Essays

New Solutions and Critical Remarks from Squaring the Circle of Dieselgate: Towards a Fruitful Coordination Between Automotive and Consumer Law?*

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Abstract

Dieselgate – first revealed about ten years ago – is a complex affair that has raised numerous legal, environmental and economic issues in the context of (national and supranational) systems with very different characteristics. It has therefore become a 'neverending case', harbinger of multiple reflections, in a constantly cha(lle)nging global context.

The reflections presented here – moving therefore from the emblematic event of the 'Dieselgate' – begin to develop critical considerations with reference also to the identification of a complex balance between different socio-economic instances, traceable to competition and sustainability, in the current European Union legal landscape. This EU system – destined to be echoed, albeit sometimes differently, in the national legal system of the individual member states – has so far developed mainly thanks to the constant dialogue between wide-ranging and structured automotive and consumer law, on the one hand, and numerous rulings of the Court of Justice of the European Union, on the other hand. The result is a detailed reconstruction – characterised by positives and negatives – outlined herein, starting from the specific perspective of individual remedies in consumer law.

I. A 'Neverending Case' in a Cha(lle)nging World

Dieselgate – at least as regards its fundamental characteristics – is already known not only to experts and scholars in the automotive sector[1], to independent administrative and judicial authorities (national and supranational), but also to the general public (also due to the significant attention given to the affair by

* The complexity of the reflection on the remedial system ascribable to 'Dieselgate' – and, more generally, to the abuse of sustainability claims in the automotive sector – required the present considerations to be structured in two parts (which, although independent, are physiologically interconnected): the first part is hosted here in Volume No 2 of 2023, but it will therefore be followed by a second part ('New solutions and critical remarks from squaring the circle of Dieselgate: a 'neverending case' between private and public enforcement'), destined for Volume No 1 of 2024.

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[1] For an initial overview, please refer to the contributions (aimed at deepening, from different perspectives, the different national solutions) contained in M. Frigessi di Rattalma ed, *The Dieselgate. A Legal Perspective* (Berlin: Springer, 2017) and in B. Gsell and T.M.J. Möllers eds, *Enforcing Consumer and Capital Markets Law. The Diesel Emissions Scandal* (Cambridge: Intersentia, 2020).

various media).[2]

In 2014, during an analysis to assess the emissions and fuel consumption of diesel engines on the road, US scientists from the Center for Alternative Fuels Engines and Emissions (CAFEE) at West Virginia University, supported by the California Air Resource Board (CARB), noted that some diesel-powered Volkswagen cars were producing more polluting exhaust gases than the company had certified and could reasonably be expected from the company's statements during test drives.[3]

The environmental performance of the vehicles thus proved to be worse not only than the results of the type-approval tests, but also than the permissible nitrogen oxide threshold values for road traffic. It was soon discovered that an add-on component had been installed on numerous diesel vehicles with the aim of circumventing the pollutant emission control system. This software was capable of recognising that a type-approval check had been carried out so that the levels of harmful gases produced (and a number of other parameters) complied with the legal requirements, only to be deactivated under on-road driving conditions

[2] As is well known, Dieselgate was a scandal on a global scale. Here, it seems only right to recall, without claiming to be exhaustive, at least some national decisions of the independent administrative authorities and case law (criminal, civil and administrative). If, on the one hand, the disputes have mostly been settled out of court in the United States of America (with the signing of three settlement agreements approved by the US District Court for the Northern District of California between 2016 and 2017), on the other hand, in Europe, there has been no lack of judicial measures and rulings. In Italy, see Autorità Garante della Concorrenza e del Mercato (AGCM) 4 August 2016 no 26137; Tribunale amministrativo regionale Lazio, Roma, Sez. I, ord, 7 December 2016, no 7872; Id, 31 May 2019, no 6920; Consiglio di Stato, Sez. VI, 7 January 2022, n. 68; Corte d'Appello di Venezia 16 November 2023 no 2260, *ForoNews*, 1 December 2023; Tribunale di Venezia, 7 July 2021, *Il Foro italiano*, I, c. 4023 (2021); *Nuove leggi civili commentate*, 1335 (2021); *Danno e responsabilità*, 243 (2022); Tribunale di Avellino, 10 December 2020, *Il Foro italiano*, I, 1482 (2021); Trib. Genova, 5 ottobre 2021; Trib. Monza, 28 January 2021, n. 135; Corte d'Appello di Bari, 4 February 2021, n. 222; Tribunale di Trieste, 7 October 2022, n. 490 (all available at www.onelegale.wolterskluwer.it/); Corte di Cassazione 14 October 2021 no 28037 (available at www.dejure.it). In Germany, in addition to a number of pronouncements (in the form of injunctions) imposing large fines on Volkswagen (such as that of the Braunschweig Public Prosecutor's Office referred to in the context of several judgments before our administrative courts), see Bundesgerichtshof, 26 June 2023, Vla ZR 335/21, *Neue Juristische Wochenschrift*, 1099 (2023); Bundesgerichtshof, 25 May 2020, n. VI ZR 252/19, *Neue Juristische Wochenschrift*, 1962 (2020), *Zeitschrift für Wirtschaftsrecht*, 1179 (2020). In Spain, see Juzgado de lo Mercantil n. 1 de Madrid, n. 36/2021, available at http://tinyurl.com/2vh85xp2 (last visited 10 February 2024); Tribunal de Valladolid, n. 291/2016, available at http://tinyurl.com/mrxsunk2 (last visited 10 February 2024).

For an overview of 'Dieselgate' facts the national case law, see, for all, F. Bertelli, *Profili civilistici del "Dieselgate". Questioni risolte e tensioni irrisolte tra mercato e sostenibilità* (Napoli: Edizioni Scientifiche Italiane, 2021), 5-90.

[3] Further information concerning the composition, organisation, publications, projects and activities of the Center for Alternative Fuels Engines and Emissions (CAFEE) can be found at: https://www.cafee.wvu.edu/. The California Air Resource Board (CARB) is a government agency operating under the umbrella of the California Environmental Protection Agency (CalEPA). The latter organisation reports directly to the Governor's Office in the Executive Branch of the California State Government (for more information on the organisation, functions and activities of the California Air Resource Board see https://ww2.arb.ca.gov/).

(when the levels became much higher).

The scandal quickly spread from the United States of America to Europe: new questions of fact emerged – arising both from the discovery of further manipulation software and from the problems relating to repairs and replacements carried out by Volkswagen (which often turned out to be, at least in part, ineffective) – without, however, distorting the fundamental coordinates of the original case. In fact, Volkswagen was authorised by the Kraftfahrt-Bundesamt (KBA) – the German Federal Motor Transport Authority (responsible for the type-approval procedure) – to carry out a recall and update of the recirculation system for polluting gas emissions from vehicles (without the type-approval ever being revoked). However, the recirculation system was only fully effective at outside temperatures between 15 and 33 degrees Celsius (and at an altitude of less than 1,000 metres; the so-called 'temperature window'), becoming progressively less effective as temperatures fell (to zero at temperatures of less than 9 degrees below zero). The purchasers of the various Volkswagen vehicles – equipped with the manipulation system, which, following the recall and updating, reduced polluting gas emissions only in the 'temperature window' – therefore took further recourse to the courts in order to obtain effective remedies against the repeated installation of devices considered to be prohibited.

As a result, legal and economic (as well as environmental) issues have emerged that have led to endless litigation – at national and EU level – which today makes Dieselgate a sort of 'neverending case'.

This 'never-ending case' is part of the more general issue of the problems arising from the use of statements concerning the environmental sustainability of goods bought and sold (usually documented as part of the vehicle's 'certificate of conformity').[4] If, on the one hand, it is now amply demonstrated that each consumer is conditioned in their final negotiating decision by the degree of social and environmental responsibility of the professional operator with whom they interact, on the other hand, it is equally clear that there is a wide information gap between operators on the real characteristics of the vehicle and the recourse, often merely instrumental, to statements on sustainability.[5] It is therefore a

[4] In the past, the 'car conformity certificate' attested that a vehicle purchased in the European Union complied with the provisions of the vehicle type-approval 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'). The aim was thus to ensure that the same environmental, technical and safety rules were observed throughout the European Union. Today, Directive 2007/46/EC is no longer in force, repealed, as of 31 August 2020, by Regulation (EU) 2018/858 of the European Parliament and of the Council of 30 May 2018 (on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) no 715/2007 and (EC) no 595/2009 and repealing Directive 2007/46/EC).

[5] See F. Bertelli, '«Dichiarazioni pubbliche fatte dal o per conto del venditore», conformità oggettiva e ed economia circolare', in G. De Cristofaro ed, *La nuova disciplina della vendita mobiliare nel codice del consumo* (Torino: Giappichelli, 2022), 226. For contributions demonstrating consumer perception of the degree of social and environmental responsibility of the professional operator, see,

question of ensuring that these statements are used correctly, so as to stimulate, albeit indirectly, competitiveness among companies on the sustainability front as well. Otherwise, the dissemination of false statements – perhaps by exploiting the information asymmetry between professionals and consumers – could end up provoking, firstly, a generalised distrust in the reliability of the statements themselves and, secondly, a significant decrease in the propensity to purchase eco-friendly vehicles.[6] The risk is that these 'greenwashing' practices (which, by presenting products and activities as environmentally sustainable, seek to conceal their negative environmental impact) – in addition to undermining any aspiration to sustainable development – will end up, at the macroeconomic level, also altering the proper functioning of competitive dynamics.[7]

So, this study therefore aims to critically outline – also thanks to the analysis of CJEU case law – the regulation of the various possible remedies to Dieselgate in the more general systemic context of a cha(lle)nging world.[8]

II. From the Regulation of Unfair Commercial Practices…

among others, M. Tavella ed, *Comunicazione, marketing e sostenibilità ambientale* (Torino: Giappichelli, 2022); Z. Sethna and J. Blythe, *Consumer behaviour* (SAGE Publications: London, 4th ed, 2019), 516; and the *Behavioural Study on Consumers' Engagement in the Circular Economy* (drafted on behalf of the European Commission by LE Europe, VVA Europe, Ipsos, ConPolicy andTrinomics, 2018 and now easily available at https://tinyurl.com/ype6yynw (last visited 10 February 2024)).

