

THE ITALIAN COMPETITION AUTHORITY

IN ITS MEETING of 4 August 2016;

HAVING HEARD the rapporteur Dr Gabriella Muscolo;

HAVING REGARD to Part II, Title III, of Legislative Decree 6 September 2005, n. 206, on "*Consumer Code*" as amended (hereinafter Consumer Code);

HAVING REGARD to the "*Regulations on preliminary procedures concerning misleading and comparative advertising, unfair commercial practices, violation of consumer rights in contracts, violation of the prohibition of discrimination and unfair terms*" (hereinafter Regulation), adopted by the Authority with resolution of 1 April 2015;

HAVING REGARD to its provision of 17 March 2016, with which, pursuant to Art. 7, paragraph 3 of the Regulation, an extension of sixty days has been granted for the conclusion of proceedings, for special inquiries needs, as well as the provision of 21 June 2016, with which, according to the same article, in granting extension of proceedings requested by Volkswagen Group Italia S.p.A and Volkswagen AG on 14 June 2016, and amended on 17 June 2016, an extension of forty-five days has been granted for the conclusion of proceedings;

HAVING REGARD to the procedural documents;

## **I. THE PARTIES**

Volkswagen Group Italia S.p.A. (hereinafter VW Italia), as a trader, pursuant to Art. 18, letter b), of the Consumer Code. The company, headquartered in Italy, operates in Italy in the distribution of passenger cars and commercial vehicles of the Volkswagen Group, which includes, among others, Volkswagen, Audi, Seat, Skoda and Volkswagen commercial vehicles brands. 2015 sales of VW Italia amounted to EUR 4,272,367,749.

Volkswagen AG (hereinafter VW AG), as a trader, pursuant to Art. 18, letter b) of the Consumer Code. The company, based in Wolfsburg, Germany, is the parent of the group, one of the leading global players in the production of cars and commercial vehicles. 2015 turnover for VW AG was EUR 73,510,000,000<sup>1</sup>.

Associazione Codici (Codes Association), Movimento Difesa del Cittadino (Citizens Protection Movement), Confconsumatori, Codacons, Altroconsumo, Cittadinanzattiva Onlus and Federconsumatori Bologna, as reporting consumer associations.

## **II. THE COMMERCIAL PRACTICE**

1. The case concerns conduct adopted by the traders, which from 2009 marketed passenger cars and commercial vehicles in Italy with engines, both diesel and gasoline, whose polluting or environment-affecting emissions would not be consistent with the values declared in type-approval, or whose approval was obtained through the use of a software in the engine control unit ("defeat device"), which can make the behaviour of the vehicle different during the bench test for emissions control compared to normal road use.

---

<sup>1</sup> 2014 total consolidated sales of the Volkswagen Group amounted to EUR 202.5 billion.

2. The case originates from information obtained officially, as well as from reports by several consumer associations, with reference to notice on 18 September 2015 from the Environmental Protection Agency (the EPA), the US federal environment agency, a "notice of violation" against Volkswagen AG, Audi AG and Volkswagen Group of America for having installed software (defeat devices) on some Group diesel engines that can reduce polluting emissions from these engines during approval compared to normal driving conditions<sup>2</sup>.

3. With the press release dated 22 September 2015, Volkswagen AG admitted responsibility for the above violation, also stating that some 11 million vehicles sold worldwide were involved<sup>3</sup>.

4. On 23 September 2015, the news was also published on the Group's Italian website. The press release reads: "*At this time, the Volkswagen Group is working flat out to clarify some irregularities concerning a particular software used on some of our diesel engines [...] A noticeable deviation between bench-test results and actual road use was established solely for a family of diesel engines prior to EU 6 approval, and Volkswagen is working intensely to eliminate these deviations through technical measures*"<sup>4</sup>.

5. As a result of the events described, on 26 September 2015 VW Italia asked Italian dealers and retailers, as a precaution, to suspend delivery and sale of motor vehicles equipped with turbo diesel engines bearing the EA 189 code.

6. Subsequently, on 3 November 2015, Volkswagen AG issued press releases informing of possible irregularities committed by the Group in determining the CO<sub>2</sub> emissions values for approval of the vehicles. The irregularities concerned vehicles with both diesel and gasoline engines. In particular, in the press release

---

<sup>2</sup> See doc. n. 25 of the dossier, the EPA Notice of Violation dated 18 September 2015. P. 1 of the document reads: "*As detailed in this Notice of Violation, the EPA has determined that VW manufactured and installed defeat devices in certain models year 2009 through 2015 light duty diesel vehicles equipped with 2.0 litre engines. These defeat devices bypass, defeat, or render inoperative elements of the vehicles' emission control system that exist to comply with the Clean Air Act emission standards*".

<sup>3</sup> See doc. n. 5 of the dossier, press release dated 22 September 2015 taken from [www.volkswagenag.com](http://www.volkswagenag.com) site. The statement reads: "*Discrepancies relate to vehicles with Type EA 189 engines, involving some eleven million vehicles worldwide. A noticeable deviation between bench test results and actual road use was established solely for this type of engine. Volkswagen is working intensely to eliminate these deviations through technical measures. The company is therefore in contact with the relevant authorities and the German Federal Motor Transport Authority (KBA - Kraftfahrtbundesamt)*".

<sup>4</sup> See doc. n. 6 of the dossier: press release dated 23 September 2015 from the site [it.volkswagen.com](http://it.volkswagen.com).

entitled “Clarification moving forward: internal investigations at Volkswagen identify irregularities in CO<sub>2</sub> levels”<sup>5</sup> Volkswagen announced that about 800,000 vehicles, most of them with diesel engines, could be involved with higher levels of CO<sub>2</sub> emissions than stated during approval testing<sup>6</sup>.

7. In a further statement of 13 November 2015, the German group released the list of vehicles and their engines currently on sale, or cars of the so-called "model year 2016", whose fuel consumption and CO<sub>2</sub> emissions would be higher than stated during approval. The number of vehicles involved would amount to about 430,000, and would also include vehicles with petrol engines<sup>7</sup>.

8. Accordingly, the profiles subject to these proceedings are as follows:

A) the marketing of diesel vehicles on the Italian market (with identification code EA189 EU 5), from 2009 until September 2015, whose approval was obtained through the use of software in the engine control unit, the so-called "defeat device", which can make the vehicle behave differently during the bench test for emissions control compared to normal road use. As will be described extensively hereinafter, it has been shown that Volkswagen installed an exhaust gas recirculation system (referred to as **EGR**) in motor vehicles of the Group with EA 189 Euro 5 diesel engines that can operate in two distinct modes according to whether the motor vehicle is being bench tested on rollers or in normal driving on the road. This system

---

<sup>5</sup> See doc. n. 47 in the dossier: press releases of 3 November 2015 taken from [www.volkswagenag.com](http://www.volkswagenag.com) site.

<sup>6</sup> See doc. n. 47 cit.: “during the course of internal investigations irregularities were found when determining type-approval CO<sub>2</sub> levels. Based on present knowledge around 800,000 vehicles from the Volkswagen Group could be affected. [...] Under the ongoing review of all processes and workflows in connection with diesel engines it was established that the CO<sub>2</sub> levels and thus the fuel consumption figures for some models were set too low during the CO<sub>2</sub> certification process. The majority of the vehicles concerned have diesel engines”.

<sup>7</sup> See doc. n. 59 of the dossier, press release of 13 November 2015 taken from [www.volkswagenag.com](http://www.volkswagenag.com) site. The statement reads: “The Volkswagen Group reports that the vehicles of the 2016 model year affected by the CO<sub>2</sub> issue have been identified. There is thus now clarity about the new vehicles of the current model year out in the marketplace. On 3 November 2015, the Group had already reported that irregularities may have arisen in determining the CO<sub>2</sub> figures for type-approval of around 800,000 vehicles. This was identified during its currently ongoing investigations and had been made public. The internal investigations into the current vehicles of the 2016 model year provide results for narrowing down the actually affected vehicles with implausible CO<sub>2</sub> figures. In total for the 2016 model year approx. 430,000 vehicles are affected across the Group”.

can provide an NO<sub>x</sub><sup>8</sup> emission value in operation mode, which is activated during the bench test, lower than in the mode for normal use of the vehicle. The EGR system is in fact able to recognize when the vehicle is on rollers in a NEDC<sup>9</sup> cycle of emission control currently in force, by setting the exhaust gas recirculation system to provide a lower result of NO<sub>x</sub> emissions than in normal road use. The EGR system is thus able to reduce the effectiveness of the pollutant emission control system in the mode activated in normal driving on the road. Use of this defeat device, which is not allowed by Community rules, therefore, would allow the vehicles in question to reduce the values of NO<sub>x</sub> emissions in the approval tests, altering the results. In light of such conduct advertising information made by traders is significant regarding ecological claims and indications about conformity with parameters on pollutant emissions and the environment.

