

## **Common position of national authorities within the CPC Network**

Under the Consumer Protection Cooperation (CPC) Regulation (2006/2004/EC), Member State competent authorities shall notably coordinate their market surveillance and enforcement activities to enforce EU consumer law in the Single Market. Reviewing certain commercial practices of the Volkswagen group, CPC authorities, under the lead of the Dutch authority ACM (Authority for Consumers and Markets) have taken the following common position regarding the protection of consumers affected by the Volkswagen diesel emission issue across the EU. This common position is without prejudice to any action that is currently being or may be taken at Member State level. The Commission is acting as a facilitator in this process.

### **1 Background**

On September 28, 2015, the German Type Approval authority KBA wrote to all other European approval authorities that it was starting its own investigation into the use of a particular software by Volkswagen<sup>1</sup>, which could infringe Article 5 of EU Regulation 715/2007, notably regulating the emissions of various pollutants.

On October 14, 2015, the KBA further wrote to the European approval authorities:<sup>2</sup>

*“Non-conformities of vehicles of the VW group with compression ignition engines (EA 189, 1,2 l, 1,6 l and 2,0 l). The vehicles of VW AG, AUDI AG, AUDI Hungaria Motor KFT, SKODA Auto a.s. and SEAT S.A. with engine character EA189, EU5 [...] are affected [...]. From our point of view the non-conformity is with regard to the use of a prohibited defeat device according to article 5 of Regulation (EC) No 715/2007 in vehicles with the above mentioned engine characters. The basic principle of the catalogue was approved by KBA and the implementation was mandated. This catalogue stipulates the following measures:*

- *1,2 and 2,0 l engine: pure adaptation of the software of engine control unit*
- *1,6 l engine: adaptation of software of the control unit and hardware of the engine [...]*”

At 7 October 2015 the approval holder of the KBA, Volkswagen AG, has delivered a time table and a catalogue of technical measures, to bring the vehicles and engines back into conformity.

In its 2015 Annual Report<sup>3</sup>, Volkswagen mentioned that the ‘implementation of measures’ will take at least the full 2016 calendar year to be completed. When meeting with Commissioner Jourová on 21 September 2016, Volkswagen committed to inform individually all consumers about when their car can be repaired before the end of 2016 and

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<sup>1</sup> First note of the Kraftfahrt-Bundesamt (KBA) to the European Approval Authorities, 25 September 2015.

<sup>2</sup> Second note of the Kraftfahrt-Bundesamt (KBA) to the European Approval Authorities, 14 October 2015.

<sup>3</sup> <http://annualreport2015.Volkswagenag.com/group-management-report/the-emissions-issue.html> .

to perform all the repairs by autumn 2017<sup>4</sup>. Due to delay in the approval of the repairs for certain clusters of engines, Volkswagen was not in a position to inform all affected car owners before the end of 2016. However, the CEO of the Group, in a meeting with Commissioner Jourová on 6 February 2017, reiterated the commitment to ensure that all cars are repaired by autumn 2017.<sup>5</sup>

Volkswagen waived citation of the statute of limitations until **December 31, 2017** with regard to any claims made in relation to the software installed in vehicles with engines of type EA 189 by vehicle customers outside the United States and Canada.<sup>6</sup>

## 2 Communication and transparency issues

In most Member States, the type approval authorities did not think there was a need for a mandatory recall since Volkswagen was instructed by KBA to repair all the affected cars. However, in the absence of clear information on the problem, consumers from the countries where a mandatory recall has not been requested have to decide between having their cars repaired, or not. In application of the principle of professional diligence, Volkswagen has to allow consumers to make an informed decision about the repair, and to do that they have to be provided with sufficient and clear information. This obligation is based on the directive on unfair commercial practices, that can be applicable to trade practices a priori to a contract, following the conclusion of a contract and during its execution, including for a service to be made after the sale of a product.<sup>7</sup>

Volkswagen, either directly or through its dealership, sent letters to car owners informing them about the repair of their cars. The content of these letters differ from Member State to Member State. However, based on the examples some CPC Authorities have seen, Volkswagen did not explain clearly the reason for the repair, alluding to a diesel problem at best, and neither clarifies the fact that the cars do not comply with the Regulations (as specified by KBA) and to do so would require a repair. The letters merely asked car owners to make an appointment with the workshop without any further explanation.<sup>8</sup>

On 8 September 2016, Commissioner Jourová met with EU-wide consumer organisations to discuss the situation in Member States. Consumer associations reported a lack of information and transparency from Volkswagen on the recalls and repairs, the consequences thereof and the consequences for consumers who would not do the repairs.