These are expanding perspectives of investigation (enhancing the current relationships between psychology, sociology, behavioural economics and consumer law). See R. Caterina, 'Modelli di razionalità e incompletezza del regolamento contrattuale', in G. Rojas Elgueta and N. Vardi eds, *Oltre il soggetto razionale. Fallimenti cognitivi e razionalità limitata nel diritto privato* (Roma: RomaTre-Press, 2014), 47 ss; N. Guéguen, *Psicologia del consumatore* (Bologna: il Mulino, 2016); A.P. Seminara, 'Libertà del consumatore e psicologia della pubblicità' *Contratto e impresa*, 493 (2020).

[6] For an overview of the risks of 'greenwashing', see F. Bertelli, n 5 above, 219, 226; T. Rumi, 'La tutela del consumatore dalle asserzioni ambientali ingannevoli' 1410 *Jus civile*, (2022).

[7] For some fascinating reflections on the relations between production, consumption and sustainability from the perspective of European private law (and not only), see H.M. Micklitz, 'Squaring the Circle? Reconciling Consumer Law and the Circular Economy' 8 *Journal of European Consumer and Market Law*, 229-237 (2019); M.W. Hesselink, 'European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?' 15 *European Review of Private Law*, 323-348 (2007). For a comprehensive overview of the characteristics and problems of green claims and statements concerning environmental sustainability, see F. Bertelli, *Le dichiarazioni di sostenibilità nella fornitura di beni di consumo* (Torino: Giappichelli, 2022); A. Benedetti, 'Le certificazioni ambientali', in G. Rossi ed, *Diritto dell'ambiente* (Torino: Giappichelli, 5th ed, 2021), 207.

[8] It is this ambitious mission that has dictated the analytical approach of, firstly, critically reflecting on the individual remedies deriving from the consumerist evolution of the European Union matrix (E. Tuccari, 'New solutions and critical remarks from squaring the circle of Dieselgate: towards a fruitful coordination between automotive and consumer law?' *The Italian Law Journal*, II (2023)), and, then, considering the dialogue between compensatory remedies and collective redress in the broader context aimed at assessing the role of and relations between public and private law (E. Tuccari, 'New solutions and critical remarks from squaring the circle of Dieselgate: a 'neverending case' between private and public enforcement' *The Italian Law Journal*, I (2024)).

In analysing the remedial solutions to 'Dieselgate', we aim to develop reflections that will allow us to grasp, in the context of the constant *dialogue between legislation and case law*, the evolution of the issues *underlying the main contractual, compensation and procedural aspects of the affair and the abuse of sustainability claims*. Indeed, this abuse is even encouraged precisely by the prospect of easy and immediate gains through false statements. The possible dissemination of untrue statements, perhaps taking advantage of consumers' limited access to the real meaning of the information provided by professionals, risks provoking not only a generalised lack of confidence in the reliability of the statements themselves, but above all a significant decrease in the propensity to purchase eco-sustainable vehicles.[9] Such cases of 'greenwashing' seem to fall – even on a first reading (also by administrative and jurisdictional authorities) –[10] within the scope of the discipline of unfair commercial practices.

A glance at the EU legislation on unfair commercial practices – contained, as is well known, predominantly within the framework of Directive 2005/29/EC (moreover, recently amended by Directive 2019/2161/EU) – immediately reveals the breadth of the definition of '(business-to-consumer) commercial practice' ('any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers'; Art 2, sub d), directive 2005/29/CE).

The general prohibition refers to all conduct contrary to professional diligence and liable to 'materially distort the economic behaviour', in relation to the product, of the average consumer they reach or to whom they are directed (Art 5). Then – if the provision of the above-mentioned general prohibition were not already considered decisive – commercial practices specifically considered 'unfair' (and, therefore, prohibited) are those held to be 'misleading' (Arts 6 and 7) and 'aggressive' (Arts 8 and 9), such as to include all those behaviours of the professional capable of determining different purchase choices from those that would have been made freely in their absence.[11]

[9] M. D'Onofrio (*Il difetto di durabilità del bene* (Napoli: Edizioni Scientifiche Italiane, 2023), 23-30) rightly dwells on the systematic role of information obligations in the perspective of a more sustainable consumer law.

[10] In Italy, for example, the decisions of the Autorità Garante della Concorrenza e del Mercato (AGCM) of 4 August 2016, no 2613 n 2 above, of the Tribunale amministrativo regionale Lazio, Rome, 7 December 2016 no 7872 n 2 above, and of the same Tribunale amministrativo regionale Lazio, Roma, 31 May 2019 no 6920 n 2 above, as well as of the Corte d'Appello di Venezia 16 November 2023 no 2260 n 2 above; Tribunsl Venezia 7 July 2021 n 2 above; Tribunale di Avellino 10 December 2020 n 2 above; Tribunale di Genova 5 October 2021 n 2 above, substantially subsume the 'Dieselgate' cases under the regulation of unfair commercial practices.

[11] Moreover, Directive 2019/2161/EU has supplemented the list of 'misleading actions' in Art 6 (thus, 'any marketing of a good, in one Member State, as being identical to a good marketed in other Member States, while that good has significantly different composition or characteristics, unless justified by legitimate and objective factors' is 'misleading' within the meaning of the new para 2, lett c)), and enriched the list of pre-contractual information to be considered 'relevant' when formulating

The 'Dieselgate' scandal – arising from the misuse of sustainability claims (contained, in turn, in the 'certificates of conformity' of Volkswagen vehicles) – therefore seems to fall directly, without particular difficulty, within the scope of application of the directive on unfair commercial practices – as then transposed in the various Member States.

Although the potentially 'all-encompassing' formulation of the notion of unfair commercial practice (and of the consequent prohibition) does not pose particular reconstructive problems, the 'remedy question' (in the structured perspective of a necessary intermingling of public and private enforcement) is decidedly more complex. In this regard, the recent enhancement of public protection (through a general tightening of pecuniary sanctions) must be welcomed (thanks, above all, to the issuance of Directive 2019/2161/EU), while private innovations deserve much less praise. As is well known, in fact, Directive 2019/2161/EU also introduced a new Art 11a into the original text of Directive 2005/29/EC:

> '(1). Consumers harmed by unfair commercial practices, shall have access to proportionate and effective remedies, including compensation for damage suffered by the consumer and, where relevant, a price reduction or the termination of the contract. Member States may determine the conditions for the application and effects of those remedies. Member States may take into account, where appropriate, the gravity and nature of the unfair commercial practice, the damage suffered by the consumer and other relevant circumstances. (2). Those remedies shall be without prejudice to the application of other remedies available to consumers under Union or national law'.

This broad formulation, however, leaves significant margins of discretion (to be exercised at the time of transposition) to individual national legislators, leaving little hope, also as a result of the significant differences in the *modus operandi* of the various Member States, of the application of uniform rules to possible future cases.

In Italy, the perplexities seem to be confirmed not only by recent decisions of national courts on the uncertain determination of compensation,[12] but also by the recent approval of Legislative Decree no 26 of 7 March 2023 and, more generally, by the 'minimalist' approach in transposing EU legislation, at least in terms of individual private remedies, carried out by the national legislator.[13] The

an 'invitation to purchase' for the purposes of assessing a commercial practice as a 'misleading omission' within the meaning of Art 7 (see, in particular, the current paras 4, 4a, 6). Annex I to Directive 2005/29/EC – which contains the list of commercial practices considered unfair in all cases – has also recently been supplemented by Directive 2019/2161/EU (see n. 11a, n. 23a, n. 23b, n. 24c). On this point, see, for all, G. De Cristofaro, 'Legislazione italiana e contratti dei consumatori nel 2022: l'anno della svolta. Verso un diritto "pubblico" dei (contratti dei) consumatori?' *Nuove leggi civili commentate*, 40-41 (2022).

[12] We will came back specifically to this topic later, with an analysis also covering additional recent (national and European) case law decisions, see E. Tuccari, 'New solutions' n 8 above.

[13] On the Italian 'legislative minimalism', which has recently emerged in the transposition of EU

latter, by inserting a new para 15-*bis* into current Art 27 of the Italian Consumer Code (titled 'administrative and judicial protection'), has, in fact, limited itself mostly to literally referring to the problematic wording of Art 11-bis of Directive 2005/29/EC, thus leaving to the national interpreter the arduous task of finding a solution, in application, to the aforementioned critical regulatory aspects.[14]

It is thus that the most recent interpretations provided by the Court of Justice – perhaps also aware of certain critical issues, especially in relation to enforcement of the unfair commercial practice rules (still, as we have seen, not entirely resolved, since they are substantially remanded to the application that the national courts make of them) – go well beyond the simple (re)affirmation of the prohibition of the installation of manipulation software in the perspective of sectoral legislation and unfair commercial practice rules, advancing an structured point of view (compatible with the prohibition of unfair commercial practices, but somewhat different).[15]

directives, see, among others, S. Pagliantini, 'L'attuazione minimalista della dir. 2019/770/UE: riflessioni sugli artt. 135 *octies* – 135 *vicies ter* c. cons. La nuova disciplina dei contratti *b-to-c* per la fornitura di contenuti e servizi digitali' *Nuove leggi civili commentate*, 1499-1560 (2022); P. Coppini, 'Armonizzazione massima e minimalismo legislativo nel "nuovo" difetto di conformità dei beni di consumo' *Actualidad Jurídica Iberoamericana*, 468-501 (2023).

