

Lawsuits triggered by the Volkswagen emissions case

SUMMARY

In September 2015, the United States Environmental Protection Agency claimed that Volkswagen had installed illegal software on some of its diesel vehicles, to modify emissions of certain air pollutants. Subsequently, the company has been the subject of legal action brought by consumers, investors, non-governmental organisations and government agencies. In many cases, the plaintiffs have gathered their actions together into collective (or class action) complaints. In the United States, complaints have been filed by law firms, government departments and even individual states (including the US Justice Department and US Federal Trade Commission, as well as the states of Texas, New Mexico and New Jersey). This briefing provides a non-exhaustive overview of the range of lawsuits under way, many of them still in their initial stages.

Several countries around the globe have opened more general investigations on whether car manufacturers respect vehicle emission limits on the road, as opposed to under test conditions. Some other carmakers are suspected also to have used software that manipulates emission levels, similar to that used by Volkswagen.

In April 2016, Volkswagen agreed in principle with the US authorities and US class action plaintiffs to buy back, or modify or cancel the leases of affected vehicles. US consumers might also receive substantial compensation. Final details of the settlement are expected in June 2016. No similar agreement has been reached in Europe.



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Background

On 18 September 2015, the US Environmental Protection Agency (EPA) [alleged](#) that 2.0-litre Volkswagen and Audi diesel cars (model years 2009-2015) included software that modified emissions of certain air pollutants. The software, considered a 'defeat device' under US law,¹ [senses](#) when the car is being tested and activates certain pollution-control devices to reduce tailpipe emissions. However, on the road, the emissions control systems are reduced or switched off, resulting in much higher emissions of air pollutants, in particular nitrogen oxides (NO_x), than claimed by the Volkswagen Group (VW). NO_x pollution can have [serious adverse](#) effects on health, in particular on the liver, lungs, spleen and blood. It also contributes to ground-level ozone and fine particulate matter. The latter is associated with various diseases and alteration of rainfall patterns.

The case was revealed after researchers at West Virginia University (US), working with the International Council on Clean Transportation,² raised questions about emissions levels, and the EPA, together with the California Air Resources Board (CARB),³ began investigating the issue. They found that a variety of four-cylinder diesel passenger cars manufactured by VW produced up to 40 times more NO_x than allowed by US emission standards.⁴

The Volkswagen Group⁵ has [admitted](#) that about 11 million vehicles worldwide contained software that could distinguish between testing and road conditions, and has started an internal investigation on the issue. It [has not stated](#) why this software was installed. [Consumer Reports](#), a US non-profit organisation, thinks that VW may have installed the software to increase fuel economy and vehicle performance. VW's chief executive and head of American operations [have resigned](#) and several high-ranking executives have been suspended. VW share prices have fallen and the company has started to recall vehicles in EU Member States and the United States as well as in other countries (such as Australia) to fix irregularities in their emissions systems.

Following the 18 September notification, the US EPA tested further vehicles to detect potential defeat devices. On 2 November 2015, the EPA issued a [second notice of violation](#) alleging that VW had developed and installed a defeat device in certain additional larger diesel vehicles (model year 2014-2016 VW, Audi and Porsche cars equipped with 3.0-litre engines).

Table 1 – VW vehicles affected by two EPA notices of violation

2.0-litre vehicles	3.0-litre vehicles
Jetta (2009-2015)	Touareg (2009-2016)
Jetta Sportwagen (2009-2014)	Porsche Cayenne (2013-2016)
Beetle (2012-2015)	Audi A6 Quattro (2014-2016)
Beetle Convertible (2012-2015)	Audi A7 Quattro (2014-2016)
Audi A3 (2010-2015)	Audi 8 (2014-2016)
Golf (2010-2015)	Audi 8L (2014-2016)
Golf Sportwagen (2015)	Audi Q5 (2014-2016)
Passat (2012-2015)	Audi Q7 (2014-2016)

Source: EPA 18 September 2015 [notice of violation](#) and 2 November 2015 [notice of violation](#).

On 12 January 2016, the CARB notified the company that it was rejecting VW's recall plan for 2.0-litre diesel passenger vehicles sold in California between 2009 and 2015. It also notified VW of several violations of California air quality regulations⁶ associated with the company's use of a defeat device in those cars. These violations could bring both criminal and civil penalties. CARB and EPA are continuing their investigations.

