

# UNFAIR COMMERCIAL PRACTICES IN THE AUTOMOTIVE SECTOR: THE VOLKSWAGEN CASE

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## 1. INTRODUCTION

In August 2016 the Italian Competition Authority (ICA) adopted a prohibition decision against Volkswagen AG e Volkswagen Group Italia S.p.A. finding an unfair commercial practice. The investigation concerned the marketing of diesel vehicles on the Italian market (with identification code EA189), from 2009 to September 2015, whose approval was obtained through the use of software in the engine control unit, the so-called “*defeat device*.” Such device can make the vehicle behave differently during the bench test for emissions control, so as to reduce emissions during the test compared to those associated with the normal road use. The ICA found that such commercial practice was unfair as it infringed article 20, paragraph 2, article 21, paragraph 1, letter b), and article 23, paragraph 1, letter d) of the Consumer Code.

The case is part of the wider “*dieselgate*” which erupted on 18 September 2015, when the United States Environmental Protection Agency issued a notice of violation of the Clean Air Act to German automaker Volkswagen Group after it was found that Volkswagen had intentionally programmed TDI diesel engines to activate certain emissions controls only during laboratory emissions testing. The programming caused the reduction of vehicles' NO<sub>x</sub> output during regulatory testing compared to real-world driving conditions. Volkswagen deployed this programming in about eleven million cars worldwide (roughly 700,000 in Italy), during model years 2009 through 2015.

## 2. THE REGULATORY FRAMEWORK IN EUROPE

The European legislation on automobile registrations within the EU and emissions of polluting gases is mainly contained in the following acts:

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- i. Directive 2007/46/EC establishes a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles; moreover, it establishes the technical and administrative requirements to be met in the fields of safety and environmental protection;
- ii. Regulation (EC) No. 715/2007 relates to the type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information; as well as, the Regulation of Implementation 692/2008/EC, which defines the details of the requirements for approval.

The purpose of Directive 2007/46/EC is to ensure that new vehicles sold on the market offer high levels of safety and environmental protection. In particular, it defines the framework of technical requirements for the approval of new vehicles in order to facilitate their registration, sale and entry into service in the Union. The approval procedure defined by the Directive is based on the principles of third-party approval and mutual recognition. Under the provisions, before being placed on the market, the vehicle is tested by a technical service designated by the approval authority. Based on these tests, the designated national authority grants approval. Once the approval is obtained in a country of the Union, the manufacturer may apply for approval in any other EU country. Upon obtaining approval, all vehicles of its type will be registered on the basis of the certificate of conformity, namely the declaration issued by the manufacturer certifying that the vehicle conforms to EU approval requirements.

Regulation 715/2007 establishes common technical requirements for type-approval of vehicles and spare parts, as well as their emissions (Euro 5 and Euro 6 standards). In particular, Article 4 of the Regulation states that manufacturers must demonstrate that all new vehicles sold, registered or put into service in the Community, as well as new replacement pollution control devices, are types approved in accordance with this Regulation and implementation measures. Manufacturers' requirements include compliance with the emission limits for all major polluting gases. Among manufacturers' other obligations: to ensure that type-approval procedures for verifying conformity of production, durability of pollution control devices and in-service conformity are met (Art. 4, paragraph 2), as well as to set out CO<sub>2</sub> emissions and fuel consumption figures at the time of purchase (Art. 4, paragraph 3). Article 5, paragraph 2, also establishes that, with the exceptions listed exhaustively in subsequent letters a), b) and c) of that paragraph, the use of *defeat devices* that reduce the effectiveness of emission control systems shall be prohibited. Art. 3, paragraph 10 of the Regulation defines manipulation systems, *i.e. defeat devices*, “any element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use.”

### 3. THE ICA'S ASSESSMENT

The investigation revealed that Volkswagen AG had installed an exhaust gas recirculation system (called EGR system) in Group vehicles with EA 189 EU5 diesel engines, capable of operating in two distinct modes and recognizing when the car is in the bench-testing phase in an NEDC<sup>2</sup> emissions control cycle. When this happens, the degree of exhaust gas recirculation is artificially increased in order to provide a lower result of NO<sub>x</sub><sup>3</sup> emissions than during the normal road use of the vehicle. The EGR system is in fact capable of recognizing when the vehicle is on rollers in an NEDC cycle of emission control, by setting the exhaust gas recirculation system to provide a lower result of NO<sub>x</sub> emissions than in normal road use.

