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## Journal of European Consumer and Market Law

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## "Dieselgate" and Consumer Law: Repercussions of the Volkswagen scandal in Austria

### I. Introduction

The so-called Dieselgate affair was made public mid-September 2015 in the United States (US) by the Environmental Protection Agency (EPA) and the Californian Air Resource Board (CARB). Volkswagen (VW) soon confirmed the usage of an alternative software operating mode built into the engine control units (ECUs) of some US diesel passenger cars from model year (MY) 2008 to MY 2011. By switching the emission relevant maps in the ECU to an alternative operating mode, it was possible to comply with the current emission standards at the moment of type certification.<sup>1</sup> After emissions certification, the operating mode reverted back to normal to improve acceleration and fuel consumption. Due to the higher nitrogen emissions (NO<sub>x</sub>) in this normal operating mode, the emission limits set would not have been fulfilled. A few days later, VW confirmed that similar software was also in use in Europe. As such mechanisms are not compliant with the relevant European emission standard EURO 5 (EU Regulation No 715/2007) either, the approvals in Europe were not correctly obtained. About 11,5 million cars worldwide are affected. These cars now have to be refitted by VW to comply with the legal requirements and to obtain lawful approval.

### II. Upgrade of affected vehicles

After becoming aware of this illegal software feature, the German Kraftfahrt-Bundesamt (KBA) arranged the recall and the preparation of the illegally certified 388.000 cars in Austria. For the majority of the concerned cars, VW announced that regulatory compliance could be achieved by installing a new dataset in the ECUs. In addition to this software update, which is necessary in all affected cars, the 1.6l high-speed direct injection (HSDI) engine also requires a so-called laminar flow element in the intake system of the engine. This reduces the turbulence of the intake airflow and therefore improves the accuracy of the intake air mass measurement, which enables more precise control of exhaust gas recirculation for NO<sub>x</sub> reduction.<sup>2</sup> However, specialists confirm that both measures could cause higher fuel consumption and degraded acceleration performance.<sup>3</sup>

### III. Warranty

#### 1. Cases of warranty

The Austrian law of warranty is based on the circumstance that performance deviates from what was explicitly agreed or implied in the contract. It gives rise to claims against the seller, not the manufacturer of an item, unless the latter is at the same time the seller.

The affected cars exceed the EURO 5 emission limits in real life operation. The permitted exhaust emission limits were listed in the standard sales contracts of VW dealers and were therefore explicitly agreed upon by the parties. In other cases (other dealers and private sellers) this might be different. Such a deviation from what was contractually agreed gives rise to

the consequences laid down in § 922 ff ABGB.<sup>4</sup> The same counts for criteria that are – under the given circumstances – normally expected, and therefore "usually factually presupposed" according to § 922 (1) ABGB. In absence of an explicit contractual agreement about emission limits § 922 ABGB protects the buyer.

In our view, the public statements made by VW and the importer in the context of product advertisements fulfil the criteria as stated in § 922 (2) ABGB. Therefore, the advertising statements concerning emissions and fuel consumption are legally binding. They can be taken into account in order to assess whether the delivered item is in conformity with the contract. Former sales-related promotional material of the VW group explicitly cited the EURO 5 emissions standard and the fuel consumption as being characteristics of the affected models and were therefore – in our view – an integral part of the sales contracts. These conditions – in our view – were expressly assured for new cars and used cars sold by retailers and are therefore relevant for the assessment.<sup>5</sup> For used cars however, we need to distinguish whether they were sold by a dealer, who had the obligation to be aware of the statements of the manufacturer, or by other sellers, who might not have been familiar with them. It is widely known that real-life consumption may be different from the manufacturer's specifications. This has been accepted in the past by car owners as well as by the governments of the EU member states. We suggest the use of the jurisdiction passed by the German Federal Supreme Court (BGH)<sup>6</sup> for the assessment of the permissible deviation, because no relevant settled OGH-jurisdiction<sup>7</sup> exists.

