

The Consumer Voice in Europe

VOLKSWAGEN DIESELGATE FOUR YEARS DOWN THE ROAD

An overview of enforcement actions and policy work by BEUC and its members since the Dieselgate scandal



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About this report

Although nearly four years have passed since the Volkswagen (VW) Dieselgate scandal came to light, millions of affected consumers in Europe are still waiting for compensation.

This report provides a perspective on the flaws of the current enforcement system from the standpoint of consumers and consumer organisations. In contrast to the situation in Europe, US consumers received generous compensations from VW almost immediately. This comparison highlights the weakness of the European public and private enforcement systems. It clearly shows the lack of effectiveness of the EU's consumer protection legislation and its national enforcement. This report recommends measures for how the situation can and should be improved.

This report is a compilation of BEUC and its members organisations' activities and experience with EU and national institutions on the VW emission affair and thus provides a consumer and consumer organisations' perspective. It does not aim at including all aspects of this scandal, for example it doesn't cover the broader context of other car producers' involvement in emission manipulation.

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1. INTRODUCTION

On 18 September 2015, the US Environment Protection Agency (EPA) announced that Volkswagen had been using so-called 'defeat device' software in a number of vehicles in order to meet air pollutant emissions standards. It soon became clear that the scale of the issue was immense and global, with 11 million cars affected, including 8 million vehicles in Europe.

This came as a shock to many European consumers and policy-makers, firstly due to the gravity of the EU law infringements and the extremely high number of affected consumers. Our member organisations immediately took action in order to help affected consumers get their cars adjusted to meet legal requirements and receive compensation. BEUC's role was to represent our members towards VW, to coordinate their work and activities where relevant, to increase information and expertise sharing and to provide a first legal analysis.

Consumers were also disappointed to discover that they had very few efficient tools at their disposal to enforce their rights. Adding insult to injury, VW did not accept responsibility for having cheated and damaged consumers and there was a blatant lack of national sanctions imposed on VW (and other car makers) who had broken the rules.

Four years later, the VW scandal must be considered as a failure of public and private enforcement with only a very few national exceptions.

On the positive side, the paralysis in enforcement has pushed EU institutions to bring forward a number of legislative initiatives that might help to prevent similar scandals in the future. However, the key legislative measure to ensure that European consumers are better protected in case of future mass damage – a law on EU-wide collective redress – is currently still under negotiation by Member States, many of whom do not appear keen to empower people with better access to justice.

BEUC and its our members have been working hand in hand over the past four years to make the consumer voice heard. Our goal is to ensure that any existing legal tools are used to claim compensation, and to prevent the VW Group (or any other company breaching EU law) from escaping their responsibly. To date however, nearly all of the eight million car owners who bought cars equipped with a defeat device in Europe remain empty handed.

We are confident that our members' actions will ultimately bring about some long overdue results for consumers, but compensation will still take a considerable amount of time and may not be available for all of those affected.

For this reason, even after all of these years, this documentation must be seen only as an interim report about how BEUC's member network is fighting to achieve justice against Volkswagen. The report also outlines other main developments in the Dieselpgate saga, including actions taken by national authorities and EU institutions.

2. VW DIESELGATE: BEUC'S CONCLUSIONS

2.1. Private enforcement

1. Despite enormous efforts by consumer organisations across Europe, four years after the discovery of the fraud VW has still not compensated European consumers (except in a very few cases resulting from individual court judgements for damages). The main reason for this failure is the lack of an effective collective redress tool in most European countries.

Remarkably, consumer organisations have for the most part been left alone in their fight for compensation. The European Commission was the first (and one of the very few) institutions that directly and openly called upon VW to compensate consumers. Despite the considerable efforts of Commissioners Jourová and Bieńkowska, VW made no relevant concessions to compensate consumers and did not even comply with basic requests from the European Commission and the national consumer authorities with regards to the so-called 'trust building measures' (see section 4.1.).

2. The case clearly demonstrates the **European Commission's lack of power** when it comes to law enforcement to the benefit of consumers, and the absence of power and ambition in the Consumer Protection Cooperation (CPC) network.

3. Wherever national civil procedural court rules provided feasible options for collective redress, our members, national consumer groups, took action:

- At the time this report was written (September 2019), the number of European consumers who were able to join a **collective redress** court action for damage compensation was low, and in any case only due to the work of our member organisations in four European countries: Belgium (our member Test Achats/Test Aankoop), Italy (our member Altroconsumo), Portugal (our member DECO) and Spain (our member OCU). Consumers in a few other countries hope to eventually receive redress through specific actions launched in their countries:
- Despite the lack of proper procedures for collective redress, our members used all of the tools at their disposal. Our Austrian member VKI – with the support of the Austrian Chamber of Labour and the national government – has launched 16 court actions representing the interest of 10,000 consumers. Two of our members (ZPS in Slovenia and FRC in Switzerland) have joined forces with legal service providers (private companies) to offer consumers a chance for access to justice. Other members have brought model cases for individual consumers.
- The **Musterfeststellungsklage** against VW in Germany is one of the largest-ever collective action in Europe, with more than 430,000 consumers registered to date.¹ The German court can render a judgment to declare that VW infringed the law and damaged consumers, but cannot however order the company to pay compensation. Affected consumers must thus use the judgment to individually claim compensation afterwards.
- For those consumers who have already gone to **court individually** (mainly in Germany), court decisions have had mixed results. VW tends to eventually pass positive judgements for individual consumers (see section 9) as part of its strategy to avoid lower court decisions that would be guided by higher court laws. Given the complexity of the legal questions involved, many first instance judges require and are waiting for such guidance. This again shows that action in the collective interest of consumers would be a much more effective and transparent way to hold VW accountable.

2.2. Public enforcement

With very few exceptions, the VW case is a failure of effective public enforcement. Consumers were abandoned by public authorities, and affected cars are still on the streets and polluting the air across Europe.

The accountability of public authorities (type-approval authorities and consumer protection authorities) in coping with the scandal was very low, and this has regrettably not been a matter of a public discourse to date.

