015 a preliminary investigation for aggravated fraud. A judicial investigation against Volkswagen was opened on 19 February 2016 and was assigned to three Parisian judges.

The qualifying elements of the aggravated fraud are known and fairly simple.⁴⁵ A person commits a fraud if, during the formation or performance of a contract, it says or suggests to the other party some inaccurate information on essential qualities of the object of the contract. It is a criminal offense to mislead, that is, to lie. The deception may have been committed during the execution⁴⁶ or the performance⁴⁷ of the contract.

⁴²Le figaro, 2nd October 2015.

⁴³www.clcv.org/actualites/la-clcv-porte-plainte-contre-volkswagen.html.

⁴⁴Chevalier and Maroselli (2016).

⁴⁵Art. L213-1 Consumer Code.

⁴⁶Art. L213-1, 1° et 3° Consumer Code.

⁴⁷Art. L213-1, 2° Consumer Code.

In the case under examination, a scheme was set up. Within the onboard computer, spyware was hidden. The sophisticated algorithm was difficult to detect even for experts. It starts to function only in a specific context, that is in the “test mode,” well known to carmakers.

The software, produced by Bosch, manufacturer of auto parts (which blandly said that it had warned Volkswagen of the illegality of the device if installed on vehicles of series), is indeed able to recognize the very particular conditions in which the homologation tests are carried out (straight drive, open hood, very slow and gradual acceleration, etc.). The spyware was dormant and had no impact on the functioning of the car in normal road traffic. Automobiles were sold as complying with emission standards, while those vehicles should not have been marketed. The fraud was perpetrated at the time of the conclusion of the contract. It was used to obtain the victim’s consent, while the buyer, if better informed, would have refused to sign the contract. The fraud continued once the cars were sold since VW initially refused to recognize the illegal manipulation, which was discovered by chance during a study. Any successive admission of liability by VW and any after-sale fixing of affected cars do not exempt the manufacturer from its criminal responsibility.⁴⁸

Two prerequisites for the qualification of the fact as deception are required: a contract that has been or will be executed and an object of this contract. The first element excludes from the scope of the criminal protection a person who would not be bound by the contract with the seller.⁴⁹ Moreover, the lie has either convinced the victim to execute the contract or convinced the victim that the contract was faithfully performed. The lie must focus on essential qualities of the object of the contract. When the parties have not specifically agreed upon any requirement, the goods must comply with ordinary substantial qualities. Common sense often determines what ordinary substantial qualities are: food should not be harmful to health, dye should not be toxic, drugs should have a composition consistent with their authorization, a car should not be equipped with software designed to mask the real emissions of NO_x.

Any quality established by statutory or regulatory standards is deemed *per se* substantial and decisive of the consent of the party, and judges shall not determine whether the victim of the deception was or was not aware of the statute or regulation that the accused person contravened.⁵⁰ Thus, the assessment of the materiality of

⁴⁸Cour de Cassation criminelle No. 84-91606.

⁴⁹This is what was found about erroneous information that the director of the Central Service for Protection against Ionizing Radiation had disseminated to the public about the safety of the radioactive cloud from Chernobyl (Cour de Cassation criminelle, No. 11-87531, JurisData No. 2012-026591; Dr. pén. 2013, comm. 28, note Robert J.H.; Comm. com. élect. 2013, comm. 7, note Lepage A.; D 2013, p. 218, note Lacroix C.).

⁵⁰Thus, although the average consumer does not know that foie gras should not contain more than two grams of sugar per kilogram of product, it is a deception to sell foie gras whose composition deviates from this administrative standard (Cour de Cassation criminelle, 30 March 1994; Bull. crim. 1994, No. 130; Dr. pén. 1994, comm. 164, note Robert J.H.).

the qualities of the object of the contract is generally conducted on the basis of an abstract reasoning by the judge, without any investigation relating to the psychology of the victim.

Deception can be committed regardless of the damage it may cause. In any case, the harm caused to society (environmental impact) and individuals (health damage resulting from additional pollution, loss of value of vehicles, resale difficulties, etc.) will be considered by the Court.

