
Country Reports

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"Dieselgate" and Consumer Law: Repercussions of the Volkswagen scandal in the European Union

In the section "Country Reports" EuCML regularly provides an overview of issues which are of great importance all over Europe but which EU member states may approach differently due to a lack of harmonisation. The first series of reports reflected on how the business model of the transportation service provider UBER resonates with the regulatory framework of EU member states. The previous country reports covered peer-to-peer lending with reports from Austria, Belgium, Denmark, Germany, the Netherlands and Poland.

In this issue we will start looking at a high-profile topic which has caused great attention throughout the world and therefore of course also has a big impact in the European Union: the Volkswagen (VW) diesel emissions scandal.

It has been a little over 16 months since the first breaking news on the subject became public. In September 2015 the US Environmental Protection Agency announced that VW had equipped several vehicle models with a so-called "defeat device", software built into diesel engines that was able to recognise when a vehicle underwent an emissions test in order to change the emissions accordingly to achieve better test results. Subsequently, VW admitted that about eleven million vehicles worldwide, including eight million in Europe, contained the described device.

On a national level the scandal touches upon various legal issues: the law of unfair competition, contracts, torts, administrative as well as criminal law. The latest development regarding criminal charges was the reported out of court settlement in the US, where VW promised to pay fines in the amount of EUR 4.1 billion.¹ In the States, also many private disputes have already been settled.²

The civil lawsuits pending in various member states are mostly against the respective car retailers, not against VW itself; only some of the cases have been decided, to our knowledge there has not been a decision by a highest court in a country yet. Jurisdiction of the national courts in these cases is partly determined by national jurisdiction rules only. Many of the purchases that became disputable were merely domestic. Other contracts might have been concluded across the borders, e. g. between a German retailer of used cars with Internet appearance and an Austrian consumer purchasing the car in Germany, the relevant jurisdiction then being determined by Art 18 (1) of the Brussels I Regulation. In each of the cases with an international character the court also has to determine the applicable law. Assuming the applicability of the Rome I Regulation this would – depending on the case – either lead to the law of the habitual residence of the seller or the buyer, but each time to the application of some national legal order. In tort cases the relevant jurisdiction and applicable law would depend on the place where the harmful event occurred also largely leading to the jurisdiction of the court where the consumer is domiciled and to the application of the law of this place.

From a private law perspective, the VW scandal represents a challenge for the traditional mechanisms of consumer redress. Questions asked include the issue of liability for the non-conformity of the car with the contract: Who is liable? Is it the producer (VW), the producer of a component or the retailer (i. e. the seller of the car)? The consumer sales directive clearly assigns responsibility to the seller, but this is probably not the best solution for the consumer in all cases.

Applying the consumer sales directive, i. e. the respective implementing laws, the limitation issue arises: Do consumers have any rights if the time limit of two years from delivery has expired? Another important question relates to the potential remedies arising from contract law in general: Do consumers have the possibility to terminate the contract due to the lack of conformity of the cars with environmental standards? Which remedies arise from the reduced power of the cars after the adjustment made by VW, the cars' reduced value in general or the additional costs due to the higher applicable tax classes? The same question can be raised regarding price reduction and it is also interesting to see whether these rights can be exercised when there is no contractual relationship with VW directly. Another possibility would be a claim for monetary damages, but the grounds are not clear, either.

As can be seen by the reactions of the company, VW is clearly addressing the issue globally not referring the issue to the individual sellers. But how much worth is VW's waiver to rely on limitation rights to the individual consumer? And how are consumer rights affected by the recall for refit ordered by the German authority (Kraftfahrt-Bundesamt, KBA)?

The Unfair Commercial Practices Directive may provide some help in finding a solution both at a regulatory and at a contractual level, as selling a car as "environmentally friendly" when it turns out not to be³ is likely to cause the average buyer of these cars to take a transactional decision that he would not have taken otherwise.

Consumer organisations around Europe are very active regarding this issue and the filing of class actions has been announced in many member states.

This issue contains Country Reports from Austria, Germany and Portugal. Further reports from other member states will be presented in issue 2/2017. ■

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1 ZEIT ONLINE of 11/01/2017, 20:41.

2 https://www.washingtonpost.com/business/economy/court-approves-15-billion-emission-settlement-by-volkswagen/2016/10/25/5f94f474-9ad9-11e6-b3c9-f662adaa0048_story.html?tid=a_inl&cutm_term=.3d4f7d62a1d6.

3 F. Henning-Bodewig, 'Corporate Social Responsibility, the VW Scandal and the UCP Directive' (2016) 4 EuCML 153.