

# Volkswagen: Bugs and Outlooks in Car Industry Regulation, Governance and Liability

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## I. Introduction

The scandal involving the Volkswagen group broke out last Fall, at the dawn of the very delicate UN Conference on Climate Change (COP21) held in Paris, and the posting of an unofficial version of the Comprehensive Economic and Trade Agreement (CETA)<sup>1</sup>. This so, just when a leaked version Transatlantic Trade and Investment Partnership (TTIP) ran through the veins of the Internet<sup>2</sup> and the Trans-Pacific Partnership (TPP)<sup>3</sup> was just about to be signed in New Zealand, fostering market integration by pushing further national treatment and mutual recognition, against the backdrop -albeit one small step at a time- of an increasing demand for environmental protection through the setting, among other regulation tools, of emission thresholds<sup>4</sup>. Almost ironically, indeed, the Volkswagen scandal raises very serious conformity assessment loopholes, just when a blowing wind in international trade seeks to reach out for greater uniformity and mutual recognition of regulatory procedures, knowing, too, that car industry lobbyists are important players in defining thresholds.

Most importantly and even before entering courtrooms, the scandal also illustrates the impossibility

of greenhouse gas (GHG) reduction if corporate social responsibility is not taken seriously, given that actual regulation techniques and assessment conformity procedures move away from the outdated domestic command-and-control paradigm. Albeit to different extents in North America and the EU, for example, many features of industries' self-regulation are central to an effective protection of thresholds. As a corollary and unless research and development (R&D) enables domestic or supranational regulators to crosscheck industries' home testing, conformity assessment procedures are destined to remain an inadequate regulation tool. From a legal perspective, what can be learned from VW's debacle? The questions invite to a kaleidoscopic answer, considering that it touches upon many legal disciplines: be it trade law, business law, consumer law, criminal law, environmental law or liability law. Having in mind to bringing up a useful mapping for future research, the present EJRR number gathers different, yet complementary, short opinion pieces against the backdrop of the VW scandal.

In the absence of courts' judgements that usually underlie most legal reasoning, lawyers generally hesitate to comment on contemporary events. Nonetheless, the scandal has so far inspired authoritative au-

\* Université Laval, Québec (Canada). This special endeavour surrounding VW is also the product of peer-reviewers, who revised around the world the present pieces within extremely short delays. Their comments and availability was most appreciated as the Number could not have been rapidly out without their exceptional contribution. Translated and adapted, my own piece builds upon "Volkswagen, le commerce et les seuils GES: la régulation des produits mise à mal", *Repères*, Jan. 2016, EYB2016REP1843.

1 Canada and European Union (EU) Comprehensive Economic and Trade Agreement, signed on Sept. 26th 2014 ["CETA"], whose Chapter XX on Technical Barriers to Trade provides for greater cooperation in the field of Motor Vehicle Regulation, in order "...to strengthen cooperation and communication, including the exchange of information on motor vehicle safety and environmental performance research activities linked to the development of new technical regulations or related standards, to promote the application and recognition of Global Technical Regulations under the framework of the 1998 Global Agreement administered by the WP.29 and possible future harmonization, between the Parties, concerning improvements and other developments in the

areas of motor vehicle technical regulations or related standards": Annex, art. 1 (emphasis added).

2 The TTIP specifically addresses motor vehicle regulatory issues: see EUROPEAN COMMISSION, "The Transatlantic Trade and Investment Partnership (TTIP) Regulatory Issues – EU position on motor vehicles", May 2014, online at [http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc\\_152467.pdf](http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152467.pdf)

3 The Trans-Pacific Partnership does not encompass a special, industry-focused section on motor vehicle trade. However, Chapter 2 entitled National Treatment and Market Access for Goods lists specific multilateral Annexes that target US/Japan and Canada/Japan relationships (see 2-D: Canada Appendix D Appendix between Japan and Canada on Motor Vehicle Trade, 2-D: United States Appendix D Appendix between the US and Japan on Motor Vehicle Trade, 2-D: Japan Appendix D-1 Appendix between Japan and the US on Motor Vehicle Trade, 2-D: Japan Appendix D-2 Appendix between Japan and Canada on Motor Vehicle Trade).