**B)** the marketing in Italy in 2015 and 2016 of diesel and gasoline vehicles, whose CO<sub>2</sub> emissions do not conform to the stated values at the time of approval, resulting in dissemination of information to consumers on the levels for these emissions, which the legislature has prescribed as obligatory under D.P.R. (decree of the President of the Republic, Italy) n. 84/2003 Regulations for Implementation of EC Directive n. 94/1999, which do not correspond to actual values.

### **III. FINDINGS FROM THE PROCEEDINGS**

#### ***1) legal procedure***

9. Regarding the actions described above, on 2 October 2015, preliminary proceedings PS10211 were initiated against

---

<sup>8</sup> NO<sub>x</sub> (nitrogen monoxide) emissions, together with emissions of CO (carbon monoxide), HC (unburned hydrocarbons) and Particulates constitute the set of parameters that make up the EURO approval system.

<sup>9</sup> The New European Driving Cycle (NEDC) is defined by EU directives. As will be seen below, it constitutes repetition of four "urban" cycles at a maximum speed of 50 km/h and one Extra-Urban driving cycle, at a maximum speed of 120 km/h. The cycle is meant to represent the typical use of a car in Europe and is used to assess levels of pollutant emissions and fuel consumption.

the traders Volkswagen Group Italia S.p.A. and Volkswagen AG for possible violation of Articles 20, 21, paragraph 1, letter b), 22, and 23, paragraph 1, letter d) of the Consumer Code. The initiation of proceedings was communicated to both traders and reporting consumer associations Associazione Codici, Movimento Difesa del Cittadino, Confconsumatori and Codacons. On 8 and 30 October 2015, and 25 February 2016, petitions were also filed for participation in the case, respectively, by the consumer associations Altroconsumo, Cittadinanzattiva Onlus and Federconsumatori Bologna.

10. On 19 November 2015, pursuant to Art. 27, paragraph 7 of the Consumer Code, the traders proposed commitments to remove the unfairness profiles of the contested commercial practice. These pledges were rejected by the Authority in its meeting of 27 January 2016 with a decision issued to the traders on 29 January 2016, concerning the presupposed interest by the Authority in ascertaining potential infringement, and the fact that the commitments submitted appeared related to conduct which, if proven, could include cases of "manifestly unfair and serious" trade practices, for which Article 27, paragraph 7 of the Consumer Code cannot be applied.

11. In a subsequent document on 2 February 2016, the extension of the object of the proceedings was communicated to the Parties, inasmuch as: the evidence gathered during the investigation indicated the opportunity to broaden the scope of the proceedings to the conduct adopted by VW Italia and VW AG, of marketing passenger cars and commercial vehicles from 2009 in Italy, with both diesel and gasoline engines of all types of displacement, whose polluting or environment-affecting emissions did not conform to the values declared in approval testing, or whose approval was obtained through the use of a software in the engine control unit, which would ensure that the vehicle behaved differently during the emissions control tests compared to normal road use.

12. On 7 December 2015 a request for information was sent to the General Directorate of Motor Vehicles of the Ministry of Infrastructure and Transport. The answer of the General Directorate of Motor Vehicles was received on 11 December 2015.

13. VW Italia and VW AG provided information and presented briefs on 26 October 2015, 2 and 3 November 2015, 19 November 2015, 8 January 2016, 27 and 29 January 2016, 22 February 2016, 31 March 2016 and 18 April 2016, and were heard on 17 November 2015 and 13 January 2016.

14. The traders exercised their right of access to the records of the proceedings on 27 October 2015, 11 February 2016 and 6 May 2016. Altroconsumo associations also exercised their right of access to documents, on 13 November 2015 and 6 July 2016, as did Cittadinanzattiva Onlus on 8 February 2016. Altroconsumo and Citizens Protection Movement filed opinions during the proceedings.

15. On 2 May 2016, pursuant to Art. 16, paragraph 1, of the Regulations, the closing notice of the investigation phase was sent to the Parties, confirming the allegations against VW Italia and VW AG and setting the conclusion of preliminary hearings for 23 May 2016. With the closing notice of the preliminary investigation the traders were arraigned, in relation to the commercial practice described above, for possible infringement of Articles 20; 21; paragraph 1, letter b); 22; and 23, paragraph 1, letter d), of the Consumer Code.

16. On 23 May 2016, the defence brief was received from VW Italia and VW AG, pursuant to Art. 16, paragraph 1 of the Regulations on preliminary procedures.

17. On 14 June 2016, the traders filed a motion for an extension of the deadline for the conclusion of proceedings pursuant to Art. 7 paragraph 3 of the Regulations on preliminary procedures. The request was based on the need to acquire some authorizations of the proceedings issued by the German Federal Motor Transport Authority (KBA) at the end of the preliminary phase. The request was supplemented on 17 June 2016 with a similar communication on certain Skoda brand vehicles, released by the UK Approval Authority.

18. On 21 June 2016, in acceptance of the aforesaid request, for defence purposes, an extension of forty-five days was granted for the conclusion of the proceedings. At the same time the Parties, pursuant to Art. 16, paragraph 1, of the Regulations, were notified that by the deadline of 25 July 2016 they could submit closing briefs or documents to be remitted to the Authority's Board along with other preliminary documents for the adoption of the final provision.

19. On 25 July 2016, finally, a further defence brief was received from VW Italia and VW AG.

## ***2) The regulatory framework***

20. European legislation on automobile registrations within the EU and emissions of polluting gases is contained in the following acts:

Directive 2007/46/EC establishes a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, and establishes the technical and administrative requirements to be met in the fields of safety and environmental protection;

Regulation (EC) 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, as well as the Regulation of Implementation 692/2008/EC, which defines the details of the requirements for approval;

Regulation (EC) n. 443/2009 setting emission performance standards for new passenger cars as part of the Community's integrated approach to reduce CO<sub>2</sub> emissions from light-duty vehicles.

Directive 1999/94/EC relating to the availability of consumer information on fuel economy and CO<sub>2</sub> emissions in respect of the marketing of new passenger cars.



21. The purpose of **Directive 2007/46/EC** is to ensure that new vehicles sold on the market, as well as their components, offer high levels of safety and environmental protection. In particular, it defines the framework of technical requirements for the approval of new vehicles in order to facilitate their registration, sale and entry into service in the Union. The approval procedure defined by the Directive is founded on the principles of approval by third parties and mutual recognition. Under the provisions, before being placed on the market, the vehicle is tested by a technical service designated by the approval authority. Based on these tests, the national approval authority grants approval. Once the approval is obtained in an individual country of the Union, the manufacturer may apply for approval in any other EU country. Upon obtaining approval, all vehicles of its type will be registered on the basis of the certificate of conformity, namely the declaration issued by the manufacturer certifying that the vehicle conforms to EU approval requirements. Among the tests to be performed are those that relate to respect for environmental obligations, including the limits for pollutant emissions.

22. The directive also establishes obligations of the manufacturer. The manufacturer is responsible to the national authority for approval and conformity of production to the approved type. Member States may verify the conformity of new vehicles to the approved type, based on sample checks of new vehicles. If a Member State which has granted approval finds that a vehicle, or component thereof, does not conform to the type it has approved, it shall take the necessary measures, including, where necessary, the withdrawal of type-approval, to ensure that production vehicles, systems, components or separate technical units are brought into conformity with the approved type (Art. 30, par. 1 of the Directive). If the certificate of approval has been issued by another Member State, the State that believes there is a breach can conduct inspections and, once any irregularities are ascertained, it may request the State which has granted approval to carry out similar checks and if necessary to take corrective action. Member States may impose sanctions in case of violation of the Directive.

23. **Regulation 715/2007** establishes common technical requirements for type-approval of vehicles and spare parts, as well as their emissions (Euro 5 and Euro 6 standards). In particular, Article. 4 of the Regulation states that manufacturers shall demonstrate that all new vehicles sold, registered or put into service in the Community, as well as new replacement pollution control devices, are type approved in accordance with this Regulation and its implementation measures. Manufacturers' requirements include compliance with the emission limits for all major polluting gases. These include nitrogen oxide (NO<sub>x</sub>), for which the limit is set at 180mg/km (Annex I to the Regulation) for diesel passenger transport vehicles and light vans for goods transport (Euro 5 standard), as well as 80mg/km for the same vehicles to Euro 6 standard. Under the regulation, from 1 September 2015 only cars whose engines meet the Euro 6 standard may be registered in Europe. Manufacturers' other obligations include ensuring that type-approval procedures for verifying conformity of production, durability of pollution control devices and in-service conformity are met (Art. 4, paragraph 2) and to set out CO<sub>2</sub> emissions and fuel consumption figures at the time of purchase (Art. 4, paragraph 3). Article 5, paragraph 2, also establishes that, with the exceptions listed exhaustively in subsequent letters a), b) and c) of that paragraph, the use of defeat devices that reduce the effectiveness of emission control systems shall be prohibited. It is considered a system of manipulation (Art. 3, paragraph 10 of the Regulation), in English defeat devices, "*any element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use*". The methods, tests and requirements for approval are set by implementing measures, in particular Implementation Regulation 692/2008/EC, which identifies the requirements relating to certain elements, including tailpipe emissions, the performance of pollution control devices in-service and conformity of production and technical controls.