Several countries have [opened](#) investigations (not only into VW) and banned the sale of certain vehicles involved in their territories. [Investigations](#) have shown that most manufacturers switch off or turn down their emission-control technologies at temperatures and conditions outside those of the lab test and some are suspected of having used software that manipulates emission levels similarly to that used by Volkswagen.

The scandal has had a negative impact on investors, employees, directors, suppliers, consumers and the car industry as a whole and has generated hundreds of civil, administrative and criminal lawsuits against VW as well as against other car manufacturers. These lawsuits touch upon many legal disciplines, for instance trade law, business law, consumer law, environmental law and liability law.

Consumer lawsuits

Although those affected by the scandal can file individual complaints, most consumer lawsuits against car manufacturers have been filed collectively. In the USA such collective lawsuits are called [class-action lawsuits](#): lawsuits where one or several individuals act as representatives for a larger group of plaintiffs suing one or more defendants. The members of the class action lawsuit must have very similar interests in the lawsuit so that they can get similar recoveries in the case.

The first **class-action cases in the USA against VW** concerning the installation of the defeat device were filed (typically in federal courts) literally hours after the scandal broke on 18 September 2015. The [first private class-action lawsuit](#) on behalf of owners and lessors of affected VW vehicles was filed by a Seattle-based consumer-rights class-action law firm in the District Court for the Northern District of California. It accused VW of fraudulent concealment, false advertising and violating consumer-rights laws. It alleged that vehicle owners will suffer loss of vehicle value and degraded performance characteristics such as horsepower and fuel efficiency in order to make the affected vehicles meet US standards. Subsequently, the firm also brought other lawsuits against VW. All US class actions against Volkswagen, Audi and Porsche concerning the defeat device have been [consolidated](#) in the Northern District of California before Judge Charles R. Breyer.

VW also faces **collective-action lawsuits in other countries** such as Canada, Australia, the United Kingdom, France and Italy. Some of these lawsuits are still [in preparation](#), others have already been filed. For instance in Canada, a consumer-fraud class action was filed on 20 January 2016. The [complaint](#) alleges that Volkswagen wrongfully fixed admissions tests and misled consumers into buying certain Volkswagen vehicles. It argues that 'by manufacturing, testing, distributing and selling affected vehicles with defeat devices that allowed for improper levels of emission, Volkswagen violated the common law and legislative standards, was negligent, defrauded its customers, and engaged in unfair competition'. It also alleges that, had the plaintiffs known of the defeat device, 'they would not have purchased or leased those vehicles, or would have paid substantially less for the vehicles than they did'. The lawsuit seeks US\$1 billion for

punitive and/or aggregated damages as well as US\$4 billion for general and special damages.

Other car manufacturers are also facing collective lawsuits. On 18 February 2016 a US national class action lawsuit was filed in the District Court of New Jersey against [Mercedes Benz USA](#). The complaint alleges that the car manufacturer knowingly programmed its 'Clean Diesel' vehicles to emit 65 times higher levels of nitrogen oxides (NO_x) than those allowed by the EPA when operating in temperatures below 10°C. On 7 April 2016, the class-action lawsuit was [amended](#) to state that the vehicles likely contain a defeat device. It adds that at low temperatures and variable speeds the vehicles produced emissions as high as 30.8 times the permitted standard. The lawsuit alleges that carmaker's actions violated numerous consumer-rights, unfair competition, false advertising and unfair trade practices laws. It also states that Mercedes' omissions and misrepresentations constitute breach of contract and fraudulent concealment.

Non-governmental organisations' actions

Non-governmental organisations (NGOs) are also helping individuals to defend their rights in the affair. The European Consumer Organisation [BEUC](#), in cooperation with its sister organisation [Consumers International](#), is coordinating the activities of European consumer organisations in this field.

In October 2015, French consumer association [CLCV](#)⁷ filed a lawsuit against VW for 'aggravated fraud' and disloyal commercial practices. CLVC also provides an informative toolkit on their website for consumers who wish to file an individual civil lawsuit. Belgian consumer association [Test-Achats](#) is considering filing a complaint against VW. Italian consumer protection organisation [Altroconsumo](#) is collecting relevant consumer complaints, and invites consumers to participate in its class action. It is asking the company to reimburse consumers 15% of the price of the affected vehicles.