The aggravating circumstances of the deception could result in the case at hand in particular from the fact that the scheme has jeopardized the health of the population or was committed by an organized gang. The offense is punished with imprisonment (seven years) and fine (750,000 euros). The fine can be augmented by the Court, proportionally to the gain derived from the criminal offense, up to 10 % of the turnover during the previous financial year.⁵¹ Criminal liability could therefore result in serious economic difficulties for VW, even in the absence of civil liability claims or in case of failure of such claims.

3.2.2 *Faux et usage de faux* (Forgery and Use of False)

Forgery is a fraudulent alteration of the truth done by any means, in writing or other medium of expression, which aims at or may have the effect of establishing a fact with legal consequences. The alteration of truth can be accomplished in several ways (material or intellectual) but must in all cases be detrimental to the victim. The lie must be an essential element of the act. In this case, the VW group stated NO_x emission levels that were false. The author of the statement could hardly ignore the inaccuracy of the statement and its harmful nature. The offense is punished by three-year imprisonment and 45,000 euros fine.⁵² If juridical persons are held liable,⁵³ they may be sanctioned with an increased fine.⁵⁴

3.2.3 *Pratiques commerciales déloyales* (Unfair Commercial Practices)

A commercial practice is unfair if it is contrary to the requirements of professional diligence and distorts or is likely to alter, substantially, the economic behavior of a reasonably well-informed consumer in respect of the purchase of a good or a service. The concept of unfair trade practices refers at once to the diligence expected from professionals in exercising their business and to its effects on consumer behavior. The expected professional diligence is assessed with regard to, in particular, the codes of conduct or rules of conduct, and also the good faith of

⁵¹ Art. L213-2 Criminal Code, modified by the Loi No. 2014-344 of 17 March 2014, Art. 131.

⁵² Art. 441-1 Criminal Code.

⁵³ Art. 441-12 Criminal Code.

⁵⁴ Art. 131-38 and Arts. 131-39 Criminal Code.

the professional and his competence, having regard to the legitimate expectations of consumers. Judges should investigate whether the commercial practice of the professional is likely to materially distort consumers' economic behavior.⁵⁵ Unfair commercial practices are divided into two categories:⁵⁶ misleading commercial practices⁵⁷ and aggressive commercial practices.⁵⁸ The VW case could be qualified as a deceptive trade practice. The professional acts in a way that false elements are communicated to consumers in order to distort their judgment. A commercial practice is misleading, especially when it is based on allegations, indications, or misrepresentations to mislead the consumer on substantial qualities of the goods.⁵⁹ VW's fraud has its origins in seeking an unfair advantage over the competitors and tricking the buyer. The aim of the dishonest car manufacturer was as follows:

- distort competition and prices and accordingly attract customers;
- receive bonuses and therefore increase margins;
- falsely inform customers, who think to pollute little, while their vehicles emit more CO₂ and NO_x;
- falsely forge a good reputation on the advanced technology used for the cars pertaining to the Volkswagen Group (Audi, Skoda, Seat, Porsche) while these cars pollute more in reality;
- reduce the car owners' costs of "Add-Blue" (decontaminating NO_x) to falsely attract customers;
- increase engine power compared to this power when the mode pollution test functions.

3.2.4 *Escroquerie en bande organisée* (Organized Fraud)

Fraud⁶⁰ is an offense consisting in deceiving, by the use of fraudulent means, a person and thus determining it to act at his prejudice or to the prejudice of a third party, intended to extract undue advantages, including monetary. The use of fraud involves the completion of positive actions to deceive the victim and determine undue advantages.

Organized fraud presupposes that a group has been formed or an association established with the purpose of committing the offense. The existence of a group

⁵⁵ Cour de Cassation commerciale, No. 10-27402.

⁵⁶ Art. L120-1 II Consumer Code.

⁵⁷ Art. L121-1 and Art. L121-1-1 Consumer Code.

⁵⁸ Art. L122-11 and Art. L122-11-1 Consumer Code.

⁵⁹ This concerns the material qualities, composition, accessories, origin, quantity, method and date of manufacture, conditions of use and the ability to use the properties and the expected results of use, as well as the results and the main characteristics of tests and controls carried out on the goods.