24. **Regulation (EC) No. 443/2009** sets CO<sub>2</sub> emission performance standards for new cars. CO<sub>2</sub> emissions contribute to climate change and for this reason the European Union has undertaken a series of measures to contain them. Unlike with other polluting gases, maximum CO<sub>2</sub> emission limits per vehicle are not established, but rather reduction targets are set.

25. Finally, **Directive 1999/94/EC** lays down a series of requirements regarding the marketing of new cars related to information on fuel economy and CO<sub>2</sub> emissions to be provided to consumers. Presidential Decree n. 84/2003 implementing Directive 1999/94/EC disciplined methods of implementing disclosure obligations to consumers on fuel economy and CO<sub>2</sub> emissions, at the expense of motor vehicle manufacturers and sales point managers.

### *The New European Driving Cycle*

26. The **New European Driving Cycle** (NEDC) is the standard currently in force in Europe for bench testing for type-approval of motor vehicles. It is an artificial driving cycle defined by EU Directive 91/441/EC, which has imposed a common procedure for measuring real fuel consumption and pollutant emissions, consisting of the repetition of four "urban" cycles, at a maximum speed of 50 km/h and one extra-urban cycle at a maximum speed of 120 km/h. The series aims to represent the typical use of a car in Europe and is used to assess the levels of pollutant emissions from vehicles, to respect the limits set out in Annex I of EC Regulation no. 715/2007, and for fuel consumption. The total duration of the cycle is 1,180 seconds, the distance is 11,023 kilometres. The cycle is carried out with the motor vehicle initially at room temperature. Although the cycle is considered unrealistic because accelerations are rather moderate and not very representative of real driving, it is still the standard currently in force for vehicle approval purposes<sup>10</sup>. The surveys are carried out using a chassis dynamometer, and during tests, accelerator, transmission and brakes are controlled by a computer. The urban survey consists of three sessions at predetermined maximum speed peaks (15, 32 and 50 km/h), interspersed by short stretches at a constant speed (respectively 8, 24 and 25 seconds), stops with the engine running and moderate accelerations: from 0 to 15 km/h in 4 seconds, from 0 to 32 km/h in 12 seconds and from 0 to 50 km/h in 26 seconds. The complete cycle takes 195 seconds for a distance of a little less than 1 km and is repeated four times. In the extra-urban test it reaches a top speed of 120 km/h and constant speed phases occur at 50, 70, 100 and 120 km/h. Even in the extra-urban cycle accelerations are fairly moderate.

### **3) Evidence gathered**

#### *i) Profile sub-heading A)*

---

<sup>10</sup> As of September 2017, the NEDC will be replaced by the Real Driving Emission (RDE) standard

*The operation of the EGR system (exhaust gas recirculation)*

27. **Volkswagen AG** installed the Group's EA 189 EU5 diesel-engine motor vehicles with an exhaust gas recirculation system (**EGR**) that can operate in two distinct modes. In **EGR 0 mode** (normal vehicle use on the road) the level of NO<sub>x</sub> emissions is higher than that detected in **EGR 1 mode**, which is activated automatically when the vehicle is switched on, and which lasts only when the vehicle is in the bench testing phase during a NEDC cycle. The EGR system can recognize when the vehicle is on rollers in a NEDC emission control cycle, and automatically maintains the system in **EGR 1 mode** for the duration of the test. In this way the result of NO<sub>x</sub> emissions provided by the test is lower than that obtainable in **EGR 0 mode**, which is activated in normal road use of the vehicle<sup>11</sup>.

From the technical standpoint, the rate of exhaust gas recirculation in **EGR 1 mode** is relatively high, while the rate of exhaust gas recirculation in **EGR 0 mode** is lower. The exhaust gas recirculation rate has a direct influence on NO<sub>x</sub> emissions (as well as, inversely, on particulate emissions) since the higher the recirculation rate, the lower the levels of NO<sub>x</sub> emissions. As recognized by the German Federal Motor Transport Authority (KBA), the transition to **EGR 0 mode** of operation (normal road use of the vehicle) causes an increase in NO<sub>x</sub> emissions, with a reduction in the effectiveness of the emission control system, compared to **EGR 1 mode** of operation<sup>12</sup>.

28. Because the application of **EGR 1 mode** in place of **EGR 0 mode** is determined when NEDC type conditions are met, as described above, it is difficult, if not impossible, to reproduce them in actual driving, under normal driving conditions, by EA 189 EU 5 standard diesel vehicles operating in **EGR 0 mode**, as in fact **EGR 1 mode** can only be activated at the time of a (possible) NEDC test.

*The decision of the German Federal Motor Transport Authority<sup>13</sup>*

---

<sup>11</sup>According to the EPA notice of violation of 21 September 2015 the results of tests performed on some Volkswagen diesel vehicles for the American market indicate NO<sub>x</sub> emissions up to 40 times higher during normal road use than those found in the bench test.

<sup>12</sup> See Annex 3 to doc. n. 61 of the dossier, order of the KBA

<sup>13</sup> German Federal Motor Transport Authority, the counterpart in Germany of the Italian Motor Vehicles, is the Authority to which approvals were requested for most of the Group's vehicles involved in the matter.

30. It should be observed that, by letter received on 11 December 2015, the General Directorate of Motor Vehicles of the Ministry of Infrastructure and Transport announced that it had received clarification on the issue from the German Federal Motor Transport Authority (KBA)<sup>14</sup>, in three communications addressed to all approval authorities of the EU<sup>15</sup> Member States. In particular, the Directorate General has informed that *"the KBA has confirmed the existence of 'defeat devices' in the vehicles in question, providing a list of identification codes of the affected engines mounted on various brands of the VW group (AUDI, SEAT, SKODA etc.) and has taken note of proposals for technical intervention submitted by the VW manufacturer in order to restore conformity of type vehicles approved in their time"*<sup>16</sup>.

31. In fact, KBA, by order of 15 October 2015<sup>17</sup>, determined that the **EGR** system described above constitutes a defeat device banned under Art. 3, par. 10 and Art. 5, par. 2 of Regulation no. 715/2007. Consequently, since the vehicles on which the design element is installed do not meet the requirements for recognition of approval in accordance with Regulation no. 715/2007, they must be considered not in compliance with regulations in force. As, according to Directive 2007/46/EC, EU type-approval for vehicles of that category may only be granted if the vehicle meets the requirements of EC Regulation no. 715/2007, it follows that such vehicles should also be considered not in conformity with approvals granted in accordance with Directive 2007/46/EC and that the EC-issued approvals must be considered illegitimate<sup>18</sup>.

---

<sup>14</sup> See doc 70.

<sup>15</sup> See doc. 70, Annexes 1, 2, and 3, the direct KBA communications to the European Approval Authorities.

<sup>16</sup> The KBA Communiqué of 14 October 2015 addressed to European approval authorities (doc. 70 Annex I, cit.) reads: *"Non-conformities of vehicles of the VW group with compression ignition engines (EA 189, 1.2 l, 1.6 l and 2.0 l). [...] From our point of view the non-conformity is with regard to the use of a prohibited defeat device according to article 5 of Regulation (EC) No 715/2007 in vehicles with the above-mentioned engine characteristics. As of 10.07.2015 the holder of KBA approval, VW AG, delivered a timetable and a catalogue of technical measures, to bring the vehicles and engines back into conformity"*.

<sup>17</sup> See doc. n. 61 cit., Annex 3 of the dossier, see also doc. 174 on the KBA press release of the 16 October 2016, which reads: *"The German Federal Motor Transport Authority believes that software used on these vehicles is a system of illegal manipulation. The KBA'S decision requires Volkswagen to remove the software in question from all vehicles and to introduce appropriate measures to restore the rule of law", from the original German translation: "The KBA contends that it is an illegal shutdown in the software used in these vehicles. VW is ordered in the decision of the KBA to remove the relevant software from all vehicles and to take appropriate measures to restore regularity"*.

<sup>18</sup> See doc. n. 61, Annex 3, cit.

32. As per Art. 25, par. 2, of the German Regulation on type-approval of motor vehicles, as provided by the rest of Art. 30 of Directive 2007/46/EC, the KBA, however, may issue additional requirements in order to eliminate any defect which may have occurred, and to ensure the conformity of vehicles including those already on the market. Therefore, the KBA has issued supplementary requirements *a posteriore* of the original type-approval in order to end the illegal situation by removing the banned defeat device system and to ensure that the manufacturer puts in place measures to ensure compliance with the emission limits for approvals issued<sup>19</sup>. In particular, in order to ensure compliance of EA 189 EU5 type engines, the prohibited defeat devices must be removed and measures must be taken to re-establish conformity<sup>20</sup>. The KBA ordered, therefore, that certified compliance with this new EU approval is conditional on the implementation of the action plan proposed by Volkswagen, according to which: (i) for vehicles which, at the date the order was issued, had not previously been registered, the **EGR** system must necessarily be removed before registration and sale; and (ii) for vehicles which, at the date the order was issued, had already been registered and sold, the EGR system must be removed by implementing a specific measure (a recall), at no cost to consumers in the time agreed with the KBA<sup>21</sup>.