[14] According to the new Art 27 of the Italian Consumer Code (titled 'administrative and judicial protection'), para 15-*bis*, consumers who have been harmed by unfair commercial practices may also generally submit a claim for proportionate and effective remedies, including compensation for the harm suffered and, where applicable, price reduction or termination of the contract, taking into account, where appropriate, the gravity and nature of the unfair commercial practice, the harm suffered and other relevant circumstances (this is without prejudice to other remedies available to consumers). The topic of unfair commercial practices has attracted the attention of Italian literature, especially in the last ten years (also with specific reference to the controversies arising from 'Dieselgate'). See, among others, the monographic studies by A. Fachechi, *Pratiche commerciali scorrette e rimedi negoziali* (Napoli: Edizioni Scientifiche Italiane, 2012), 11, 31; M. Bertani, *Pratiche commerciali scorrette e consumatore medio* (Milano: Giuffrè, 2016), 79-90; E. Labella, *Pratiche commerciali scorrette e autonomia privata* (Torino: Giappichelli, 2018), 21-45, 93-150; T. Febbrajo, *Il* private enforcement *del divieto di pratiche commerciali scorrette* (Napoli: Edizioni Scientifiche Italiane, 2018), 95; F. Leonardi, *Comportamento omissivo dell'impresa e pratiche commerciali scorrette* (Milano: Wolters Kluwer, 2019), 47-95; L. Guffanti Pesenti, *Scorrettezza delle pratiche commerciali e rapporto di consumo* (Napoli: Jovene, 2020), 191-290; as well as the even more recent contributions of M. D'Onofrio, n 9 above, 113-150; C. Granelli, 'Pratiche commerciali scorrette: le tutele' *Enciclopedia del diritto* (Milano: Giuffrè, 2021), 825-873; Id, 'L'art. 11-*bis* della direttiva 2005/29/CE: *ratio*, problemi interpretativi e margini di discrezionalità concessi agli Stati membri ai fini del recepimento' *Jus civile*, 256-268 (2022); G. De Cristofaro, 'Rimedi privatistici "individuali" dei consumatori e pratiche commerciali scorrette: l'art. 11-*bis* dir. 2005/29/UE e la perdurante (e aggravata) frammentazione dei diritti nazionali dei Paesi UE' *Jus civile*, 269-303 (2022); S. Pagliantini, 'I rimedi non risarcitori: esatto adempimento, riduzione del prezzo e risoluzione del contratto' *Jus civile*, 304-315 (2022); M. Maugeri, 'Invalidità del contratto stipulato a seguito di pratica commerciale sleale?' *Jus civile*, 316-320 (2022).

[15] As is well known, the Court of Justice of the European Union (CJEU) plays a decisive role in the general interpretation of the European Union framework (and, in particular, there are indeed numerous pronouncements dealing with individual provisions of the legislation on unfair commercial practices and lack of conformity in the supply of consumer goods). Recently, on the 'ideological-political' character of the reference for a preliminary ruling to the Court of Justice of the European Union, see S. Pagliantini, 'Trent'anni di direttiva 93/13, postvessatorietà restitutorio ed il

III. ...to That of Lack of Conformity

In the summer of 2022, the Court of Justice of the European Union – through a trilogy of judgments (issued following a reference for a preliminary ruling on certain questions raised by the Austrian Supreme Court, the Eisenstadt Regional Court and the Klagenfurt Regional Court) (C-128/20, GSMB Invest; C-134/20, Volkswagen; and C-145/20, Porsche Inter Auto and Volkswagen) – proposed, in particular, an interesting reinterpretation of the regulation of the automotive sector and the sale of consumer goods.[16]

First of all, the CJEU stated that *a device that ensures compliance with nitrogen oxide emission limit values only in the 'temperature window' constitutes*, insofar as it reduces the effectiveness of the emission control system under normal conditions of use, *a defeat device prohibited under Art 5, para 2, of Regulation no 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.

A different conclusion might perhaps be reached if it were shown that the installation of the defeat device meets the 'need to protect the engine against damage or breakdown and for safe operation of vehicles' (Art 5, para 2, lett a) of Regulation No 715/2007).

Nevertheless, according to the Court,

> 'a defeat device such as that at issue in the main proceedings can be justified under that exception only where it is established that that device strictly meets the need to avoid immediate risks of damage or accident to the engine, caused by a malfunction of a component of the exhaust gas recirculation system, of such a serious nature as to give rise to a specific hazard when a vehicle fitted with that device is driven'.[17]

vuoto di una interpretazione conforme a tutto tondo' *Accademia*, 11 (2023); Id, *Rinvio pregiudiziale ed interpretazione adeguatrice (la narrazione del civilista)* (Milano: Wolters-Kluwer, CEDAM, 2023) 23; P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, II, *Fonti e interpretazione* (Napoli: Edizioni Scientifiche Italiane, 4th ed, 2020), 150.

[16] For an analysis of these CJEU rulings, see S. Vanini, 'Violazione di norme pubblicistiche di tutela ambientale da parte del produttore e difetto di conformità al contratto del bene consegnato al consumatore: La Corte di giustizia UE e il caso «*Dieselgate*» (C. Giust. UE 14 luglio 2022, in causa C-145/20, Porsche Inter Auto e Volkswagen)' *Rivista di diritto civile*, 166-192 (2023); E. Tuccari, 'La CGUE ritorna sul "Dieselgate" e disegna una disciplina sempre più "sostenibile" del settore *automotive*' *Giurisprudenza italiana*, 5, 1010-1026 (2023); and, in the foreign literature, see M.-E. Arbour, 'The Volkswagen Scandal at the CJEU: Defeat Devices between the Conformity Guarantee and Environment Law' 13 *European Journal of Risk Regulation*, 670-681 (2022); V. Bassani-Winckler, 'Environnement - Émissions des véhicules' *Europe*, 10, 344 (2022); A.M. Rodríguez Guitián, 'El Dieselgate y el Tribunal de Justicia de la Unión Europea (Reflexiones a propósito de tres pronunciamientos de 14 de julio de 2022)' *Anuario de Derecho Civil*, 727-792 (2023).

[17] C-128/20 *GSMB Invest*, Judgment of 14 July 2022, available at www.eur-lex.europa.eu, para 62; C-134/20 *Volkswagen*, Judgment of 14 July 2022, available at www.eur-lex.europa.eu, para 74; C-145/20 *Porsche Inter Auto and Volkswagen*, Judgment of 14 July 2022, available at www.eur-

Such a requirement exists only where, at the time of EC type-approval of that device or of the vehicle fitted with it, no other technical solution makes it possible to avoid risks. It is clearly for the referring courts to ascertain whether that is the case with the manipulation device with which the vehicles are equipped in each individual case, but, according to the Court,

> ‘while it is true that Article 5(2)(a) of Regulation No 715/2007 does not formally impose any further conditions for the application of the exception laid down in that provision, the fact remains that a defeat device which, under normal driving conditions, operated during most of the year in order to protect the engine from damage or accident and ensure the safe operation of the vehicle, would clearly run counter to the objective pursued by that regulation, from which that provision allows derogation only in very specific circumstances, and would result in a disproportionate infringement of the principle of limiting NOx emissions from vehicles’.[18]

It would therefore be the same overall *ratio* of the legislation – aimed at limiting as far as possible the emission of noxious gases by vehicles –[19] that would guide the interpreter in the direction of a markedly (and rightly) restrictive interpretation of the exception in Art 5, para 2, lett a) of Regulation no 715/2007.

Moreover, the consumer – when he buys a vehicle belonging to the series of an approved type and, therefore, accompanied by a certificate of conformity – may reasonably expect that such a vehicle complies, even in the absence of specific contractual clauses, with all the provisions (including Art 5) of Regulation no 715/2007. Art 2 of Directive 1999/44/EC contributes to outlining a structured system of presumptions to facilitate the assessment of the conformity of the commodity with the contract. In particular, the wording of Art 2, para 2, lett d) must be interpreted, according to the CJEU, as meaning that a motor vehicle, falling within the scope of Regulation No 715/2007, does not have the usual quality of goods of the same type that the consumer may reasonably expect if, although it has EC type-approval in force (and may therefore be used), it is equipped with a manipulated software.

Finally, the circumstance that, after having purchased a vehicle, a consumer admits that they would have purchased it even if they had been aware of such a lack of conformity is not in itself relevant, according to the CJEU, for the purpose of determining whether a lack of conformity is to be classified as ‘minor’. Therefore, despite the absence of any legislative definition of the notion of ‘minor

lex.europa.eu, para 73.

[18] C-128/20 *GSMB Invest*, Judgment of 14 July 2022 n 17 above, para 63; C-134/20 *Volkswagen* n 17 above, para 75; C-145/20 *Porsche Inter Auto and Volkswagen* n 17 above, para 74.

[19] This *ratio* seems to emerge already from a simple reading of several Recitals of Reg. no 715/2007 (see, in particular, Recitals 1, 4, 5, 6, 10, 11, 12). On this point, see M.-E. Arbour, n 16 above, 672-674.

lack of conformity',[20] the CJEU reaches this conclusion by developing a systematic analysis (and enhancing the purpose) of Directive 1999/44/EC and Regulation No 715/2007. These regulatory texts – if read in a coordinated manner – aim, on the one hand, to establish a fair balance between the interests of the consumer and those of the seller and, on the other hand, to protect the environment and considerably reduce harmful gas emissions from diesel-powered vehicles in order to improve air quality in compliance with pollution limit values. Having regard to the dual purpose of the system of protection, as outlined by the Court of Justice, the presence of a defeat device in a vehicle, the use of which is prohibited under Art 5, para 2, of Regulation no 715/2007, cannot be regarded as a minor lack of conformity within the meaning of Art 3, para 6, of Directive 1999/44/EC. The latter provision must therefore be interpreted – according to the CJEU – as meaning that a lack of conformity of a vehicle consisting in the installation of a manipulation device (prohibited under Art 5, para 2, of Regulation No 715/2007) cannot be classified as 'minor' even where the consumer, had they been aware of the existence and functioning of that device, would in any event have purchased that vehicle. It follows that it is impossible to exclude *ex ante* any possible recourse to the remedy of rescinding the contract of sale of a vehicle where there is a manipulation device prohibited under Art 5, para 2, of Regulation no 715/2007.[21]

So, the trilogy of CJEU judgments – in addition to clarifying the interpretation to be given to the specific provisions of EU law (applicable at the time of the facts) – seems to contribute to a peculiar 'sustainable' view of consumer law in the automotive sector.

