

Environmentally Unsustainable Behaviours

& Liability of Corporations

Francesca Bertelli and Karin Peluffo

Long Abstract:

Climate change and its associated environmental challenges are among the most pressing issues facing institutions and citizens worldwide. As the impacts of climate change become increasingly evident, the need for effective remedies and law enforcement to mitigate and address these challenges becomes paramount.

The common values implied in the principle of Sustainable Development are reshaping the overall approach to EU law. Indeed, the principle of Sustainable Development demands from every market player – institutions, corporations, and citizens – a contribution to the transition to a Circular Economy. The pathways tracked by SDGs 12 (Responsible Consumption and Production) and 17 (Partnership for the Goal) demonstrate the need to investigate the role of economic initiatives in fostering this transition, as well as to identify the main instruments available for private autonomy to integrate individual economic interests with collective environmental or social ones.

EU Treaties, international Courts, and national Constitutions are already referring to “Sustainable Development” as a principle of post-modern law. Modern constitutions reveal that the principle of Sustainable Development has emerged as the principal expression of the idea of sustainability in contemporary law, and the relationship between private law and sustainability operates in at least two directions:

- 1) Private law may have an impact on sustainability, in terms of whether it helps move societies toward ecologically sustainable patterns of production and consumption.
- 2) Sustainability may have an impact on private law, for instance, leading to a preference for some legal doctrines, institutions, or instruments over others.

The so called “Dieselgate scandal”, which unfolded in 2015, highlights how this double relationship between private law and sustainability is becoming more and more evident and requires a conceptualization explaining how and to what extent the principle of Sustainable Development is reshaping private economic initiatives and, more broadly, private autonomy.

Beyond its criminal implications and strict liability rules, the dieselgate raised serious questions about the accountability of corporations for environmentally unsustainable behaviours. Legal proceedings concerning the sale of these vehicles to European consumers are still pending despite the production of vehicles affected by the defeat device manipulating polluting emissions taking place between 2009 and 2015.

In this context, the same arguments underpinning the consumers’ claims, namely the conclusion of sale contracts for vehicles that exceed the legal thresholds prescribed by art. 5, 2 Reg. n. 715/2007, have been evaluated by national judges in different ways. As a consequence of this interpretation, remedies didn’t coincide, resulting in inconsistent solutions within the same country. Uncertainty is compounded by the recall and update procedure authorized by the German Federal Office for Motor Vehicles (KBA) and carried out by Volkswagen (VW), with the awareness that balancing conflicting interests and ensuring

the implementation of the principle of Sustainable Development is crucial. Indeed, the KBA ordered Volkswagen to withdraw the manipulation device to comply with prescriptions for the Euro 5 generation according to Reg. 715/2007. VW then proposed a software update aimed at re-establishing conformity of the defeated vehicles, but the execution of the software update revealed only partial effectiveness: the authorized intervention replaced the switch system deactivating the emission-reducing mode outside test drives with a program under which the emission gas recirculation (EGR) was activated even when the vehicle was used on the road. However, the EGR recirculates the full percentage of polluting emissions only when the external temperature is between 15 and 33 °C (so-called 'temperature window'). The implications of this procedure are that owners are still driving more polluting cars than expected, and the circulation of the involved cars jeopardizes the environmental purpose for uniformity of homologation procedures for light passenger vehicles.

Given this piecemeal scenario and its uncertainty, the judgments of the European Court of Justice C-145/20 of July 2022 and C-873/19 of November 2022 represent a new starting point to reconceptualize the function of private law and underscore the relationship between consumer rights and their liabilities in the green transition. The impact that the Court's judgments may have on national solutions highlights the need for greater uniformity of remedies for consumers, considering that the judicial interpretation provided for Directive 1999/44 will be undoubtedly applicable to 2019/771 as well.

After being questioned for a preliminary ruling under art. 267 TFEU from the Austrian Oberster Gerichtshof (C-145/20) and from the Schleswig-Holsteinisches Verwaltungsgericht (C-873/19), CJUE's decisions are both ground-breaking considering their impact on consumer law and on national solutions.

Firstly, regarding the seller's liability to the consumer for lack of conformity, the CJEU radically overturns the view that some national courts argued, to which the defeat device couldn't be considered a defect of such serious nature to preclude the main purpose of the sale. Moreover, the Court clarifies that a device which complies with polluting emissions legal thresholds only within a certain temperature violates art. 5 (2) Reg. 715/2007. The CJUE's statement that consumers who bought defective vehicles are entitled to invoke the discipline provided by Directive 1999/44 (amended now by Directive 2019/771) increases the uniformity of remedies in member States.

Secondly, a higher level of harmonization determines a stronger effectiveness of the protection of the final consumers: once clarified that VW's software update has not been capable of bringing back the good to conformity, consumers are also entitled to use the second degree of hierarchy of remedies (proportionate price reduction or termination of the contract). In fact, the Court aims to establish a fair balance between the interests of the consumer and the seller, by guaranteeing the consumer complete and effective protection from the seller's incorrect performance of his contractual obligations.

Overall, the CJEU seems to consider that the focus on environmental liability and responsibility of corporations has a link with consumers' environmental expectations. Indeed, the principle of sustainable development is now orienting European policies, in which sustainability inspires the interpretation and the identification of the most suitable remedy to satisfy conflicting interests in case of lack of conformity.

Lastly, the CJEU's judgments have a pivotal role in conferring to environmental associations the power to challenge before a national court an administrative decision in violation with art. 5 Reg. 715/2007. In so doing, the Court ensures the right to access to justice and an impartial judge to protect environmental interests. The interests protected by the aforementioned Regulation, indeed, are considered both public and general. Thus, relying on art. 47 of the EU Charter of Fundamental Rights and on art. 9 on the Aarhus Convention, it is affirmed that national law should be interpreted in a way that does not impede

environmental associations the right to bring proceedings against acts and omissions by private or public authorities.

CJEU's decisions have now a pivotal role both in:

- Strengthening consumer protection and the role of environmental associations, recognizing the importance of environmental interests and suggesting an interpretation of national law inspired by the need to ensure access to justice and effective remedies;
- Highlighting the need to further explore rights and duties of market players in shaping the economic model through their private autonomy, especially focusing on the impact of ESG factors on corporate choices and activities.

Private law mechanisms, such as civil liability and class actions, can play a crucial role in addressing corporate liability for environmentally or socially unsustainable behaviour and providing protection for consumers.

Therefore, the use of private law frameworks can play a key role in facilitating and incentivizing the green transition, by encouraging sustainable consumption and holding companies accountable for greenwashing practices and unsustainable behaviours.