#### *EA 189 EURO 5 diesel vehicles involved and actions carried out by the Traders*

33. According to the latest information provided by the traders<sup>22</sup>, more than 700,000 vehicles with EA 189 diesel engines were sold in Italy in the period 2009-2015, with the defeat device described above, and are therefore involved in the recall campaign. In particular, about [150,000-300,000]\*, Audi vehicles, [30,000-50,000] Skoda vehicles, [30,000-50,000] SEAT vehicles, [300,000-400,000] Volkswagen vehicles and [15,000-20,000] Volkswagen commercial vehicles.

---

<sup>19</sup> See doc. n. 61, Annex 3, cit., p. 14, section IV.

<sup>20</sup> The KBA communication of 25 September 2015 addressed to European approval authorities (doc. 70, cit. Annex 3) reads: "*The manufacturer is already requested by the KBA to present a detailed package of measures and a timetable to bring the vehicles back into conformity*".

<sup>21</sup> As clarified by the traders, "*following the intervention, it will no longer arise that the EGR system operates in different modes, under real driving conditions and in the artificial NEDC cycle*", see doc. 95, paragraph 6.

<sup>22</sup> See doc. n. 177 of the dossier, Annex 1.

\* In this version some data are omitted, since they are considered matters of confidentiality or privacy of information

34. The total sales value of the vehicles involved is approximately EUR [10-20 billion]<sup>23</sup>, for an average purchase price per vehicle of over EUR [10,000-30,000]<sup>24</sup>.

35. On 26 September 2015, in the days after the story broke, VW Italia asked Italian dealers and retailers, as a precaution, to suspend delivery and sale of motor vehicles equipped with turbo diesel engine bearing code EA 189.

36. As described in the previous paragraph, KBA scheduled removal of the **EGR** system for EA 189 vehicles which were not already registered on the date of enactment of the ordinance of 15 October, while for vehicles already in circulation it imposed removal of the **EGR** system through a mandatory recall campaign, to be implemented within the time agreed upon with KBA.

37. The measures included in the recall plan and the timing are articulated according to the different engines of the EA 189<sup>25</sup> group. According to the latest information provided by the traders, the recall campaign would take place in Italy throughout 2016, once KBA has provided final authorization of each model.

38. KBA, in fact, despite having already approved the different technical solutions presented for the three types of EA 189 engine involved, stated that it would issue separate authorization for each solution prior to the implementation of the intervention plan, in order to confirm and further ensure the effectiveness of the approved technical solutions.

#### *Advertising messages circulated by the traders*

---

<sup>23</sup> See doc. n. 40 of the dossier, Annexes 6 to 10.

<sup>24</sup> Processing of data provided by doc. 40, Annexes 6 to 10, cit .

<sup>25</sup>The solution provided for Bosch 2.0 TDI and Delphi 1.2 TDI engines only involves a software change in the engine control unit, while Continental 1.6-litre TDI engines, in addition to replacing the software, also required a hardware intervention, by installing a flow stabilizer inside the air inlet duct.

39. Concerning the traders' advertising messages containing specific ecological claims and indications of conformity of their vehicles to parameters on pollutant and environmental emissions, the following table shows, for example, some of the messages on procedural documents, contained in various brochures circulated on the Internet via the websites of the individual brands of the Group, as well as through the network of dealers and retailers:

- in Audi catalogues of cars A1, A3 and A4 issued in 2013 and 2014, a specific paragraph is entitled "Environmental responsibility" which reads, "*Environmental responsibility is a cornerstone of Audi's strategy*"<sup>26</sup>;

- In Volkswagen Golf catalogues 2010, 2011, 2012<sup>27</sup>, there is a specific page titled "*Golf BlueMotion: Volkswagen's most eco-friendly Golf ever*"; a box next to it reads: "*The 'BlueMotion' logo on the back of the car and on the radiator grille conveys a very clear message: the motorist who has chosen this car thinks in a responsible and environmentally friendly way*";

- in a similar manner, in Volkswagen Polo 2011, 2012<sup>28</sup> catalogues, there is a specific page titled "*Polo BlueMotion*". A box reads: "*The 'BlueMotion' logo on the tailgate and on the radiator grille indicates that this is a car whose driver really takes environmental protection and sustainable driving to heart.*"

---

<sup>26</sup> See doc. 44 Annex I, eg. catalogues A1, December 2013, p. 117; A3, May 2013, p. 97; A3, May 2014, p. 139; A4, September 2013, p. 2; full range catalogue 2013, p. 2

<sup>27</sup> See doc. 44 Annex I, cited above. eg. Golf catalogue, March 2010, p. 13; Golf catalogue, June 2011, p. 10; Golf catalogue, May 2012, p. 8

<sup>28</sup> See doc. 44 Annex I, eg. Polo catalogue, February 2011, p. 42; Polo catalogue, November 2012, pp. 24-27.



- the Skoda Rapid Spaceback catalogue, edition of June 2015, page 28<sup>29</sup> reads: "*SKODA's most important objectives include the development and implementation of products as environmentally friendly as possible at every stage of their life cycle [...]. Our business strategy marries the philosophy of consumption and emissions, and engines in our range comply with regulations in force [...] SKODA's contribution aims to preserve a clean natural environment, while ensuring its clients' mobility and comfort. The green SKODA logo expresses the awareness of the automobile maker to be able to develop sustainably, acting responsibly towards the environment and doing everything possible to move in that direction, with a deep respect for life and for nature*";

- similarly in the Skoda Roomster catalogue, January 2010 edition, p. 31<sup>30</sup> under the title "*Skoda Roomster and the environment*," reads: "*Skoda Auto considers the development and production of environmentally friendly products as a top priority during all stages of the life of a product [...] The result of all these measures is that Skoda Roomster not only meets all technical, safety and quality requirements, but also in the field of environmental protection. Skoda Auto thus helps preserve a clean and healthy environment while ensuring customers' mobility and satisfaction*".

- in the Seat Ibiza car catalogues for 2012, 2013 and 2014 and February 2015, there is a specific page titled "*Beautiful, clean, fun and safe*" which reads: "*Ibiza is not only a fun car, it's also a responsible car. [...]. These engines perfectly combine sportiness and efficiency: so you can love the road and love the planet at the same time*"<sup>31</sup>;

ii) *Sub B profile) on possible irregularities in the process of determining the values of CO<sub>2</sub> emissions in type-approval*

---

<sup>29</sup> See doc. 44 Annex II, cit ..

<sup>30</sup> See doc. 44 Annex II, cited above.

<sup>31</sup> See doc. 44 Annex I, cit., for example SEAT Ibiza catalogue, March 2012, p. 10; SEAT Ibiza catalogue, January 2013, p. 10; SEAT Ibiza catalogue, November 2014, p. 8; SEAT Ibiza catalogue, February 2015, p. 8.

40. With regard to marketing in Italy during 2015 and 2016 of cars whose CO<sub>2</sub> emissions would not meet the values declared during certification, the traders have recently announced that, as verified by tests and surveys by a third party technical service under the supervision of KBA, there were no abnormalities, except for two models of the Volkswagen brand, marketed in Italy. For the two models in question, however, minimum discrepancies were detected in the declared and actual values; discrepancies that, in any case, the traders proceeded promptly to remove, by updating data in the respective approval.

41. The update of the emission levels would also affect a third model, which however would not have been marketed in Italy, but would be available, upon specific customer request.

#### ***4) The traders' defence arguments***

42. With documents received on 26 October and 19 November 2015, 8 and 27 January, 22 February and 31 March 2016, and with defensive briefs at the closing of the proceedings received on 23 May 2016 and 25 July 2016, the traders have presented, in summary, the following system of defence.

*a) Need to differentiate between the evaluation of the conduct of VW Italia  
VWAG*

43. First, the need was emphasized to differentiate the assessment of the conduct of VW Italia from that of VW AG. VW Italia, in fact, acts as the official importer and distributor in Italy of vehicles of the Audi, Seat, Skoda, Volkswagen and Volkswagen Commercial Vehicles brands. In the exercise of this activity VW Italia imports to Italy vehicles manufactured and certified abroad. Therefore as a mere importer and distributor VW Italia has neither had any role in the design and manufacture of vehicles, or would have in any way knowingly contributed to the dissemination of the allegedly incorrect data on emission levels of vehicles marketed in Italy. On the other hand, VW Italia did not prepare, nor was aware of, nor could have in any way been able to verify, the technical information in question nor the parameters of approval granted by the approval authority. Add to this that VW Italia could not doubt, nor verify the data with which it was provided, as they come from official documents confirmed by the competent approval authority, and the power to carry out audits of the correctness of the data belongs exclusively to the approval authority<sup>32</sup>.