The reconstructive hypothesis essentially ends up including environmental attestations among the integrative elements of the conformity of the motor vehicle to the contract of sale. This reconstruction requires the interpreter to carefully scrutinise the fundamental characteristics of the regulation of the sale (or, *rectius*, of the supply)[22] of consumer goods through the prism of sustainability

[20] For a reflection of the Italian literature, already in the context of Dir. 1999/44/EC, see, among others, G. De Cristofaro, Difetto di conformità al contratto e diritti del consumatore. L'ordinamento italiano e la direttiva 99/44/CE sulla vendita e le garanzie dei beni di consumo (Padova: CEDAM, 2000); R. Pardolesi, 'La direttiva sulle garanzie della vendita: ovvero di buone intenzioni e di risultati opachi' Rivista critica di diritto privato, 442 (2001); A. Luminoso, 'Chiose in chiaroscuro in margine al d. legisl. N. 24 del 2002, Problemi e dilemmi', in M. Bin and A. Luminoso eds, Le garanzie nella vendita dei beni di consumo, in F. Galgano ed, Trattato di diritto commerciale e di diritto pubblico dell'economia (Padova: CEDAM, 2003), XXXI, 10; R. Fadda, La riparazione e la sostituzione del bene difettoso nella vendita (dal codice civile al codice del consumo) (Napoli: Jovene, 2007), 176.

[21] See, critically, S. Pagliantini, *Rinvio pregiudiziale* n 15 above, 3-5. In the foreign literature, see, among others, R. Simon, 'Manipulated Software as a Minor Lack of Conformity?' 12 *Journal of European Consumer and Market Law*, 2, 71-75 (2023).

[22] Thus – with regard to Art 1, para 4, Dir. 1999/44/EC as well as today's art 3, Dir. 771/2019/EU – see F. Addis 'Spunti esegetici sugli aspetti dei contratti di vendita di beni regolati nella nuova direttiva (UE) 2019/771' *Nuovo diritto civile*, 5-27, 12 (2020). Moreover, the shift from sales to supply corresponds to an increasing focus on so-called 'servitization' (especially within the automotive sector). On the phenomenon of 'servitization', see Y.M. Atamer and S. Grundmann, 'Sales Law in

not only to appreciate its positive aspects, but also to unveil its negative aspects through a critical analysis of the evolution of the dialogue between European Union legislation and case law in the automotive sector.

1. The Evolution of European Union Legislation

If, on the one hand, European Union legislation in the automotive sector is characterised by a great deal of complexity resulting above all from the incessant succession of numerous interventions (as specific as they are often partial), on the other hand, it is distinguished by a dual perspective – the protection of competition and sustainable development – which, for years now, seems to have inspired the main legislative innovations.

Indeed, there is no lack (nor has there been a lack in the past) of legislation in the automotive sector that is specifically oriented towards the protection of competition, as evidenced, purely by way of example and without any claim to exhaustiveness, by the specific provisions of EU Regulation no 461/2010 on the application of Art 101, para 3, of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector (which, as of 1 June 2010, replaced EU Regulation no 1400/2002 and will remain in force, after being amended by Commission Regulation (EU) 2023/822 of 17 April 2023, until 31 May 2028), or by the rules on distribution contracts, also applicable in the automotive sector, of EU Regulation 2022/720 on the application of Art 101, para 3, of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (which, as of 1 June 2022, replaced EU Regulation 2010/330).[23] Nor can we overlook the numerous regulatory interventions in the automotive sector inspired, more or less directly, by protection (in addition to competition) of the environment in the perspective of sustainable development. In addition to the aforementioned Regulation no 715/2007 (on the type-approval of motor vehicles with respect to emissions from passenger and light commercial vehicles, Euro 5 and Euro 6, and on obtaining vehicle repair and maintenance information), there is also Directive 2007/46/EC (the so-called 'framework directive' for the type-approval of motor vehicles and their trailers), later repealed by Regulation (EU) 2018/858 of the European Parliament and of the Council of 30 May 2018 on the type-approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles),

Transformation: Sustainability, Digitalisation, Servitisation', in Ead eds, *European Sales Law. Challenges in the 21st Century* (Cambridge: Intersentia, 2023) 1-46; H. Beale, 'From Sales to Servitisation', in S. Grundmann and Y.M. Atamer eds, *European Sales Law. Challenges in the 21st Century* (Cambridge: Intersentia, 2023) 47-76, 49.

[23] On this point, for a recent overview of contract law in the automotive sector (including transposition, and significant related issues, into Italian national law), see F. Ricci, 'I contratti di distribuzione automobilistica integrata nel D.L. n. 68/2022 (dalla l. n.108/2022 alla l. n. 6/2023)' *Accademia*, 231-251 (2023).

to Regulation (EC) no 692/2008 (implementing and amending Regulation no 715/2007), later amended by Regulation (EU) no 566/2011 and repealed by Regulation (EU) 2017/1151 (which, in turn, supplements Regulation no 715/2007, amends Directive 2007/46/EC and Regulation (EU) no 1230/2012), and Regulation (EU) 2019/631 (setting CO2 emission performance standards for new passenger cars and new light commercial vehicles and repealing Regulations (EC) no 443/ 2009 and (EU) no 510/2011). In the same sense, reference can also be made to the numerous resolutions of the European Parliament (such as, most recently, that of 14 February 2023, which amends Regulation (EU) 2019/631 with regard to the strengthening of performance levels for CO2 emissions from new cars and new light commercial vehicles, in line with the Union's greater ambition on climate change).[24]

And it is precisely with the specific regulatory context of the automotive sector that the analysis of the legislation on the sale of consumer goods – also of a European Union matrix and, according to the proposed reinterpretation, on protection of competition and, at least in part, on sustainable development – must be coordinated.[25]

In order to develop a summary analysis of the evolution, in a (more or less) sustainable key, of the legislation on the sale of consumer goods, it seems appropriate to first consider the original Directive 1999/44/EC (in force at the time of the facts brought to the attention of the Austrian courts) and, then, the subsequent directive – declared to be of 'maximum harmonisation' –[26] 771/2019/EU

[24] See n 42 below.

[25] Traditionally, the regulation of the sale of consumer goods moves from an ideal protection of competition from a 'capitalist' perspective. It is very clear in Art 1 of Dir. 2019/771/EU itself: 'The purpose of this Directive is to contribute to the proper functioning of the internal market while providing for a high level of consumer protection, by laying down common rules on certain requirements concerning sales contracts concluded between sellers and consumers, in particular rules on the conformity of goods with the contract, remedies in the event of a lack of such conformity, the modalities for the exercise of those remedies, and on commercial guarantees [...]'. For all, see L. Nivarra, *Diritto privato e capitalismo. Regole giuridiche e paradigmi di mercato* (Napoli: Jovene, 2010), 15, 97-108. The regulation of the sale of consumer goods therefore aims to ensure the promotion and development of the market, also through the protection of competition. In the context of consumer discipline, especially when reread in conjunction with the specific regulation of the automotive sector, it seems possible, however, to glimpse, alongside the ideal of competition protection, an additional *ratio* of environmental protection for the development of a sustainable single market. In the foreign literature, see H.W. Micklitz, n 7 above, 229-237; Y.M. Atamer and S. Grundmann, n 22 above, 1-46. In the Italian literature, interesting insights can be found, for example, in D. Imbruglia, 'Mercato unico sostenibile e diritto dei consumatori' *Persona e mercato*, 495-510 (2021); F. Modugno, 'I diritti del consumatore: una nuova "generazione" di diritti?', in *Scritti in onore di Michele Scudiero*, III, (Napoli: Jovene, 2008), 1363-1464, 1412; S. Pagliantini, 'Contratti del consumatore (diritto europeo)' *Enciclopedia del diritto* (Milano: Giuffrè, 2021), 68-69, 101-102.

[26] Dir 771/2019/EU – once past the principle of 'greater protection' of the consumer – is declared to be of 'maximum harmonisation'. According to Art 4 ('Level of harmonisation'), 'Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more, or less, stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive'. For a critical analysis, see,

(which repeals the previous directive and has now been transposed, albeit sometimes with significant differences, by practically all the Member States) with reference to at least two distinct profiles.

The first relates to the very notion of 'conformity'. As we have seen, Art 2 (titled 'Conformity with the contract') of Directive 1999/44/EC provides for a system of presumptions to facilitate comparative assessment between the actual qualities of the goods delivered and their expected qualities. Despite the fact that there has been no lack of problems in interpreting the complex overall wording of the legislation, it must be noted how, especially in the automotive sector, any comparative assessment is decidedly facilitated by the aforementioned provision according to which

> 'consumer goods are presumed to be in conformity with the contract if they […]: show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling' (Art 2, para 2, lett d)).

Indeed, this presumption seems to be able to operate, especially in the automotive sector, with reference to products that do not comply with the environmental parameters specifically agreed upon in the sector regulations as well as expected at the end of homologation processes and certifications issued by third parties. It is difficult, therefore, to doubt the applicability in the case of motor vehicles equipped with an emissions manipulation system, already in light of the original regulations of the European Union matrix – as then transposed into the legislation of the various Member States – on the nonconformity in the sale of consumer goods. It seems even more difficult, however, to escape the application of the new European Union discipline resulting from the transposition in the various Member States of Directive 771/2019/EC. The latter reformulates, in fact, the very notion of 'conformity' (of the goods to the contract of sale), outlining precise subjective (Art 6) and objective requirements (Article 7) in place of the structured system of presumptions set forth in Art 2 of Directive 1999/44/EC. Moreover, precisely in the context of the objective requirements, it states that the goods shall

among others, A. Barenghi, Osservazioni sulla nuova disciplina delle garanzie nella vendita di beni di consumo' *Contratto e impresa*, 806-822, 808 (2020). Thus, according to the majority of Italian doctrine, there is either 'armonizzazione massima parziale e temperata' (S. Pagliantini, 'Contratti di vendita di beni: armonizzazione massima, parziale e temperata della Dir. UE 2019/ 771' *Giurisprudenza italiana*, 217-238 (2020) or 'armonizzazione massima selettiva' (F. Addis, n 22 above, 7). On this point, for an articulate position (starting from the wording of Dir. 771/ 2019/EU), see S. Pagliantini, 'A partire dalla dir. 2019/771 (UE): riflessioni sul concetto di armonizzazione massima' *Nuovo diritto civile*, 1, 11-22 (2020); F. Bertelli, 'L'armonizzazione massima della direttiva 2019/771 UE e le sorti del principio di maggior tutela del consumatore' *Europa e diritto privato*, 953-993, 957, 971 (2019).