Environmental organisations are also taking action on the issue. For instance [Ecologie sans frontière](#), a French NGO, filed a complaint in Paris on 30 September 2015 against unknown persons for 'aggravated fraud' and putting others in danger.

Investors lawsuits

Investors have also claimed to suffer negative impacts from the scandal and brought lawsuits against VW. For example, on 14 March 2016, 278 institutional investors from around the world (including a subsidiary of German insurer Allianz, and CalPERS, a Californian public pension fund) from around the world filed a [lawsuit](#) against Volkswagen in the regional court of Braunschweig, in the state of Lower Saxony, where the German carmaker has its headquarters in the nearby city of Wolfsburg. They demand €3.3 billion in damages from the firm, claiming the company had committed several breaches of duty on the capital market between June 2008 and September 2015. In particular, they claim that the company did not inform shareholders about the emissions scandal in a timely manner. VW has [considered](#) the lawsuit to be without merit, believing 'that its Management Board duly fulfilled its disclosure obligation under German capital markets law'.

[Norway's sovereign wealth fund](#) is also planning to join one of the class actions against Volkswagen in Germany.

US government department lawsuits

Local and state governments and US federal government departments have also filed or plan to file complaints against VW for cheating on emission results.

US Department of Justice lawsuit

On 4 January 2016, the US Department of Justice [filed](#) a civil complaint against VW on behalf of the EPA, in a federal court in Detroit, Michigan, for allegedly violating environmental laws. The [complaint](#) alleges that VW installed illegal software on some of its diesel vehicles that impairs their emission control systems and causes emissions to exceed EPA's standards. It also claims that the company violated the [Clean Air Act](#) by selling, introducing into commerce, or importing into the US vehicles that are designed differently from what VW had stated in applications for certification to EPA and CARB.

The Department of Justice is seeking injunctive relief⁸ and civil penalties. According to the complaint, VW could face fines as high as US\$37 500 per vehicle for each violation of the law, up to US\$3 750 per defeat device, and another US\$37 500 for each day of violation. However, these penalties are not generally imposed. Courts have also to consider a violator's ability to pay a penalty and remain in business when assessing a civil penalty.

This lawsuit was later transferred to the US District Court for the Northern District of California where collective lawsuits against VW have been consolidated.

The Department of Justice is also [conducting](#) a criminal investigation, the details of which have not been made public. The investigation is being led by the Environment and Natural Resources Division, which prosecutes violations of pollution-control laws.

US Federal Trade Commission lawsuit

On 20 March 2016, the US Federal Trade Commission (FTC) [filed a complaint](#) in a federal court in California against VW for deceiving consumers with the advertising campaign promoting supposedly 'clean diesel' VWs and Audis. FTC alleges that VW made false claims that the cars were low-emission, environmentally friendly, met emissions standards and would maintain a high resale value. The company's promotional materials repeatedly claimed that its 'clean diesel' vehicles have low emissions, reduce NO_x emissions by 90% and have fewer such emissions than gasoline cars, although they are now known to emit up to 40 times more NO_x than the legal limit. The complaint also alleges that VW provided the means and instruments for others to deceive consumers, and that installing the emissions-defeat devices was an unfair practice.

County and state lawsuits

A number of US counties and states (including [Texas](#), [New Mexico](#), [New Jersey](#)) have filed various lawsuits against VW for fraudulently manipulating emission controls in their vehicles and thus polluting the air and deceiving consumers. Some of them (such as [Harris County](#) in Texas) claim that VW's deceptive acts have undermined their efforts to improve air quality and protect its citizens. Others (for example [Texas](#) and [New Mexico](#)) criticise VW's deceptive marketing campaigns. Typically the counties and states seek civil penalties as well as attorney fees and costs.

Competition, anti-fraud and anti-corruption authorities' investigation in Europe

In several European countries (including [Sweden](#), France, Italy), competition, anti-fraud and anti-corruption authorities have conducted investigation into VW. Several investigations have characterised the fraud of VW as 'serious' or 'aggravated'. [Italy's competition regulator](#) is investigating whether VW engaged in 'improper commercial practices'. [France's](#) anti-fraud authority is also investigating other companies such as Renault and the PSA Group (Peugeot, Citroën). These companies have been the subject of visits and seizures of evidence.

