

DEJF Newsletter – April 2023

Dear participants,

It is with great pleasure that we once again provide you with a further update regarding the various proceedings that we are conducting on your behalf. Below, we first provide an overview of the current state of those proceedings.

In addition, we share two documents which we believe will be of interest to you. First, an [article recently appearing in the Telegraaf newspaper](#), the contents of which show that the Dutch establishment is aware of the ongoing problem of unlawful diesel emission. Second, the [March 2023 ICCT White Paper Reassessment of Excess Nitrogen Dioxide from European Diesel Cars Following the Court of Justice of the European Union Rulings](#).

We then discuss the groundbreaking results of a technical investigation that the renowned expert Felix Domke performed on two Peugeot vehicles at the request of the Diesel Emissions Justice Foundation. This investigation, for the first time, uncovers the technical operation of the defeat devices of the Peugeot, Citroën and DS brands. Finally, we discuss two recent landmark decisions of the European Court of Justice relating to illegal defeat devices. The first, rendered on 21 March 2023, makes it possible for car owners to claim damage directly from the manufacturer. The second allows environmental organizations to force national authorities to take action against defrauding manufacturers. These developments show that the manufacturers' position is untenable and further increases the likelihood of a positive outcome.

Additionally, it is worth noting that during March 2023, Volkswagen, Daimler and other automotive manufacturers affected by Dieselgate are publishing their financial reports and statements. They are all reporting about the legal actions adopted by the DEJF in the Netherlands and in other jurisdictions. These companies are including the corresponding provisions to cover the potential outcome of the ongoing litigation.

You can read more here:

[Consolidated Financial Statements of Volkswagen AG as of December 31, 2022](#)

Lastly, the DEJF will be hosting a virtual conference on “Dieselgate Litigation in Europe after the Representative Actions Directive” on 24 May 2023 15:00-17:30 CET. An invitation will follow but please save the date. We hope you can join us to learn more about the progress of dieselgate litigation in different countries in Europe and around the world.

UPDATE ON PROCEEDINGS

The cases in the Netherlands

Currently the foundation has collective actions running against the Volkswagen, Renault and Mercedes conglomerates as well as the former Fiat Chrysler companies and the former PSA companies (Peugeot, Citroën, DS and Opel). In each of these proceedings, DEJF has the support of renown environmental organizations, including Friends of the Earth and Deutsche Umwelthilfe.

Thus far, the Court of Amsterdam consistently decided that it has jurisdiction for claims of the Dutch car owners. In the case against Fiat Chrysler, it decided that it can additionally hear the claims of all car owners in the EU. This is because the parent holding of the Fiat Chrysler conglomerate, Stellantis NV, is a Dutch company. In the proceedings against Stellantis NV, regarding Citroën, Peugeot, DS and Opel, the court is yet to decide on this.

In each of the cases thus far, the court has ruled that the old collective action statute applies to the case, instead of the new collective action statute. This means that the court can render a declaratory decision regarding the unlawfulness of the emissions fraud. However, unless a settlement is reached, damage claims will have to be litigated in follow up proceedings or settled collectively.

In the cases against VW and Fiat Chrysler, the Foundation has appealed the decision contending on your behalf that the new collective action law applies. The defendants have lodged cross appeals regarding jurisdiction. The court submissions have been exchanged and the first hearing on these matters is likely to occur in the summer. The first level proceedings are delayed for the appeal to be heard.

The Foundation has good hopes that the Court of Appeal will reverse the decision that the old collective action law applies in part or in full. If the appeals in the VW and Fiat Chrysler cases are successful, the Court may also apply the new law in the other cases as well. We will tell you as soon as we know more.

The proceedings against Stellantis (PSA Opel), Renault and Mercedes are nearing the end of the admissibility phase. This means that in the Renault case, the Court has recently ruled that our Foundation has a sufficiently large number of participants to proceed. In PSA Opel, a hearing took place on 14 March 2023 regarding the admissibility of the claims. The court is expected to render a decision on 24 May 2023 about which we remain optimistic.

After the admissibility phase, the actual claims will be addressed. In each of the cases, the Diesel Emissions Justice Foundation has already submitted extensive technical evidence. In view of the recent decisions and opinions of the European Court of Justice, we are confident that we will be able to secure damages for you.

Belgian proceedings

The Belgian court adjourned the VW proceedings in order to await the decision of the Dutch court on whether it is able to hear claims of non-Dutch car owners. As noted above, the Dutch court ruled that it is able only in relation to Dutch car owners. We therefore asked the court in Belgium to restart the proceedings and are currently awaiting a date for the next stage.

French proceedings

In November 2022, the Defendants requested the court delay the VW French proceedings until a decision on the merits will be reached in the Dutch proceedings. The Foundation has pointed out that the claims of the VW French car owners are not part of the Dutch proceedings and has asked the court in France to continue the proceedings as soon as possible.