> 'be of the quantity and possess the qualities and other features, including in relation to durability, functionality, compatibility and security normal for goods of the same type and which the consumer may reasonably expect given the nature of the goods and taking into account any public statement made by or on behalf of the seller, or other persons in previous links of the chain of transactions, including the producer, particularly in advertising or on labelling' (Art 7, para 1, lett d)).

This further and express regulatory recognition of the systematic centrality of public statements (and, therefore, of sustainability statements) – *a fortiori* considering the contextual overcoming of any equivocal reference to the previous system of presumptions – makes it possible to appreciate, even more easily and directly, the possible gap between the actual sustainability of the goods purchased and the public sustainability declarations made prior to the purchase. It follows that the individual cases of 'greenwashing', including those implemented in the automotive sector, may now entail a breach not only of the prohibition of unfair commercial practices (pursuant to Art 5 of Directive 2005/29/EC), but also of the separate obligation to supply the consumer with compliant goods (pursuant to Art 5 of Directive 2019/771/EU). Such a reinterpretation of the very notion of 'conformity' is, moreover, reflected on the level of protection, since it allows the use of individual remedies provided for the delivery of non-compliant goods and, in so doing, makes it possible to obviate the limits of protection underlying the (national) discipline of unfair commercial practices (moving, however, in the same direction as the new Article 11-bis of Directive 2005/29/EC).

The second profile – which allows us to critically evaluate the evolution of the legislation on the sale of consumer goods through the prism of sustainability – is represented precisely by the 'remedies'. This is, as is well known, a system that provides for a sort of 'hierarchy of remedies' (originally provided for in Art 3 of Directive 1999/44/EC and substantially replicated in Art 13 of the subsequent Directive 771/2019/EC):[27] in the event of a lack of conformity of the goods, the

[27] In the Italian literature, on the nature of the regulation of the sale of consumer goods, see Addis, n 22 above, 5-27, 15. Here, without any pretension of taking a position on such a doctrinal dispute (since, though fascinating and harbinger of undoubted concrete consequences, it does not appear strictly relevant to the elaboration of this paper), we only wish to recall the heated debate between those who trace the discipline of the sale of consumer goods back to the system of sales guarantees (see A. Nicolussi, 'Diritto europeo della vendita di beni di consumo e categorie dogmatiche' *Europa e diritto privato*, 525-580 (2003); C. Castronovo, 'Il diritto di regresso del venditore finale nella tutela del consumatore' *Europa e diritto privato*, 957-988 (2004); L. Nivarra, 'I rimedi specifici' *Europa e diritto privato*, 157-201 (2011)) and those who, on the other hand, resort to the concept of obligation to explain the seller's liability in the case of lack of conformity of consumer goods (G. Amadio, 'La "conformità al contratto" tra garanzia e responsabilità' *Contratto e impresa/Europa*, 2, 10 (2001); P. Schlesinger, 'Le garanzie nella vendita di beni di consumo' *Corriere giuridico*, 561 (2002); R. Fadda, 'Il contenuto della Direttiva 1999/44/CE: una panoramica' *Contratto e impresa/Europa*, 410, 418 (2000)). This contrast was substantially reproposed, albeit with some differences in argumentation (arising from the new regulatory wording), in the analysis of

consumer has the right, firstly, to repair or replacement of the goods and, secondly (where restoring conformity is impossible or imposes disproportionate costs on the seller), to a reduction of the price or termination of the contract.[28] If, on the one hand, the remedial solution – 'sustainable' par excellence – of repairing the goods continues to have a central role in the 'hierarchy' of remedies in cases of lack of conformity, on the other hand, a whole series of interpretative questions remain unresolved today, precisely in the perspective of an enhancement of the legislation through the prism of sustainability. First of all, the non-hierarchical nature of the remedies aimed at restoring the conformity of the goods is confirmed: it is up to the individual consumer to freely choose between repair and replacement without any marked preference, if not on the basis of predominantly material and economic reasons,[29] for the (clearly more 'sustainable') remedy of repairing the goods.[30] Moreover, the margins of application of the same right to the

Dir 771/2019/EU (in particular, for the thesis of the so-called 'pure guarantee' ['garanzia pura'], see F. Piraino, 'La violazione della vendita di beni al consumatore per difetto di conformità: presupposti della c.d. responsabilità del venditore e la distribuzione degli oneri probatori', in G. De Cristofaro ed, *La nuova disciplina* n 5 above, 125-174, 136-143; Id, 'La garanzia nella vendita: durata e fatti costitutivi delle azioni edilizie' *Rivista trimestrale di diritto e procedura civile*, 1117-1144 (2020); Id, 'Garanzia per vizi nella vendita e tempo: il nodo della durata e della prescrizione', in G. Passagnoli et al eds, *Liber amicorum per Giuseppe Vettori* (Firenze, 2022), 3291-3368; for the obligation argument, see R. Fadda, 'Il diritto al ripristino della conformita` negli artt. 135-*bis* e 135-*ter* cod. cons.: tendenze conservatrici e profili innovativi', in G. De Cristofaro ed, *La nuova disciplina* n 5 above, 281-311, 286-292. Among others, A. Iuliani ('Note minime in tema di garanzia per i vizi nella vendita' *Europa e diritto privato*, 671-692, 682 (2020); Id, *La promessa del fatto del terzo. Contributo allo studio della prestazione di garanzia* (Napoli: Edizioni Scientifiche Italiane, 2023), 109-113) has recently returned to reasoning on the nature of defects in sales between warranty and non-performance (with a critical approach to the 'pure guarantee' thesis); on this point, recently, see also L. Regazzoni, *La garanzia nel diritto dei contratti. Logiche economiche, scelte legislative e autonomia privata* (Milano: Giuffrè, 2022), 78.

[28] There are doubts as to whether the 'primary remedies' in particular belong to the remedial phase proper (as protection against non-performance): see, among others, R. Fadda, n 27 above, 292-299; F. Oliviero, 'La nuova disciplina dei c.d. "rimedi secondari": riduzione del prezzo e risoluzione del contratto', in G. De Cristofaro ed, *La nuova disciplina* n 5 above, 313-355, 313-318; and, more recently, L. Nivarra, 'I rimedi contrattuali', in C. Granelli and N. Rizzo eds, *L'Europa dei codici o un codice per l'Europa?* (Torino: Giappichelli, 2023), 109-123, 120-121.

[29] This perspective seems to emerge from the current wording of Art 13, paras 2 and 3, Dir 2019/771/: '(2). In order to have the goods brought into conformity, the consumer may choose between repair and replacement, unless the remedy chosen would be impossible or, compared to the other remedy, would impose costs on the seller that would be disproportionate, taking into account all circumstances, including: (a) the value the goods would have if there were no lack of conformity; (b) the significance of the lack of conformity; and (c) whether the alternative remedy could be provided without significant inconvenience to the consumer. (3). The seller may refuse to bring the goods into conformity if repair and replacement are impossible or would impose costs on the seller that would be disproportionate, taking into account all circumstances including those mentioned in points (a) and (b) of paragraph 2'.

[30] This element has been critically emphasised in the literature. See, among others, E. Terryn, 'A Right to Repair? Towards Sustainable Remedies in Consumer Law' 27 *European Review of Private Law*, 4, 851-873, 857 (2019); T.M.J. Möllers, 'The Weaknesses of the Sale of Goods Directive – Dealing with Legislative Deficits' *Jus civile*, 1165-1188, 1186 (2020); V. Mak, E. Terryn, 'Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment

restoration of conformity (and, therefore, of the remedy of repair of the goods) are reduced, albeit indirectly, whereas the new Directive 771/2019/EC provides for new and further specific circumstances that, in the case of a lack of conformity, give rise to the consumer's right to directly request the proportional reduction of the price or the termination of the contract of sale (see Art 13, para 4).

These are, once again, perspectives and criticalities present in the text of the directive that have been reflected – also as a result of the usual 'minimalist' transposition activity – in the current text of the Italian consumer code (Arts 128-135-*septies*).[31]

Through Consumer Law' 43 *Journal of Consumer Policy*, 227-248, 234 (2020); A. Michel and E. Van Gool, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption' 10 *Journal of European Consumer and Market Law*, 4, 136-147, 144 (2021); and, in the Italian literature, see D. Imbruglia, n 25 above, 505.