⁶⁰ Art. 313-1 Criminal Code.

constitutes⁶¹ an aggravating circumstance⁶² that increases the penalty for the crime. The maximum penalties for simple fraud are five-year imprisonment and 375,000 euros fine, while they are 10 years of imprisonment and a fine of one million euros for aggravated fraud.

3.2.5 *Publicité mensongère et trompeuse* (False and Misleading Advertising)

False or misleading advertising consists in the fact that a professional disseminates misleading information about his products and intends thereby to win support of customers.⁶³ Deceptive advertising practices apply to advertising that must emanate from a professional but that can target both professionals and consumers. The offending advertisement may relate in particular to the substantial qualities and properties of the goods and to the main characteristics of tests and controls carried out on the goods.

Advertising must then be false or likely to mislead; in other words, it is not necessary that the advertising actually cheats provided that it is likely to do so. The onus of proof is on the victim of deception, and the proof of the bad faith of the seller is not required.

The assessment of the misleading is referred to an average contractor, reasonably attentive and informed. The sanctions are those provided for unfair commercial practices. The fine may be fixed to 50 % of the expenditure for publishing the misleading advertising.

3.2.6 *Mise en danger de la vie d'autrui* (Endangerment of the Lives of Others)

The offense called endangerment of another person's life is characterized by the deliberate violation of a duty of care or precaution imposed by the law or regulations,⁶⁴ which is the case of the regulations governing the type approval of vehicles.

This offense was invoked especially in relation to the Creutzfeldt-Jakob disease, asbestos-related losses, nosocomial infections, and death caused by medical

⁶¹ Art. 132-71 Criminal Code.

⁶² Art. 313-2 Criminal Code.

⁶³ Art. L121-1 Consumer Code.

⁶⁴ The Chambre d'Accusation (Indictment Division) was right when it confirmed the order of refusal of information about a complaint accusing the mayor of Paris to have directly exposed people to the immediate risk of death or injury by not adopting effective measures to mitigate the effects of air pollution, as the provisions relied upon by the claimants in support of their complaint did not impose on the mayor a specific duty of care and precaution (Cour de Cassation criminelle, No. 95-86205, Bull. crim. n° 274, Dr. pén. 1996. 265, obs. Véron, Rev. sc. crim. 1997. 106, obs. Mayaud, et 390, obs. Robert J.H.).

malpractice. The endangerment offense assumes that the violation of the rule directly exposes the person to immediate risk of death or of injuries resulting in mutilation or permanent infirmity.

It will be up to Courts to decide whether there has been this endangerment in the Dieselgate affair, and a special role will be played by the experts appointed by the Court, who will advise the Court on the effects to the health of individuals of the increased pollution caused by the affected VW vehicles.

Judges will also have to establish whether there was a direct and immediate causal link between the breach of the rule and the exposure to risk. However, it is not necessary to establish that the violation was the exclusive cause of the risk. It is noteworthy that the offense under examination does not imply the existence of a concrete prejudice to the victim; it is sufficient that the victim has been exposed to a risk. The penalties for this offense are one year of imprisonment and 15,000 euros fine.

3.3 *Civil Law Aspects*

The counterparty of VW has several actions against VW. Some relate to the validity of the contract; other actions concern its performance.

3.3.1 **Civil Actions: The Conclusion of the Sales Contract**

*Dol*⁶⁵ (fraud) may be invoked. Misinformation, possibly provided at the time of the purchase, has raised false expectations among consumers who purchased the vehicle. For this reason, the contract was flawed. The fraud could well imply the cancelation of the contract when the scams practiced by one party are such that it is obvious that without these scams the other party would have not executed the contract. In France, the level of NO_x is not part of the contractual regulation. Only the level of emission of CO₂ is specified by the deed of sale.

But the fact that the type approval was obtained by VW irregularly certainly involves deception. All devices by which one party misleads the other party and so determines the conclusion of the contract are relevant. In this scandal, VW lied and the purchaser thought that his vehicle was type approved after a due process, but this was not the case. The originality of the Dieselgate is that the vice affects new vehicles and not used ones. If we go through the case law, we can detect that typically scams concern transactions of used vehicles.