4 Regarding the political dimension of thresholds, see Agathe VAN LANG, *Droit de l'environnement*, Paris, PUF, pp. 78-80.

thors<sup>5</sup>, just as extrajudicial confessions by VW itself continue fusing here and there on social networks. Within this context, the very features of the scandal already gathered relevant sources that can be looked upon to construe a first tentative analysis. In the end, it represents the perfect example of an infra-disciplinary case-study, which stimulated the present endeavour. There is, indeed, sufficient evidence to comment on the case, considering that an unambiguous *mea culpa* has been officially released by Volkswagen as to the use of a defeat device in 11 million cars, and knowing that further measures were taken by the company in the context of a damage control strategy (while printing the present lines, a recall of vehicles is currently being organized in Germany<sup>6</sup> and the US). From a methodological standpoint, the gathered comments probably all over-emphasise the relevant materials that were released by VW itself. Albeit overly prudent, such attitude is undoubtedly excusable, considering that some peripheral facts and liabilities still need to be pinpointed and assessed in a near future. Such consideration brings about another intellectual caveat. The debacle may be global from a mass media and stock market perspectives, but some of its core features remain regional, or even domestic.

In facts, antibodies to such corporate misbehavior are to be found in some federal or harmonized legislation (such as EU or US environmental legislation). Besides, however, national legislation on corporate governance, consumer protection likewise criminal

and civil liability may provide solutions that vary from a legal system to another. As a result, addressing VW's debacle from a domestic standpoint does not offer cut and paste solutions to all raised legal issues; but it shall, at least conceptually, highlight the legal categories that come into play in finding remedies -if there are- for the involved stakeholders. Within this context, this introductory piece to VW's case study shall, after synthesizing the factual background (Section I) touch upon three legal areas: trade and the protection of human health and the environment (Section II), corporate governance (Section II) and greenwashing as an anti-consumer marketing strategy (Section IV).

## II. The Volkswagen Scandal: Some Facts

*"Software installed on some of our vehicles permitted deviations in nitrogen oxide emissions (NOx) performance depending on whether the vehicle was running during a regulatory compliance-related test cycle or running outside the test cycle during normal road use. This is the subject of the current investigations<sup>7</sup>",* admitted Volkswagen. Seemingly, the scandal was born of a corporate attitude that was destined to increase benefits by curbing out environmental standards, relying on sophisticated technology to blur the results of vehicle testing in artificial conditions. Initially, the scandal blew out of the allegations released by the American Environmental Protection Agency (EPA) to the effect that the German group has, between 2009 and 2015, falsified data on polluting nitrogen oxide (NOx) and carbon dioxide (CO<sub>2</sub>) in occasion of conformity assessment procedures<sup>8</sup>. Pursuant to the *Clean Air Act*, the EPA issued a Notice of Violation<sup>9</sup> (NOV), which stated that the company "manufactured and installed defeat devices in certain model year 2009 through 2015 diesel light-duty vehicles equipped with 2.0 liter engines." The NOV further alluded that the "defeat devices bypass, defeat, or render inoperative elements of the vehicles' emission control system that exist to comply with [federal american] emission standards." Knowing that in the US -and, by extension, in Canada- the area of product safety is closer to the "market diplomacy paradigm", the issuing of the NOV is a strong gesture.

Whilst meeting with the California Air Resources Board ("CARB") and the EPA on September 3, 2015, indeed, Volkswagen AG had revealed that some mod-

5 See Nicolas DE SADELEER, "La réponse politique à VW ressortit de la chirurgie lourde", *L'Écho*, Oct. 6th, 2015, at p. 15.

6 On reads on VW's website: "Kundenfreundliche Lösungen waren bei der Erarbeitung der technischen Maßnahmen ein wichtiger Aspekt. Für die betroffenen EA189-Dieselmotoren sehen die Maßnahmen wie folgt aus: Die 1,2- und 2,0-Liter-Aggregate bekommen ein Software-Update. [1] Die reine Arbeitszeit wird knapp eine halbe Stunde betragen. [2] Die 1,6-Liter Aggregate bekommen ebenfalls ein Software-Update. Zusätzlich wird direkt vor dem Luftmassenmesser ein sogenannter Strömungsgleichrichter befestigt. Die Umsetzung wird weniger als eine Stunde Arbeitszeit in Anspruch nehmen": <http://www.volkswagen.de/de/volkswagen-aktuell/News.suffix.html/2015-2Fnox-thematik.html> (last visited Feb. 18th, 2016).