[31] In Italy, the decreto legislativo 2 February 2002 no 24 had originally introduced the provisions into the civil code, outlining, however, a 'sub-type' of sale (that, precisely, of the sale of consumer goods; see A. Zaccaria and G. De Cristofaro, *La vendita di beni di consumo. Commento agli artt. 1519-bis – 1519-nonies del codice civile* (Padova: CEDAM, 2002); and, more recently, A. Luminoso, *La compravendita* (Torino: Giappichelli, 10th ed, 2021), 380). Those rules were repealed by Art 143, lett s) of decreto legislativo 6 September 2005 no 206 (the Consumer Code) and their contents were merged into Chapter I of Title III of Part IV of the Consumer Code (Arts 128-135). Then, following the enactment of the subsequent Dir 771/2019/ EU, decreto legislativo 4 November 2021 no 170 transposed the new provisions into Italian law by replacing the previous Chapter I of Title III of Part IV of the Consumer Code (Arts 128-135-septies). This regulatory evolution, at a European Union level, was clearly reflected in our consumer code discipline as well. However, the 'hierarchisation of remedies', according to De Cristofaro ('Legislazione italiana e contratti dei consumatori nel 2022: l'anno della svolta. Verso un diritto "pubblico" dei (contratti dei) consumatori?' *Nuove leggi civili commentate*, 29 (2022); Id, 'Verso la riforma della disciplina delle vendite mobiliari *B-To-C*: l'attuazione della dir. UE 2019/771' *Rivista di diritto civile*, 229, fn 49 (2021), is somewhat weakened, since the consumer can nowadays access – with greater ease than in the past – to the 'secondary' remedies of price reduction or contract termination. In the same sense, see R. Fadda, n 27 above, 301-302; Oliviero, n 28 above, 320-330 (and, for a comparison also with the legislation previously in force, see also Id, *La riduzione del prezzo nel contratto di compravendita* (Napoli: Jovene, 2015), 46-50). For an analysis of the remedy of the out-of-court settlement as a direct consumer remedy, see C. Sartoris, 'La risoluzione della vendita di beni di consumo nella dir. n. 771/2019 UE' *Nuova giurisprudenza civile commentata*, 702-713 (2020); and, with reference to its enhancement in the (more specific) Italian legal system, T. dalla Massara, 'Art. 135 *septies* cod. cons.: il coordinamento tra codice del consumo e codice civile in tempi di armonizzazione massima', in G. De Cristofaro ed, *La nuova disciplina* n 5 above, 485-498, 496-498. On the 'minimalist' approach in transposing the directive on the sale of consumer goods into Italian law, see P. Coppini, n 13 above, 468-501.

Different choices have been made in the legal systems of other Member States. And this, in the first place, with reference to the scope of application and influence of European Union legislation. Here, for example, are the cases of the German and French legal systems, which have traditionally had an important influence on our legal system. Indeed, as is well known, Germany proceeded, also as a result of the need to transpose Directive (EU) 771/2019, to reform the Civil Code. France, although having initially chosen (like Italy) to transpose Directive (EU) 771/2019 within the framework of the *Code de la consommation*, has then greatly enhanced the directive on the sale of consumer goods (and in particular the rules on lack of conformity) within the recent project of reform on contracts, where the influence (also remedial) of the aforementioned directive is rather significant well beyond the scope of the sale of consumer goods (see, among others, A. Fournier, 'Les contrats portant sur une chose', in V. Monteillet and G. Cerqueira eds, *L'avant-projet de réforme du droit des*

2. The Evolution of European Union Case Law

In order to also appreciate the development of EU case law on 'Dieselgate', with reference to both the specific legislation of the automotive sector and that of the sale of consumer goods, it is necessary to start from the ruling of 17 December 2020, C-693/18, of the Court of Justice of the European Union.

The judgment – rendered after the request of the examining magistrates in the context of criminal proceedings (against Volkswagen for the offence of aggravated fraud concerning the placing on the French market of vehicles equipped with an alleged manipulation system) before the *Tribunal de grande instance de Paris* – concerns

> 'the interpretation of Article 3(10) and Article 5(2) of Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 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'.[32]

This is, in other words, the first time that the Court of Justice of the European Union has been called upon to deal with specific legislation relating to the type-approval of motor vehicles with regard to emissions from passenger and light commercial vehicles (Euro 5 and Euro 6) and the obtaining of information on vehicle repair and maintenance. The Court holds that software integrated into the control unit, if it acts on the functioning of the emission control system and reduces its effectiveness, falls within the concept of 'defeat device' (as laid down in Art 3, para 10, of Regulation (EC) no 715/2007).

The broad interpretation, thus outlined, of the concept of 'defeat device' must then be followed, according to the same ruling of the Court of Justice, by a restrictive interpretation of Art 5, para 2, lett a) of Regulation (EC) no 715/2007. The latter provision, as is now well known, provides for an exemption from the

contrats spéciaux (Paris: Société de législation comparée, 2023), 89-101; X. Godin, 'Introduction', in Ch.-E. Bucher and M.-A. Daillant eds, *La réforme du droit des contrats spéciaux* (Paris: Dalloz, 2023), 28; A.S. Lebret, 'La vente', in Ch.-E. Bucher and M.-A. Daillant eds, ibid 107-116; F.C. Dutilleul, 'Observations provisoirement conclusives sur l'avant-projet de réforme du droit des contrats spéciaux', in Ch.-E. Bucher and M.-A. Daillant eds, ibid 194-195).

[32] Case 693/18, *CLCV and Others*, Judgment of 17 December 2020, available at www.eur-lex.europa.eu, para 1. For a first comment, in the Italian literature, see G. F. Simonini, 'La Corte di giustizia analizza i dispositivi sul controllo delle emissioni degli autoveicoli alla luce di una interpretazione molto restrittiva, offrendo nuove prospettive di lettura del c.d. scandalo *dieselgate*' *Diritto comunitario e degli scambi internazionali*, 3-4, 567 (2020). In the foreign literature, see, in France, A. Rigaux and D. Simon 'Environnement - Émissions des véhicules' *Europe*, 2, 72 (2021); P. Thieffry, 'Le Dieselgate, rare rencontre du droit international privé et de l'environnement en aval des mines de potasse d'Alsace' *Revue trimestrielle de droit européen*, 1, 220-222 (2021); and, in Germany, M. Schröder, 'Urteil v. 17. 12. 2020 – C-693/18: Anmerkung' *Juristenzeitung*, 782-784 (2021); M. Will, 'Unionsrechtswidrigkeit von Diesel-Abschalteinrichtungen' *Neue Juristische Wochenschrift*, 1199-1202 (2021).

general prohibition on the use of defeat devices that reduce the effectiveness of emission control systems where there is a need to protect the engine against damage or breakdown and to ensure the safe operation of vehicles: however, according to the CJEU, this provision is not applicable if the device systematically improves the performance of the vehicle emission control system only during type-approval procedures with the sole aim of complying with the threshold values set by the legislation and thus obtaining vehicle type-approval. The Court of Justice outlines a broad interpretation of the concept of 'defeat device' – and, consequently, the application of the general prohibition of the use of such devices that reduce the effectiveness of emission control systems – and then suggests a restrictive interpretation of the provision – and thus excludes its application – considered to be decidedly exceptional, which justifies the possible installation on the grounds of the need to protect the engine against damage or breakdown and to ensure the safe operation of vehicles.

These are clear indications of the position of CJEU that certainly aim, in interpreting the automotive sector legislation, to emphasise protection of the environment from the outset, in the perspective of sustainable development.

When 'Dieselgate' – albeit in the light of a slightly different (but substantially comparable) case – returns to the Court of Justice in the summer of 2022, the outcome, at least for questions concerning the lawfulness or otherwise of the 'incriminated' software, is fairly predictable: the Court limits itself to essentially retracing the same argumentative process as in the previous case. Once again, the broad interpretation of the notion of 'defeat device' (pursuant to Art 3, para 10, of Regulation (EC) no 715/2007) and the consequent application of the general prohibition on the use of software that modifies the effectiveness of emission control systems (pursuant to Art 5, para 2, of Regulation (EC) no 715/2007), this time ensuring environmental performance only within a certain 'temperature window', and then reiterating the restrictive interpretation of the provision – and therefore precluding its application – considered exceptional, which justifies the possible installation for the need to protect the engine from damage or breakdown and to ensure the safe operation of vehicles (Art 5, para 2, lett a) of Regulation (EC) no 715/2007).

It is certainly not the increasing emphasis placed by the Court of Justice on the 'sustainable' approach of the entire Regulation no 715/2007 that is, however, the main novelty. Instead, in the trilogy of rulings from the summer of 2022 (and, indeed, above all in the decisions stemming from C-134/20 and C-145/20), the previously entirely neglected reference to the law on the sale of consumer goods now becomes central.

The fruitful interaction of the interpretation of the sectoral legislation with that of Art 2, para 2, lett d) of Directive 1999/44/EC constitutes the real novelty of the aforementioned rulings. To the now familiar interpretation of Art 3, para 10, and Art 5, paras 1 and 2, of Regulation no 715/2007 is added, as we have seen,

the coordination with an interpretation of the legislation on the sale of consumer goods aimed at making the regulation on the lack of conformity applicable to the 'Dieselgate' cases (because, as has already been pointed out,

> 'when both the protection of the environment and a high level of consumer protection are taken seriously, a true commitment towards the reduction of NOx emissions seems tangible').[33]

It follows that a motor vehicle equipped with a system to manipulate its environmental performance, against the issuance of public sustainability statements, could be considered as a non-compliant product within the meaning of Directive 1999/44/EC. Moreover, we see no reason why this conclusion should change following the entry into force of the new concept of 'nonconformity' – even broader and, as we have seen, specifically aimed at enhancing the role of, *inter alia*, public sustainability statements – introduced by Directive 771/2019/EC.

However, there is more: the applicability of the rules on lack of conformity of the goods with the contract raises – subject, of course, to the ascertainment, on a case-by-case basis, of the fact by the national courts – the question of 'remedies'.[34] An interesting consideration has thus developed concerning the

[33] M.-E. Arbour, n 16 above, 678-679.