⁶⁵Under French contract law, *dol* is a scam of a counterparty aimed at deceiving his partner. Fraud is, together with error and violence, one of the three vices of consent.

The victim of a fraud has a well-known option. It may decide to request the cancellation of the contract, possibly claiming also damages; alternatively, it may merely ask for damages, without requesting the cancellation.⁶⁶

If the future effects of the contract do not raise particular problems, it is not the same with reference to the past effects of the contract:

- If the contract has not been performed by the parties previously to the cancellation (no delivery of the vehicle and no payment of the price), there will be obviously no restitution. The only effect of the cancellation will be that the parties may not request to the Court the enforcement of the contract.
- If the contract has been performed (car delivered and price paid), its past effects will be challenged.⁶⁷

3.3.2 Civil Actions: The Implementation of the Sale Contract

The professional must deliver goods that comply with contractual provisions and regulations. A general obligation is laid down by the Civil Code (Arts. 1134 and 1135).

To be compliant, the delivered goods should correspond not only to what was agreed upon by the parties in the contract but also to the law and administrative regulations.⁶⁸ Article 1135 of the Civil Code states: "The contracts oblige not only to what is agreed upon in it, but also to all the consequences which equity, usages or

⁶⁶The invalidity that may be invoked is relative and is time-barred after a five-year term. In principle, the starting point of this term is the day of the execution of the contract. However, in this case, it would start to run only from the day when the fraud was discovered. A Court will be required to annul the contract.

⁶⁷Thus, the cancellation of a bilateral contract will result in reciprocal restitutions. The seller shall return the amount that he received. He will be held to pay interest on the sum if he has acted in bad faith, which would probably be the case here. The buyer shall reconstitute the car. When restitution is not possible (loss, destruction, sale), compensation will be by equivalent (monetary). Damages to the car will be eligible for compensation. However, due to the retroactive effect of the cancellation of the sale, the seller is in principle not entitled to an indemnity equal to the benefit to the purchaser for the use of the vehicle.

⁶⁸The good sold must comply with administrative standards: it seems logical, if not otherwise stated, to require the seller to deliver a good that is in good working conditions; this is a natural effect of the contract (Cod. Civ. Art. 1135). For example, the developer who delivers a land that does not meet the building standards (Cass. 3e civ. 17 January 1990, Bull. civ. III, no 26, D. 1991, somm. 168, obs. Tournafond O.), the seller who delivers a restaurant whose electrical installation does not meet the safety rules (Cass. com. 21 January 1992, Bull. civ. IV, no 33), the selling company that installs an alarm system with outdoor siren at a private home without making sure of obtaining the mandatory administrative authorization (rapp. Cass. 1re civ. 27 October 1981, Bull. civ. I, no 315, D. 1982, IR 532, obs. B. Audit), the vendor who delivers a stolen motor vehicle (Cass. 1re civ. 29 May 1996, Bull. civ. I, no 230, D. 1997, somm. 346, obs. Tournafond O.), or a vehicle not compliant with the provisions of the technical inspection (Cass. 1re civ. 29 January 2002, Bull. civ. I, n° 35) do not properly perform the duty to deliver to which they are contractually bound.

law provide.” The dissatisfied purchaser of the delivered goods may exercise the exception of nonperformance, the right of option between resolution and enforcement of the contract, the request of damages based on the contractual liability of the seller.

In this case, the delivered cars did not comply with the standards and administrative regulations concerning type approval of cars.

Besides the general provisions of the Civil Code, Articles L. 211-4 and following of the Consumer Code⁶⁹ may govern the relationship between the professional and the consumer. In this regard, French law will probably not represent a marked peculiarity.⁷⁰ The guarantee applies only to the contractual relationship between a professional seller and a buyer acting as a consumer.⁷¹

In the case of the Dieseldgate, this specific guarantee would be difficult to enforce. This is so because in France the information to be disclosed to the buyer of the car concerns CO₂ emissions and not NO_x emissions. Decree No° 2002/1508 of 23 December 2002 on the information on fuel consumption and emissions of carbon dioxide from new passenger cars requires that the measurement of fuel consumption and carbon dioxide emissions (CO₂) is indicated at each selling point on each new passenger car and prominently displayed. If CO₂ measurements were found to be different from those displayed by the manufacturer, the consumer would be entitled to invoke the noncompliance of the vehicle.