¹ https://www.vzbv.de/sites/default/files/downloads/2019/09/12/19-09-04_bilanz_abgasskandal_4_jahre.pdf

Consumer authorities:

- a) Despite our calls on **national consumer authorities** to act against VW for the use of unfair commercial practices,² only very few of them took action. The early groundbreaking decision of the Italian Competition and Consumer Authority (4 August 2016), despite its European legal base, unfortunately did not serve as a model for most other countries. Only the Netherlands Authority for Consumers and Markets followed suit and imposed a fee on VW (see section 7.2.).
- b) **Public communication by the authorities to consumers** The national authorities to a large degree let VW inform consumers about the impact and the consequences of the emission fraud, only stepping in after more than a year had passed to try to improve the way this information was provided.

Type-approval authorities

- a) The German BKA (Kraftfahrt Bundesamt, the type approval authority) recall (2016) is mandatory and covers all affected cars across the EU. Nevertheless, it was unclear whether or not national type-approval/market surveillance authorities in the other EU countries also needed to issue an additional mandatory recall. According to information from the European Commission,³ eight Member States issued such a mandatory recall. As none of the other Member States issued a recall, VW only offered the software to consumers in those countries as an element of a service check for the car. It was unclear which country had issued a mandatory recall or not and what the consequences of the Member States' choices were for consumers
- b) This fragmented situation has been very confusing for consumers. Overall, a lack of transparency has prevailed and in many countries consumers have been uncertain about their rights and obligations. The lack of a mandate and the responsibility of national authorities to act towards consumers (i.e. to reach out to affected consumers to inform them about a recall or other measures, and to provide information on the legal impact of the recall) was one of the most obvious flaws during the scandal.
- c) In many countries, most of the necessary information was provided by consumer organisations and automobile clubs without any cooperation from the authorities.

Despite the fact that a recall should have the same implications in all countries due to the Single Market, it was left to Member States to define the consequences of the German authorities' decision.

Sanctions and fines for VW in Germany

In Germany, Volkswagen was finally fined €1 billion for infringing its supervisory duty by selling vehicles equipped with defeat devices between 2007 and 2015. This amount stands in stark contrast to the almost \$10 billion that Volkswagen had to pay in the US for various sanctions, particularly as relatively few⁴ cars were affected (for more details see section 8).

2.3. Regulatory impact of the VW scandal: some positive consequences

After VW admitted to having cheated, many national authorities conducted on-road tests with other brands of cars to check whether other manufacturers had also misbehaved. Results from these tests showed that the problem went far beyond VW. Pollutant emissions (NOx) from the diesel vehicles of most car makers were on average 500% higher in real life than in the laboratory,⁵ and it soon became clear that the car industry had systemically made use of

² Legal base: EU Directive on Unfair Commercial Practices.

³ <https://circabc.europa.eu/sd/a/de78647f-d522-4a3e-a777-39d382963c72/State%20of%20play%20of%20the%20recall%20actions%2020180706%20v1.pdf>

⁴ "[A]pproximately 590,000 model year 2009 to 2016 diesel motor vehicles", according to the US Environmental Protection Agency (EPA): <https://www.epa.gov/vw/learn-about-volkswagen-violations>

⁵ <https://www.transportenvironment.org/what-we-do/air-pollution/road-vehicles>

loopholes in EU and national regulations. For instance, most car makers justified the use of defeat devices by arguing that they were necessary to protect their vehicles' engines, without providing robust evidence that this was the case as legislation normally requires.⁶ They were able to get away with this thanks to the complacency of the national type-approval authorities who failed in their duty to enforce the law.

The VW fraud and the wider Dieselgate scandal have served as a wake-up call for EU and national decision-makers. In September 2015 a major regulatory overhaul was initiated with regards to EU type-approval, market surveillance, CO2 emissions and even consumer law.

Although several of the adopted regulatory changes were already in the pipeline before the fraud was revealed, the scandal undoubtedly accelerated the pace of reforms and strengthened the level of ambition in the agreed measures.

What has been done since 2016?

- With the aim of improving the ability of consumers to be compensated in case of mass harm, the European Commission proposed a **Directive for representative actions for the protection of the collective interests of consumers** in April 2018. However, due to the reluctance of Member States to equip consumers with such a tool, the proposal is still pending in legislative procedure and adoption may take even longer. This raises doubts about the effectiveness of this new legislation.
- A review of the framework for the **activities of the Consumer Protection Cooperation (CPC)** network in the case of cross-border infringements has been adopted and will enter into application as of January 2020. The new regulation provides more powers to national authorities and to the European Commission.
- The **review of the type-approval and market surveillance legal framework for cars** has been adopted. The new rules, which will apply from September 2020, will ensure a much more robust oversight over national type-approval authorities. The Commission will have the possibility to initiate EU-wide recalls and directly impose penalties on car makers. National authorities will also have to conduct a minimum number of tests on vehicles in circulation.
- The VW scandal clearly had a positive effect on the level of ambition and the swift adoption of **regulations for the emissions testing of cars**, although these were already planned before the scandal broke. Since September 2017, new cars need to pass the more reliable 'WLTP' laboratory test before they are put on the road. This laboratory test is accompanied by a 'Real Driving Emissions' test to measure emissions of NOx and fine particles. These new tests will ensure more reliable emissions figures, in terms of both fuel consumption and pollution.
- **Ambitious CO2 reduction targets have been adopted for the automotive industry for the 2020-2030 period.** Dieselgate also increased awareness about the need to accelerate the transition to zero and low-emission cars, which are much better for both the climate and air quality. In December 2018, the EU agreed to new CO2 reduction targets for 2025 and 2030. Car manufacturers will have to reduce the CO2 emissions of their new cars by 15% in 2025 and 37.5% in 2030 in comparison with 2020 levels. These objectives should significantly accelerate the roll-out of cleaner and more efficient cars by pushing car makers to increase their offer of zero-emission cars such as battery electric vehicles.
- Better **public health protection** has been achieved through the enforcement of clean air legislation. Triggered by the VW scandal, more and more market surveillance authorities in charge of enforcing the EU's clean air legislation are taking urgently

⁶ <http://ec.europa.eu/DocsRoom/documents/21149>

required action to ensure clean air in cities. This action has partly been a result of national court cases brought for example by Deutsche Umwelthilfe in Germany. While improving air quality in cities will benefit everyone and in particular the most vulnerable groups – such as children, the elderly and patients suffering from respiratory diseases – diesel car owners have been left very much alone with the consequences of new clean air zones in cities that prevent even quite new diesel cars from entering. This unfair situation can only be remedied through additional action at the regulatory level and by the car industry itself (see our recommendations below).