7 VOLKSWAGEN CANADIAN WEBSITE, at <https://www.vwemissionsinfo.ca/> (last visited on Feb. 18, 2016).

8 See "Scandale Volkswagen : comment un logiciel a-t-il pu tromper les tests antipollution ? ", *Le Monde*, Sept. 22, 2015 (online at [http://www.lemonde.fr/pixels/article/2015/09/22/scandale-volkswagen-comment-un-logiciel-a-t-il-pu-tromper-les-tests-antipollution\\_4767405\\_4408996.html](http://www.lemonde.fr/pixels/article/2015/09/22/scandale-volkswagen-comment-un-logiciel-a-t-il-pu-tromper-les-tests-antipollution_4767405_4408996.html)).

9 EPA, "Notice of Violation", online at <https://yosemite.epa.gov/opa/admpress.nsf/a883dc3da7094f97852572a00065d7d8/dfc8e33b5ab162b985257ec40057813b1?OpenDocument>.

els among marketed diesel vehicles contained a hidden software that could distinguish between testing conditions and road conditions. However, the alarm had been launched by an American NGO (the International Council for Clean Transportation, (ICCT)) mandated by the EPA, which, unable to duplicate the manufacturer's data in real traffic conditions<sup>10</sup>, has relied upon further expertise of a research center nested at the University of West Virginia<sup>11</sup>. The subsequent report highlighted important discrepancies between laboratory data, and those obtained in real driving condition<sup>12</sup>; in particular, a software destined to distort emission data in "test" mode was discovered. Put differently: another greenwashing episode had been discovered.

Among the most stunning details surrounding the alleged defeat practice is the fact that the involved vehicles *are* actually equipped with a GHG reduction system. The software's task consists in deactivating the device in real driving conditions. Therefore, most incriminated vehicles have the mechanical and technical potential to meet the environmental thresholds fixed by law; a recall suffices to give free rein to the GHGs filters. Nonetheless, such restoration in terms of environmental protection weakens the engine power and increases fuel consumption: hence the sufficient *leitmotif* to cheat. Searching for details, one soon realizes that such deceit practice is anything but new: a specific offense is even nested in EU regulation, as it prohibits manufacturers to equip a vehicle with a defeat device, defined as "[...] any element of

design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, *that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use*<sup>13</sup>". The avoidance maneuver, thus, is anything but new to the car industry (or regulators, for the matter); and not even to VW<sup>14</sup>.

Having admitted the allegations later released by the EPA, the CEO of the famous German group resigned, apologizing at the same time of having deceived the public trust. Among others, the French site of the company made a similar apology<sup>15</sup>; followed by those verbalized by delocalized CEO's<sup>16</sup>.

Recalls were organized in Europe and compensation schemes were also drafted<sup>17</sup>. Several countries have banned the sale of the involved vehicles on their territory, and initiated further investigation procedures.

### III. Trade and Human Health & Environment Protection Tools

It is no secret to anyone that contemporary international trade fights unjustified obstacles to trade, including quotas, tariffs and discriminatory measures of any kind<sup>18</sup>. The car industry being increasingly

10 See " Une ONG à l'origine du scandale Volkswagen ", *Le Monde*, Sept. 22, 2015, (online at [http://www.lemonde.fr/planete/article/2015/09/22/l-ong-a-l-origine-du-scandale-volkswagen\\_4767318\\_3244.html](http://www.lemonde.fr/planete/article/2015/09/22/l-ong-a-l-origine-du-scandale-volkswagen_4767318_3244.html)). The NGO is partially financed by the ClimateWorks Foundation.