Until now, the Tribunal of Soissons (Aisne) issued a decision on four claims commenced in November 2015 against Volkswagen Group France, claiming delivery of a vehicle compliant to the purchase order.⁷² The four French plaintiffs were dismissed by the Tribunal.⁷³ The applicants were also ordered to pay to the defendant the sum of 1,800 euros each as refund of legal costs.

3.3.3 Civil Liability Actions

Victims may consider seeking compensation for damages suffered. This type of action does not, in principle, imply the refund of the price or the replacement of the vehicle. Compensation may be sought for damages caused by the misleading information provided at the time of the sale or by changes to the vehicles within the postsale fixing operations.

⁶⁹ Art. L211-4 Consumer Code, confirmed in Articles L217-4 of Order No. 2016/304 of 14 March 2016.

⁷⁰ This standard derives from the implementation into French law of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees and was inspired by the Vienna Convention of 11 April 1980 on the international sale of goods.

⁷¹ Art. L211-3 Consumer Code.

⁷² www.journalauto.com 29 April 16; de la Brosse (2016).

⁷³ *Ibid.*

Civil Actions Consumers

Volkswagen France affirms that there is no harm to French buyers of the affected vehicles. At the end of November 2015, Volkswagen announced that European buyers affected by the Dieselgate would not be compensated, unlike their US counterparts. The disclosure of the level of NO_x emission would be the object of a contractual term in the US, not in Europe. VW France considers therefore that no harm was produced to European clients, to the extent that the fixing operations would correct the defect and considering that all necessary measures would be promptly undertaken by VW. This approach by the German group vis-à-vis the law of civil liability may probably be explained by the desire to discourage actions in Court by dissatisfied buyers.

It is submitted that the French legal system does not provide for punitive damages and that the damages suffered in the context of the Dieselgate require in-depth studies as they are relatively complex to evaluate.

In any case, it is clear that a breach of the law has been committed by the VW group as far as type approval of vehicles is concerned. A clear causal link connects this breach to the damages. These could include several economic losses: vehicle depreciation, difficulties or impossibility to sell the used vehicle, difficulties in case of future technical controls and tests if regulations were to change, etc. Damages may result from the bad image toward third parties that may derive from the property of an affected vehicle.

The fixing of the cars by VW will determine a lack of availability of the vehicle for the owner, and it will be necessary to monitor how VW executes the fixing. It will also be necessary to verify if the fixed vehicles do show unfavorable characteristics (higher consumption, ineffective reduction of levels of pollution, modified top speed, increased amount of particles, reduced particles filter life, etc.). The French owners of affected vehicles will test their cars before and after the fixing by the manufacturer in order to ensure that the technical characteristics of the cars are preserved.⁷⁴ If the damage is established, the conditions for the implementation of actions for recovery of damages could be met.

Civil Actions for Environmental Victims

The effect of diesel on human health is known.⁷⁵ An environmental victim can bring an action against the liable person. The right to the environment could be the

⁷⁴AFP 26th April 16. The French owners meeting within the ADD Association (Action Auto Defence) have decided to anticipate the fixing and to test their cars before and after upgrading, in partnership with the Union of independent car experts. A dozen of vehicles, belonging to the four affected brands (Volkswagen, Audi, Seat, and Skoda), will thus undergo a consumption test and an analysis of pollution by NO_x (nitrogen oxides) before and after the upgrading in order to assess the efficiency of the technical solution envisaged by VW and the effective preservation of technical and contractual standards.

⁷⁵Senate report on behalf of the Commission of Inquiry on the economic and financial costs of air pollution (Rapp. Sénat No. 610/2015, p. 59 ff.).

basis for civil liability for environmental damages. In our case, the injury would result from additional pollution generated by fraud.⁷⁶ The European Court of Human Rights went so far to explicitly recognize the human right to the enjoyment of a healthy and protected environment.⁷⁷

Individual actions for damages are, however, poorly suited for mass damages since the interest to act before the Court of the single claimant could be difficult to evidence. It could result from the additional pollution provoked by the fraud damaging the individual. The evidence of the latter would also require expertise that weighs down the proceeding.

