



UNIVERSITÀ EUROPEA DI ROMA

“After Dieselgate”.

Situation in Italy. Part II

Ilaria Garaci

April 13, 2018

Motor Liability & Dispute Resolution Working Party

VII AIDA EUROPE CONFERENCE, WARSAW 2018

Dieselpgate in the U.S

- Effective judicial system :
 - Popolar jury
 - Class action based on opt-out model
 - Punitive damages
 - Incentives for lawyers (e.g. success fee)
- U.S (through the United States Department of Justice) and Volkswagen AG and Volkswagen Group of America, Inc. reached a settlement agreement that meets both consumer needs and the more general requirements of deterrence

Dieselpgate in the U.S (ctd)

The agreement involves :

Towards the eligible users:

- Buy-back or recall programme;
- all eligible owners and lessees of affected vehicles will receive cash payments.

Towards the State, VW:

- agreed to plead guilty to three criminal felony (conspiracy, obstruction of justice, entry of goods by false statements) and pay a \$2.8 billions in criminal penalties;
- is obliged to invest \$ 2 billions over the next 10 years in research into technology that reduces harmful emissions, as well as to develop electric cars.

Dieseldate in Europe

- The situation in Europe is different:
 - European regulations on harmful emissions from diesel engines are less stringent than in the U.S.
 - Consequently it is easier to bring cars back into compliance.
- European Commission has adopted Regulation no. 646 of 20 April 2016, which increases the tolerance factor during a transitional period until sept. 2019 and therefore also applies to diesel engines. The Regulation intends to avoid biased testing.

How to deal with Dieselpgate in Italy

Is the Italian and European public and private enforcement system able to act as a deterrent to unlawful conduct by companies?

Italian Competition and Market Authority against VW re. Dieselgate

- **Public Enforcement:** fine issued by AGCM against VW for unfair commercial practice (5 million Euro) represents less than 1% of total turnover of the companies concerned
- **Follow-on Actions:** The AGCM decision re. Dieselgate is likely to be used for **private enforcement** both for individual and collective consumer claims : the findings of AGCM related to the unfair commercial practice can be validly used as evidence to ground the civil actions

Private Enforcement before Italian courts re. Dieselgate

- Court of Venice declared the class action request against the VW and its Italian subsidiary **admissible** (May 27, 2017).
- The Court confirmed:
 - **homogenous individual** interests and rights
 - that the claim is **not manifestly unfounded**
- The Court of Appeal of Venice upheld the decision of the Court of Venice (October 15, 2017)

Private Enforcement before Italian courts re. Dieselgate (ctd)

- High level of adherence to the Dieselgate class action : +/- **90.000 consumers**
- No decision on the merits yet
- Court assessment on the merits re. claims (pecuniary and non pecuniary damages)
 - Difficult assessment
 - no incentive to settle

Class action regime in Italy

- **Consumer class action** under Consumer Code (art. 140 bis).
- Effective from 2010, but applies to illegal acts after 15 August 2009
- **Scope of application:**
 - Consumer contracts,
 - Unfair commercial practices
 - Antitrust
 - Product liability
- **Who can act?**
 - Consumers and consumers' associations (as representative of individual consumers)
- **Who can join the class action?**
 - Consumers with homogeneous individual rights
- **How to join the class action ?**
 - Opt-in model within a period set by the court not exceeding 120 days.

Class action regime in Italy (ctd)

Main objectives of consumer class action:

- Prevent and stop unlawful practices
- Access to justice for “trifling damages”, when the cost of individual actions would deter the harmed individuals from going to court
- efficiency and economy of proceedings

Hurdles to deterrent effect

- Little success of class action (with few exceptions e.g. Dieselgate): too complex, costly, lengthy to fully reach its objectives.

Reasons:

- opt-in system
 - class representatives must advance costs
 - no incentives (e.g. success fee)
-
- Civil liability in italian system is only based on a **compensatory model** (mono-functional): it is not allow to recognize compensation in excess of actual damages suffered.
 - No punitive damages

Hurdles to deterrent effect (ctd)

- The Italian private enforcement system still appears weak and not suitable in creating a deterrent effect
- Consumers have no real incentive to act

Class Action Bill of Law

Proposed improvements in **Bill of Law**, considering 2013 EC Recommendation

- Main amendments aim to extent:
 - Personal scope: all holders of homogeneous individual rights who suffered a damage (no longer limited to consumers)
 - Legal scope: all unlawful acts (no longer limited to consumer's contracts, unfair commercial practices, anticompetitive conducts and product liability).
- Regulation under Civil Procedure Code (no longer Consumer Code)

Class action Bill of Law (ctd)

- **Increasing deterrent effect:**
 - **Opt-in system** but possibility to adhere **after** favourable court decision (840-sexies lett. e))
 - **success fee** for class representatives and advocates

The role of civil liability in european context

- 2005 Green Paper on antitrust damage proposed :
 - double compensation of damages
 - Disgorgement of profits

BUT:

- 2013 EC Recommendation on Collective redress clarifies that punitive damages should be prohibited
- Directive no. 2014/104/EU on antitrust damages excludes treble or multiple damages as well as punitive damages. Directive does not allow determination of the compensatory measures on the basis of profits, as available in the context of infringements of industrial and intellectual property rights

Enhancing deterrent effect

- **The Italian doctrine has proposed** to expand the current private enforcement rules :
 - analogical application of art. 125 of the Italian Code of Industrial Property providing for the **restitution of profits**;
 - broader interpretation of general restitutionary remedies available in civil law system (**action for unjust enrichment, negotiorum gestio**);
 - recognizing the «**multi-functional**» nature of civil liability

Enhancing deterrent effect (ctd)

- The perspective of «**multi-functional**» nature of the civil liability was also endorsed by the decision of the United Sections of the Court of Cassation in 2017 (**Cass. 5 July, 2017, n. 8730**):
in the context of the **recognition of foreign sentences** containing **punitive damages**, the Court affirmed the principle that the **deterrent** and **punitive** function of civil liability is **no longer incompatible** with the general principles of our legal system.
- It should be noted that the decision of the Court of Cassation cannot go as far as accepting the institution of punitive damages as a general figure in our legal system, since an ad hoc legal provision is always required.

Enhancing deterrent effect (ctd)

- Improving public enforcement (administrative or criminal sanctions): increasing fines **linked to turnover** of the infringer. See:
 - antitrust rules where the Italian Competition Authority can impose a fine of up to 10% of the turnover of the companies involved.
 - General Data Protection Regulation (Regulation (EU) 2016/679): has linked the data breach penalties to the annual turnover of the company

Enhancing deterrent effect (ctd)

- EC working on «**A New Deal for Consumers**» in response to mass-harm cases (affecting multiple EU consumers)
 - Enforcing injunction procedure
 - Improving public enforcement (more effective, proportionate and dissuasive penalties)
 - Making efficient use of out-of court redress mechanism (2013 ADR Directive and ODR Regulation)

Enhancing deterrent effect (ctd)

- EC presented a **proposal for a directive** that will allow the introduction of the collective redress in all the EU Member States.
- Main features:
 - Representative action, the European way
 - Qualified entities will launch representative action on behalf of consumers
 - Better protection against unfair commercial practices
 - Introducing effective penalties for violations of EU consumer law (sanctions linked to the annual turnover of a company)

Thank you for
your attention !