11 That is, the *Center for Alternative Fuel Engines and Emissions* (<http://cafee.wvu.edu/>).

12 JG Thompson, DK Carder, MC Besch, A Thiruvengadam et HK Kappanna, *In-use emissions testing of light-duty diesel vehicles in the United States Final Report Center for Alternative Fuels, Engines & Emissions*, West Virginia University, 2014 ([http://www.theicct.org/sites/default/files/publications/WVU\\_LDDV\\_in-use\\_ICCT\\_Report\\_Final\\_may2014.pdf](http://www.theicct.org/sites/default/files/publications/WVU_LDDV_in-use_ICCT_Report_Final_may2014.pdf)).

13 Regulation 715/2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, OJ. L 171/1, at art. 3 (10). See similarly, in the US, 40 C.F.R. § 86.1803-01 (penalties at CAA § 205(a), 42 U.S.C. § 7524(a), 40 C.F.R. § 19.4), and, in Canada, the *Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations*, SOR/2010-201, at art. 9, par. 2 (emphasis added).

14 CNBC WEBSITE, " VW had previous run-in over 'defeat devices' " (online at <http://www.cnbc.com/2015/09/23/vw-had-previous-run-in-over-defeat-devices.html>) [accessed on Feb. 24th].

15 " Le groupe Volkswagen a récemment reconnu qu'il existait des écarts entre les émissions d'oxydes d'azote (NOx) obtenues lors de conditions de circulation réelles et celles obtenues lors de tests sur banc. [...] Nous souhaitons aussi vous exprimer nos plus sincères regrets et vous dire que nous ferons tout pour regagner votre confiance " (<https://informations.volkswagenfr.com/> last visited Dec. 3rd, 2015).

16 See Michael Horn, President and CEO of Volkswagen Group of America, Inc. before the House Committee on Energy and Commerce Subcommittee on Oversight and Investigations, Oct. 8<sup>th</sup>, 2015, online at: <http://docs.house.gov/meetings/IF/IF02/20151008/104046/HHRG-114-IF02-Wstate-HornM-20151008.pdf> (last accessed Feb. 23th, 2016): " On behalf of our company, and my colleagues in Germany, I would like to offer a sincere apology for Volkswagen's use of a software program that served to defeat the regular emissions testing regime ".

17 See " Volkswagen fait un premier pas dans l'indemnisation des clients américains ", *Le Monde* du 10 novembre (en ligne à [http://abonnes.lemonde.fr/economie/article/2015/11/10/volkswagen-fait-un-premier-pas-vers-l-indemnisation-de-clients-americains\\_4806209\\_3234.html](http://abonnes.lemonde.fr/economie/article/2015/11/10/volkswagen-fait-un-premier-pas-vers-l-indemnisation-de-clients-americains_4806209_3234.html)).

18 Jean-Maurice ARBOUR, Sophie LAVALLÉE et Hélène TRUDEAU, *Droit international de l'environnement*, 2<sup>ème</sup> éd., Yvon Blais, Cowansville, 2012, at pp. 910ff.

global, both GHG emissions threshold and conformity assessment procedures are at the very core of contemporary international trade law. Much like the North American Free Trade Agreement (NAFTA<sup>19</sup>), the Agreement on Technical Barriers to Trade (TBT<sup>20</sup>) concluded under the auspices of the World Trade Organization (WTO) provides that trade barriers on products themselves can be maintained if they pursue legitimate objectives<sup>21</sup>, including environmental protection<sup>22</sup>. Emission thresholds represent one of these exceptions, especially because they stem out of an international technical consensus that meets the standard of objectiveness, rationality, “scientificity” underlying standardization. Hence, States are encouraged to rely on international standards to set acceptable thresholds. And they do so. *Mutatis mutandis*, the EU embraces similar regulatory schemes, ideally ensuring the free circulation of goods within the internal market whilst protecting the environment. This complex equilibrium is reached by way of a regulatory cocktail (directive, regulations, etc.) which is precisely the object of Nicolas De Sadeleer’s contribution.