Collective action, better suited, could come from an association acting⁷⁸ in the interest of individual members.⁷⁹ Collective action is a method that has many disadvantages, which are well known,⁸⁰ but its regime tends to be softened by a

⁷⁶A first step in this direction can be found in the jurisprudence of the European Court of Human Rights that protects the environment through other fundamental rights such as the right to life (ECHR, *Öneryildiz vs. Turquie*, 18 June 2002), the right to a fair trial (ECHR, *Zander vs. Sweden*, 25 November 1993), the right to respect for private and family life (ECHR, *Lopez-Astra vs. España*, 9 December 1994; ECHR, *Anna Maria Guerra vs. Italy*, 19 February 1998; ECHR, *Kyrtatos vs. Greece*, 22 May 2003).

⁷⁷ECHR, *Tatar vs. Romania*, 27 January 2009.

⁷⁸Cass. Civ. 3e, 19 Oct. 1978, D. 1979. 581. The Supreme Court recognized the right, in the case of the residents of a neighborhood committee grouped against air pollution caused by a coffee roasting plant, to seek compensation for the damages caused to the interests of the members of that committee.

⁷⁹The traditional approach of self-interest to act before a Court means that in principle a person may not defend the interests of others. This approach is based on the rule that "nul ne plaide par procureur," according to which the proceedings in Court are not regulatory but result in a decision regarding a specific case. For this reason, the collective exercise of actions requesting compensation for several individual damages should be prohibited. This is the case before criminal courts and less rigorously before administrative courts. However, it is settled case law in civil law matters that the action of an association organized as a defense committee asking compensation for damages suffered individually by its members is admitted by the Court, provided that the statute of the association empowers the latter to act on behalf of its members. Thus, the law opens the way to the collectivization of civil actions, a necessity in cases of mass torts, as often environmental torts are.

⁸⁰Despite the potential benefits of collective proceedings for compensation of individual damages caused by environment torts, the recourse to such action is weakened by uncertainties about their conditions and effects. From the perspective of the conditions of admissibility of collective proceedings, there is uncertainty as to whether all members must evidence to have suffered injury or evidence of injury to one is sufficient. From the perspective of the effects of the action, in most cases the decisions do not engage in a case-by-case allocation of damages to each member, but damages are assessed in a very comprehensive and generic manner. The result is that the damages obtained by the association are often kept by it rather than distributed to members. These uncertainties and inconsistencies prevent this procedural tool to become an effective means for compensation in mass tort litigation. This form of civil action is not used for compensation of a large number of individual damages but is the most useful for groups not exceeding a few tens of victims.

pragmatic jurisprudence.⁸¹ The action in joint representation,⁸² for its part, has never really worked.⁸³ Group action is not envisagable, at present, with reference to environmental damages.

3.4 Group Action

Consumers can, as the environmental victims, form an association and collectively defend their converged individual interests. But they can also, pursuant to Hamon Law No. 2014-344 of 17 March 2014, bring a group action. These actions tend to the compensation of economic damages to property suffered by consumers placed in the same or similar situation.⁸⁴

The right to bring a group action requires the establishment of a particular quality:⁸⁵ the law permits the exercise of collective actions only to consumers' associations acting at national level and approved by the State. The procedure, which is more complex than that governing individual proceedings, applies only to the enforcement of consumer rights. Victims of environmental damages may not act through a group action against VW. Only consumers who bought the affected cars may act through a group action toward VW. To this end, the Paris Bar has launched a platform (avocats-actions-conjointes.com) to promote the joint submission of consumers' complaints against Volkswagen. The advantage of group action in this case consists also in limiting the costs of the trial for each individual claimant. It is very likely that the complexity of the assessment of the damages will make the recourse to expensive expertise necessary.