⇒ **Ultimately, whether or not all of these new rules deliver will depend upon the effectiveness of public and private enforcement.**

2.4. Finally: a law is as strong as its enforcement system

While we hope that the new rules – if properly implemented and enforced – will prevent a new scandal, Europe still has to deal with the legacy of Dieselgate. Across the EU, tens of millions of dirty diesels are still on our streets and polluting our cities. Many cities are left with no other choice than to introduce diesel bans. These bans pose significant problems for consumers whose daily mobility needs are affected and who will lose money as the value of their vehicles decreases. To mitigate the effects of such bans on consumers, car manufacturers should either fix the affected cars through so-called 'hardware retrofits' or offer attractive conversion premiums allowing owners of diesel vehicles to exchange them for cleaner cars.⁷

At the same time, as stated at the outset of this report, European consumers have not yet been compensated for the damages they have suffered as a result of VW's fraudulent practices. Even with the handful of collective court actions that were launched in a few countries, timelines are long and the outcomes are uncertain.

The current president and the newly-elected president of the European Commission have both promised to work towards a Europe of equality and justice for all people. An effective and accessible enforcement and redress system that tackles illegal commercial practices must be at the core of this endeavour. A new European enforcement system and culture urgently needs to be put in place.

Measures to achieve systematic and effective European enforcement should be methodically considered in every new law and in every review/REFIT evaluation⁸ of existing law, and should include both private and public enforcement with the involvement of all relevant stakeholders, public authorities and courts, consumer organisations, businesses, EU institutions and governments.

3. OUR MEMBERS' ACTIVITIES

3.1. Altroconsumo – Italy

Altroconsumo launched a group action at the beginning of April 2016. The Italian group action system requires that individual consumers actively 'opt-in' to become part of the court action. To date, 75,000 consumers have joined.

The collective action was declared admissible by the competent court in May 2017. The findings of the technical report commissioned by the Court were presented at a hearing on 8 May 2019.

⁷ https://www.beuc.eu/publications/beuc-x-2018-078_local_bans_of_diesel_cars.pdf

⁸ REFIT evaluations are part of the European Commission's Better Regulation Agenda. See: https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly_en

The next hearing will be dedicated to presenting the respective arguments of the parties, including information about the economic damage suffered by consumers. This hearing will not take place until March 2020.

3.2. Test Achats/Test Aankoop - Belgium

Test Achats/Test Aankoop launched a collective redress action against the VW Group Belgium and the international VW Group in June 2016. More than 10,000 consumers expressed interest in joining the action at that time. The collective action was declared admissible by the court in December 2017. Importantly, the judge decided that the procedure should be based on an 'opt-out' procedure, which means that the interests of all affected consumers are automatically represented in the action even if they have not actively joined (thus individual consumers must declare their wish to drop out). This was a first and major success for Test Achats, as it is the first large group action based on an 'opt-out' procedure.

In October 2016, Test Achats/Test Aankoop started an additional action against the VW Group. This was based on the individual assignment of claims for those consumers who had purchased a VW car before 1 September 2014 and therefore were not able to participate in the group action (the Belgian group action legislation can only be applied for damages occurred from September 2014 onwards). After a mandatory negotiation period, both procedures will continue before court.

3.3. DECO – Portugal

The collective lawsuit against VW Portugal and other VW Group members was filed by DECO on 29 October 2016. According to Portuguese law, DECO automatically represents all affected Portuguese consumers before the court (opt-out system). The defendants presented their opposition during summer. A preliminary hearing should happen before December 2019.

3.4. OCU – Spain

OCU filed a group action against the VW-Audi Spain Group on 19 July 2016. The action represents more than 7,500 car owners.

The collective action was declared admissible by the court in April 2018, and the first hearing will take place on 7 October 2019. According to Spanish procedural law, the judge will first ask the parties to find an agreement. If no settlement is achieved, the judge will continue with the trial.

3.5. Zveza Potrošnikov Slovenije (ZPS) – Slovenia

Because no collective action instrument existed in Slovenia in 2017, our member ZPS started a cooperation with the law firm Hausfeld (and its myRight online platform).

On 28 March 2018, financialright claims GmbH ("financialright") filed a collective action including 6,024 claims by Slovenian customers against the Volkswagen Group ("VW") at the Regional Court of Braunschweig, Germany. In their statements of defense, filed in December 2018 and February 2019, VW attempted to challenge the claimant's legal theory on various levels.

The court holds the view that it would be an adequate option to separate one single claim from the collective action in order to use it as a 'sample case' in which all of the legal questions can be addressed in a manageable way. Although VW opposes this proposal, ZPS is optimistic that the court will follow through with this idea as it just did so in a parallel case for Swiss consumers containing similar legal issues.

The chamber also informed the parties that due to an extraordinary caseload of thousands of other pending cases in the Dieseltgate scandal it was unable to address the matter for the time

being. The proceedings have thus come to a temporary halt and the court has asked the parties for their patience. It is expected that the court will take the case on again later this year.

3.6. Fédération Romande des Consommateurs (FRC) – Switzerland

In 2015, FRC filed a criminal complaint against VW and made a criminal complaint template available to its members to file with the Public Prosecutor's Office. FRC's criminal complaint was however overruled, and the competent court denied the association the right to appeal. Nevertheless, a criminal investigation is ongoing.

Given the absence of a collective redress instrument in Switzerland and, more broadly speaking, the difficulty for associations to represent their members in court, FRC encouraged all car owners in Switzerland to file an action in cooperation with the Hausfeld law firm and the myRight online platform. Over 2,000 people are taking part in this action.

3.7. Verein für Konsumenteninformation (VKI) – Austria

As of September 2018, VKI had brought 16 group actions in front of 16 courts representing a total of 10,000 consumers. To date, the main focus of these proceedings has been on jurisdiction issues.

VW argues that Austrian courts are not internationally competent for the dispute between Austrian car holders represented by VKI.