From a technical point of view, authorized thresholds are quite similar in North America and the EU: 80mg/km NOx under the new standard Euro 6<sup>23</sup>, or 50 mg/km under the US *Clean Air Act* and its Canadian twin, the *Regulation on emissions from road vehicles and engines*<sup>24</sup> adopted under the *Canadian Environment Protection Act*<sup>25</sup>: according to the author,

“the level of protection is more the result of a gradual, pragmatic approach and a search for the possibilities than a desire to implement in detail the scientific experts’ recommendations”. However, whomever violates these standards incurs administrative penalties, including heavy fines: on January 4th, 2016, the US Department of Justice filed a civil action on behalf of the EPA Volkswagen *et al.* for alleged violations of the *Clean Air Act*<sup>26</sup> and regulations, thus seeking injunctive reliefs and civil penalties<sup>27</sup>.

In the EU, likewise, many Member States<sup>28</sup> are carrying out investigations surrounding the use of a defeat device in the diesel car industry (thus, not only Volkswagen). Ultimately, national regulators could, based on Directive 2007/46/EC<sup>29</sup>, withdraw their market approval if recalls do not suffice to ensure environmental regulations’ compliance. In Canada, manufacturers and sellers must notify Transport Canada and vehicle owners of all “design defect, manufacturing or operation that affects or is likely to undermine human security—fnref:31” as well as non-consistency vehicles or their equipment with the regulations<sup>31</sup>. Unlike other regulators, it may force a product recall.

Greater distinctions between the US and the EU regulatory attitudes are to be found in approval processes of vehicle compliance: whereas, in the absence of any Agency, it is incumbent to domestic national authorities in the EU (Directive 2007/46/EC sets a framework for a type-approval regime then subject to the mutual recognition principle), manu-

19 North American Free Trade Agreement (NAFTA), which came into effect on January 1, 1994.

20 April 15th, 1994, 1868 RTNU 141.

21 See art. 904, NAFTA and art. 2.2, TBT.

22 Art. 2.5, TBT.

23 Contained at Commission Regulation (EU) No 459/2012 of 29 May 2012 amending Regulation (EC) No 715/2007 of the European Parliament and of the Council and Commission Regulation (EC) No 692/2008 as regards emissions from light passenger and commercial vehicles (Euro 6) Text with EEA relevance, *OJ L 142, 1.6.2012, p. 16–24, OJ no. L 142, 1.6.2012, p. 16.*

24 DORS/2003-2, <<http://canlii.ca/t/69jq1>>

25 (1999), LC 1999, c 33, <<http://canlii.ca/t/69g3p>>

26 Pursuant to Sections 204 and 205 of the Clean Air Act (“Act”), 42 U.S.C. §§ 7523 and 7524.

27 See complaint at UNITED STATES OF AMERICA, Ministry of justice, <http://www.justice.gov/opa/file/809826/download> and further settlement at <https://www.toyotaesettlement.com/>, whereby the company alleges that “Toyota denies that it has violated any law, denies that it engaged in any and all wrongdoing, and denies that its ETCS is defective. The parties agreed to resolve these matters before these issues were decided by the Court” (see, similarly in Canada [http://www.toyotaesettlement.ca/index\\_en](http://www.toyotaesettlement.ca/index_en)

.html, and full settlement at <http://www.toyotaesettlement.ca/Documents/Compiled%20Toyota%20Canada%20Minutes%20Settlement%20Agreement%20-%20Executed%20August%206%202013%20%282%29.pdf>).

28 For instance, in the UK : the Vehicle Certification Agency (VCA).

29 Directive 2007/46/EC establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, OJ no. L 263/1. The text replaces national approval systems “with a Community approval procedure based on the principle of total harmonisation” (2d Recital)

31 *Id.*, art. 10.1 (1). In this case, the Minister may “[...] require any company that applies a national safety mark to any vehicle or equipment, sells any vehicle or equipment to which a national safety mark has been applied or imports any vehicle or equipment of a class for which standards are prescribed to give a notice of non-compliance in the manner specified by the Minister, if the Minister considers that it is in the interest of safety” (art. 10 (7)). Such powers could be used for Fiat models which allegedly do not comply to standard 108 of the Canada Motor Vehicle Safety Standard (CMVSS) 108 (which requires the backup lights to light up when the driver turns on the ignition switch and puts the vehicle in reverse). See TRANSPORT CANADA, Preliminary Determination -2012-2014 Fiat 500 and 500c with Automatic Transmission (online at <http://www.tc.gc.ca/eng/motorvehiclesafety/safevehicles-defectinvestigations-1435.html>).