44. Furthermore, the traders have pointed out that as soon as VW Italia was informed by VW AG of potential problems related to NO<sub>x</sub> emissions of the vehicles concerned and the subsequent investigation relating to CO<sub>2</sub> emissions, VW Italia prepared and launched a number of initiatives to protect consumers, to ensure them maximum protection both in terms of content of transparency of information.

---

*b) Overly general and vague nature of complaints expressed and lack of evidentiary support*

45. The traders have contested the overly generic and vague nature of the complaints made in the communication of closure of investigation. According to the traders, at no point in the communication or of previous filing and extension measures was there any indication of what the pollutant emissions were, besides NO<sub>x</sub> emissions, to which reference is made, thereby making the right of defence and cross-examination devoid of those elements of certainty about the allegations, which is an essential requirement. Moreover, while the communication contains references to elements considered evidence with regard to NO<sub>x</sub> emissions, it contains nothing regarding CO, HC and Particulates.

---

<sup>32</sup>See doc. n. 187 of the dossier, paragraphs 28 and 29.

46. With particular reference to advertising used in the communication to demonstrate the alleged misrepresentation of vehicle quality, it has been extrapolated from messages that, when analysed in context: 1) they do not refer to the operation of the EGR system and its effects in terms of emission reduction; 2) they do not provide any specific value with regard to NO<sub>x</sub> emissions; 3) they communicate the positive effects on emissions, fuel consumption and environment in general of devices and innovative technologies, for which no evidence is offered to the contrary, or the Volkswagen Group's commitment in terms of corporate responsibility on environmental issues, and which has nothing to do with emissions of cars sold on the market.

*c) The conditions established by the NEDC do not represent normal behaviours of vehicles on the road*

47. The traders point out that emissions measured according to NEDC conditions do not reflect those produced by vehicles under real driving conditions and that for these reasons, discrepancies can normally be detected between the two different modes of operation. As the European Commission itself has recognized that the artificial NEDC cycle does not adhere to actual driving conditions, the recent EU Regulation 2016/427 of 10 March 2016 amended Regulation 692/2008 regarding emissions of passenger and light commercial vehicles, introducing a trial procedure of real driving emissions (RDE). Therefore, to claim that the behaviour of vehicles is different during the bench tests for emissions control compared to normal road use is equivalent to blaming the companies for facts that were derived mainly from the application of mandatory procedures of approval imposed by regulations.

*d) There is no Community requirement for car manufacturers to declare all emission control devices as part of the requested issuance of certificates of conformity, and furthermore the vehicles concerned were and remain fully approved, as they did, and do, and meet the requirements*

48. According to the traders, unlike the American system, there is no provision in Community regulations governing the approval procedure that requires automakers to declare, describe and justify all auxiliary emission control devices when requesting issuance of certificates of conformity. Therefore, the possible lack of knowledge by the approval authorities of the existence of a defeat device is not the responsibility of companies, pursuant to Art. 23, paragraph 1, letter d) of the Consumer Code<sup>33</sup>. According to the traders, the competent approval authority has not only the task of certifying conformity of the data provided by the manufacturer, but more generally of ensuring conformity of the entire approval procedure with relevant legislation. Therefore, the same approval authority is responsible for the correct application of the approval procedure and its compliance with the requirements imposed by law.

49. The traders also dispute the existence of a possible violation of Article ~~23, paragraph 1, letter d)~~ of the Consumer Code, on the assumption that such vehicles do not comply "*with the authorisation conditions, acceptance or approval received in the aforementioned article,*" the Traders having "*used a defeat device in EA 189 diesel engines, which is not allowed by Community rules and unknown by the approval authority at the time the original approval was granted*", based on two arguments. The first is that none of the relevant European authorities which have granted approval for the vehicles of the Volkswagen Group has withdrawn EU type-approval or declared non-conformity of the approved vehicles. The second argument is that KBA's order cannot be equated to a finding of non-conformity with approval conditions, given that the same order introduced, effective *pro futuro*, requirements in addition to those originally required for the EUR 5 approval, the validity of which, in the opinion of Traders, is not called into question by the German authority, but only conditioned to the implementation of the replacement action plan of the existing EGR system (for vehicles already registered).

e) *The approval issued by KBA remains valid and effective*

---

<sup>33</sup> See doc. n. 187 of the dossier cit., Point 72

50. According to the Traders, the KBA order of 15 October 2015 would not raise objections to the EU regulatory approval conformity issued for the vehicles concerned, subject to the necessary implementation of this action plan. The KBA provisions should not be interpreted "*as a withdrawal of EU approval for the vehicles concerned, or on a par with a formal finding of non-compliance of such vehicles, but rather as a confirmation that the relevant EU type-approval remains valid and effective*"<sup>34</sup>.

51. In formulating the above-mentioned order, KBA verified both the conformity of already-registered vehicles with the Euro 5 type-approval granted by KBA, "*as well as conformity of the same Euro 5 type-approval with the requirements established by Community law, thereby complying with Art. 30 of the Directive*". According to Volkswagen, "*the conclusion reached by KBA about the outcome of such assessments has been to raise no objections to the regulatory compliance of vehicles subject to Euro 5 type-approval issued by KBA, but rather to order implementation of the corrective measures proposed by Volkswagen*"<sup>35</sup>.

52. In addition, the traders point out that "KBA merely argues that the EGR system installed in the involved vehicles reduced the effectiveness of the emission control system, but not that emission limits prescribed by EU regulations governing issuance of EU approval have been exceeded. KBA's judgment has essentially focused on, and is limited to, operating modes of the EGR system and not on the effects of this function regarding the emissions levels"<sup>36</sup>. In the German Authority's finding, therefore, it is impossible to recognize of a lack of conformity of the vehicles concerned with the approved type, much less that emission limits were exceeded.

*f) EU approval granted by other authorities shall remain valid and effective*

53. None of the other authorities that granted approval for some of the Volkswagen Group vehicles<sup>37</sup> has withdrawn EU type-approval or declared non-conformity with said approval of the vehicles concerned.

---

<sup>34</sup> See doc. n. 61 of the dossier, cit .

<sup>35</sup> See doc. n. 187 of the file, cit., Paragraph 54 et seq..

<sup>36</sup> See doc. n. 187 of the dossier cit., Point 57

<sup>37</sup> Specifically, the United Kingdom for Skoda and SEAT Toledo vehicles, Luxembourg for some parts of Audi vehicles and Spain for the remainder of SEAT vehicles

*g) There has been no misleading or deceptive statement or omission to the detriment of Italian consumers, who possessed all the elements necessary to form an informed purchasing decision*

54. The indication provided to Italian consumers about the conformity of vehicles to the parameters on pollutant emissions and the type-approval class, to the extent that it provides the consumer with information on the conformity of the vehicle in question with the EU Euro 5 approval originally granted, cannot be considered misleading and untrue, since such compliance has not been challenged by any competent authority in accordance with Art. 30 of the Directive.

Moreover, no information was provided to consumers on NO<sub>x</sub> emissions which could be put into question by the functioning of defeat devices. Specifically, no commercial/brochure catalogue (and no website pages or TV spots) contain any information on the results of the NO<sub>x</sub> emissions potentially arising from the use of the vehicles concerned, whose veracity cannot be questioned by the functioning of defeat device.

36 From this point of view, the emission levels potentially could only be detected by the consumer if they were such as to deprive the purchased vehicle of conformity to approval obtained for class Euro 5. And so, as the approval is the only information provided to consumers with reference to NO<sub>x</sub> emission values<sup>38</sup>.

*h) The absence of any prejudice for consumers in terms of changing the performance and characteristics of the vehicle downstream due to the intervention plan*

---

<sup>38</sup> See doc. n. 211 of the dossier, paragraph 10

56. The traders point out that according to the statement in each of the authorizations to date<sup>39</sup> issued by KBA prior to the implementation of action plans on individual vehicles, no change in the characteristics of the vehicle was found. In addition to the absence of prohibited defeat devices, KBA verified conformity of exhaust emissions levels, the absence of an increase in consumption values and CO<sub>2</sub> emissions, and harmful impacts resulting from implementation of corrective measures on engine performance, maximum torque, duration of anti-pollution devices, and noise emission levels of the vehicle post-intervention<sup>40</sup>. Furthermore, the Vehicle Certification Agency (hereinafter VCA)<sup>41</sup> confirmed, with reference to some Skoda brand vehicles involved, the absence of any change in essential characteristics of same, following the implementation of the intervention plan.

57. According to the traders, the position of Italian consumers in the face of the invitation to perform the intervention approved by KBA is similar to that of the consumer in the event of lack of conformity of the purchased product<sup>42</sup>. Such differences, in the opinion of traders, are resolved by Art. 130 of the Consumer Code by giving the consumer the right to repair of the goods.

*i) No harm to consumers: the sales data and the trend in resale value*

58. The data on resale value and sales trends of the vehicles concerned show no substantial deviations from the normal market trend. In the opinion of the traders, these circumstance lead to the conclusion that "*the consumer's business decision - if he had had full knowledge of the EGR system operation approved by KBA at the time the vehicle was purchased - would probably not have been different*"<sup>43</sup>.

