

DEJF Newsletter – May 2022

Dear Participant,

Today I am writing to update you on our progress in seeking compensation for European constituents affected by the diesel scandal.

Diesel Emissions Justice Foundation (DEJF) is the only foundation that has launched collective actions against Volkswagen Group (Volkswagen, Audi, SEAT, Skoda, Porsche), Daimler (Mercedes and Mercedes Benz), Stellantis Group (FIAT, Alfa Romeo, Jeep, Citroën, Peugeot, DS Opel) and Renault (Dacia and Renault).

According to our expert research, all of the above manufacturers have installed software to disguise, in regulated test centres, the much higher harmful emissions of their diesel vehicles that they actually emit on our roads.

Last month, the Court of Amsterdam declared itself competent in the case against the Stellantis Group to hear claims from DEJF on behalf of all European constituents with a diesel vehicle from FIAT, Alfa Romeo and/or Jeep. In the case against the Volkswagen Group, the court only considers itself competent to adjudicate on claims of the Dutch constituents affected by the diesel scandal.

In both cases, the Court ruled that it will not apply the new Act on the Settlement of Mass Damage in Class Action (the WAMCA), which would make it possible to claim damages directly on behalf of the constituents. According to the Court, this is because the cheating software would have been developed before November 15, 2016. This means that the collective actions should be carried under the old collective action regime (the WCAM).

Andrew Goodman, chairman of DEJF: *"These are important rulings. The international jurisdiction of the Amsterdam District Court in the case of FIAT et al. is a great result, because it offers the possibility of solving this long-standing issue in one case on a large scale. That is a win for the European constituents affected by the diesel scandal in the FIAT case. However, we believe that the WAMCA does apply because the car manufacturers have continued to sell diesels with illegal cheating software after November 15, 2016. A significant proportion of these vehicles are still driven on public roads. For that reason, DEJF will appeal in the short-term and it looks forward to the outcome with confidence."*

The Foundation will be appealing the rulings and the appeal will carry with it the representation of VW owners outside of the Netherlands.

The Foundation continues to monitor the subject of Dieselgate across Europe with their counterparts elsewhere in a concerted and continuing effort to obtain redress for those affected by such unlawful activity. We are co-ordinating our activities in support of prosecuting authorities, regulatory bodies, environmental associations, and others that are independently pursuing justice from a public perspective.

For those participants active in our French proceedings against Volkswagen, Audi, Skoda, Seat and Porsche, these are ongoing. The defendants have requested information about the Participants represented by the DEJF in the proceedings, and the

Foundation has fully complied with the communication of the documents required. The next step should be defendants submitting their defences.

We will, as always, keep you informed about any developments in our proceedings across Europe against the manufacturers referenced above.

In addition, we would like to inform you of the following recent developments in the Diesel cases.

Firstly, there have been **numerous important developments regarding software updates and the illegality of thermal windows.**

In an opinion of September 2021 rendered in three combined cases (C-128/20, C-134/20 and C-145/20), Advocate General Rantos considered that the software update in Euro 5 vehicles produced by Volkswagen et al. with the EA 189 engine contains illegal defeat devices. It concerns a thermal window that reduces the operation of the engine at temperatures which regularly occur in Europe, namely 15-33 degrees Celsius and an altitude meter that reduces the operation at altitudes above 1000 meters altitude. The Advocate General also considered that this condition constitutes a lack of conformity, even if the consumer would have been aware of the defect when he purchased the vehicle.

If followed, this will put beyond doubt that the thermal windows employed by numerous manufacturers including Volkswagen, Mercedes, Fiat, Renault, Peugeot Citroën and Opel, are illegal and cause liability.

Meanwhile, this line of reasoning has been picked up by the German Supreme Court (Bundesgerichtshof). In a decision of 26 January 2020 (VIII ZR 140/20) the Bundesgerichtshof once again confirmed that the software update for the EA 189 constitutes an illegal defeat device. The Bundesgerichtshof also considered that the fact that the German type approval organization KBA had approved the update is not relevant, and that this condition does not mitigate the risk of a ban on the use of the vehicle.

Environmental organisation has standing to challenge decisions re. approval of software updates by national type approval organisation.

In case C-873/19 before the European Court of Justice, environmental association Deutsche Umwelthilfe, which whom the Foundation collaborated previously in relation to the Daimler case (see previous Newsletter) brought an action against the German Federal Motor Transport Authority. In this action, Deutsche Umwelthilfe challenged their approval of the software updates for the EA 189 engines because of the presence of a thermal window.

The National Court considered German procedural law does not give this association standing to challenge that approval by the German Administration and asked the CJEU whether the Aarhus Convention and fundamental rights of EU Law require the national court to recognize a right to challenge that decision.

The Advocate General's Opinion in the case argued positively, meaning that the environmental association must be given the right to protect the general interest (of the environment) and challenge this decision by the KBA. It also provides additional clarifications on how to assess the legality of cheat devices. This decision opens the possibility for environmental organizations to challenge decisions regarding other manufacturers in addition.

The DEJF hopes the CJEU's judgment will follow the Advocate General's opinion to enhance the protection of the environment through granting standing to specialised NGOs to have the ability sue. In the end, should the German national case proceed and the EC type approval for these engines be annulled, this case could have important implications in the Dieselgate litigation like the DEJF's initiative.

Volkswagen's Euro 6 engine EA 288

Recently, there have been numerous decisions by the German lower courts regarding Volkswagen's widely used EA 288 engine, which is the successor engine of the widely used EA 189. A striking example is a decision of the Court of Appeals (Oberlandesgericht) of Cologne of 10 March 2022 (24 U 112/21) in which the illegality of the defeat device for this engine has been confirmed. It is only a matter of time when the BGH will also rule on the EA 288.

Similar decisions have also been made regarding the heavier 3.0 and 4.2 litre engines deployed by VW, Audi and Porsche, most recently by the German Bundesgerichtshof of 11 April 2022 regarding a Volkswagen Tuareg 3.0 V6.

New KBA listings of illegal defeat devices in Opel and Mercedes vehicles

In January 2022, the KBA published a new overview of affected vehicles with engines other than the EA 189. In this overview, new listings of illegal defeat devices were published, including a number of varieties of the Mercedes Sprinter, Vito and Vivaro and numerous Euro 6 Opel vehicles that had not been listed before (Corsa, Astra and insignia of various types, with 1,3 and 1,6 engines). The findings regarding the Opel vehicles are in line with conclusions drawn by the German expert Prof. Wachtmeister in an investigation authorized by the German type approval organization KBA, which Deutsche Umwelthilfe has obtained in document disclosure proceedings.

While we accept this may be a long and drawn-out process, the fight for justice and redress by the DEJF will continue.

We thank you for your continuing interest, and for your support.
Kind regards,



Andrew Goodman
Chairman of the Board
Diesel Emissions Justice Foundation

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