facturers self-assess environmental compliance of their own vehicles both in Canada and the US. Of course, *ex-post* sales compliance checks may be carried on by competent authorities (in this case, EPA and Environment Canada). It may therefore seem paradoxical that the scandal broke out in a legal system where controls accrue primarily to the private sphere; just as it escaped the attention of the European authorities. Doesn't defeat, hence, go beyond compliance assessment strategies? Corporate misconduct here comes into play.

#### IV. Bugs in Corporate Good Governance

An observer noted: "The Volkswagen debacle should be treated as an Enron moment for sustainability measurement and evaluation, with a comparable overhaul of the requirements for corporate accounting an evaluation".<sup>32</sup> In the stream of infamous Enron's heritage, truly enough, the scandal shook the very paradigm of corporate social responsibility (CSR) and responsible business conduct, which refer to "[...] companies taking responsibility *for their impact on society and to their actions over and above their legal obligations towards society and the environment*, strengthen the contribution of trade and investment to a sustainable growth and [...] support high levels of environmental and labour protection".<sup>33</sup> Considering the responsible and "greenish" image, Volkswagen projected and nourished thoughtfully through marketing strategies, the debacle has taken enormous proportion that immediately bounced back into stock markets. Was the cost of the fraud to be deliberately internalized by the company? After all, safety was not the issue; *Ford Pinto's* phantom never came into play. The anecdotal documentation and good sense –admittedly– seem to suggest that the installation of a software on a production line may not be done at the initiative of "a few engineers".

"What when wrong", however, still need to be assessed, as the different hypothesis formulated hereby analyzed by Raymonde Crête remain to be verified by internal and external inquiries. The very first step, she adds, consists in rapidly pinpointing liability *on someone* for the alleged misconduct. In the VW context, organizational features of the Group–stock options may well have backfired as they were precisely destined to stimulate productivity. Rather, she

explains, race for profit may explain a deliberate strategy destined to lower production costs by curbing out environmental threshold, candidly waiting for fines, damages compensation and penalties, recalls, knowing that such trade-offs still allow a significant mark-up. After all, isn't the internalization of mishaps part of any good corporate governance?

The massive dimension of the "case" –in non-legal parlance– invites to a negative answer, considering that the incommensurable reputational damage caused to the Group rather suggests that such cowboy corporate practices were born of an unethical corporate strategy, or were the result of a more subtle faulty behavior that could not be neutralized with classical good governance tools, which include "accountability and to adherence, implementation, follow-up and dissemination of internationally agreed guidelines and principles".<sup>34</sup>

#### V. Greenwashing: Between Unfair Practices and Product Liability Law

Facts to be confirmed at a later stage of the procedure and if they do not renounce contractually to their right of action following, say, a recall, most consumers will be in a position to ask for damages. At least two general legal categories could enter the picture: unfair commercial practices and/or product liability. These rights of action are not mutually exclusive; which means that they both could be embedded in the same line of procedure, as they fall into the greenwashing category Eric Lane has chosen to address in "Volkswagen and the High-tech Greenwash", describing the matter as "communicating false or misleading information about purported environmental benefits". Greenwashing has precedents in the car industry. Lane offers examples of previous cases involving misrepresentation of fuel consumption. What appears striking in the VW case –he adds– is the use of high-tech technology to deceive, "deep inside the vehicle where nobody could detect its actions". Does high-tech greenwashing fall into a legal black hole? Beyond problems linked to its actual discovery, this remains to be seen.

32 G. WHITEMAN, "Volkswagen and the road to Paris", (2015) vol. 15 *Nature*, p. 38.

34 "Leaked" TTIP, at art. [...] (art. 21).

