

Marco Frigessi di Rattalma *Editor*

The Dieselgate

A Legal Perspective

 Springer

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With contributions by:

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Marisa Marraffino; Adolfo Paolini; Giorgio Pedrazzi; Gabriella Perotti;
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Introduction

On 18 September 2015, the United States Environmental Protection Agency (EPA) issued a notice of violation of the Clean Air Act to German car producer Volkswagen Group. The notice was based on the allegation that the car producer had intentionally programmed turbocharged direct injection (TDI) diesel engines to activate certain emission control systems only during laboratory testing. This manipulation had the obvious aim of bypassing the diesel emission standards in the US so as to get the VW diesel cars approved for the US market.

Not only the USA with 480,000 vehicles but also Germany with 2.2 million vehicles and many other European countries are affected. VW has admitted that about 11 million cars worldwide, including eight million in Europe, are fitted with the so-called defeat device. VW even sold vehicles with the questionable software in China. Several public prosecutors and environmental protection agencies announce investigations or start investigating. In Germany, the Braunschweig prosecutor and the State office of criminal investigations start searching the offices of Volkswagen in Wolfsburg and other (German) cities.

What started in the US has spread to a growing number of countries. The UK, Italy, France, and, of course, Germany, have opened investigations. Throughout the world, politicians, regulators, and environmental groups are questioning the legitimacy of VW's emission testing. In France and China, the authorities start investigating the scandal and the US Justice Department announces that it will sue Volkswagen over the emission scandal. Meanwhile, the VW Group has already made a loss of 3.5 billion euros in the third quarter. Workers employed at the Wolfsburg manufacturing plant and at other plants have to fear for their jobs.

Thus, the Dieselgate can for sure be defined as a global or worldwide scandal.

This book aims to analyze the complex legal issues that arise from the facts that make up the magmatic and not yet fully defined reality that goes by the name of Dieselgate. The book is meant to represent a moment of reflection on something so unprecedented as the Dieselgate. The authors and myself have decided to work hard to give readers interested in exploring the legal issues related to Dieselgate a timely reference point.

The structure of the book is quite simple.

A first group of essays is devoted to the main countries involved by the scandal. These essays shall give a full picture of the main legal consequences and issues triggered by the scandal. They will thus deal with private and consumer law, criminal law, environmental law, etc. to the extent that they are necessary for explaining the implication for each specific jurisdiction.

A second group of essays investigates the Dieselgate each from a specific legal perspective: civil and consumer law, corporate and insurance law, criminal law, environmental law, and European Union law. These contributions are thus centered on specific areas of the law and adopt a comparative law approach.

In sum, this particular structure of the book shall be apt to give to the reader a quite complete picture of the legal dimension of the Dieselgate.

Last but not least, I would like to thank Dr. Marta Lazzaroni, PhD Student and Lecturer of EU law at the University of Brescia, who patiently helped me in the preparation of this book from start to finish.

Milan, Italy
January 2017

Marco Frigessi di Rattalma

Part I
National Perspectives

France

Laurent Posocco

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 Dieselgate on sales volumes and prices of the vehicles. Automotive professionals affirm that, for the time being, the Dieselgate 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 Dieselgate.

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 Dieselgate on the volume of sales cannot be completed at the current state of information. The Dieselgate 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.cdfa.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 prodiesel 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-appfondie-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.).