#### 2. Primary warranty remedies

Under Austrian warranty law the claimant first has to refer to the so-called primary remedies. These are improvement/repair or replacement of the affected item (s § 932 (2) ABGB). We both fully agree with VW, that the measures taken are able to achieve the lawful emission status defined by the EURO 5 in the new European driving cycle (NEDC) under laboratory conditions. Nevertheless, the achievement of the gaseous and particulate exhaust emission limits will have a negative impact on the fuel consumption (CO<sub>2</sub>) and

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1 <http://www.zeit.de/wirtschaft/2015-09/vw-abgase-manipulation-faq> (accessed 27 October 2016).

2 <http://www.ingenieur.de/Themen/Automobil/Kunststoffrohr-Abgasprobleme-VW-Diesel-beseitigen> (accessed 3 January 2017)

3 <http://www.auto-motor-und-sport.de/news/vw-diesel-update-amarok-leistung-gleich-gut-verbrauch-leicht-erhoeht-10551733.html> (accessed 27 October 2016).

4 Allgemeines Bürgerliches Gesetzbuch 1811 (General Civil Code) last amended by BGBl (federal gazette) I 2016/43.

5 Supreme Court (Oberster Gerichtshof OGH) OGH 8 Ob 25/10 z.

6 BGH 8.5.2007 VIII ZR 19/05, no right to withdraw under 10 % deviation.

7 OGH 2 Ob 337/55, 1-2l increased consumption is not a severe defect at a consumption level of 12l/100km.

on the acceleration behaviour of the affected cars.<sup>8</sup> CO<sub>2</sub> is also a gaseous emission component that is relevant for the EURO 5 type certification. Therefore, the KBA also needs to measure the fuel consumption once again within the NEDC cycle. Due to the high number of affected cars, the sellers (who carry out the work on behalf of VW) must be given a reasonable (adequate) period for repair.<sup>9</sup> VW planned the finalization of the upgrades by the end of 2016, which was in our opinion an achievable plan. The number of upgrades is, however, far behind the plan. Approximately 44.000 of 388.000 cars in Austria had received the software update by the end of September.<sup>10</sup> In order to eliminate the possibility of a deterioration in fuel consumption and acceleration performance that may result from the upgrade (dataset and flow straightener), additional engine hardware components are required. Additional hardware is associated with high costs and so far VW has not announced any plans for further modifications. In general, the claimant can choose freely between the different means of primary remedies. However, the seller has a defence against either, if it causes an 'unreasonable' effort. It could be argued that the exchange of engines or cars constitutes such an unreasonable effort in the meaning of the last sentence in § 932 (2) ABGB. This is probably true if one takes into account how large the number of affected cars is. If the seller offers the improvement of emission limits on behalf of VW, performs and thus brings them to the legal state, a contractual condition is established with regard to the emission limits. Apart from the legal emission state, the question remains open regarding the negative impact on fuel consumption and acceleration behaviour.

### 3. Secondary warranty remedies

If a seller refuses the emission improvement, the buyer may rely on the secondary warranty remedies (s § 932 (4) ABGB) request a price reduction or rescission because the threat of a withdrawal of the type approval according to § 25 DEG-FGV (basis for the approval in Austria) is not a minor defect. The improvement is carried out properly if conformity with the contract is established. This criterion is, however, not met if other defects such as reduced acceleration behaviour or increased fuel consumption are newly added. If so, these new defects can be treated as irreparable defects by the buyer. He does not need to allow the seller repeated attempts to improve<sup>11</sup> and can therefore desire a price reduction or rescission. The date on which the secondary warranty remedy arises is, in our opinion, immediately after the refit.<sup>12</sup> But this is only the case if the buyer made a special interest regarding these particular conditions (consumption and/or acceleration performance) clear to the seller at the time of purchase (individual assessment). If a defect can be compensated by a price reduction, the buyer cannot choose rescission. The additional costs due to higher fuel consumption and a decrease in market value can be compensated by means of price reduction. The significance of the acceleration behaviour for the customer has to be made primarily on subjective grounds, taking into account what reasonable and honest parties had hypothetically agreed upon in that situation.<sup>13</sup> § 933 ABGB contains the limitation period for moveable goods. The right can be brought to justice within 2 years after delivery. Austrian VW dealers and the manufacturers waived the statute of limitations until 31.12.2017.<sup>14</sup>