The regional courts have answered the question of international jurisdiction in diverse manners. Jurisdiction has partly been affirmed (orally by the regional courts in Leoben and Eisenstadt, although VW appealed the latter decision), and partly denied (by the regional courts in Korneuburg, Wiener Neustadt, Wels and Feldkirch). VKI appealed these negative decisions, and in May 2019 the High Court in Linz repealed the decisions of the regional courts in Wels and Korneuburg, followed by a ruling by the Vienna High Court in June 2019. Ultimately, VKI's legal opinion was upheld and the Austrian courts were deemed competent.

On 27 March 2019, the Landesgericht Klagenfurt made a reference for a preliminary ruling to the Court of Justice of the European Union in order to seek for clarification in relation to the competence of Austrian courts for lawsuits against VW. The legal question concerns the international jurisdiction of the Austrian court over purely economic damages.

VW has also stated that the court proceedings must be assigned to a chamber of three judges instead of a single judge. The high courts in Linz and Vienna have rejected this opinion. They also did not admit remedies against this decision to the Supreme Court.

Other regional courts have also appointed hearings, with no decisions to date. The court in St. Pölten decided on 25 July to abate the legal proceedings until the European Court of Justice ruling.

3.8. vzbv – Germany

Musterfeststellungsklage by vzbv

On 12 September 2018, vzbv announced that it would bring a declaratory court action ('Musterfeststellungsklage') against the Volkswagen Group. This action, taken in cooperation with the German touring organisation ADAC, was based on the new German legislation for declaratory model judgements. Their aim is a legally-binding declaratory judgement specifying that Volkswagen, with its software manipulation, deliberately and unethically caused damage to its customers and now owes redress to affected buyers.

The lawsuit addresses Volkswagen, Audi, Škoda and SEAT branded vehicles with EA 189 diesel engines. As of September 2019, over 430,000 consumers had registered to join this action, making it the largest-ever collective "opt-in" court action in Europe. The first oral hearing before the Brunswick Higher Regional Court (OLG Braunschweig) will take place on 30 September

2019. The court has also already scheduled a second hearing to take place on 18 November 2019. So far, it is not possible to predict when the court will issue its judgement.

Previous vzbv model case

On 23 November 2017, vzbv started proceedings at the Bremen regional court for the recovery from a VW dealer of money paid by a consumer impacted by the diesel scandal. The consumer had rescinded his purchase agreement, as the car dealer had been unable to guarantee that the technical fix offered by VW would not have any adverse effect on his vehicle. Following lengthy discussions, vzbv managed to secure a far-reaching guarantee from Volkswagen. The action now being brought seeks to have the 'value' of this guarantee – namely whether consumers can enforce it against any dealer – tested in court. On 21 February 2019, the district court of Bremen followed vzbv's reasoning and sentenced the respective VW dealer to reimburse the purchaser for the vehicle affected by a defeat device.

Finally, it should be noted that the Federal Court of Justice (BGH) in Karlsruhe rendered a sentence that classified manipulative software in diesel cars as a 'defect'.⁹ The decision was a major boost for consumers seeking damages over the VW Dieselgate scandal.

Although the opinion does not explain what action the carmaker should take to correct the 'defect' represented by a defeat device – such as replacing or refitting vehicles or compensating drivers – and it is not binding, it is an important opinion and can guide lower courts at a time when tens of thousands of VW owners' cases are working their way through the justice system.

3.9. Union Luxembourgeoise des Consommateurs (ULC) – Luxembourg

In the absence of a collective redress tool in Luxembourg, ULC selected four individual examples from ULC members as test cases. These individual 'assignments' were simultaneously introduced before the court (the tribunal d'arrondissement, composed of three judges) in Luxembourg City, and the request was a partial reimbursement of the purchase price. The defendants are the car seller, the Luxembourg importer, and VW and Audi as the car manufacturers. The legal basis for these test cases is the Luxembourg rules transposing the EU Unfair Commercial Practices Directive. The defendants' lawyers decreed that the submissions were inadmissible, leading to significant delays, but in July 2019 the court in Luxembourg issued a judgement that upheld the submissions as admissible.

3.10. UFC-Que Choisir – France

In France, BEUC member UFC-Que Choisir was appointed as member of a national independent testing commission created to investigate the diesel scandal. The commission was composed of a wide variety of stakeholders: a consumer organisation (UFC-Que Choisir), an environmental organisation, parliamentarians, electronic and data processing experts, representatives of the French authority tasked with consumer protection and the Ministry of Ecology. This Commission developed a protocol which it used to run vehicle tests in order to determine the level of pollution in real driving situations of a number of vehicles (both Volkswagen and non-Volkswagen cars) and to decide whether or not a defeat device had been used. The work of the Commission was summarised in a report published on 29 July 2016¹⁰ that confirmed the systematic use of defeat devices across the industry, as defined by Regulation 715/2007, but left it to the court to determine whether or not the use of these defeat devices was legal. As a result, four criminal cases were filed in France against Volkswagen, Renault, Fiat and Peugeot Citroën and are still ongoing. UFC-Que Choisir joined all of these cases as a private party.

In December 2018, UFC-Que Choisir invited French consumers to join the group action launched by the German consumer organisation vzbv.

⁹ <https://www.vzbv.de/pressemitteilung/vw-abgasskandal-bundesgerichtshof-geht-von-sachmangel-aus>

¹⁰ <https://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/164000480.pdf>

3.11. Consumentenbond – the Netherlands

In September 2016, the Dutch Consumentenbond (CB) filed an official complaint (an enforcement request) to the Dutch Authority for Consumers and Markets (ACM) which consequently opened an investigation against VW and as a result imposed the (at the time) maximum fine of €450,000 on the VW Group for undertaking unfair commercial practices. ACM confirmed its decision on 6 December 2018, after taking VW's objection into account.

VW appealed, and the case is now in the hands of the administrative court of Rotterdam. The Consumentenbond is actively involved in these ongoing administrative procedures as an interested party and provided a written response to VW's grounds of appeal to the district court of Rotterdam a few months ago. The court has planned a first hearing on 16 December 2019.

3.12. Spoločnosti ochrany spotrebiteľov – Slovakia

BEUC's Slovakian member (Spoločnosť ochrany spotrebiteľov, or SOS) has also started to examine cooperation with professional legal service providers due to the absence of a collective redress tool in Slovakia. A public campaign was kicked off by SOS to reach out to consumers, but the idea of launching a court case ultimately had to be dropped due to a lack of resources.