[34] In the past, the Court of Justice of the European Union had already intervened several times to interpret the characteristics of the 'hierarchy of remedies' (of course, especially at the time of Dir 1999/44/EC). See Case 404/06 *Quelle AG* v *Bundesverband der Verbraucherzentralen und Verbraucherverbände*, [2008] ECR I-2685; Joined Cases C-65 and 87/09 *Gebr. Weber GmbH* v *Jürgen Wittmer and Ingrid Putz* v *Medianess Electronics GmbH* [2011] ECR I-5257. For comments, in the Italian literature, see L. Mangiaracina, 'La gratuità della sostituzione del prodotto difettoso nella direttiva 1999/44/CE: la normativa tedesca al vaglio della Corte di giustizia' *Europa e diritto privato*, 191-202 (2009); G. Magri, 'La vendita di beni di consumo torna alla Corte di giustizia: eccessiva onerosità del rimedio, differenze linguistiche e influsso della Dir. 99/44/CE sul diritto tedesco e italiano' *Giurisprudenza italiana*, 534-539 (2011); M. Francisetti Brolin, 'Garanzie nell vendita di consumo ed esatto adempimento sostitutivo: nuove questioni al vaglio della Corte di giustizia' *Contratto e impresa/Europa*, 775-797 (2011); De Hippolytis, 'Su chi gravano le spese occorrenti per la rimozione di un bene di consumo difettoso e l'installazione di un bene sostitutivo?' *Il Foro italiano*, IV, 567-570 (2011); A. De Franceschi, 'La sostituzione del bene "non conforme" al contratto di vendita' *Rivista di diritto civile*, 559-596 (2009); A. Genovese, 'Ripristino della conformità del bene di consumo difettoso' *Giurisprudenza italiana*, 1502-1504 (2011). And, in the foreign literature, see S. Herrler, 'Rückforderung von Nutzungsersatz beim Verbrauchsgüterkauf: Verzögerter Beginn der Verjährungsfrist wegen unübersichtlicher Rechtslage' *Neue Juristische Wochenschrift*, 1845-1847 (2009); C. Herresthal, 'Die teleologische Auslegung der Verbrauchsgüterkaufrichtlinie - Der EuGH auf dem Weg zu einer eigenständigen Methode der Rechtsgewinnung' *Zeitschrift für europäisches Privatrecht*, 598-612 (2009); S. Stijns and S. Jansen, 'Consumer Sales – Remedies', in E. Terryn et al eds, *Landmark cases of EU consumer law: in honour of Jules Stuyck* (Cambridge: Intersentia, 2013) 704-724; Grundmann, Stefan: 'Consumer Sales – The Weber-Putz Case-Law: From Traditional to Modern Contract Law', in E. Terryn et al eds, *Landmark cases*, ibid, 731-742; M. Dupont, 'Le consommateur n'est pas tenu d'indemniser le vendeur d'un bien de consommation défectueux pour l'usage qu'il en a fait jusqu'à son remplacement' *Droit de la consommation*, 77-81 (2008); K. Lilleholt, 'Case: CJEU – Quelle' 6 *European Review of Contract Law* 2, 192-196 (2010); G. Pignarre and L. F. Pignarre, 'A propos de la gratuité du remplacement d'un bien non conforme' *Recueil Le Dalloz*, 2631-2635 (2008); P. Rott, 'The Quelle Case and the Potential of and Limitations to

abstract admissibility, in cases attributable to 'Dieselgate', even of the termination of the original contract of sale, since a conformity defect of this kind cannot be considered 'minor' within the meaning of Art 3, para 6, of Directive 1999/44/EC. Moreover, the circumstance that, after having purchased a commodity, the consumer themself admits that they would have purchased it even if they had been aware of such a lack of conformity is not in itself relevant, according to the CJEU, for the purpose of determining whether a lack of conformity can be objectively characterised as 'minor'.[35] This means that – in the light of both Art 3 of Directive 1999/44/EC (and, as we have seen, Art 13 of Directive 771/2019/EC) – the termination of the contract is a remedy which, once the conformity defect has been established, cannot be abstractly excluded in cases attributable to 'Dieselgate'.[36]

Interpretation in the Light of the Relevant Directive' *European Review of Private Law*, 1119-1130 (2008); T.M.J. Möllers and A. Möhring, 'Recht und Pflicht zur richtlinienkonformen Rechtsfortbildung bei generellem Umsetzungswillen des Gesetzgebers' *Juristenzeitung*, 919-924 (2008); C. Schneider and F. Amtenbrink, ' "Quelle": The possibility, for the seller, to ask for compensation for the use of goods in replacement of products not in conformity with the contract' *Revue européenne de droit de la consommation*, 301-309 (2007-08); C. Aubert de Vincelles, 'Charge des frais liés au remplacement d'un bien vendu non conforme' *Revue des contrats*, 1233-1242 (2011); J.A. Tamayo Carmona, 'Gastos y costes de la acción de sustitución de bienes no conformes - Directiva 1999/44/CE, sobre venta y garantías de bienes de consumo - Comentario de la STJ de 16 junio 2011, C-65/09 y C-87/09' *Revista de Derecho Patrimonial* 31, 401-425 (2013); J. Luzak, 'Who should bear the risk of the removal of the non-conforming goods?' 1 *Journal of European Consumer and Market Law* 2, 35-40 (2012); Ead, 'A Storm in a Teacup? On Consumers' Remedies for Nonconforming Goods after Weber and Putz' 23 *European Review of Private Law*, 689-704 (2015); A. Fromont, 'Verdure, Christophe: Arrêt Weber et Putz: la prise en charge des frais de remplacement en application de la garantie des biens de consommation' *Revue européenne de droit de la consommation*, 141-150 (2012); K. Sein, 'Kalamees, Piia: Recoverability of Removal and Installation Costs in Case of Defective Consumer Goods: How Would the Weber and Putz Case Be Solved under Common European Sales Law?' *Zeitschrift für Gemeinschaftsprivatrecht*, 289-293 (2011); J. Hoffmann and S. Horn, 'Grundfragen des kaufrechtlichen Aufwendungsersatzes für Ein- und Ausbaukosten' 218 *Archiv für die civilistische Praxis*, 865-904 (2018); E. Poillot, 'Droit contractuel de la consommation. Inexécution du contrat' *Recueil Le Dalloz*, 845-846 (2012); G. Paisant, 'Quelles obligations pour le vendeur qui délivre un bien défectueux?' *La Semaine Juridique - édition générale* 40, 1759 (2011).

[35] The Court of Justice of the European Union thus essentially agrees with the Opinion of Advocate General Athanasios Rantos (delivered on 23 September 2021 before the Court of Justice). On this point, see, for all, G. F. Simonini, 'Verso una concezione oggettiva (e tecnica) del difetto di conformità dei beni di consumo' *Danno e responsabilità*, 64-76, 68 (2022).

[36] According to M.-E. Arbour, n 16 above, 678-680: 'Handed down in the aftermath of the diesel scandal, the CJEU trilogy left plaintiffs with three certainties: the car industry regulatory framework impacts upon almost every condition of the conformity guarantee; the lack of conformity is not 'minor' (conversely, we may qualify it 'major'); and, as a result, consumers from twenty-seven Member States may seek the termination of sale contracts with the seller, as the CJEU basically acknowledged that greenwashing is not tolerable contractual practice: '[t]he beauty evoked by commercial marketing may induce consumers to act to their later regret on sober reflection, but more is at stake when these aesthetic charms camouflage environmental injury' [...] 'the CJEU sent three powerful messages to diesel car manufacturers and national regulators: firstly, the state of the art cannot supersede supranational regulation; secondly, regulation costs must be internalised by the industry; and thirdly, technical means must be devised in order to comply with Euro thresholds (Euro

Here, although probably animated by the best of intentions, the Court of Justice proposes a reading that runs the risk of not taking sufficient account of the current evolution of the body of laws (both in the wording of Directive 1999/44/EC and the subsequent Directive 771/2019/EC and in that of Regulation 715/2007). The impression is that we are dealing with a 'political pre-understanding' of the matter:[37] if, on the one hand, the first step of the Court's argumentation is convincing where it finds an 'objective' lack of conformity of the motor vehicle (in the absence of the usual qualities and characteristics of goods of the same type) because it was equipped with software prohibited by Regulation 715/2007, on the other hand, the next step of the same argumentation is decidedly less convincing – in case of a conformity defect (and not of a material defect and even less of an *aliud pro alio*) – when it objectively and almost automatically deduces (irrespective, moreover, of whether the consumer states that, had they been aware both of the existence and of the operation of the prohibited device, they would in any event have purchased the said vehicle) the potential (but general) seriousness of the defect from the very wording of Art 5, para 2, of Regulation 715/2007 ('the use of defeat devices that reduce the effectiveness of emission control systems shall be prohibited').[38] However, this last step of the argumentation, relating to the *potential (but general) seriousness of the lack of conformity*, seems to be based simply (not on the prohibition laid down by the text of the regulation but) on the teleological context and, above all, on the circumstance that a vehicle circulating in disregard of the emission limit values laid down in Annex I to Regulation no 715/2007 (despite valid EC type-approval) generally violates the principle of sustainable development (Art 1, para 3, of the EU Treaty) and the value of 'the importance of environmental protection'.[39]

IV. Future Perspectives: From Emphasis on Product Durability to Mandatory Repair?

Already at the outcome of *this incessant dialogue referred to so far between European Union legislation and case law* – inspired by a coordinated rereading of the regulation of the automotive sector and the sale of consumer goods through the prism of sustainability – there is no lack of reasons to reflect on possible future prospects.

In particular, the same Directive 771/2019/EU – notwithstanding the lack of hierarchisation within the scope of the remedies aimed at restoring the conformity of the goods (and the persistent perplexities, *inter alia*, on the discipline of the

5, Euro 6, etc), *no matter what*'.

[37] S. Pagliantini, *Rinvio pregiudiziale* n 15 above, 3-5, 20.

[38] See C-145/20 *Porsche Inter Auto and Volkswagen*, n 17 above, paras 94-95.

[39] ibid para 95.

terms within which such remedies can be asserted) –[40] allows one to glimpse references with a view to a (even more) sustainable reinterpretation of the regulations on the sale of consumer goods.

Leaving aside for the moment the need to identify (at national and European Union level) new and more incisive 'information obligations' for the seller, so that he is required to disclose to consumers the characteristics that affect the environmental impact of the commodity (such as, for example, its durability, its reparability, and the availability of spare parts),[41] it should be noted the emphasis already placed by Directive 771/2019/EU – particularly under Arts 5 and 7, para 1, lett d) and Recital 48 (but also present in some previous and subsequent resolutions of the European Parliament) –[42] on the *durability of the commodity* as an objective requirement of conformity and on repair as a means of encouraging sustainable consumption.[43]

There has been no lack of 'courageous' ideas – aimed at legitimising even the

[40] On the perplexities about the regulation of the terms, see M. Faccioli, 'La nuova disciplina europea della vendita di beni ai consumatori (dir. (UE) 2019/771): prospettive di attuazione delle disposizioni sui termini' *Nuove leggi civivili commentate*, 250-279 (2020); Id, '*La durata della responsabilità del venditore e la prescrizione dei diritti del consumatore*', in G. De Cristofaro ed, *La nuova disciplina* n 5 above, 383-415.

