



Association Internationale de Droit des Assurances
International Insurance Law Association
Associazione Internazionale di Diritto delle Assicurazioni
Internationale Vereinigung Versicherungsrecht
Asociacion Internacional de Derecho de Seguros

JOINT MEETING OF THE AIDA CLIMATE CHANGE WORKING PARTY AND THE AIDA CIVIL LIABILITY INSURANCE WORKING PARTY IN CONJUNCTION WITH THE AIDA MOTOR INSURANCE WORKING PARTY

***Testing times for emissions and targets
– counting the cost and insurance implications of failure and false promises***

**AIDA FRANCE CONFERENCE
11:30hrs-13:30hrs - WEDNESDAY 2 DECEMBER 2015
FFSA - 26 BOULEVARD HAUSSMANN – 75009 PARIS**

MINUTES OF MEETING

1. Welcome and Introduction

- 1.1 Tim Hardy as Chair of the AIDA CCWP welcomed everyone, thanking AIDA France for staging the event and providing such good facilities and such a warm welcome at such a troubled time in Paris.
- 1.2 Introductory remarks were kept very brief as plans for the two-hour session were ambitious. A register of attendance was circulated to permit new attendees to be added to our email list. A number of apologies had been received. Contributions for the meeting had also been received from those unable to attend, notably a 54 page report from the ever-industrious Mercosur group of the CCWP. All presentations and materials would as ever be posted on the AIDA website as soon as possible.
- 1.3 For the first 30 minutes Sara Landini, Chair of the AIDA MIWP and Marco Frigessi, Vice Chair of the AIDA CCWP would introduce some of the main factual, legal and environmental aspects of the “VW Dieselgate” affair as now popularly called, before the MIWP members withdrew to conduct the remainder of their meeting separately. The CCWP and CLIWP would then continue in joint session analysing different aspects in closer detail. Marco Frigessi was particularly to be thanked for the initiative of proposing a timely topic of such wide and immediate interest.

2. VW Dieselgate

FIRST PRESENTATION:

A First Survey of the Main Facts and Legal Issues (Marco Frigessi, Italy – assisted by Sara Landini, Paolo Rainelli and Francesca Romanin-Jacur)

- 2.1 18 Sep 2015 saw the US Environment Protection Agency (EPA) issue to VW Group a Notice of Violation of the Clean Air Act (CAA). It was founded on alleged improper programming (a “defeat device”) during emissions testing of diesel engine vehicles, designed to record compliant nitrogen

oxide (NOx) emissions when real-world driving known to be forty times higher. 11m vehicles produced between 2009 and 2015 under brands of VW and Audi thought to be involved worldwide (500k in US). Other actions or investigations simultaneously commenced by EPA and Californian Air Resources Board.

- 2.2 The defeat device software reported as having been discovered by independent research analysis conducted at West Virginia University in collaboration with a US-based NGO. NOx pollution was known to contribute to higher levels of NO2 and ground-level ozone in the atmosphere, responsible for serious health effects. Liability for civil penalties and injunctive relief were in prospect.
- 2.3 VW allegedly in breach of CAA provisions re use of defeat devices and manufacture and sale of vehicles without valid emissions certification. Express recall provisions permit EPA to effect recalls where appropriate. In response for over 12 months VW had insisted no impropriety, merely technical glitches were responsible. Only when confronted with evidence of the defeat device was deception acknowledged in a conference call on 3 Sep 2015 when VW were faced with threats to withhold approval of 2016 VW and Audi diesel models. VW senior management announced that those responsible within VW in the US had to be held accountable and should have informed the main VW Board at least 12 months earlier.
- 2.4 On 29 Sep 2015 VW announced plans to refit up to 11m vehicles affected (including Skoda and SEAT marques also). Germany, then the UK, led the list of countries where most refits were to be expected. Govt responses included German prosecutors investigating fraud allegations against individual VW managers, raids on VW premises and testing of vehicles by other manufacturers; French authorities investigating “aggravated deception” by VW; further probes made by UK, Italian, Australian and Canadian authorities. Swiss authorities took the boldest action of imposing an immediate ban on the sale of VW diesel vehicles. US also suspended sales of VW diesel vehicles and embarked of major review of testing of diesel vehicles of all major rival manufacturers.
- 2.5 VW shares on Frankfurt Stock Exchange suffered an immediate near 30% loss of value in immediate wake of scandal. In immediate prospect are actions by shareholders against the company and management and a derivative action by the company against its management or those accountable for the deception. Claims were potentially to be commenced in a range of jurisdictions, dependent upon location of testing, shareholders, law or jurisdiction governing any prospectus rendered allegedly false. There is an inevitable possibility of knock-on actions against auditors, rating agencies etc.
- 2.6 Class actions against VW reported in US to exceed 230 by early October and in mid-November nearly 100k vehicle owners had joined a class action commenced in Australia and another launched in Italy by a consumer association.
- 2.7 VW inevitably looking at how far any financial consequence of potential 6.5bn euros compensation and cUS\$18bn in fines might in part be met by others. Insurers of VW are known to include Allianz and Zurich. Notifications of potential claims bound to be made across range of covers re shareholder actions, product liability or recall policies and D&O insurance. Product recall and liability often depend on establishment of risk of serious loss or injury. Much recent activity in passing of economic responsibility for recalls to others, but also some degree of fortuity expected. D&O exposures will be discussed more closely later in this session. It was sufficient to note that not all losses will be recoverable from insurers. Coverage for fines is often restricted by policy provision and/or applicable governing law.