The German Federal Motor Transport Authority (Kraftfahrt-Bundesamt, or KBA) viewed this software as illegal, and ordered a full recall of all affected cars in Germany. Therefore, Volkswagen decided to recall around 8.5 million cars in Europe. The German authorities required Volkswagen to remove the software and to ensure that emission rules were fulfilled. For EA 189 vehicles not yet registered, the KBA ordered to remove the device before marketing and sales, while for vehicles already in circulation, there must be a mandatory recall campaign to remove the EGR system.

The investigation also focused on traders' related conduct, which consisted in disseminating specific green claims with regard to the manufacturer's particular environmental sensitivity or specific attention to the level of polluting emissions of its cars, as well as indications about conformity with parameters on pollutant emissions and the environment.

The ICA considered that such conduct was an unfair commercial practice under different aspects. First of all, the ICA considered the conduct as unfair under the general clause of article 20, paragraph 2 of the Consumer Code as being contrary to professional diligence and likely to appreciably distort consumers' economic behaviour.

With reference to diligence requirements, traders deliberately installed the Group's EA 189 diesel vehicles with an illegal exhaust gas recirculation system, contrary to EU legislation on approvals, in

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<sup>2</sup> The New European Driving Cycle (NEDC) is the standard currently in force in Europe for bench testing for type-approval of motor vehicles. It is an artificial driving cycle defined by EU Directive 91/441/EC, which has imposed a common procedure for measuring real fuel consumption and pollutant emissions, consisting of the repetition of four "urban" cycles, at a maximum speed of 50 km/h and one extra-urban cycle at a maximum speed of 120 km/h. The series aims to represent the typical use of a car in Europe and is used to assess the levels of pollutant emissions from vehicles, to respect the limits set out in Annex I of EC Regulation no. 715/2007, and for fuel consumption. Although the cycle is considered unrealistic because accelerations are rather moderate and not very representative of real driving, it is still the standard currently in force for vehicle approval purposes.

<sup>3</sup> NO<sub>x</sub> (nitrogen monoxide) emissions, together with emissions of CO (carbon monoxide), HC (unburned hydrocarbons) and Particulates constitute the set of parameters that make up the EURO approval system.

order to alter the results of the tests on pollutant emissions, in particular the level of NOx emissions. The ICA considered this conduct a serious breach of the requirements of professional diligence. In fact, it was an evident failure to respect the normal degree of skill and care reasonably expected, considering the importance and the reputation of one of the leading global players in the automotive sector and the increasing importance of environmental issues in guiding customer consumption choices.

Furthermore, the ICA established that the conduct appears likely to significantly distort consumers' economic behaviour, causing them to make expensive consumer choices which they would not have made had they been aware of the real characteristics of the purchased vehicle. By altering the detection of NOx emission levels during the test, in fact, traders were able not only to bypass the NEDC test by using an illegal defeat device, but also to be accredited with lower NOx emission levels than real values.

In this regard, the ICA noted that growing environmental awareness can guide consumers' commercial choices, to the point that the competition in various markets also involves the claim of features and product innovations to preserve nature and the environment (*green claims*). Therefore, consumers attentive to these values would have been significantly affected in their purchasing choices, had they been aware that tests on pollutant emissions were obtained using an illegal defeat device. Indeed, said device was capable of altering the level of NOx emissions, considered so important by the EU lawmaker in combating pollution as to be subject to regulations designed to reduce them gradually over time.<sup>4</sup>

Evidence of the clear impact of the conduct on consumers' commercial choices is given by the numerous reports submitted by private parties and consumer associations during the proceedings. According to the ICA's opinion some of these reports highlight that if consumers had been aware of the defeat device in the control unit of the vehicles they would not have purchased them.

On the other hand, the ICA considered that installing EA 189 diesel vehicles with a defeat device capable of altering the pollutant emission tests also violates art. 23, paragraph 1, letter d) of the Consumer Code. The circumstance (referred to in the cited article) that *conditions of authorisation, acceptance or approval granted were not observed*, with reference to the vehicle type-approval procedure, results from the fact that Volkswagen used a *defeat device* in the control unit of EA 189 diesel engines not allowed by EU rules.

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<sup>4</sup> See in particular the information contained in sections 5 and 6 of EC Regulation no. 715/2007: "(5) *Achieving EU air quality objectives requires a continuing effort to reduce vehicle emissions. For that reason, industry should be provided with clear information on future emission limit values,*" "(6) *In particular, a considerable reduction in nitrogen oxide emissions from diesel vehicles is necessary to improve air quality and comply with limit values for pollution.*"

Finally, in the light of the above-described conduct, the ICA deemed that traders' use of advertising is relevant in relation to ecological claims and indications about conformity with parameters for pollutants and the environment.