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<sup>4</sup> [http://europa.eu/rapid/press-release\\_MEX-16-3165\\_fr.htm](http://europa.eu/rapid/press-release_MEX-16-3165_fr.htm)

<sup>5</sup> [http://europa.eu/rapid/press-release\\_MEX-17-231\\_en.htm](http://europa.eu/rapid/press-release_MEX-17-231_en.htm)

<sup>6</sup> Annual report 2015 Volkswagen AG, p. 50.

<sup>7</sup> Recital 13 and Article 2(d) of the UCPD.

<sup>8</sup> As in letters sent to car owners in Slovakia, Germany and Belgium; To car owners in Slovakia by the VW Group and Porsche Slovakia on 19 July 2016, letters sent to car owners in Germany by the VW Group in December 2016 and letters sent to car owners in Belgium on 23 December 2016. Certain letters available to CPC authorities contain incomplete information on the fact that the repair would be necessary in view of a difference between NOx emissions in tests and in road circulation, when the issue is due to a lack of conformity of the car as the criteria to pass the type approval tests were not fulfilled, see a letter sent to German car owners in December 2016 and forwarded to the Commission.

Consumers should be informed clearly about the extent of the repair and the possible consequences of not opting for the repair. For example not having a car repaired may have consequences in the future, if the vehicle is not in accordance with the statutory standards. Non-repaired cars may not even be allowed on the road in certain Member States in the future and consumers travelling with their car across borders or relocating to other Member States may encounter problems.

It must be noted that lack of information to consumers concerning the repair process, as it emerges in some Member States, could qualify as an infringement of consumer law, should such behavior continue.

- **Consequently, CPC authorities ask Volkswagen to provide the following (material) information about the repair to consumers in an individual letter, possibly via its network, in order to provide them with enough information to make a well-informed decision:**
  - **The precise and clear reason why the car has to be repaired,**
  - **What the repair entails,**
  - **What they have to do to get their car repaired,**
  - **What can or will happen if they do not have their cars repaired,**
  - **In which Member States, cars which have not been repaired will stop to be roadworthy and when.**

### **3 Trust Building Measure**

It was brought to the attention of the CPC authorities that Volkswagen will now give a formal assurance about the repair, but so far, CPC authorities have concluded that Volkswagen is not transparent about that assurance. The introduction of the so-called Trust Building Measure is a positive step that we hope will improve consumers' trust and stimulate them to have their cars repaired. However, for it to be effective, is of the utmost importance that Volkswagen and its network communicate about such measures. CPC authorities also are of the opinion that this Trust Building Measure is not enough to restore consumer's trust. If Volkswagen is confident that the repair does not affect the other parts or performance of the car, that information should also be included in this measure. The measure should also be legally binding for Volkswagen, its network and the other car sellers.

- **CPC authorities ask Volkswagen**
  - **to provide detailed information about the 'Trust building measure' and its conditions to consumers, make those conditions simple and straightforward, and to communicate more clearly and publicly to consumers, CPC-authorities and consumer organisations about the 'Trust Building Measure',**

- **to not limit the ‘Trust Building Measure’ to specific components but to extend it to all parts as well as the performance of the cars; after all, Volkswagen is confident that the repair does not affect the other parts or performance of the car,<sup>9</sup>**
- **to not limit the ‘Trust Building Measure’ to a certain time period from when the vehicles are repaired,**
- **to clearly inform consumers about the steps they have to take in case of problems after the repair, e.g. who the contact would be,**
- **to also inform those consumers whose cars have already been repaired, of the measure so that they can confidently go to their workshop should they have a problem and obtain possible repairs free of charge,**
- **to explain to the CPC-network how the measure was communicated to the dealers and will be monitored in order to ensure that consumers who need it can effectively call upon it.**

## **4 Repairs**

### **4.1 Non-conformity and assistance to the sellers of the cars**

The cars equipped with the non-authorized defeat device do not meet all the criteria for the type approval as stated by the KBA in its letter of 14 October 2015. The KBA letter therefore instructs Volkswagen to adapt this software and ensure conformity of the cars.<sup>10</sup> The responsibility for ensuring this conformity lies with the car manufacturer, under the control of the relevant type approval authorities.

In addition to the conformity issue under Regulation (EC) No 715/2007, another type of non-conformity issue enters into play: under the Sales and Guarantee Directive, a seller is liable for any defect that exists at the time the goods were delivered. In relation to some affected vehicles, the relevant seller is likely to be a member of the Volkswagen Group. The CPC-authorities expect Volkswagen to have identified where such liabilities exist and to honour its legal obligations.