SECOND PRESENTATION:

VW Dieselgate and Environmental Claims (Sara Landini, Italy)

- 2.8 The events of “*Dieselgate*” need also to be considered in the context of whether VW are accountable for a misleading “environmental claim”.

- 2.9 In March 2014 the EU Commission published a report addressed to the European Parliament, Council and the European Economic and Social Committee. This concerned the implementation and application of the Unfair Commercial Practices Directive in the context of any claim made in marketing or advertising material by a commercial entity that its products or services were in any way environmentally friendly or less damaging than those of rivals. Two main principles were highlighted: i) any such assertions must be made by traders in a specific, accurate and unambiguous manner; and ii) they must have scientific evidence to support any claims made and to be able to provide it in a comprehensible fashion if any claim is challenged.
- 2.10 There is no EU legislation specifically harmonizing environmental marketing. Environmental claims are partly covered by specific community legislation regulating the environmental performance of a category of products and prohibiting the misleading use of the claim. Certainly any evidence that VW (or other vehicle manufacturers) knowingly allowed its products to be represented as having lower and compliant emissions levels than was the case calls into question whether it was in breach of any such legislation or Directive provisions.

3. The litigation, insurance and regulatory aftermath of VW *Dieseldgate* and wider issues raised

THIRD PRESENTATION:

The VW Scandal watched with D&O Spectacles (Adolfo Paolini, UK)

- 3.1 **Main features of D&O Insurance:** Developed to protect the directors and officers, *not* the company. Generally “claims made” policies requiring liability to be established to trigger substantive cover, which does cover regulatory investigations, but not extend to wilful misconduct or fraud, with pollution often featuring as an exclusion. Traditionally there are three insuring clauses: Side A – coverage for individual D&Os when not indemnified by the company; Side B – for the company indemnifying the D&Os; and Side C – for the company for securities claims brought against it.
- 3.2 **Uncontested facts:** Many of those already laid out by Marco Frigessi in his opening presentation. Of particular note, just seven days before the service of the Notice of Violation by the US EPA, VW made a public statement pronouncing how prosperous and environmentally friendly it was: “*the world’s most sustainable automotive group*”.
- 3.3 **Likely VW scenarios:** These include: i) Company’s Liability for breaching anti-pollution rules; ii) Directors’ liability to the Company for breach of directors’ duties; iii) Class Actions against VW by consumers; iv) Class Actions against VW by company shareholders/investors; v) Attempted actions against directors by third parties; vi) Attempted actions against directors by Environmental Agencies; vii) Regulatory Investigations; and ix) Defence Costs Cover.
- 3.4 **Germany Scenario + D&O implications:** A two-tier system is in operation concerning the respective positions of the supervisory & executive boards of VW. The supervisory board is able to bring a claim on behalf of the company against the executive or management board. Shareholders could move to enforce the supervisory board to do so or utilise power of a court-approved statutory derivative action of evidence of need for redress against suspected dishonesty, costs of which claimed back by shareholders if successful. Company’s admission may not affect ability of innocent directors to make claims if severable interests within composite policies. It is relatively unusual for intra company/inter-insured disputes to be pursued. Insurer decides whether actions to be settled or fought. Funding is now available for shareholder action litigation. Responsibility for defence costs ought to be governed by policy wording. Debate presently being engaged about whether most appropriate to consider limits of indemnity under a policy for supervisory and executive board liability better considered as “twin” or separate towers with different limits of indemnity and how are triggered and/or should interplay.