⁸¹Cass. civ. 2^{ième} 7 December 2006 n° 05-20297, *Envir.* 2007. Comm. 63; Civ. 2e, 16 November 2006, n° 05-19062; *Envir.* 2007. Comm. 63; Cass. Civ. 2^{ième} 5 October 2006, n° 05-17602, *Bull. civ. II*, n° 255; Cass. Civ. 3e, 8 June 2011, n° 10-15500, *D.* 2011. 2635, note Parance; Cass. civ. 3^{ième} 9 June 2010, n° 09-11738. *D.* 2010. Pan. 2468, obs. Trébulle; *D.* 2010. 2608, obs. Monge et Nesi.

⁸²Art. L142-3 Environmental Code enacted by the Loi of 2 February 1995.

⁸³The joint representation action is surrounded by extremely restrictive conditions that reduce its practical usefulness. It is reserved only for approved associations, and the approval procedure is quite complex. In addition, the need for prior identification of all victims makes this action almost useless for groups of up to several hundreds or thousands of victims. Above all, the possibility for environmental protection associations to seek the mandate of victims of environmental damage is excluded, which reduces the scope of the joint representation action with regard to environmental mass torts. Authorized associations do not have sufficient money to manage hundreds or thousands of claims and are reluctant to act, fearing to bear a heavy responsibility for errors in the management of the cases. For all these reasons, the number of joint representation actions exercised to date is insignificant.

⁸⁴Art. L423-1 Consumer Code.

⁸⁵Art. L411-1 Consumer Code.

4 Answers of the Manufacturer

The answers proposed by the manufacturer raise a number of questions. As it has been said, the communication of the VW group was, initially, hesitant, awkward. The advertising agency acting for VW was even accused to have threatened French media to postpone or even cancel advertising campaigns in order to put pressure on the contents of the information regarding the fraud committed by Volkswagen. The car manufacturer denied to have ordered such conduct, but it remains that the advertising agency works exclusively for the Volkswagen group.⁸⁶

On the merits, Volkswagen France began the process of recall announced on 15 October 2015. This fixing will be spread over the year 2016. The group does not want to compensate its clients but proposes to update the affected vehicles. The announcement of the absence of any proposal of amicable compensation seems to be an attempt to discourage victims from seeking compensation. Even if it is submitted that the damage is complex to estimate in the present case, this does not mean that it should be a priori excluded.

Measures concerning the affected EA 189 diesel engines, 1.2,⁸⁷ 1.6,⁸⁸ and 2.0, have been validated by the German Federal Authority for Transport (KBA). Customers are being informed about the next steps. VW claims that, after the implementation of these corrective measures, the vehicles will meet the applicable emission standards while such interventions will not alter the engine power, fuel consumption, and performance of the cars. Technical measures for 2.0 l engines will be implemented in the first quarter of 2016, for 1.2 l engines in the second quarter. From the third quarter of 2016, to complete the recall campaign, the measures will affect the 1.6 l engines. Volkswagen AG announced that, while these technical measures are carried out, it will do every effort to avoid inconveniences to customers' mobility. Volkswagen will ensure that a replacement mobility solution is offered free of charge to all customers.

Finally, until 31 December 2017, Volkswagen AG expressly waives the right to invoke any statute of limitations with regard to claims arising from software installed on vehicles equipped with the EA 189 engine, even if the time limit to file such claims has already expired. Volkswagen customers will not bear the legal inconveniences of any waiting. This decision by VW raises some concerns in the affected car owners who do not understand why, if the update is so simple, it has not been done before.

More indirectly, Volkswagen responds to the scandal by investing heavily in the market of electric cars. An extensive renovation program of the range sets

⁸⁶Couberchet (2015).

⁸⁷Engines 1.2 and 2.0 will undergo a software update. The time necessary for this update will be less than half an hour.

⁸⁸Engines 1.6 will also undergo a software update. In addition, a "flow regulator" will be installed in front of the air mass flow meter. The time requested for the upgrading process will be less than one hour.

ambitious goals since Volkswagen says it wants to become the world leader in sustainable mobility. To achieve this goal, the manufacturer will launch more than 30 new electric vehicles by 2025. Also in 2025, the Wolfsburg firm hopes to sell between two and three million of its “BEV” (battery electric vehicle). The implementation of this program will probably attract the attention of analysts and consumers.

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