---

<sup>39</sup>According to information from the traders, on 25 July 2016, KBA issued authorizations to implement the action plan with regard to vehicles: (i) Amarok in cluster 12, (ii) AUDI A4, A5, A6 and Q5 in cluster 14, (iii) SEAT Exeo in cluster 14, (iv) certain Golf vehicles in cluster 5, (v) certain Caddy in cluster 9, (vi) Amarok, AUDI A4, A5, A6, Q5 and Seat Exeo in cluster 3; (Vii) Caddy, Tiguan and Audi Q3 in cluster 6 and (viii) EOS, Passat, Passat CC and Passat Variant in cluster 13. KBA has also approved the implementation of the action plan for vehicles belonging to cluster 5, cluster 2, as well as those within cluster 7 (see doc. no. 211 of the dossier, cit., paragraph 6).

<sup>40</sup> See doc. n. 211 of the dossier, cit., Paragraph 5.

<sup>41</sup> Vehicle Certification Agency is the competent UK authority for the approval of certain models of Skoda brand vehicles involved in the matter.

<sup>42</sup>See doc. n. 211 of the dossier, cit., Paragraph 11.

<sup>43</sup> See doc. n. 211 of the dossier, cited above, Paragraph 25.



*j) On possible irregularities in the process of determining the level of CO<sub>2</sub> emissions in type-approval*

59. Regarding the matter of possible discrepancy between the CO<sub>2</sub> emissions data from some models of the Group declared in type-approval compared to the actual values, the traders have pointed out that the issue, compared to the original press releases of November 2015, has been much scaled down, and that as a result of tests carried out in the manner prescribed by KBA, it appeared that *"in just six vehicle models originally involved in the case, deviations were found from the CO<sub>2</sub> levels listed in approval. For only two models marketed in Italy<sup>44</sup> in 2016 was it necessary to specify new values, and with slight differences, since these tests confirmed a variation of a few grams in CO<sub>2</sub> levels"*<sup>45</sup>.

60. The traders emphasize on the one hand that *"similar updating of CO<sub>2</sub> values indicated in the relevant approvals fit within the ordinary revision process of these values, normally carried out by all manufacturers. This is in order to update the values of CO<sub>2</sub> emissions of new productions in relation to possible discrepancies that all producers normally find with reference to the values originally declared during certification, so as to provide consumers with the most accurate and up-to-date information, regardless of the non-materiality of the discrepancies in values"*<sup>46</sup>.

61. On the other hand, VW Italia, as soon as it was informed by VW AG of the initial results of the abovementioned internal investigation, promptly executed, pending completion of checks, various information initiatives to prevent consumers from buying cars with quality characteristics that potentially differed from those officially specified. In particular, VW Italia promptly inserted in its marketing information material (catalogues/flyers/posters) an ad hoc disclaimer to inform consumers that the values of CO<sub>2</sub> emissions and consumption reported therein were being revised at the time, and this warning was also reported in the Group's websites and advertising campaigns.

---

<sup>44</sup> Volkswagen Golf 2.0 TDI 110kW EU6; Volkswagen Passat Variant 2.0 TDI SCR 4MOTION BMT 176 kW EU6

<sup>45</sup> See doc. n. 187 of the dossier cit., Paragraph 108.

<sup>46</sup> See doc. n. 187 of the dossier cit., paragraph 109

62. Finally, the traders emphasize that values for CO<sub>2</sub> levels and fuel consumption supplied to consumers have always been presented as merely indicative, precisely so as not to create any expectations of consumers about details of data.

#### **IV. OPINION OF THE AUTHORITY FOR GUARANTEES IN COMMUNICATIONS**

63. Since the commercial practice covered by this provision has also been widely broadcast on television and on the Internet, on 23 May 2016 an opinion was requested from the Authority for Guarantees in Communications, pursuant to Art. 27, paragraph 6, of the Consumer Code.

64. With its opinion issued on 8 June 2016, the said Authority gave its opinion about the likelihood that specific means of communication, used to spread business practice, would possibly be misleading, holding that, in the present case, the use of Internet, together with television, is a tool that can significantly affect the realization of the practices at issue.

#### **V. FINAL ASSESSMENT**

---

65. First of all, in the matter of the disputed conduct, both VW AG and VW Italia should be considered jointly liable. It should be considered, in fact, that VW AG is the company which heads the international group and is the entity responsible for emissions data approval for a large part of the Group's models, and that VW Italia – in addition to being the economic and marketing beneficiary in Italy of advantages deriving from the conduct covered by the proceedings - is the company responsible for Italian distribution of Volkswagen Group vehicles of the Audi, Seat, Skoda, Volkswagen and Volkswagen Commercial brands, as well as being in charge of marketing campaigns and consumer communication of promotional material containing emissions data.

*i) marketing in Italy of motor vehicles with EA 189 EU 5 diesel engines*

66. The investigation revealed that Volkswagen AG had installed an exhaust gas recirculation system (**EGR**) in Group vehicles with EA 189 EU5 diesel engines, which can operate in two distinct modes and recognizes when the car is in the bench-testing phase in a NEDC emissions control cycle. When this happens, the degree of exhaust gas recirculation is artificially increased in order to provide a lower result of NO<sub>x</sub> emissions than during normal road use of the vehicle. According to KBA, in fact, the transition to Mode **0** (normal driving conditions) causes an increase in NO<sub>x</sub> emissions levels, and reduces the effectiveness of the emissions control system.

67. As described in paragraphs 31 and 32, KBA has determined that the **EGR** system is a defeat device prohibited in accordance with Art. 3, par. 10 and Art. 5, par. 2 of Regulation no. 715/2007.

68. The same Authority considers that vehicles installed with this design element must be considered not in conformity with current regulations and must also be considered not in conformity with approvals granted in accordance with Directive 2007/46/EC. In order to ensure conformity with legislation for EA 189 EU5 type engines, KBA has established that banned defeat devices must be removed and appropriate measures must be taken to re-establish conformity. KBA communicated that decision to the Directorate General of Motor Vehicles of the Ministry of Infrastructure and Transport<sup>47</sup>.

69. Based on KBA's indications, then, for EA 189 vehicles not registered prior to the date the order was issued, the device must be removed before marketing and sales, while for vehicles already in circulation, there must be a mandatory recall campaign to remove the EGR system, to be implemented with a timetable agreed with the same federal authority.

---

<sup>47</sup>See doc. 70, Annex 1, cit.

70. As shown in paragraph 33, from 2009 to 2015 the traders sold over 700,000 vehicles installed with the unlawful defeat device in Italy. Consequently, as of February 2016, a recall plan for these vehicles was begun in Italy, similar to the one established for Germany. It is thus established that the Traders sold EA 189 series diesel cars on the Italian market, from 2009 until September 2015, with NO<sub>x</sub> emissions that in reality do not conform to those observed in type-approval and declared in Certificates of Conformity, namely the declarations issued by the manufacturer certifying that the vehicles conform to EU approval requirements. The Certificates of Conformity for EA 189 EU5 vehicles, and as a result, the values indicated in the registration certificates issued by the Ministry of Infrastructure and Transport to individual owners<sup>48</sup>, report pollutant emission values that do not correspond to reality. In particular, the level of NO<sub>x</sub> emissions is lower than would have reasonably been expected from the test results without the defeat device.

71. In this regard it is noted that such conduct is unfair under the general clause of Article. 20, paragraph 2 of the Consumer Code as being contrary to professional diligence and likely to distort consumers' economic behaviour appreciably.

72. Again with reference to the diligence requirements, it was found that the traders deliberately installed the Group's EA 189 EU 5 diesel vehicles with an illegal exhaust gas recirculation system, contrary to EU legislation on approvals, in order to alter the results of the tests on pollutant emissions called for in the Euro parameter, in particular the level of NO<sub>x</sub> emissions. The conduct of the traders, which however was never discussed during the proceedings, constitutes a serious breach of the requirements of professional diligence, being beyond the failure to respect the normal degree of skill and care which could reasonably be expected, considering the importance and the reputation of one of the leading global players in the automotive sector and the increasing importance of environmental issues in guiding customer consumption choices.

---

<sup>48</sup>In the registration papers, the levels of exhaust gas emissions are given in letter V of the same; in particular the level of NO<sub>x</sub> emissions is given in point V.3

The same traders are indeed fully aware of this serious breach of professional diligence. In this respect it suffices to observe that in a direct advertising message to its customers, in a full-page spread in major national daily newspapers and journals from the middle of October 2015, Volkswagen acknowledged that it had recently "*made a serious mistake*," compromising the relationship of trust with consumers, for which it publicly apologized<sup>49</sup>.

73. This conduct also appears likely to significantly distort consumers' economic behaviour, causing them make expensive consumer choices which they would not have made had they been aware of the real characteristics of the purchased vehicle. By altering the detection of NO<sub>x</sub> emission levels during the test, in fact, the traders were able not only to bypass the NEDC test by using an illegal defeat device, but also to be accredited with lower NO<sub>x</sub> emissions levels than real values.