- 3.5 **UK Strategy:** In contrast, there is a one-tier system, but distinguishing between executive and non-executive directors. Directors' duties are owed to the company. Also, rights of minority shareholders to bring derivative actions. Directors' misconduct can be attributed to the company, but as the UK Supreme Ct ruled in their 2015 judgment in *Jetivia v Bilta* this does not deny by way of a defence of illegality the right of liquidators of the company to bring actions against third parties in the name of the company because their own directors' conduct had been criminal. An earlier 2011 case of *Safeway v Trigger* saw the Court of Appeal reject the company's right to recover from its own directors fines it had paid for serious competition law breaches, owing to the company itself being deemed statutorily responsible for compliance.
- 3.6 On a final question of whether directors could ever be held personally liable to third parties the 2012 Canadian case of *Northstar Aerospace v Min of Environment Ontario Canada* has proved of interest. It was a case where the company knew of its responsibility for a polluting agent and did its best to clean up but ran out of cash, with no suggestion of negligence or malevolence on the part of directors, but the latter were still held personally liable. Despite the presence of a pollution exclusion, D&O insurers agreed to pay up a sizeable sum resulting in settlement of the dispute.

FOURTH PRESENTATION:

VW Dieselgate – A Perspective from the UK (Stephen Turner, UK)

- 3.7 **Overview:** A number of issues of interest arise in the context of potential claims against VW by customers and dealers. Some claimants' lawyers have already drawn attention to the fact that prior to the latest revelations disputes were already occurring about VW's mpg claims. A wider case of mis-selling may be pursued in some cases. In terms of the basis of any cause of action consideration will need to be given to questions such as whether emissions data forms part of any sales contract. Also, what consequences befall customers in terms of any increased liability for vehicle excise duty, complications from MOT emissions testing and any impact upon any resale value of vehicles impacted. No full recall of all vehicles is presently in prospect, although VW is pledging to "fix" – in a way yet to be specified - any vehicles fitted with any "defeat device".
- 3.8 **Consumer claims- class actions?** No provision in the UK for "class actions" as such. In England & Wales there is now scope for a Group Litigation Order to be made at the discretion of the Court for which any claimants must opt *In*, in cases where there are demonstrable "common or related issues". Also, new collective redress reforms under the Consumer Rights Act 2015. Re: costs a "loser pays" regime prevails, but conditional fee arrangements are permitted whereby claimants may be saved bearing their own costs in the event of unsuccessful claims. No punitive damage regimes such as in the US. For any recovery a loss must be proved.
- 3.9 **Regulatory response:** The Driver and Vehicle Standards Agency (DVSA), the UK's automotive regulator, has declared that its priority is to protect the public and that they have a vehicle recall process in place and will be monitoring VW's response to owners to assess the adequacy of any action taken. VW representatives have already appeared before a House of Commons Select Committee. The UK Secretary of State for Transport has been considering possible bases for prosecution. False obtaining of type approval? Possible prohibited unfair commercial practices, misleading acts and omissions under the Consumer Protection from Unfair Trading Regulations 2008? Fraud Act 2006 violations? Obtaining gain or causing loss by false representation or failed disclosure? Remedial action expected to be completed by 2016.
- 3.10 **Insurance implications:** In context of potential customer or dealer claims, important to recognise that product liability policies are typically triggered by liability for injury or property damage. Care

needed if financial loss only in issue. Policies may commonly contain provisions by way of repair or replacement exclusions. More specifically for product recall covers to be triggered there is likely to be need for some risk of physical harm. For product guarantee covers to be triggered it is necessary for there to be some effect on the functionality of the product. Usual questions of issues of fortuity and the obligation on the part of the insured to take reasonable precautions need also to be taken into account.

FIFTH PRESENTATION:

A French Perspective on VW Scandal-related Litigation (Cédric Wells, France)