Preliminary framework settlement in the USA

On 21 April 2016, a judge for the US District Court for the Northern District of California [announced](#) that VW has reached an agreement in principle with the US Justice Department, the State of California, the US Environmental Protection Agency, the Federal Trade Commission and the American Plaintiffs' Steering Committee. This could lead to a settlement of the American class actions over its cheating of diesel emissions tests. Affected consumers would be given several options, including the option to have VW buy back their vehicle or to have the vehicle modified, and for consumers who leased their car, to cancel the lease and return the car to VW. They might also get substantial compensation. Furthermore, VW would pay into an environmental fund and commit other funds to promote green car technology. The settlement is only for US residents. Final details of the settlement are expected to be announced in June 2016.

For comparison, when the Department of Justice and the EPA [sued](#) Toyota more than a decade ago for US\$58 billion in environmental violations, the car manufacturer finally settled with the government for a US\$34 million penalty.

European Parliament

Parliament has [urged](#) the Commission and Member States to 'quickly restore the confidence of consumers through concrete actions', and stressed 'the need for significant strengthening of the current EU type-approval regime, including greater EU oversight, in particular as regards the market surveillance, coordination and follow-up regime for vehicles sold in the Union, the power to require Member States to launch control procedures based on evidence, and the ability to adopt appropriate measures in the event of breaches of EU law'. It has also called to consider the establishment of an EU-level surveillance authority ([Resolution](#) of 27 October 2015 on emission measurements in the automotive sector).

On 17 December 2015, the European Parliament set up a Committee of Inquiry ([EMIS](#)) to investigate alleged contraventions and maladministration in relation to emission measurements in the automotive sector. During its one-year mandate, the EMIS committee is hearing witnesses and experts, requesting documents and undertaking fact-finding missions. It will submit an interim and a final report within respectively six and 12 months of starting its work in March 2016.

Main references

['Volkswagen, Defeat Devices, and the Clean Air Act: Frequently Asked Questions'](#), Congressional Research Service, 2016.

['Explaining road transport emissions – A non-technical guide'](#), European Environment Agency, 2016.

['Defeat devices under the U.S. and EU passenger vehicle emissions testing regulations'](#), International Council on Clean Transportation, 2016.

Endnotes

¹ US law [defines](#) a defeat device as follows: 'Defeat device means an auxiliary emission control device (AECD) that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use, unless 1) such conditions are substantially included in the Federal emission test procedure; 2) the need for the AECD is justified in terms of protecting the vehicle against damage or accident; 3) the AECD does not go beyond the requirements of engine starting; or 4) the AECD applies only for emergency vehicles and the need is justified in terms of preventing the vehicle from losing speed, torque, or power due to abnormal conditions of the emission control system, or in terms of preventing such abnormal conditions from occurring, during operation related to emergency response. Examples of such abnormal conditions may include excessive exhaust backpressure from an overloaded particulate trap, and running out of diesel exhaust fluid for engines that rely on urea-based selective catalytic reduction.'

For comparison, the EU defines in its 2007 [regulation](#) on type approval of motor vehicles a defeat device as 'any element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use'.

² A non-profit environmental research organisation.

³ A department of California Environmental Protection Agency.

⁴ US standards for NO_x are [stricter](#) than the EU ones.

⁵ The Group [comprises](#) the following brands: Volkswagen Passenger Cars, Audi, SEAT, Škoda, Bentley, Bugatti, Lamborghini, Porsche, Ducati, Volkswagen Commercial Vehicles, Scania and MAN.

⁶ Such as 'failure to comply with the emission standards or test procedures; invalid certification applications; the use of Defeat Devices; the importation, delivery, purchase, acquisition, or receipt of uncertified vehicles; the sale of vehicles that do not meet emission standards; and failure to comply with on-board diagnostic (OBD) system requirements'.

⁷ Association nationale de défense des consommateurs et usagers.

⁸ An [injunctive relief](#) is a court order for the defendant to stop a specified act or behaviour.

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