3.13. Lietuvos vartotojų organizacijų aljansas – Lithuania

Our Lithuanian member (Lietuvos vartotojų organizacijų aljansas) coordinated consumer organisations in the Baltic States with the aim of launching a legal action with assigned claims. However, the lack of an effective redress tool and logistical difficulties forced the organisation to cease its efforts.

4. THE EU INSTITUTIONS' RESPONSE TO VW'S DIESEL FRAUD FROM A CONSUMER PROTECTION PERSPECTIVE

4.1. European Commission negotiations with VW

In 2016, the European Commission (represented by Commissioner Jourová) started talks with Volkswagen with the goal of supporting European consumers. Regrettably, the Commission's demands during this dialogue did not include calling on Volkswagen to compensate consumers, but were limited to securing better information from the company for consumers and bringing the vehicles back into conformity with emissions limits. During this dialogue, Volkswagen committed to undertaking all 'repairs' (software updates as ordered by the German type-approval authority) across the EU by the autumn of 2017.

In June 2017, Commissioner Jourová further agreed with VW on so-called 'trust building measures' for affected car holders/consumers. Those measures included an agreement by Volkswagen to offer affected car holders a 'guarantee' of two years for any defect arising after the 'repair' (software adjustment). The 'guarantee' was however subject to several conditions, and limited to 11 specific vehicle components.

BEUC criticised the lack of added value in these 'trust building measures' due to their very limited scope and the fact that they were not communicated to consumers in a targeted nor even particularly visible manner.

Volkswagen only agreed to some very limited concessions for consumers. We observed a general lack of transparency, public scrutiny and communication to the public about the progress and impact of VW's measures

The European Commission also coordinated the work of the national consumer authorities (within the CPC network), which was mainly driven by the Dutch Authority for Consumers and Markets.

The dialogue between the European Commission and Volkswagen was officially terminated in July 2018, when the coordinated CPC action (see section 7.4) was declared finished. Attempts by the European Commission and the CPC to tackle VW's

fraudulent practices via dialogue and a coordinated enforcement action (the final results of which were published in July 2018) must be considered as very modest in their outcome¹¹.

The case illustrates the European Commission's absence of power in the field of consumer protection law enforcement and the CPC network's lack of ambition.

4.2. Investigative committee set up by the European Parliament

In December 2015, the European Parliament set up a Committee of Inquiry into Emission Measurements in the Automotive Sector (EMIS) with the aim of investigating the diesel scandal. After many months of looking into this issue, the Committee adopted its report in April 2017.¹²

In this report, members of the EMIS Committee backed many measures that BEUC and its members had been advocating for, specifically the compensation of consumers impacted by the Dieselgate scandal and the introduction of an EU collective redress scheme for consumers.

4.3. European Court of Auditors (ECA) report

In February 2019 the European Court of Auditors published a briefing paper – 'The EU's response to the dieselgate scandal'¹³ – which highlighted the fact that the EU type-approval system is not complemented by a consumer compensation system. The report also acknowledged that the proposed EU legislation for a collective redress system will not be available to consumers affected by the Dieselgate scandal.

4.4. Infringement procedures launched by the European Commission

In December 2016¹⁴ and March 2017¹⁵, the European Commission opened infringement procedures against eight Member States on the grounds that they had failed to fulfil their obligations under EU vehicle type-approval legislation, namely by not putting an effective penalties system in place or by not applying their national provisions on penalties.

¹¹ See CPC report about the conclusion of the joint action: https://ec.europa.eu/info/sites/info/files/live_work_travel_in_the_eu/consumers/assessment_reaction_vw_to_comm_on_position_22062018.pdf

¹² The full text of the EMIS report is available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bREPORT%2bA8-2017-0049%2b0%2bDOC%2bPDF%2bV0%2f%2fEN>

¹³ https://www.eca.europa.eu/Lists/ECADocuments/BRP_Vehicle_emissions/BRP_Vehicle_emissions_EN.pdf

¹⁴ For more information see: http://europa.eu/rapid/press-release_IP-16-4214_en.htm

¹⁵ For more information see: http://europa.eu/rapid/press-release_IP-17-1288_en.htm

4.5. Anti-trust investigation launched against car manufacturers

In September 2018, after carrying out inspections at the companies' premises, the European Commission opened an in-depth investigation to assess whether BMW, Daimler and VW (which also includes Audi and Porsche) colluded, in breach of EU antitrust rules, to avoid competition on the development and roll-out of technology to clean the emissions of petrol and diesel passenger cars.

4.6. Re-fitting the EU type-approval legislation

In the aftermath of the scandal, the European Commission proposed to revise the legal framework for the type-approval of motor vehicles.

In April 2018, a deal was reached between Member States and the European Parliament regarding the reform of the type-approval and market surveillance legislation for cars and vans. Although the review did not meet all of BEUC's expectations, it was a real step forward in comparison with the current system. It especially strengthens the supervision of national type-approval authorities and should help to prevent new scandals like Dieselpgate from happening.

The new type-approval framework will be applicable as of 1 September 2020.

5. BEUC'S RESPONSE TO THE DIESEL SCANDAL

5.1. Attempts to establish a dialogue with Volkswagen

After the scandal came to light, BEUC and its members first tried to establish a constructive dialogue with Volkswagen in order to achieve better consumer information as well as repair (where possible) and compensation for affected car holders. It was BEUC that alerted Volkswagen, through input from its members, about the huge lack of information consumers were experiencing about the impact of the fraud on their cars, particularly non-German consumers. We provided information and input to VW on how to improve the situation across the EU. A series of exchanges by letter and a couple of meetings with Volkswagen representatives led to meagre and ultimately unacceptable results for us. Volkswagen rejected all compensation demands and made only small concessions with regards to its information policy towards consumers. In March 2016, when it became clear that VW would continue to reject any compensation requests. BEUC's expectations for meaningful results from the dialogue could no longer be upheld and the dialogue stopped. Consumers would from then on have to rely on court action and public enforcement by authorities.