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<sup>9</sup> The information on different websites (for example <http://www.vwdieselfinfo.dk/tillidsskabende-tiltag.aspx>, <http://www.skoda-auto.com/en/mini-apps/trust-building-measure> and <http://www.volkswagen.nl/terugroepactie>) about the Trust Building Measure contains the following statement: “that implementing the technical measure has no adverse impact on fuel consumption figures, CO2 emissions figures, engine output, torque, noise emissions, or durability of the engine and its components. All figures relevant to type approval for the vehicle will remain valid. The regulatory authorities have expressly confirmed that the regulatory requirements are met. The confirmation also applies to the durability requirements for emission control systems. The Trust Building Measures has no bearing on this position.”

<sup>10</sup> For 1.2 and 2.0 l engine: pure adaptation of the software of engine control unit and for 1.6 l engine: adaptation of software of the control unit and hardware of the engine.

However, even where the relevant seller is not a member of the Volkswagen Group, we believe Volkswagen will also be indirectly liable. This is because under the Sales and Guarantee Directive, where the final seller is liable to the consumer because of a lack of conformity '*resulting from an act or omission by the producer (...)*', the seller is entitled to pursue remedies against the person or persons liable in the contractual chain. Accordingly, in view of the infringement of the type approval legislation and the KBA letter, Volkswagen must recognize its responsibilities and take the necessary steps to ensure the car is brought into conformity for all affected consumers.

- **CPC authorities ask Volkswagen to facilitate with all possible means the work of the sellers to ensure the cars can be repaired, taking into account what is stated before in paragraph 2.**
- **CPC authorities ask Volkswagen, on request, to offer consumers that have bought their vehicles outside the Volkswagen dealership network or are maintaining it outside of such a dealership a solution<sup>11</sup>; this concerns in particular second-hand cars but also cars bought directly from importers. We ask VW to maximise their efforts to inform these car owners.**

#### **4.2 Requirement for the implementation of the repairs**

CPC authorities consider that the timeframe to which Volkswagen committed to Commissioner Jourová, to repair all cars by autumn 2017, should be seen by Volkswagen as an absolute maximum in terms of the *reasonable period* of time necessary to perform the repairs. The Authorities remind Volkswagen that under the Sales and Guarantees Directive, sellers (which may include members of the Volkswagen Group) must remedy any defect that exists at the time goods are delivered, within a reasonable period.<sup>12</sup> Two years have passed after the non-conformity of the cars with regard to Regulation (EC) No 715/2007 became clear and Volkswagen received the KBA instruction to provide the necessary remedy.<sup>13</sup>

It is, of course, of utmost importance that Volkswagen ensures that it acts in compliance with its Trust Building Measure in the event that consumers have problems with their vehicles due to the implementation of the fix. The Trust Building Measure is not a substitute for the direct obligations and liabilities that certain entities in the VW Group may have to consumers under the Sales and Guarantee Directive.

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<sup>11</sup> For example free of charge remedies.

<sup>12</sup> According to the Directive on Sales and Guarantees, the repairs should be completed within a 'reasonable' period of time and without any 'significant inconvenience' to the consumer. If this is not possible, the consumer is entitled to an appropriate price reduction or to have the contract rescinded. This is also applicable if the reparation does not succeed in bringing back the cars into conformity with the contract of sale.

<sup>13</sup> CPC authorities and the European Commission received complaints from certain car owners in particular in Germany and in Finland, that they cannot obtain free of charge repairs and/or that they have very limited information on the remedies proposed. Some of these complainers mentioned they requested the seller to buy back the vehicle or to exchange it but did not receive any answer or clear information, including reassurance about the repairs, when such solution was refused. In addition, there are still some uncertainties about the remedies for second-hand cars, which are very common in some EU countries

- **Volkswagen is asked to confirm to CPC authorities the timeframe in which all cars will be repaired or car owners, in case they have a choice, can let their cars be repaired.**
- **Volkswagen is asked to ensure that the repair has no adverse impact on any components or the performance of the cars such as fuel consumption figures, CO2 emissions figures, engine output, torque, noise emissions, or durability of the engine and its components.**
- **Furthermore, as the repair process may in fact, take longer than foreseen, CPC authorities ask Volkswagen to commit to extending the period of the waiver regarding claims made in relation to the software issue as long as necessary in order to respect its duty to put cars in conformity.**
- **CPC authorities would like to invite Volkswagen to consider the specific situation of consumers that may have incurred additional losses due to exceptional circumstances during this long process and to make communication with Volkswagen for these consumers easy.**