- 3.11 **French Govt announcements and responses:** In immediate aftermath of the scandal breaking, the French Govt announced that VW must repay the state subsidies it had received as part of *bonus-malus* scheme and random anti-pollution inspections were to be conducted. Additionally, in October the Paris Public Prosecutor announced an enquiry to establish any fraud/prior knowledge of VW directors and to assess potential harm to customers (reduced performance, value, recall inconvenience etc) with help of two bureaux: the environment and public health office and the anti-corruption office.
- 3.12 **VW Response:** VW response in France and US contrasted. In France, approx 950k cars involved, All customers individually contacted to verify on VW website whether vehicle affected and to accept offer of voluntary refit/recall to reformat electronic motor calculator software and in some cases replace injectors and/or catalysers. VW is to refund any tax benefit-related losses and certify current compliance (for benefit of re-sale). In US, re 482k vehicles involved: a financial goodwill package offered by way of pre-paid credit card sum, VW voucher and 3yr roadside assistance. Strategy behind differing approaches: **France** – where 50%+ cars are diesel (a subsidised fuel) intention to make cars **compliant** with type approval regulations + fix an EU-approved recall/re-fit to certify validity of use across EU; **US** - diesel vehicles are small proportion of market and diesel is more expensive, but promoted as “cleaner” fuel option, so purpose of package is principally to **compensate** and fend off class actions etc.
- 3.13 **Civil/criminal law issues in France:** under civil law various grounds available for breach of contract claims with burden of proof on claimant to demonstrate car failed to comply with sales contract and/or any concealed/misrepresented emissions information material to purchase decision, needing to overcome challenge that emissions information was not part of mandatory information required etc; under criminal law various grounds for fraud available (unfair commercial practice, deceptive advertising, forgery etc), with claimants being able to rely on continuing criminal investigations to discharge higher burden of proof required for criminal prosecution.
- 3.14 **Individual and collective initiatives in France (not class actions):** A number of distinct activities have been pursued against VW in France. These include several criminal complaints on behalf of various individuals commenced by the same Counsel in different parts of the country. Collective criminal actions, such as that by one group representing 50+ car owners, another by an ecological NGO and a third, a state-approved form of class action (CLCV) where claimants are encouraged to pursue actions in the same jurisdiction where any vehicle was purchased, using template letters of complaint etc. A further collaborative effort is made by 9,000+ vehicle owners (by mid-Nov 2015) looking to mount a class action-style initiative as a recognised consumer group.
- 3.15 **New business opportunities:** A number of enterprising entities have promoted their services to represent potentially affected consumers/dealers with websites advertising means by which group

settlements may be achieved without recourse to formal legal action and reduced fees. Terms vary between % recoveries from VW of vehicle purchase prices by way of collective bargaining or alternate remedy solutions via class action management.

- 3.16 **“French” Class Actions:** Pursuant to the *Loi Hamon* (since 18.3.14) two or more consumers (*not* corporate professionals or shareholders, etc) may pursue a class action to recover damages for loss from breaches of contract or professional duties owed, confined to compensation as recognised by law not by way of punitive remedy. Actions pursuable only pursuable by State-approved (15 to date) consumer associations, requiring advertising to potential claimants who must positively opt in to an action with representing lawyers unable to rely on 100% success fees. Six such class actions so far commenced, with limited success, but with prospect that the CLCV could develop into one, if not before any fraud by VW is established. Some costs and financial commitment involved and individual features of claimants’ rights have to be accounted for. Suspicion is that if VW manage voluntary settlements and compensation effectively this may reduce prospect of class actions gaining momentum.

QUESTIONS AND DISCUSSION OF ISSUES RAISED IN PRESENTATIONS:

- 3.17 The remainder of the allocated time for the meeting was given over to a lively series of questions and answers concerning what had been established to date in different jurisdictions. Some in the meeting were themselves VW diesel-fuelled vehicle owners who had first-hand experience of negotiating directly with VW representatives for compensation terms, including the provision of new vehicles in return for abandoning class action participation and/or formal legal claims.
- 3.18 There were marked differences in attitude evident between and within different countries, even within the EU, to the significance in terms of consumer perception about the standards of behaviour shown by individual motor manufacturers and/or the importance of emissions testing rules being flouted by VW and/or others. These raised questions about the long-term economic significance of corporate brand image, which had seemed likely to dominate the minds of manufacturers and class insurers alike, both in the context of future promotional advertising and the unfolding of any shareholder actions which may ultimately be pursued.

4. Conclusion to meeting and future work and meetings in 2016

- 4.1 The issues raised by the *VW Dieselpgate* story were plainly at a very preliminary stage, which meant that at future meetings we should look to re-visit those aspects which were likely to be of the greatest significance, particularly to insurers, emerging from what was established about emissions testing and any unexpected insurance problems resulting. It was widely agreed that the collaborative work of the three working parties on this occasion had greatly enhanced the level of interest in the timely issues raised. All contributors were warmly thanked for their efforts.
- 4.2 The meeting closed with Tim Hardy announcing that after a busy year this year with three rounds of Working Party meetings taking place there was in prospect a repeat of three meetings in the coming year: in Helsinki (in June), in Lima (in October) and in Istanbul (in November). Full details of these would be circulated and posted on the AIDA website with all materials from the session just concluded.

Tim Hardy
Jan 2016