### IV. Counterclaim: usage fee

In cases of rescission, the Austrian law of unjust enrichment provides the basis for a counterclaim. The buyer is seen to be

enriched by the fact that he was able to use the car between the time of delivery and the rescission. He therefore owes an appropriate and reasonable usage fee.<sup>15</sup> The determination of the fee largely depends on the usage related wear and tear. In absence of a settled OGH jurisdiction, we suggest using the calculation formula provided by the German Supreme Court.<sup>16</sup> The purchase price is multiplied by the ratio of driven kilometres to the expected total mileage. The affected diesel cars have a theoretical lifetime of 200.000 up to 250.000 kilometres.<sup>17</sup>

### V. The Law of Mistake

When concluding the sales contract, the buyer was under the misunderstanding that he had acquired a car with a legally compliant EU type approval. Under Austrian law this constitutes a mistake of fact as the mistake relates to the essential characteristics of the car.<sup>18</sup> In law, a mistake only gives rise to a claim of rescission or modification of the contract if the other party is not worthy of protection. One of the cases stated in § 871 (1) ABGB is that the other party "caused" the mistake. In the cases at stake this can be assumed, if the emissions standard was explicitly stated in the written sales contract or if they were part of the relevant explanations of the seller upon contract conclusion. In other cases one could assume a common mistake<sup>19</sup> if the seller had no knowledge of the manipulations either. The mistake relates to value creating characteristics (roadworthiness and usability of the car). In our view this is a significant error, because a buyer who had knowledge about the manipulations and the possible withdrawal of the EU type approval would not have bought such a car.

In the case of a significant mistake, the mistaken party has the right to choose between modification and rescission of the contract.<sup>20</sup> In the case of modification, the mistaken party receives adequate compensation for the mistake to restore equivalence. He obtains the difference between the purchase price and the actual value of the purchased item.<sup>21</sup> Modification may, however, only be claimed in a case where the seller would have also concluded the contract with the modified content.<sup>22</sup> It can be assumed that if a retailer of a car they ordered for a customer from the manufacturer had had knowledge of the truth (lack of standards for the EU type approval and lack of usability), they would not have sold

8 Basshuysen/Schäfer, *Handbuch Verbrennungsmotor* (6<sup>th</sup> edn, 2012) 28 ff.

9 OGH 6 Ob 85/05 a; OGH 4 Ob 112/06 h.

10 <http://diepresse.com/home/wirtschaft/economist/5103135/Ruckrufaktion-nach-VWskandal-kommt-kaum-voran?from=suche.intern.portal> (accessed 27 October 2016).

11 OGH 2 Ob 34/11 f.

12 Landesgericht (County Court) St. Pölten 21 R 194/10 b; *Krachler/Rzehorska*, ZVR 2016/63.

13 OGH 1 Ob 14/05 y (case-by-case basis).

14 <http://www.konsument.at/auto-transport/vw-abgasskandal-haendler-verzichten-auf-verjaehrung> (accessed 16 January 2017).

15 OGH 4 Ob 286/04 v; OGH 8 Ob 74/13 k.

16 BGH VIII ZR 215/13.

17 Compare county court Bochum 1 O 471/09.

18 Rummel in Rummel/Lukas, ABGB<sup>4</sup> § 871 note 14.

19 OGH 8 Ob 57/14 m; Rummel in Rummel/Lukas, ABGB<sup>4</sup> § 871 note 29, teaching and jurisdiction treat the same error in different ways. The jurisdiction recognizes the common mistake as 4<sup>th</sup> (non legislative) ground for appeal, whereas recent teachings prioritize a solution via the rescission of the basis for business (within the meaning of § 901 ABGB).