Most –if not all- industrialized countries provide legal solutions to combat unfair commercial practices. In the EU, the Unfair Commercial Practices Directive (2005/29/EC<sup>35</sup>) provides that misleading acts and omissions are among unfair commercial practices. Using a defeat device certainly fits into the general category of unfair practices as defined at article 5 of the said Directive<sup>36</sup>, as well as more specific ones – releasing false information about the main characteristics of a product- tucked in article 6 to 8. Penalties, however, are left to the Member States, who shall “ shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive<sup>37</sup> ”. In the present case, false representations consist in inducing the idea that the chosen vehicle would offer an economical energetic solution, whilst being environmentally friendly. From a domestic standpoint, this factual basis is likely to infringe Article 220 of Quebec’s *Consumer Protection Act*<sup>38</sup>, as “no merchant, manufacturer or advertiser may, falsely, by any means either: a) assign to a property or a particular benefit service; [...]”.

35 Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC and Regulation (EC) No 2006/2004, OJ no. 149, p. 22.

36 By virtue of the provision: “ 1. Unfair commercial practices shall be prohibited. 2. A commercial practice shall be unfair if: (a) it is contrary to the requirements of *professional diligence* [which means « the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity » (art. 2 (h))]; and (b) *it materially distorts or is likely to materially distort* the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers [that is, « to materially distort the economic behaviour of consumers’ means using a commercial practice to appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise » (art. 2 (e)))] ” (emphasis added).

37 Directive 2005/29/EC, art. 13.

38 L.R.Q., c P-40.1.

39 See United States Judicial Panel on Multidistrict Litigation, *In re: Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation*, MDL No. 2151, 9 April 2010 (J. Selna).

40 That is, “ Real Driving Emission Tests ” : voir De Sadeleer, *id.*

41 <https://www.vwemissionsinfo.ca/> (last visited Feb. 18th.); see also the same comment on German site : “ Fest steht: Die Fahrzeuge sind weiterhin technisch sicher und fahrbereit und können deshalb uneingeschränkt im Straßenverkehr genutzt werden ” <http://www.volkswagen.de/de/volkswagen-aktuell/News.suffix.html/2015-2Fnox-thematik.html> (last visited Feb. 18th).

Liability may also stem at the initiative of some States, by virtue of special legislation, as product liability may also provide grounds for litigation, as the information defect may have caused economic losses. In the US, more than 30 class actions have already been filed: plaintiffs altogether argued they purchased their cars “at least in part” because they thought they were purchasing environmentally friendly vehicles which met or exceeded federal emissions standards. In the past, some consumer-friendly States such as California have been willing to grant consumer compensation amounting to the difference between what they actually paid for a product and what they *would* have paid, had they known the defect. In the Toyota sudden-acceleration case, for example, a settlement was reached<sup>39</sup>.

## VI. Conclusion

In the end, however, the consequences of the scandal may not proclaim any winner, and, by contrast, many losers. Unless VW executives have been blinded by an extraordinary race for profit (which seems unlikely, given the expected skills of its top managers), the Volkswagen case inspires two comments.

Ultimately and regardless of the legal outcome, the Volkswagen case shows that it may be unrealistic to rely on private industries to ensure “internalizing negative externalities” here, the costs associated with environmental protection- in the context of implementing sustainable development and corporate social responsibility. Through these lenses, sought for mutual recognition of assessment compliance procedures may be illusory if it is not counterbalanced by specific accountability measures. Hence there appears to be a need to maintain controls exercised by regulators on the economy, although there is a need, too, to ensure scientific and technological modernity in testing cars<sup>40</sup>. In the end, the scandal pinpoints classic questions linked to the multilevel state of motor vehicle regulation: is mutual recognition of assessment procedures sufficient to ensure safety and good business practices? Shouldn’t a centralized, impartial regulator be endowed with the task of ensuring compliance?

There is, though, something stunning about VW’s looping comment about the fact the scandal is related to emission, whereas “The safety of the vehicles is not affected<sup>41</sup> ”. In view of traffic accidents: surely enough. Nevertheless, they weren’t safe from a col-

lective perspective. The reduction of GHG is part of the worldwide fight against climate changes. Underestimating the causal link between these two variables –GHG and health problems- precisely explains

the difficulties experienced by the international community to combat them, whereas it discredits those companies who are precisely asked to self-regulate themselves.