

Declaration of the Consumer Protection Cooperation (CPC) network on the use of defeat device software by the Volkswagen Aktiengesellschaft (VW)

Under the Consumer Protection Cooperation (CPC) Regulation (EU) 2017/2394 national authorities work together to enforce EU consumer law. When choosing the most appropriate measures to address an infringement of consumer law, competent authorities should take all fact and circumstances of the case into account (Recital 18).

Against this background and taking into account that the relevant commercial practice has already ceased, the Consumer Protection Network decided to make the following statement with regard to VW.

This declaration does not prevent authorities to take further actions either at Member State level or jointly within the CPC Network.

By end 2015, VW had sold approximately 8.5 million diesel cars on the EU market fitted with a defeat device software which was considered not in accordance with Article 5 of Regulation (EC) No 715/2007 by relevant technical authorities which therefore requested the engines affected to be updated. CPC authorities reached out to VW on 6 September 2017 in view of the slow progress of the update. They expressed, in a common position¹, concerns regarding the repair process and guarantee of the affected cars after the update. Authorities explained at that time that their action was without prejudice to any action at Member State level, such as possible claims for damages based on national tort law. There are still several lawsuits pending on such claims in various Member States.

On 17 December 2020, the Court of Justice of the European Union decided in case C-693/18 that a car manufacturer cannot install a defeat device which systematically improves, during approval procedures, the performance of the vehicle emission control system and thus obtains a certification that the vehicle meets the required legal emission standards.

Taking note of this judgment, the CPC Network concludes that the commercial practices of VW related to the marketing of diesel cars equipped with such defeat devices also violates EU consumer protection law. This assessment is in line with previous decisions of CPC authorities. Specifically, the competent authorities in Italy, the Netherlands and Poland already sanctioned VW for an infringement of EU consumer protection law as transposed in their national law.²

¹ <https://ec.europa.eu/info/sites/default/files/cpcvwcommonposition.pdf>

² Italy: AGCM, PS10211, 4 August 2016. Netherlands: ACM/UIT/23048, 18 October 2017. Poland: UOKiK, Volkswagen Group Poland, 15 January 2020. Moreover, VW has been fined or is still prosecuted in various EU national jurisdictions, including in Germany (e.g. Braunschweig public prosecutor's order of 13 June 2018), reflecting the width of the offences committed and the various applicable laws concerned in addition to EU consumer law and type approval law. In France, 6 May 2021, the manufacturer was indicted for misrepresentation of the substantial qualities of a product resulting in a danger to human health.

EU consumers are protected against unfair commercial practices by businesses under the Unfair Commercial Practices Directive 2005/29/EC. According to its Article 3(1), this Directive applies to unfair business-to-consumer commercial practices before, during and after a commercial transaction relating to a product. Besides a general prohibition of unfair commercial practices, the Directive contains in its Annex I a list of commercial practices which are in all circumstances regarded as unfair.

Point 4 of Annex I provides that it is an unfair commercial practice to claim that a product has been approved by a public body, without complying with the terms of the approval. The judgment in case C-693/18 established the non-compliance of the concerned VW diesel cars with type approval legislation. VW's marketing of diesel cars claiming they comply with type approval when it was not the case thus falls within the scope of Point 4 of Annex I.

Another provision relevant for this case is Article 5(2) of Directive 2005/29/EC which prohibits practices that are contrary to the requirements of professional diligence and materially distort or are likely to materially distort the economic behaviour of an average consumer - as the required 'professional diligence' encompasses principles such as 'honest market practice', 'good faith' and 'good market practice'³.

The CPC Regulation provides that consumers should be entitled to redress for harm caused by infringements covered by the Regulation (Recital 17), such as widespread infringements of the Unfair Commercial Practices Directive. Indeed, consumers should also be protected against infringements that have already ceased, but the harmful effects of which may continue (Recital 5). While Directive 2005/29/EC does currently not provide for individual remedies for consumers harmed by unfair commercial practices, the Court of Justice of the European Union has acknowledged that "compensatory protection may be considered one of the adequate and effective means to combat unfair commercial practices required by [Article 11 of Directive 2005/29/EC]"⁴.

Under the CPC Regulation, competent authorities are not in a position to order a trader to pay compensation to consumers, but the Regulation provides that a trader may propose to authorities a commitment about adequate remedies to be provided to consumers affected by an infringement falling in the remit of the CPC Regulation (Article 21(1)). For this reason, the CPC Network welcomes that VW decided to settle with large parts of the consumers that were residing at the time of the purchase in Germany. It calls upon the company to reach out to consumers in all Member States that are still seeking redress, in order to find appropriate solutions and to close this chapter avoiding further years of litigation. Alternatively, VW can also require a dialogue with the same aim from CPC authorities.

³ Guidance on the implementation/application of directive 2005/29/EC on unfair commercial practices p. 49-51.

⁴ Case C-109/17, Bankia SA Juan Carlos Marí Merino, Juan Pérez Gavilán, María de la Concepción Marí Merino, ECLI:EU:C:2018:735, paras 45-46.