20 OGH 3 Ob 15/53.

21 OGH 3 Ob 34/16 w; Riedler in Schwimann/Kodek, ABGB – Praxiskommentar IV<sup>4</sup> (2014) § 872 note 5.

22 OGH 1 Ob 197/75; OGH 2 Ob 176/10 m; Rummel in Rummel/Lukas, ABGB<sup>4</sup> § 872 note 7.

such a car (nor under other conditions). Under this assumption, the buyer would only have the remedy of rescission. However, this needs to be checked in detail in each individual case. Rescission has an *ex tunc* effect, meaning that it is assumed that the transfer of the car had never taken place. Therefore, the buyer receives the purchase price and returns the car to the seller. In case of full indemnification by the other party, a dispute is excluded.<sup>23</sup>

## VI. Compensation for damages

### 1. Damage

It is obvious that the owners of manipulated cars have suffered damage in that they have acquired a car that violates exhaust emission standards. The monetary value of an affected car is less than it would be, if the car were compliant with the legislative standards. The recall the KBA ordered is mandatory for the car owners because the KBA issued the EU type approval for the affected cars.

### 2. Who bears liability?

Direct tortfeasors are the employees of the manufacturer who were concerned with programming the engine control and the execution of the emission tests. The manufacturer as a legal entity is directly liable for damages caused by its employees if they are in an executive position with self-responsible authority. The manufacturer is therefore liable for the employees who represent the manufacturer in emissions tests.<sup>24</sup> The manufacturer of a component could be liable if he contributed to the exhaust manipulations. There is a subsidiary company of VW AG in Austria, which is a retailer for cars of the VW group with several establishments in Austria. This retailer is liable for the manipulations of its parent company due to their connection within the group. There is one first instance decision in Austria, in which an ordinary authorized VW retailer was held liable for the damages caused by the manipulations due to the reason that it is an authorized "VW retailer".<sup>25</sup>

### a) Tort claims

The manufacturer violated exhaust emission standards as a result of the manipulations. When the cars were bought, the buyers were fraudulently misled regarding the conformity with the legal requirements and they paid a higher price than they would have paid if they had had knowledge of the manipulations. The manipulations were against the law and the fulfilment of exhaust emission standards was causal for the buying decisions. Therefore the manufacturer is liable for the damage. In the lawsuits in Austria, VW and many dealers expressed the opinion that the manipulations did not violate exhaust emission standards, because the used software feature is no defeat device as described in Article 3 Abs 10 Regulation (EC) No 715/2007. They argued that the software exclusively adapts the exhaust gas recirculation (EGR) when it recognises emission tests. The exhaust gas recirculation concerns the internal engine combustion system and is not a part of the emission control system. Due to this, there is no violation of exhaust emission standards. However, "defeat device" means any element that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation. Emissions depend among other things on the EGR. The EGR is an emission reduction technique and therefore a part of the emission control system. A deactivation of the EGR system during the normal

engine operation mode on the road is also not foreseen in the EURO 5 Regulation.

### b) Contractual claims

The owner of an affected car can bring a claim against the retailer for damages out of their contractual relationship. Authorized VW retailers have a contractual relationship with the manufacturer. VW as manufacturer is not a subcontractor to the retailer because the cars were not produced for the retailer. The cars were produced to be sold to customers by authorized VW retailers. Therefore, the authorized VW retailer is liable for the damage caused by the manufacturer.<sup>26</sup> In absence of their own unlawful act, used car retailers and private sellers cannot be held responsible. They are also not liable for the culpability of the manufacturer.

### 3. Restitution in kind, monetary compensation, interest in an action for a declaratory judgement

In Austria, the primary remedy to compensate for damages is restitution in kind. The car has to be put in the state that it would be in without the manipulation.<sup>27</sup> After the planned refit, the cars would fulfil the exhaust emission standards. It is anticipated, however, that the consumption of fuel will be higher, the driveability will be worse and the monetary value of the cars will be reduced. Therefore restitution in kind is not possible. For the disadvantages after the refit the owner can claim monetary compensation.<sup>28</sup> The suffered loss to be compensated can be seen in the difference between the market price of a new car with the named disadvantages and the price the owner actually paid. The loss of monetary value of affected cars of the VW-group is noticeable and this loss will be representative for the amount of compensation. Until a car is refitted and the actual disadvantages caused by the refit are known, the owners have a legal interest in an action for a declaratory judgement.<sup>29</sup>

### 4. Consequential damages

The refit will cause higher fuel consumption<sup>30</sup> and more stress for several parts of the engine (modified injection strategy). In the on-going lawsuits in Austria, VW explains that the refit will cause a 10 % higher pressure in the Common Rail System, increased exhaust gas recirculation and an additional post injection for soot oxidation in the part-load area. Due to this, the durability of the common rail system and the exhaust gas recirculation could be decreased and consequential damages cannot be ruled out. Therefore, even after the refit, the legal interest for consequential damages lasts.