GROUNDBREAKING INVESTIGATION BY THE DIESEL EMISSIONS JUSTICE FOUNDATION ON PEUGEOT VEHICLES

Earlier, DEJF asked expert Felix Domke to investigate vehicles of various brands, including Mercedes. Mr. Domke uncovered the exact operation of the defeat devices by Mercedes. Deutsche Umwelthilfe also tested the emissions of the vehicle and proved how the defeat devices indeed triggered excessive emissions. These results were submitted as evidence in the Mercedes proceedings.

This month, Mr. Domke provided the Foundation with another investigation report that proves how Peugeot/Citroën defrauded the emissions standards.

Mr. Domke reviewed two random Peugeots vehicles, being a Peugeot 308 from October 2016 and a Peugeot 5008 from October 2017. Both vehicles were found earlier by various authorities to exceed the emissions standards.

Mr. Domke proved that the emissions system recognizes the test and makes sure that the vehicle meets the test. Outside the test, one part of the system only works properly in a limited set of circumstances due to, inter alia, the use of a temperature window, a speed restriction of 60km/h and an altitude meter. The other part of the system – that uses AdBlue to reduce NOx – never works properly outside a test situation. This explains the excess emissions previously reported for these vehicles.

This report for the first time provides **conclusive** evidence of exact operation of Peugeot's defeat device. The Foundation believes that similar technology is used for all other diesel vehicles of Peugeot, Citroën and DS produced up to at least very recently. A similar report had been submitted regarding Opel vehicles. The manufacturers have not responded to these reports.

LANDMARK DECISIONS BY THE ECJ

In our previous newsletter, we pointed at decisions by the European Court of Justice in which defeat devices that reduce the effectiveness of the emissions system during regular use circumstances are judged to be illegal. (C-128/20 | GSMB Invest, C-134/20 | Volkswagen and C-145/20 | Porsche Inter Auto and Volkswagen, link to decisions, [here](#)). This includes temperature windows and altitude meters.

<https://curia.europa.eu/juris/liste.jsf?language=nl&jur=C,T,F&num=C-128/20&td=ALL>

<https://curia.europa.eu/juris/liste.jsf?num=C-134/20>

<https://curia.europa.eu/juris/liste.jsf?num=C-145/20>

Recently, on 21 March 2023, the European Court of Justice rendered its long-awaited decision in a case against Mercedes (C-100/21). Following a previous opinion by Advocate General Rantos, the ECJ ruled that the conformity certificate issued by the manufacturer is as a guarantee which, if violated, grants the purchaser direct claim for compensation against the manufacturer. The decision also lowers the threshold for liability of the manufacturers. For instance, in a 2021 decision regarding VW defeat devices, the Amsterdam District Court ruled that damage can be awarded only when there is evidence of deceit. A similar approach has been taken by the German courts. However, as the ECJ now clarified, the mere presence of an illegal defeat device suffices. A press release can be found here: [The purchaser of a vehicle equipped with an unlawful defeat device has a right to compensation from the car manufacturer where that device has caused damage to that purchaser \(europa.eu\)](#)

A copy of the decision can be obtained here: [CURIA - List of results \(europa.eu\)](#)

On 8 November 2022, the environmental organization Deutsche Umwelthilfe secured a big victory before the European Court of Justice against the German

state and the type approval organization Kraftfahrt Bundesamt (case C 873/19). In this decision the Court confirmed that Deutsche Umwelthilfe has standing to sue a type approval organization and/or the state and request a court order to take action against manufacturers who are defrauding the emissions norms. This is very important, as the KBA has been protecting Volkswagen, Opel and other manufacturers by approving software updates that still contain illegal defeat devices.

Meanwhile, on 23 February 2023, the Verwaltungsgericht of Schleswig Holstein ruled that the decision by the German type approval authority KBA to approve the software update for VW vehicles is at odds with the law as it contained illegal defeat devices (case Az. 3 A 113/18). These included a temperature window and an altitude meter. The court ruled that the KBA is obliged to take legal action to remove these defeat devices. Deutsche Umwelthilfe has filed similar proceedings regarding 141 vehicles of various manufacturers. A press release of the Verwaltungsgericht and translation can be found here: [Durchbruch gegen illegale Abschaltrichtungen in Dieselfahrzeugen: Deutsche Umwelthilfe gewinnt Grundsatzklage gegen das Kraftfahrt-Bundesamt – bis zu 10 Millionen Pkw betroffen – Deutsche Umwelthilfe e.V. \(duh.de\)](#)

A press release by Deutsche Umwelthilfe can be found here: [schleswig-holstein.de - Medieninformationen - Klage des Deutschen Umwelthilfe e.V. gegen das Kraftfahrt-Bundesamt weitgehend erfolgreich](#)

A French court of appeal has also confirmed the indictment of VW in a separate case. <https://www.auto-infos.fr/article/dieselgate-la-mise-en-examen-de-volkswagen-confirmer-en-france.267646> Thus, the criminal proceedings will proceed towards trial.