Due to Volkswagen's objections, no amicable solution could be reached during BEUC's dialogue with the company

5.2. BEUC as a coordinator of the consumer organisations' response

Consequently, BEUC started to coordinate the activities of its members to ensure that as many consumers as possible who had bought a diesel VW car would obtain redress in as many countries as possible. However, the situation with regard to collective redress court procedures is not at all coherent across the EU. While in a few countries consumer organisations can go to court on behalf of a group of damaged consumers, an effective procedure to file such a collective redress action is not available in most EU countries. Therefore, we followed two different routes:

- 1) BEUC's members in Italy, Spain, Portugal and Belgium have the possibility for collective action. After the dialogue with VW had to be terminated, these members started to prepare group actions in their respective countries. BEUC's role was to share intelligence and expertise from these members with the rest of the network in order to inspire other members to follow suit where possible .
- 2) Given that in many Member States there is no useable collective redress system, BEUC investigated whether cooperation with a legal service provider to help our members bring individually assigned compensation demands to court was an option.

See the detailed description of our members activities in section 3 of this report.

5.3. BEUC's requests to the European Commission and to Member States' consumer protection authorities (CPC network)

In May 2016, BEUC sent a letter to Commissioner Věra Jourová at the Directorate-General for Justice and Consumers (DG JUST) asking her to put more political pressure on VW and particularly to support our claim that European consumers should receive redress.

As a follow up to this letter, BEUC was invited to present our work on 16 October 2016 on the VW dieselgate scandal to the European network of national consumer protection authorities (CPC network). At this meeting, BEUC asked Member States' consumer authorities to intervene against Volkswagen on the basis of its unfair commercial practices. In particular we called on authorities to follow the example of the Italian Competition and Consumer authority, which had already issued a decision on the infringement of Italian and European consumer legislation against VW in August 2016 (see section 4.1).

Still, it took the authorities more than a year to react to the emissions fraud. Following BEUC's demands, the CPC network finally took action on 7 September 2017 by adopting a joint position¹⁶ requesting that VW improve its information practices and establish measures for consumers whose cars showed defects *after* the so-called 'repair' (VW's software update to reduce the cars' NOx emissions). The CPC's decision regrettably fell short of asking VW to provide compensation to consumers for the damage suffered from purchasing a manipulated car. (For more information, see section 7.4 of this report.)

In January 2018, BEUC wrote another letter to the European Commission (DG JUST) and the CPC network in order to inform them about the results of the survey¹⁷ conducted by consumer organisations from Belgium, Spain, Italy and Portugal. The survey clearly showed that consumers were still facing problems with their cars, even following the software update. We also called on the CPC authorities to require VW to uphold its commitments to them and to reimburse consumers for any damages arising from failed repair attempts.

5.4. BEUC's 'Fitness check on the car sector' public conference

On 28 September 2016, BEUC organised a public conference entitled 'Fitness check on the car sector in Europe – Vehicles testing and emission scandal'. The goal of the conference was to take stock of the consumer detriment resulting from the Dieselgate scandal, the ongoing investigation into the car sector and existing solutions to clean up the car sector in Europe.

The Volkswagen scandal was the obvious focus of the discussions, but a broader range of issues was addressed in a more general way. These included European type-approval regulations and emission thresholds.

¹⁶ https://europa.eu/rapid/press-release_IP-17-3102_en.htm

¹⁷ <https://www.test-achats.be/mobilite/autos/dossier/dieselgate-faites-vous-partie-des-gens-trompes/action-de-rappel-vw>

The key outcome of the conference was that European Commissioners Věra Jourová and Elżbieta Bieńkowska issued a joint statement in support of consumers obtaining compensation from Volkswagen.¹⁸

5.5. BEUC's activities in a nutshell

BEUC's activities can be summarised as follows:

- Regularly informing BEUC members about developments relevant to the Dieselgate scandal.
- Informing VW through letters (for several months following September 2015) about the problems faced by consumers due to their illegal practices, what information consumers needed, what consumers expected from VW and what VW should do.
- Trying to find an amicable solution with VW via a dialogue between October 2015 and March 2016.
- Coordinating knowledge sharing between BEUC members on factual and legal questions (legal analysis was provided from a European perspective), and organising several meetings for BEUC experts.
- Coordinating and providing material for media activities by BEUC and its members.
- Intervening at parliamentary hearings (at both EU and national level) and at other institutional events to provide evidence of consumer damage and our members' relevant activities.
- Meeting regularly with representatives of the European Commission and with Members of the European Parliament to draw attention to the lack of consequences of the emissions fraud, and providing them with information about the situation of consumers.
- Writing several times to the European Commission and to the network of national consumer authorities (CPC network) to inform them about the situation of consumers in Europe, providing evidence and asking them to actively support consumers.
- Holding a public conference in September 2017 with the participation of European Commissioners Jourová (responsible for Justice and Consumers) and Bieńkowska (responsible for the Internal Market and Industry).
- Calling for the introduction of a European collective redress tool to better enforce consumer rights at EU level. (A proposal that would introduce collective redress in all Member States was proposed by the European Commission in April 2018 as part of a legislative package called 'New Deal for Consumers').
- Successfully calling for an improvement of the EU type-approval legislation, which was reviewed in 2017 and inter alia obliges Member States to undertake more control on car emissions.

An overview of our activities and our successes to date can be found on our [campaign page on the Volkswagen emission affair](#).

5.6. BEUC's legal analysis

Common legal grounds: EU legislation

In order to explore the potential and merits of a joint enforcement strategy, BEUC prepared an assessment of the legal state of play to bring actions against Volkswagen. In a first step, BEUC analysed common legal grounds, hence options under EU law that could allow all BEUC members to act against Volkswagen or the sellers of Volkswagen cars.

¹⁸ For more information see: http://europa.eu/rapid/press-release_MEX-16-3242_en.htm

BEUC identified the breach of harmonised rules on type-approval and the use of defeat devices as common ground. Furthermore, the analysis demonstrated that the breach of relevant EU consumer legislation could also form the basis for common actions against VW. The prime anchor was the Unfair Commercial Practices Directive, which sets out standards for fair market conduct. The practice of advertising cars that do not correspond to the ads or offers could be considered an unfair practice, as false promises "materially distort the economic behaviour" of consumers. Furthermore, the practice of claiming that a product has been approved without complying with the terms of the authorisation is considered unfair under all circumstances.