### 5. Jurisdiction

In Austria the jurisdiction for claims against the manufacturer is an important issue. There is no contract between the

23 OGH 1 Ob 217/59; OGH 6 Ob 733/87; Rummel in Rummel/Lukas, ABGB<sup>4</sup> § 871 note 34; Pletzer in Kletečka/Schauer, ABGB-ON<sup>1.01</sup> § 871 note 62.

24 OGH 1 Ob 625/78; OGH 6 Ob 108/07 m; Spitzer in *WiR – Studiengesellschaft für Wirtschaft und Recht* (ed), Haftung im Wirtschaftsrecht (2013) 29 (41 ff).

25 District court Amstetten, 30.8.2016, case 40 C 905/15 v.

26 District court Amstetten, 30.8.2016, case 40 C 905/15 v.

27 OGH 2 Ob 158/07 k; Reischauer in Rummel, ABGB, II/1 (3<sup>rd</sup> edn, 2003) § 1323 note 1 f; Hinteregger in Kletečka/Schauer, ABGB-ON<sup>1.02</sup> § 1323 ABGB note 3.

28 OGH 2 Ob 232/71; Koziol, Österreichisches Haftpflichtrecht I – AT (3<sup>rd</sup> edn, 1997) 286; Hinteregger in Kletečka/Schauer, ABGB-ON<sup>1.02</sup> § 1323 ABGB note 23.

29 Fasching in Fasching/Konecny III (2<sup>nd</sup> edn, 2004) § 228 note 58, 97; Krachler/Rzehorska, ZVR 2016/63.

30 Basshuysen/Schäfer, Handbuch Verbrennungsmotor (6<sup>th</sup> edn, 2012) 28 ff.

owner of a car and the manufacturer. Therefore the special jurisdiction is applicable.<sup>31</sup> Exhaust manipulation violates exhaust emission standards and is a tort according to Article 7 (3) Regulation (EU) No 1215/2012. The owner of an affected car paid a higher price than he would have paid if he had known about the manipulations. The place where the damage occurred is the place where the immediate victim is violated and the initial damage arises, and this is the place where the owner bought the car (in Austria in most cases). Only the immediate damage has to be considered. The increased fuel consumption, the deterioration in acceleration performance and consequential damage have as little relevance concerning the place where harm occurred as does the home address of the owner.<sup>32</sup> There are already different judgements, but only two are legally decided and in both cases the court of review confirmed the Austrian jurisdiction.<sup>33</sup>

## VII. Lawsuits

A number of lawsuits are currently still pending; some concern claims of car owners against several manufacturers of the VW-group and retailers concerning damages, other concern claims of car owners against retailers concerning rescission and price reduction. Moreover, the leading Austrian consumer association, the Verein für Konsumenteninformation (VKI) is examining potential claims of consumer and plans a group action.<sup>34</sup> ■

31 EuGH C-189/87; Simotta in Fasching V/1 (2<sup>nd</sup> edn, 2008) Art 5 EuGVVO note 268, 292.

32 OGH 2 Ob 222/14g; Simotta in Fasching V/1 Art 5 EuGVVO note 318.

33 Regional court Graz, 4.8.2016, case 5 R 113/16 y; Higher regional court Linz, 17.10.2016, case 3 R 123/16 b.

34 [https://umfragen.verbraucherrecht.at/lime\\_2016/limesurvey/index.php/415824](https://umfragen.verbraucherrecht.at/lime_2016/limesurvey/index.php/415824) (accessed 27 October 2016).