SPAIN TO INTRODUCE OPT-OUT COLLECTIVE REDRESS SYSTEM

On 9 January 2023, the Spanish Government shared its first draft bill to implement the EU Collective Redress Directive. The draft includes comprehensive regulation of collective injunctive and redress actions.

Main aspects:

- **Opt out:** The draft implementation act sets out an opt-out system for redress actions, i.e. consumers represented in the action will be bound by the decision unless they expressly opt out.
- **Exceptional Opt in:** As an exception and depending on the specific circumstances, the court may decide – but is not obliged – to accept a redress action on an opt-in basis. This shall only be possible if considered more efficient and each represented claim amounts to at least €5,000.
- **Electronic system:** The draft introduces a specific electronic system, to be managed by the qualified entity submitting the claim. Through this system, consumers can effectively opt out of redress actions and preserve their individual rights.
- **Public register:** The Spanish Consumer Affairs Ministry will set up a public register on collective actions, for certified collective actions (see below) to be public knowledge.
- **Certification:** In the certification phase, the court must review (i) adequacy of representation issues, such as the qualified entity's legal standing to bring redress actions; (ii) the appropriateness of any third-party funding received for the action; and (iii) commonality issues. The certification decision is subject to appeal and proceedings are stayed until the appeal is resolved. If the court certifies the collective redress action, it must clearly define the subject matter of that action.
- **Standing:** Consumer associations which meet certain requirements will be qualified entities with legal standing to file collective actions.
- **Access to evidences:** Plaintiffs are allowed to request access to sources of evidence. The draft provision on this procedural tool replicates the Directive.
- **Jurisdiction:** The courts of first instance in the place where the defendant has its registered office in Spain or, if registered elsewhere, where it has commercial premises will have jurisdiction for collective actions.
- **Settlements:** The draft allows for settlements in collective actions subject to judicial approval. Courts can only approve settlements after confirming that consumers' rights to individual compensation are protected. This

includes monitoring any litigation funders' profits from settlements. Settlements approved in a collective action that has been certified, are binding for all consumers in the group. If a settlement is achieved and approved by the court before the collective action is certified, consumers must be granted a time limit to opt out of the settlement.

As you can see, progress is being made on many fronts. As always, we will continue to keep you updated as things develop.

Kind regards,

A handwritten signature in brown ink, appearing to read 'Andrew Goodman', with a long horizontal flourish extending to the right.

Andrew Goodman
Chairman of the Board
Diesel Emissions Justice Foundation (DEJF)

PRESS RELEASE No 124/22

Luxembourg, 14 July 2022

Judgments of the Court in Cases C-128/20 | GSMB Invest, C-134/20 | Volkswagen and C-145/20 | Porsche Inter Auto and Volkswagen

Software in diesel vehicles which reduces the effectiveness of the emission control system at normal temperatures during most of the year constitutes a prohibited defeat device

Since such a vehicle default is not minor, rescission of the sale contract in respect of the vehicle is not, in principle, precluded

Purchasers of Volkswagen vehicles fitted with software that reduces the recirculation of a vehicle's pollutant gases according to, among other things, the temperature detected are requesting that the Austrian courts annul sales contracts they concluded between 2011 and 2013.

According to the information provided by those courts, that software ensures compliance with the limits laid down at EU level for emissions of nitrogen oxide (NOx) only when the outside temperature is between 15 and 33 °C (the temperature window). Outside of that window, the rate of exhaust gas recirculation (EGR) reduces in a linear way down to zero, which leads to those limits being exceeded.

That temperature window results from a software update in the vehicles at issue carried out by Volkswagen with a view to replacing software prohibited under EU law. The German Federal Office for Motor Vehicles had authorised that update, having concluded that it did not constitute a prohibited defeat device.

The Austrian Supreme Court, the Regional Court, Eisenstadt, and the Regional Court, Klagenfurt, referred a number of questions to the Court concerning the lawfulness of such a temperature window and the rights available to purchasers, in so far as they are consumers, under the EU law in force at the time of the facts in the case.

By today's judgments, the Court finds that **a device which ensures compliance with the NOx emission limits only in the temperature window does in principle constitute a defeat device prohibited under Article 5(2) of Regulation No 715/2007.**¹

The Court points out, in that regard, first, that ambient temperatures below 15 °C are to be considered as normal within the territory of the European Union. Second, emission limits laid down at EU level must be observed even where those temperatures are significantly below 15 °C. Accordingly, software such as that at issue reduces the effectiveness of the emission control system under conditions of normal use.

For that reason, the mere fact that that device contributes to protecting separate engine parts such as the EGR

¹ Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (OJ 2007 L 171, p. 1).