BEUC also identified that the harmonised rules under the EU Consumer Sales and Guarantees Directive, which sets out legal guarantee rights, could form a possible ground for action. After all, consumers did not receive what was promised in the contract: a car that complies with EU emission standards, that does not feature a defeat device, and that fulfils certain performance criteria. However, the Sales Directive cannot be used to act directly against Volkswagen, which was not the car seller in most cases.

BEUC also identified that the recall of cars to undertake 'repairs' will likely impact car owners equally in terms of fuel consumption, performance and emissions standards.

This fact that consumers are equally or very similarly affected could help in formulating claims on behalf of many consumers under substantial law as well as in joining claims under national procedural laws.

Comparative assessment: commonalities and differences

In a second step, BEUC worked together with its members to assess possible actions and legal grounds for redress under national legislation. A comprehensive comparative table was prepared that focused on the concept of damage, the grounds for breach of contractual and non-contractual obligations, and against whom which type of action can be brought in which timeframe. Many members participated in the analysis, which revealed that the notion of compensation loss, such as the lower value of the car, the higher fuel consumption, repair costs or lesser performance largely correspond across the EU. The same was revealed with regard to the grounds for breach of contractual obligations, such as non-conformity, fraud and error and non-contractual obligations, such as tort, misleading practices and unjust enrichment.

Differences could be identified in terms of which legal actions could be brought against whom. The analysis showed a scattered enforcement framework and differing roles of consumer organisations among Member States. Whilst individual actions and injunctions are the main enforcement tools in certain countries, others offer group action or collective claims, including collective settlement regimes. Complaints before authorities by consumer organisations were an option in some but not all Member States.

BEUC mandate and objective - European options

The analysis by BEUC and input from BEUC members formed a pillar of BEUC's mandate to first negotiate with VW and later coordinate activities with members.

That a focus on harmonised rules on unfairness can form a solid common legal ground to act against Volkswagen was confirmed by enforcement actions in different Member States. The lead was taken by the administrative authorities in Italy and the Netherlands, which based their decisions on rules against unfair market practices. Although the proceedings are not yet concluded, they can pave the way for enforcement actions in other countries.

Despite these successes, procedural obstacles remain. As explained earlier, consumer organisations face difficulties due to scattered enforcement frameworks or the lack of powerful enforcement tools such as collective redress. But particularly as regards cross-border actions, the EU area of justice shows its weakness in the protection of consumer interest. This is

demonstrated by the poorly coordinated activities undertaken by the consumer protection authorities (CPC, explained in section 7.4), which were not sufficiently ambitious and were lacking in true enforcement power.

EU private international law constitutes another problem. Whilst it grants individual consumers a jurisdictional benefit – they can sue the trader before their home courts – the relevant rules are not fully apt to deal with collective actions brought by consumer organisations. Actions cannot be brought before domestic courts in all instances, and even where it is possible Volkswagen has done everything in its power to dispute the international jurisdiction. An example is provided in Austria, where our member VKI has brought several collective actions against VW.

Although we are very confident that our members have the stronger legal arguments, jurisdictional manoeuvres by Volkswagen undermine effective and quick access to justice for consumers. The ultimate objective of our activities remains to ensure that VW indemnifies harmed consumers.

6. VW'S 'REPAIR' AND ITS CONSEQUENCES

4 out of 10 drivers reported negative impacts from the software update on their car

In January 2018, four BEUC members (Test Achats/Test Aankoop from Belgium, Altroconsumo from Italy, OCU from Spain and DECO from Portugal) published the results of a survey of almost 10,600 car owners affected by Dieseldgate who underwent the software update provided by the Volkswagen Group.

Results showed that over 4 out of every 10 drivers who made the software update reported a negative impact on their car: namely increased fuel consumption, loss of engine power or a less smoothly running engine. Most of the changes were observed less than one month after the software update. In addition, many consumers had to pay for car repairs following the software update.



BEUC communicated these alarming results to the European Commission and to the CPC network of consumer protection authorities.

Many of the members of this campaign – including BEUC members from Belgium, Italy, Spain and Portugal as well as the BEUC secretariat – raised awareness of the need for consumers to have access to justice under the slogans #neveragain and #demandjustice.

7. Individual responses of national authorities to the VW diesel fraud

7.1. Decision to fine VW in Italy

In August 2016, the Italian Competition Authority (AGCM) imposed a fine of €5 million on Volkswagen for breaching the country's unfair commercial practices legislation.¹⁹ This was the highest possible fine that this authority could impose on the trader according to Italian law.

This was a very important decision, as the AGCM was the first consumer authority to respond so forcefully to the diesel scandal. Unfortunately, authorities in only two other countries have followed this path to date.

Volkswagen challenged the AGCM decision in court, but on 31 May 2019 the Regional Administrative Tribunal of Rome rejected the company's appeal and confirmed the fine. However, at the time of writing this report it is likely that VW will appeal this decision.

7.2. Decision to fine VW in the Netherlands

Over a year later, in November 2017, another public authority concluded its investigation into VW Dieselgate. The Netherlands Authority for Consumers and Markets (ACM) fined Volkswagen €450,000, which was the maximum fine that this authority could impose in this case.²⁰ The Dutch authority also played a leading role in driving the CPC network to a joint position. The decision is now under appeal in the court of Rotterdam.

7.3. Decision to fine VW in Germany

In June 2018, the prosecutor's office in Braunschweig, Germany, fined Volkswagen €1 billion for infringing its supervisory duties.²¹ The fine was composed of an administrative fine of €5 million, related to the fact that VW neglected to take the necessary supervisory measures to prevent infringements that led to the sale of vehicles equipped with defeat devices between 2007 and 2015. The prosecutor imposed an additional €995 million for the skimming off of unjustified revenues. The company did not appeal this fine.

7.4. Attempts to tackle the scandal via the CPC network

The Consumer Protection Cooperation (CPC) network, composed of national authorities responsible for the enforcement of certain consumer protection legislation, revealed in March 2017 that it would launch a coordinated enforcement action under the leadership of the Netherlands Authority for Consumers and Markets (ACM).²² This came after BEUC called for the launch of a coordinated action during its presentation in one of the network meetings in October 2016.