[41] There are – as M. D'Onofrio has already correctly pointed out (see, n 9 above, 24) – national regulations that are decidedly more advanced than the Italian one (such as, for example, the French one).

[42] Several resolutions emanating from the institutions of the European Union propose the imposition of stringent information obligations on professionals regarding these aspects. In its resolution of 10 February 2021 on the New Circular Economy Action Plan, the European Parliament insisted on consumer information on the durability of goods and their reparability (no 26; and overall preference for the ecological theme and repair: nos 23 and 31 and nos 54 to 132). Also in the resolution of 25 November 2020, entitled 'Towards a more sustainable single market for business and consumers', the Parliament had considered the aspect of pre-contractual information (no 6 (b); no 21), calling for the development of a strategy to increase the durability and reparability of goods (no 6 (b); no 21). Even earlier, the resolution of 4 July 2017, on a longer lifetime for products: benefits for consumers and companies, devoted a paragraph to the need to ensure better consumer information (from nos 27 to 29; but nos 1 to 8; nos 9 to 15 are also very important).

[43] This point of view seems to be confirmed by reading the text of Arts 5 and 7, para 1, lett d), as well as Recital 48 of Directive 771/2019: 'Article 5 [Conformity of goods] 'The seller shall deliver goods to the consumer that meet the requirements set out in Articles 6, 7 and 8, where applicable, without prejudice to Article 9'; 'Article 7 [Objective requirements for conformity] (1). In addition to complying with any subjective requirement for conformity, the goods shall: [...] be of the quantity and possess the qualities and other features, *including in relation to durability*, functionality, compatibility and security normal for goods of the same type and which the consumer may reasonably expect given the nature of the goods and taking into account any public statement made by or on behalf of the seller, or other persons in previous links of the chain of transactions, including the producer, particularly in advertising or on labelling'; 'Recital 48: As regards bringing goods into conformity, consumers should enjoy a choice between repair or replacement. Enabling consumers to require repair should encourage sustainable consumption and could contribute to greater durability of products. The consumer's choice between repair and replacement should only be limited where the option chosen would be legally or factually impossible or would impose costs on the seller that would be disproportionate, compared to *the other option available. For instance, it might be disproportionate to request the replacement* of goods because of a minor scratch, where such replacement would create significant costs and the scratch could easily be repaired'.

professional's refusal to proceed to replacement when the most convenient solution is repair (parameterising the choice in the light of the 'environmental', and not merely 'economic', cost of one solution compared to the other) –[44] but the current legal situation does not seem to allow 'leaps forward' due to legislative choices that have so far been decidedly less 'courageous'. The risk, in fact, is that of confusing 'being' (ie a European Union regulation set up mainly to protect consumers and competition, only partly re-readable today, through the prism of sustainability) with 'wanting to be' (ie, in the perspective of some interpreters, a regulation capable of protecting, at the same time and in equal measure, consumers, competition and environment)![45]

It is not certain, however, that the above-mentioned European regulatory indications (especially, but not only, on the durability of products) – still mainly of a programmatic nature –[46] will not lead to more binding forecasts in the near future.

For example, the recent 'Proposal for a Directive of the European Parliament and of the Council on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394, Directives (EU) 2019/771 and (EU) 2020/1828' seems to give greater value to the repair remedy, also through specific information duties placed on the producer (see Art 6).[47] According to the framework of the Proposal

[44] See, in this sense, for instance D.M. Matera, 'Difetto di conformità, gerarchia dei rimedi e sostenibilità ambientale nel nuovo art. 135-bis cod. cons. e nella Dir. 771/2019' *Rivista di diritto privato*, 453-472, 458-470 (2022).

[45] See n 25 above. In more general terms, on the relationship between 'competitiveness' and 'sustainability', see E. Caterini, 'Sustainability and Civil Law' 4 *The Italian Law Journal* 2, 289-314, 295-297, 305-306 (2018).

[46] This is already (well) noted by M. D'Onofrio, n 9 above, 143.

[47] This different perspective (information, first, repair, second) is evident – as well as from numerous passages in the explanatory memorandum – from several provisions. This is the current text of Arts 4 and 6: 'Article 4 [European Repair Information Form] (1) Member States shall ensure that, before a consumer is bound by a contract for the provision of repair services, the repairer shall provide the consumer, upon request, with the European Repair Information Form set out in Annex I on a durable medium within the meaning of Article 2 (11) of Directive 2019/771/EU. (2) Repairers other than those obliged to repair by virtue of Article 5 shall not be obliged to provide the European Repair Information Form where they do not intend to provide the repair service. (3) The repairer may request the consumer to pay the necessary costs the repairer incurs for providing the information included in the European Repair Information Form. Without prejudice to Directive 2011/83/EU, the repairer shall inform the consumer about the costs referred to in the first subparagraph before the consumer requests the provision of the European Repair Information Form. (4) The European Repair Information Form shall specify the following conditions of repair in a clear and comprehensible manner: (a) the identity of the repairer; (b) the geographical address at which the repairer is established as well as the repairer's telephone number and email address and, if available, other means of online communication which enable the consumer to contact, and communicate with, the repairer quickly and efficiently; (c) the good to be repaired; (d) the nature of the defect and the type of repair suggested; (e) the price or, if the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated and the maximum price for the repair; (f) the estimated time needed to complete the repair; (g) the availability of temporary replacement goods during the time of repair and the costs of temporary replacement, if any, for the consumer; (h) the place where the consumer hands over the goods for repair, (i) where applicable, the availability of

for a Directive – which, albeit only implicitly, thus demonstrates *the need for a further Euro-Union legislative step* – 'Member States shall ensure that upon the consumer's request, the producer shall repair, for free or against a price or another kind of consideration, goods' (Art 5).[48] From the lack of conformity of the goods to the contract – found, as we have seen, in the hypothesis of the misuse of environmental sustainability statements included in the 'certificate of conformity' of the vehicle – *will thus derive primarily an obligation to repair at the expense of the producer*?

Without prejudice to the interpreter's need to try to critically coordinate the regulation (of the automotive sector and) of consumer law at least with further compensation and procedural profiles, as well as with equally relevant problematic

ancillary services, such as removal, installation and transportation, offered by the repairer and the costs of those services, if any, for the consumer; (5).The repairer shall not alter the conditions of repair specified in the European Repair Information Form for a period of 30 calendar days as from the date on which that form was provided to the consumer, unless the repairer and the consumer have agreed otherwise. If a contract for the provision of repair services is concluded within the 30 day period, the conditions of repair specified in the European Repair Information Form shall constitute an integral part of that contract. (6).Where the repairer has supplied a complete and accurate European Repair Information Form to the consumer, it shall be deemed to have complied with the following requirements: (a) information requirements regarding the main features of the repair service laid down in Article 5(1) point (a), and Article 6(1), point a of Directive 2011/83/EU and Article 22(1), point (j), of Directive 2006/ 123/EC; (b) information requirements regarding the repairer's identity and contact information laid down in Article 5(1), point (b), and Article (6)(1), points (b) and (c), of Directive 2011/83/EU, Article 22(1), point (a), of Directive 2006/123/EC and Article 5(1), points (a), (b) and (c), of Directive 2000/31/EC; (c) information requirements regarding the price laid down in Articles 5(1), point (c), and Article 6(1), point (e), of Directive 2011/83/EU and Article 22(1), point (i) and (3), point (a), of Directive 2006/123/EC; (d) information requirements regarding the arrangements for the performance and the time to perform the repair service laid down in Articles 5(1), point (d), and Article 6(1), point (g), of Directive 2011/83/EU'; 'Article 6 [Information on obligation to repair] Member States shall ensure that producers inform consumers of their obligation to repair pursuant to Article 5 and provide information on the repair services in an easily accessible, clear and comprehensible manner, for example through the online platform referred to in Article 7'.

[48] This is the current wording of Art 5 of the Proposal (published on 23 March 2023): '[Obligation to repair] (1). Member States shall ensure that upon the consumer's request, the producer shall repair, for free or against a price or another kind of consideration, goods for which and to the extent that reparability requirements are provided for by Union legal acts as listed in Annex II. The producer shall not be obliged to repair such goods where repair is impossible. The producer may sub-contract repair in order to fulfil its obligation to repair. (2). Where the producer obliged to repair pursuant to paragraph 1 is established outside the Union, its authorised representative in the Union shall perform the obligation of the producer. Where the producer has no authorised representative in the Union, the importer of the good concerned shall perform the obligation of the producer. Where there is no importer, the distributor of the good concerned shall perform the obligation of the producer. (3). Producers shall ensure that independent repairers have access to spare parts and repair-related information and tools in accordance with the Union legal acts listed in Annex II. (4). The Commission is empowered to adopt delegated acts in accordance with Article 15 to amend Annex II by updating the list of Union legal acts laying down reparability requirements in the light of legislative developments'. On this topic, see, among others, C. Dalhammar et al, 'What is Right to Repair (R2r) and How Can it be Realised through Legal Interventions?', in S. Grundmann and Y.M. Atamer eds, n 22 above, 165-196.

aspects concerning the relationship between private and public enforcement,[49] the possible provision (and punctual formulation) of a repair obligation placed on the manufacturer – also supported by precise duties of information – is already an interesting prospect to start assessing the actual possibility of 'squaring the circle' of future cases similar to Dieselgate.[50]

[49] On the need for further critical coordination work – in light of the usual debate between national and EU law and case law – including of the various compensatory and procedural profiles as well as interference between public and private enforcement measures in the Dieselgate affair, see E. Tuccari, 'New solutions' n 8 above.

[50] The idea of 'squaring the circle' of these cases is clearly taken up by H.W. Micklitz, n 7 above.