74. In this regard, it should be noted, first, that growing environmental awareness can guide consumers' commercial choices, to the point that, as will be explained later, the competition in various markets also involves the claim of features and product innovations to preserve nature and the environment (*green claims*). All the more reason, therefore, that consumers attentive to these values would have been significantly affected in purchasing choices, had they been aware that tests on pollutant emissions were obtained using an illegal defeat device, capable of altering the level of emissions, in particular NO<sub>x</sub>, considered so important by the EU lawmaker in combating pollution as to be subject to regulations designed to reduce them gradually over time<sup>50</sup>.

76. It must be also considered that consumers are affected by the conduct of the traders, as the purchased vehicle must be subjected to a recall plan that will limit its use during the technical review phase.

---

<sup>49</sup> See doc. n. 28 of the dossier. The body of the message reads "*Dear Volkswagen customer, recently we made a serious mistake: we compromised the relationship of trust that has always bound us. We apologize to everyone, first to you. Our research and development departments are working quickly in collaboration with competent authorities to shed light on the emission values for nitrogen oxide (NOx) of some of our EA189 diesel engines. [...] Know that we will not stop until we've gained your full confidence.*"

<sup>50</sup> See in particular the information contained in sections 5 and 6 of EC Regulation no. 715/2007: "(5) *Achieving EU air quality objectives requires a continuing effort to reduce vehicle emissions. For that reason, industry should be provided with clear information on future emission limit values*", "(6) *In particular, a considerable reduction in nitrogen oxide emissions from diesel vehicles is necessary to improve air quality and comply with limit values for pollution*".

In the sense of a clear impact of the conduct on consumers' commercial choices, numerous reports from private parties and consumer groups obtained during the proceedings bear witness. Some of these, in particular, point out that if consumers had been aware of the defeat device in the control unit of the vehicles they would not have purchased them<sup>51</sup>.

77. Moreover, according to established case-law, unfair commercial practices are viewed as dangerous offenses, where the assessment of impropriety must be conducted solely in the light of the breach of due fairness obligations and the potential distortion of the consumer's economic behaviour, regardless of the extent of the economic damage caused or that may occur. In other words, for the purpose of tort assessment, it is not necessary to analyse the effects produced by the conduct, being sufficient that, on the basis of a prognostic judgment, the same is deemed potentially likely to affect consumer choices<sup>52</sup>.

---

79. With regard to the reconstructing of facts above, the traders have argued that the emissions measured in the NEDC test cycle do not reflect emissions from vehicles under real driving conditions, and that for these reasons, discrepancies can normally be detected between the two different operating modes. According to the traders, contesting that the behaviour of the vehicle is different during bench tests for emissions control compared to normal road use is equivalent to blaming the companies for facts derived mainly from applying mandatory procedures of approval imposed by regulations.

80. In this regard, it must be noted that the subject of these proceedings is not the possible discrepancy between emissions from NEDC tests and emissions in real driving, contrary to what the traders assert. The issue here is the use by the traders of a defeat device to artificially alter the NEDC test results for type-approval of motor vehicles. The traders, therefore, cannot invoke in their defence the fact that a discrepancy generally exists between emissions in NEDC compared to those in real driving. In fact, they designed and installed in the vehicles in question a prohibited device defeat which only operates when the vehicle is in a NEDC cycle, altering the performance and function of the emission control system, as has been emphasized.

---

<sup>51</sup> See docs. n. 18, 22, 76, 78 and 128 Annex 1

<sup>52</sup> See, *ex multis*, State Council 22 July 2014, n. 3896 and 10 December 2014, n. 6050, Lazio Regional Administrative Court, 5 June 2012, n. 5101, 14 November 2012, n. 9349 and 15 February 2012, n. 1575.

81. In this context, for the purposes of assessing the traders' conduct, it is irrelevant that KBA has not revoked approval of the vehicles involved. What is relevant for the purposes of these proceedings, in fact, is the traders' misconduct in deliberately installing a defeat device capable of altering the approval tests and likely to affect consumers' economic behaviour, as in points 74-78 of these proceedings.

On the other hand, installing EA 189 diesel vehicles with a defeat device capable of altering the pollutant emissions tests violates Art. 23, paragraph 1, letter d) of the Consumer Code. The circumstance, in fact, that *conditions of authorisation, acceptance or approval granted referred to in the cited article were not observed, with reference to the vehicle type-approval procedure*, results from KBA's finding that Volkswagen used a defeat device in the control unit of EA 189 diesel engines banned by EU rules and unknown to the approval authority at the time of the original approval. Therefore, the statements made by the manufacturer on the certificate of conformity and, as discussed below, in advertising ("*the engines of our range comply with regulations in force*"), are contrary to regulations<sup>53</sup>.

83. From this point of view, the argument is devoid of merit that, unlike the American system, EU law governing the approval procedure contains no provision requiring automakers to declare all auxiliary emissions monitoring devices when requesting certificates of conformity, and, therefore, the possible lack of knowledge by the approval authority of a defeat device cannot be blamed on the traders, in accordance with Art. 23, paragraph 1, letter d) of the Consumer Code.

---

<sup>53</sup> Regulation no. 715/2007 on the approval of motor vehicles, Art. 5 on "Requirements and tests", states unequivocally that, par. 1: "*The manufacturer shall equip vehicles so that the components likely to affect emissions are designed, constructed and assembled so as to enable the vehicle, in normal use, to comply with this Regulation and its implementing measures*", and that, par. 2 "*The use of defeat devices that reduce the effectiveness of emission control systems shall be prohibited*". The use of a defeat device prohibited under EU law, as clearly stated by KBA, implies that the manufacturer has not complied with the conditions of permit, acceptance or approval received, because one of the conditions for approval is to not use defeat devices that reduce the effectiveness of emission control systems.

84. In this regard it is noted that similar arguments tend to assign other parties, in this case the Approval Authority, responsibilities that should be charged only to the Volkswagen Group. Moreover, these arguments seem to support the paradoxical thesis that the Approval Authority was exclusively responsible for the unrevealed defeat devices in approved vehicles, which they did not detect, rather than the manufacturer, which developed, designed and installed the illegal device. However, the Authority considers that the matter is overridden by what is clearly stated in Art. 5, paragraph 2, of Regulation no. 715/2007, which prohibits the use of defeat devices that reduce the effectiveness of emission control systems.

85. ~~With reference, finally,~~ to the findings made by the KBA and the VCA concerning the conformity of vehicles subject to the recall plan to regulatory requirements for approval, it must be emphasized that the tests carried out by the two institutions could at most be relevant with regard to possible harmful effects for downstream consumers of the technical changes required by the recall plan, to prevent interventions to remove the defeat device from altering performance and fuel economy of the vehicles involved, a question which, however, is not in dispute in these proceedings.

*ii) dissemination of misleading advertising*

86. In light of the above-described conduct, the traders' use of advertising, subsequent to approval for different models of the Group, becomes relevant in relation to ecological claims and indications about conformity with parameters for pollutants and the environment.

87. From this point of view, it should be noted that so-called green claims or environmental claims, to suggest or imply or merely to evoke minor or reduced environmental impact of a product or service, have become an important advertising tool that can significantly guide consumers' purchasing choices, based on their heightened sensitivity to these issues.



88. Consistent with international guidelines<sup>54</sup>, the Authority believes that it is essential for the traders, who intend to use these claims in their marketing policies, to present them in a clear, truthful, accurate, unambiguous and non-deceptive way<sup>55</sup>.

89. With regard to the importance of environmental issues and in the context of competition among car manufacturers on these aspects, it should be noted that for the leading brands of the Volkswagen Group, obviously increasingly aware of the importance of these issues for consumers, a line of models is offered, which by name and advertised features is presented to consumers as particularly environmentally friendly: these include Volkswagen and Volkswagen commercial vehicles in the Bluemotion Technology line, Skoda GreenLine models, SEAT Ecomotive models and Audi models with TDI Clean diesel engines.

90. In these circumstances, evidence obtained during the investigation revealed, in various information catalogues disseminated on the websites of the individual Group brands, as well as through the network of dealers and retailers, specific green claims of the manufacturer's particular environmental sensitivity or specific attention to the level of polluting emissions of its passenger cars (see paragraph 39).

---

<sup>54</sup> See in this regard, the "*Compliance Criteria on Environmental Claims*" document available on Internet at [http://ec.europa.eu/consumers/consumer\\_rights/unfair-trade/environmental-claims/index\\_en.htm](http://ec.europa.eu/consumers/consumer_rights/unfair-trade/environmental-claims/index_en.htm), as well as the Guidelines on application of the "Unfair Commercial Practices Directive", updated and published on 25 May 2016 available on Internet at [http://ec.europa.eu/consumers/consumer\\_rights/unfair-trade/unfair-practices/index\\_en.htm](http://ec.europa.eu/consumers/consumer_rights/unfair-trade/unfair-practices/index_en.htm). Also see "*Consumer market study on environmental claims for non-food products*" of the European Commission, Justice and Consumers, July 2014, available on Internet at [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/environmental\\_claims/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/environmental_claims/index_en.htm) and Appendices and linked reports.