In September 2017, CPC authorities together with the European Commission sent a joint letter to the CEO of Volkswagen. The authorities, in their common position²³ attached to this letter, asked the company to:

- Inform consumers via individual letters about the following: the reasons why their cars needed to be repaired, what this repair entailed, what steps they needed to follow to have their cars repaired, and what could happen if they did not have their cars repaired.

¹⁹ The AGCM Decision of 4 August 2016 is available in English at the following link:

<https://en.agcm.it/en/media/detail?id=0899f747-5c9e-4642-b866-c4ac22cc60e0>

²⁰ <https://www.acm.nl/nl/publicaties/boete-volkswagen-ag-voor-oneerlijke-handelspraktijken>

²¹ <https://staatsanwaltschaft-braunschweig.niedersachsen.de/startseite/aktuelles/presseinformationen/vw-muss-bugeld-zahlen-174880.html>

²² https://ec.europa.eu/info/live-work-travel-eu/consumers/enforcement-consumer-protection/coordinated-actions_en#volkswagen

²³ <https://ec.europa.eu/info/sites/info/files/cpcvwcommonposition.pdf>

- Provide more detailed information to consumers about the 'trust building measures' that had previously been agreed with the European Commission (see section 4.1) and make these measures more accessible.
- Extend the 'trust building measures' to all parts of the car.
- Not limit the 'trust building measures' in time.
- Make the 'trust building measures' legally binding for Volkswagen, its network and the other car sellers.
- Offer solutions to consumers who bought their cars outside of the Volkswagen dealership network.
- Confirm the timeline within which cars would be repaired and ensure that the repairs would have no adverse impact on performance, fuel consumption, emissions, etc.
- Extend the waiver regarding claims beyond the end of 2017.
- Consider the specific situation of consumers who might have incurred additional losses due to exceptional circumstances.

In December 2017, the authorities announced²⁴ that Volkswagen had committed to speeding up the repair of the remaining cars affected by Dieselgate as a result of this letter. At the time, the initial deadline of autumn 2017 had already passed and only around 80% of affected cars had undergone the repair.

Volkswagen did not fulfil the demands of consumer authorities

In July 2018, the European Commission and national consumer authorities published a final assessment²⁵ of their dialogue with Volkswagen. While they welcomed some progress made in the information provided to consumers and VW's attempts to build better consumer trust, they regretted that the company did not agree to fulfil some of their important demands, namely making the 'trust building measures' legally

binding and without conditions; extending the limitation period beyond 2017; and clearly informing consumers about the exact reasons for why the repairs were needed (e.g. the existence of software prohibited by EU law).

8. Comparison with the USA

Whereas European consumers are still waiting to get their rightful compensation from Volkswagen, US consumers already received justice three years ago²⁶. In October 2016, the responsible US Court approved a settlement according to which affected car owners could choose between a buyback or a free fix (in the case that they wanted to keep their vehicles). Regardless of the choice they made, they were also entitled to compensation ranging between \$5,100 and \$10,000 (depending on their car model).

²⁴ <https://ec.europa.eu/info/sites/info/files/noticefromcpcondialoguewithvw.pdf>

²⁵ https://ec.europa.eu/info/sites/info/files/live_work_travel_in_the_eu/consumers/assessment_reaction_vw_to_com_mon_position_22062018.pdf

²⁶ See this AP article: <https://apnews.com/ced9c70836ff4ed9904f67667b2b6074>

"The German automaker has agreed to spend up to \$15.3 billion to settle consumer lawsuits and government allegations that its diesel cars cheated on U.S. emissions tests. The settlement announced Tuesday is believed to be the largest auto-related class-action settlement in U.S. history. Up to \$10 billion will go to 475,000 VW or Audi diesel owners. VW agreed to either buy back or repair their vehicles, although it hasn't yet developed a fix for the problem. Owners will also receive payments of \$5,100 to \$10,000."

On top of that, Volkswagen in the US agreed to:

- Remove 85% of the defective vehicles from the US market.
- Pay \$2.925 billion to the national NOx emissions mitigation trust fund.
- Invest \$2 billion in electric vehicle charging infrastructure and promotion.
- Pay a civil penalty of \$1.45 billion.
- Pay a criminal fine of \$2.8 billion.

In sharp contrast, only three authorities in Europe have taken actions to sanction VW (apart from the remedy that the German type-approval authority KBA has imposed, namely the software update for German cars). In Germany, VW was sanctioned for negligence in supervision (an administrative offense) and had to pay a fine plus a compensation for its illegal profit of a total of €1 billion. The Italian and the Dutch consumer authorities also sanctioned Volkswagen for its wrongdoing (misleading practices against consumers) for comparably insignificant amounts (see section 7). Thus in total, VW had to pay €1 billion in Germany, €5 million in Italy, and €250,000 in the Netherlands (note that the decisions in Italy and the Netherlands are not final).

In the US, Volkswagen also committed to a series of measures in order to prevent any future infringements, including:

- Ensuring that the personnel who tests vehicles for emissions compliance is different from the personnel who designs them.
- Establishing a steering committee to ensure compliance with the Clean Air Act.
- Performing portable emissions measurement system (PEMS) testing on their vehicles (including gasoline vehicles).
- Establishing a whistleblower system.
- Allowing an independent auditor to thoroughly assess Volkswagen's compliance with the settlement.

The comparison clearly shows the enormous divergences in public and private enforcement measures taken against VW in the US compared with the EU.

9. Scattered case law in the national courts

In light of the lack of other available options, individual consumers also decided to go to court against VW on their own, mainly in Germany. Their claims were founded on different legal bases, among which the most common ones were the breach of EU-based national laws on legal guarantee rights and unfair commercial practices or breaches of the EU type-approval legislation (including an invalid certificate of conformity). It appears that VW uses a strategy to settle confidentially with consumers in such individual cases in order to avoid the higher court case law that would guide the decisions of lower instance courts. Given the complexity of the legal questions involved, many first instance judges are waiting for such guidance. The results of these court actions have not been very coherent; however they have been shifting more towards decisions in favour of the consumers over the past two years.²⁷

This again shows that action in the collective interest of consumers would be a much more effective and transparent way to hold Volkswagen and other corporate wrongdoers accountable.

END

²⁷ See the website of BEUC member Stiftung Warentest for a list of cases won by consumers against VW in Germany: <https://www.test.de/Abgasskandal-4918330-5038098/>



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