From this point of view, the ICA noted that the so-called *green claims* or *environmental claims* - to suggest or imply or merely to evoke minor or reduced environmental impact of a product or service - have become an important advertising tool that can significantly guide consumers' purchasing choices, based on their heightened sensitivity to these issues.

Consistent with international guidelines,<sup>5</sup> the ICA believes that it is essential for traders, who intend to use these claims in their marketing policies, to present them in a clear, truthful, accurate, unambiguous and non-deceptive way.

Under these circumstances, the evidence obtained in the proceedings revealed - in various information catalogues disseminated on the websites of the individual Group brands, as well as through the network of dealers and retailers - specific green claims of the manufacturer's particular environmental sensitivity or specific attention to the level of polluting emissions of its passenger cars.

The ICA noted that consumers reasonably interpret such messages to mean the motor vehicle manufacturer makes environmental protection one of its main objectives. Hence, in the awareness of a particular social responsibility, the manufacturer is guided in its production strategy (eg: "*Environmental responsibility is a cornerstone of Audi's strategy*"<sup>6</sup> - "*The motorist who chooses this car thinks in a responsible and environmentally friendly way*"<sup>7</sup> - "*The green SKODA logo expresses the automobile manufacturer's awareness of sustainable development, acting responsibly towards the environment and doing everything possible to move in this direction, with a deep respect for life and for nature*"<sup>8</sup>). Moreover, some claims assert compliance with regulations on pollutant emissions.

The ICA considered that these messages, in the light of the above, are likely to mislead consumers, pursuant to Art. 21, paragraph 1, letter b) of the Consumer Code, regarding the producer's environmental and social responsibility claims, as well as claims of compliance with current regulations.

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<sup>5</sup> See in this regard, the "*Compliance Criteria on Environmental Claims*" document available on the Internet at [http://ec.europa.eu/consumers/consumer\\_rights/unfair-trade/environmental-claims/index\\_en.htm](http://ec.europa.eu/consumers/consumer_rights/unfair-trade/environmental-claims/index_en.htm), as well as the Guidelines on application of the "Unfair Commercial Practices Directive," updated and published on 25 May 2016 available on the Internet at [http://ec.europa.eu/consumers/consumer\\_rights/unfair-trade/unfair-practices/index\\_en.htm](http://ec.europa.eu/consumers/consumer_rights/unfair-trade/unfair-practices/index_en.htm). Also see "*Consumer market study on environmental claims for non-food products*" of the European Commission, Justice and Consumers, July 2014, available on the Internet at [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/environmental\\_claims/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/environmental_claims/index_en.htm) and Appendices and linked reports.

<sup>6</sup> Audi catalogues of cars A1, A3 and A4 issued in 2013 and 2014, in a specific paragraph titled "*Environmental responsibility*."

<sup>7</sup> Volkswagen Golf catalogues 2010, 2011, 2012, there is a specific page titled "*Golf BlueMotion: Volkswagen's most eco-friendly Golf ever*."

<sup>8</sup> Skoda Rapid Spaceback catalogue, June 2015.

## 4. CONCLUSIONS

The ICA found that the commercial practice jointly put in place by Volkswagen Group Italia S.p.A. and Volkswagen AG, concerning the marketing of diesel vehicles EA189 on the Italian market, from 2009 until September 2015, was unfair as it infringed article 20, paragraph 2, article 21, paragraph 1, letter b), and article 23, paragraph 1, letter d) of the Consumer Code.

Firstly, pursuant to Article 20 of the Italian Consumer Code, the ICA deemed such commercial practice to be contrary to the requirements of professional diligence. In fact, it is likely to materially distort consumers' economic behaviour, causing them to make transactional decisions they would not have made had they been aware of the actual features of the vehicles.

Secondly, the ICA found a violation of the article 23, paragraph 1, letter d) of the Consumer Code.

Thirdly, the ICA ascertained that specific green claims of the manufacturer's particular environmental sensitivity or specific attention to the level of polluting emissions of its passenger cars, as well as claims of compliance with current regulations, present in several catalogues distributed by the Volkswagen group, were misleading under Article 21, paragraph 1, letter b), of the Consumer Code.

The ICA adopted a prohibition decision, according to which the unfair commercial practice was banned and its continuation was prohibited. Given the particular gravity and duration of the commercial practice, the ICA also imposed a fine of 5 million euros - the maximum level of fine provided for by the law - jointly on Volkswagen Group Italia S.p.A. and Volkswagen AG.