<sup>55</sup> See also in this regard the following documents: Commission of the International Chamber of Commerce, "*Framework for responsible environmental marketing communication*", July 2011 and "*Code consolidé sur les pratiques de publicité et de communication commerciale*", chapter "E" regarding "*Allégations environnementales dans la communication commerciale*" (document published on the ICC website, [www.iccwbo.org](http://www.iccwbo.org)) and OECD, "*Environmental claims. Finding and conclusions of the OECD Committee on Consumer Policy*", March 2011 (published on the OECD website, [www.oecd.org](http://www.oecd.org)).

91. Consumers reasonably interpret such messages to mean the motor vehicle manufacturer makes environmental protection one of its main objectives, and, in the awareness of a particular social responsibility, is guided in its production strategy (eg: *"Environmental responsibility is a cornerstone of Audi's strategy"* - *"The motorist who chooses this car thinks in a responsible and environmentally friendly way"* - *"A car whose driver takes environmental protection and sustainable driving to heart"* - *"The green SKODA logo expresses the automobile manufacturer's awareness of sustainable development, acting responsibly towards the environment and doing everything possible to move in this direction, with a deep respect for life and for nature"* - *"Ibiza is not only a fun car, it's also a responsible car" - so you can love the road and love the planet at the same time"*).

92. Moreover, some claims assert compliance with regulations on pollutant emissions (*"the engines in our range conform to regulations in force"*).

93. These messages, in the light of what emerged during the proceedings - the installation of a defeat device in EA 189 EU 5 diesel vehicles capable of unlawfully reducing NO<sub>x</sub> emissions levels detected in testing - are likely to mislead the consumer, pursuant to Art. 21, paragraph 1, letter b) of the Consumer Code, regarding the producer's environmental and social responsibility claims, as well as claims of compliance with current regulations.

*iii) The marketing of vehicles whose CO<sub>2</sub> emissions would not conform to values declared in type-approval*

94. With regard to the dissemination of misleading information in 2015 and 2016<sup>56</sup> about the CO<sub>2</sub> emissions of VW vehicles, it is noted that from an overall examination of the documents in the case there is no evidence to support specific hypothetical violations of the Consumer Code.

Limited to the advertising profile and given the available information, in fact, it has emerged that the CO<sub>2</sub> emission values stated in the brochures substantially coincide with the data provided by VW during the investigation.

---

<sup>56</sup> See in that regard the press releases of November 2015 (paragraphs 6 and 7 of this decision).

The traders have also promptly rectified certain minimum dissimilarities observed between the actual values and the indication given in adverts, as is usually done, according to a statement in the traders' defence, in ordinary revision processes for such values by vehicle manufacturers.

## **VI. QUANTIFICATION OF THE SANCTION**

95. Under Art. 27, paragraph 9, of the Consumer Code, when taking the measure prohibiting the unfair commercial practice, the Authority will apply a sanction of from EUR 5,000 to 5,000,000, taking into account the gravity and duration of the infringement.

96. With regard to the quantification of the sanction, account should be taken, as applicable, of the criteria defined in Art. 11 of Law no. 689/81, in ~~virtue of the warning in~~ article. 27, paragraph 13, of the Consumer Code: in particular, the severity of the violation, the work performed by the enterprise to eliminate or mitigate the offense, the agent's personality, as well as the economic conditions of the same.

97. With regard to the gravity of the infringement, consideration is made in the present case that Volkswagen AG is one of the leading global players in the production of cars and commercial vehicles. In 2015 total turnover of VW AG amounted to EUR 73.51 billion. Volkswagen Group Italia S.p.A. is the Group's Italian subsidiary and operates in Italy in the distribution of passenger cars and commercial vehicles of the Volkswagen Group, which includes among others, the Volkswagen, Audi, Seat, Skoda and Volkswagen commercial vehicles brands. In 2015 VW Italia turnover amounted to EUR 4,272,367,749.

98. Motor vehicles with EA 189 diesel engines sold in Italy in 2009-2015 amounted to over 700,000. In particular, about [150,000-300,000] Audi vehicles, [30,000-50,000] Skoda vehicles, [30,000-50,000] SEAT vehicles, [300,000-400,000] Volkswagen vehicles and [15,000-20,000] Volkswagen commercial vehicles.

99. The total value of sales of these vehicles is more than EUR [10-20 billion].

100. With regard to the extent of damage to the consumer, it should be noted that the inducement to error concerns a central element of consumer choice, which is compliance with environmental regulations. The consumer is also misled regarding a major economic choice: the average purchase price per buyer is, in fact, over EUR [10,000-30,000].

101. As regards the duration of the infringement, the elements available in the case show that the traders' conduct regarding the defeat device went from 2009 until September 2015.

102. As for the diffusion of the above messages, from the information acquired during the proceedings it appears that the same were disseminated through brochures, on the internet and through the distribution network, in the time period specified in paragraph 39, thus in brochures for A1, A3 and A4 cars for 2013 and 2014, in Volkswagen Golf brochures for 2010, 2011 and 2012, in Volkswagen Polo brochures for 2011, 2012, in Seat Ibiza car catalogues for 2012, 2013 and 2014 until at least February 2015, and in Skoda Roomster brochures at least in January 2010 and, finally, for Skoda Rapid Spaceback brochures at least in June 2015.

103. With regard, finally, to the subjective element, it should be noted that the traders appear to have deliberately installed diesel vehicles of the EA 189 EU 5 Group with an unlawful exhaust gas recirculation system, contrary to EU legislation on approvals, to alter test results on pollutant emissions laid down by the Euro parameter.

104. Based on these elements, given the particular gravity and duration of the commercial practice, the amount of the fine shall apply jointly to Volkswagen Group Italia S.p.A. and Volkswagen AG at the edictal maximum of EUR 5,000,000<sup>57</sup>.

---

<sup>57</sup> In this regard it is noted that the amount of the aforementioned fine is well below 1% of their respective total turnovers (for VW AG it represents 0.0068% of sales and for VW Italia 0.12%).

IT IS HELD, therefore, taking into account the opinion of the Authority for Guarantees in Communications, on the basis of the foregoing, that the commercial practice under examination is unfair according to Articles 20, paragraph 2; 21, paragraph 1, letter b); and 23, paragraph 1, letter d) of the Consumer Code, as contrary to professional diligence and likely to appreciably distort the average consumer's economic behaviour in relation to products offered and advertised by the traders;

## DECISION

a) that the commercial practice described in point II, letter A) of this provision, put in place by Volkswagen Group Italia S.p.A. and Volkswagen AG, constitutes, for the reasons and within the limits set out in the explanatory statements, an unfair commercial practice pursuant to Articles. 20, paragraph 2; 21, paragraph 1, letter b); and 23, paragraph 1, letter d) of the Consumer Code, and prohibits its diffusion or continuation;

b) A fine of EUR 5,000,000 (five million euro) shall be imposed jointly on Volkswagen Group Italia S.p.A. and Volkswagen AG.

---

The imposed administrative sanction must be paid within thirty days of notification of this decision, using the tax codes listed in Annex F24 form with identification information, referred to in Legislative Decree no. 241/1997.

The payment must be electronically debited from their own banks or postal accounts, through home-banking services and the CBI provided by banks or Poste Italian S.p.A., or using e-services of the Income Revenue Authority, available on the website *www.agenziaentrate.gov.it*.

Upon expiry of this deadline, for a delay of less than six months, interest must be paid at the legal rate effective from the day following the expiry of the term of payment until the date of payment. In case of further delay in compliance, according to Art. 27, paragraph 6, of Law n. 689/81, the amount due for the sanction imposed shall increase by one tenth for every six months from the day following the expiry of the term of payment, and until the day the concessionary receives payment; in that case the increase absorbs the default interest accrued during the same period.

Notice of payment must be given to the Authority by way of documentation attesting to payment made.

The parties concerned shall be notified of this resolution and it shall be published in the Bulletin of the Competition Authority.

Under article 27, paragraph 12, of the Consumer Code, in the event of failure to comply with the measure, the Authority shall impose an administrative fine of EUR 10,000 to 5,000,000. In cases of repeated failure, the Authority may order the suspension of business activities for a period not exceeding thirty days.

An appeal against this decision may be filed with the Regional Administrative Court of Lazio, in accordance with Art. 135, paragraph 1, letter b) of the Code of Administrative Procedure (Legislative Decree of 2 July 2010, n. 104), within sixty days from the date of notification, subject to further terms of Art. 41, paragraph 5, of the Code of Administrative Process, or an extraordinary appeal may be brought before the President of the Republic in accordance with Art. 8 of the Decree of the President of the Republic, 24 November 1971, n. 1199, within 120 days from the date of notification.

SECRETARY GENERAL  
*Roberto Chieppa*

f.f. THE CHAIRMAN  
*Gabriella Muscolo*