Thomas Riehm & Lukas Lindner\*

## "Dieselgate" and Consumer Law: Repercussions of the Volkswagen scandal in Germany

Volkswagen has lost much of the shining reputation that the brand 'Made in Germany' once stood for. So-called 'defeat devices' are assumed<sup>1</sup> to have been installed in more than ten million passenger cars worldwide from all brands of the VW group to detect the presence of a test stand and change the performance to a safety mode in which the legal requirements regarding NOx emissions were met, whereas under normal operating conditions the emissions exceeded the permitted extent. More than one year after its revelation, the emissions scandal is still a current issue of which the legal consequences are unclear and developing with the growing knowledge of the facts. The following country report portrays the legal situation in Germany. First, the potential claims against the car dealers are subject to discussion and then, the liability of VW AG that is not identical to the seller will be outlined.

### I. Claims against the sellers

The customers did not purchase the affected vehicles from VW AG directly but from a third-party car dealer. Even authorised dealers, part of which are wholly or partly owned by a VW subsidiary, are formally and legally independent from VW AG, which will affect the contractual rights of the customers towards their contract partners.<sup>2</sup>

#### 1. Cure

One principle in German Contract Law is the privity of contracts.<sup>3</sup> Contractual claims only work on the other party. VW AG is not part of this purchase agreement and therefore cannot be held responsible on contractual grounds.

The buyer will be entitled to demand cure within the meaning of §§ 437 No. 1, 439 (1) Alt. 1 German Civil Code (Bürgerliches Gesetzbuch, BGB) if the car does not comply with the contractual standard of quality (see Art. 3 (3) Directive

1999/44/EC). In the relevant cases, the contract demands at least conformity with the Euro 5 standard. With a built-in defeat device, the Euro 5 standard is violated according to Article 5 (2) Regulation (EC) No. 715/2007, regardless of the actual NOx emissions.<sup>4</sup> Therefore, the car is defective according to § 434 (1) 2 No. 2 BGB (Art. 2 (2) Directive 1999/44/EC)<sup>5</sup> without any need to invoke potential reduction of the resale value.<sup>6</sup>

However, the material defect apparently can be cured easily by installing an update.<sup>7</sup> Tests show that in most cases the updated cars work properly<sup>8</sup> and that some cars even consume less fuel,<sup>9</sup> while other testers have witnessed a slight increase in fuel consumption.<sup>10</sup> Thus, customers may certainly demand the repair of this defect by the de-installation of the defeat device.<sup>11</sup> § 439 (1) BGB in principle also entitles

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1 Recently, the asserted malpractice has been denied by VW AG: <http://www.sueddeutsche.de/wirtschaft/nach-abgasaffaere-vw-wir-haben-nicht-manipuliert-1.3233138>.

2 Cf. LG Frankenthal, BeckRS 2016, 08996.

3 Mansel, in: Jauernig (ed.), BGB (16<sup>th</sup> edn, 2015) § 241 para. 4.

4 See Riehm, 1.10.2015, <http://www.lto.de/recht/hintergruende/h/vw-abgasaffaere-schadensersatz-rechtsslage-deutschland>; LG Lüneburg, BeckRS 2016, 17486, has seen the defect in the deviation of the actual emissions output from the agreed output, § 434 (1) 1 BGB.

5 Comprehensive overview of the notions of the defect: Ring, NJW 2016, 3221, 3222.

6 See also: Schöller, jurisPR-Verkr 9/2016, Anm. 4.

7 Doubts pronounced by: OLG Celle, MDR 2016, 1016.

8 As samples show: <https://www.welt.de/motor/news/article156634374/VW-Diesel-Nachruetzung-im-Test.html>.

9 See Auto Zeitung: <http://www.autozeitung.de/auto-vergleichstest/dieselskandal-software-test-passat-tdi>.

10 [https://www.adac.de/infotest/adac-im-einsatz/motorwelt/agbas\\_update\\_vw.aspx](https://www.adac.de/infotest/adac-im-einsatz/motorwelt/agbas_update_vw.aspx).

11 For legal problems arising from a possible increase in consumption following the repair, see Horn, NJW 2017, 289.