



Testing Times: Criminal culpability in the Volkswagen emissions scandal

In September 2015, Volkswagen admitted that, for a period of seven years, it deliberately falsified the emissions readings of 11 million of its diesel-fuelled vehicles world-wide. The vehicles had been fitted with a device that detected when a vehicle was undergoing emissions testing, and changed the vehicle's performance output to ensure that the levels of nitrogen oxide emitted remained within legal limits.

It is highly likely that Volkswagen will face civil claims brought by consumers and/or dealerships. Coupled with this, Volkswagen is facing environmental claims brought by the US Environmental Protection Agency, and it is likely that the European Commission will bring similar claims.

However, enforcement agencies across the world are also conducting investigations into whether to take criminal enforcement action.

In the UK, details of potential criminal investigations emerged as ministers and officials appeared before the transport select committee of MPs. During this exchange, Michael Hurwitz of the Department for Transport confirmed that the SFO was "looking at" the issue and that the Competition and Markets Authority are also "considering" an investigation.

Accordingly, this briefing explores the potential criminal prosecutions that might be brought against Volkswagen and/or its officials under UK law.

Potential defendants

German prosecutors have already announced that they have launched a criminal investigation into the former Chief Executive of Volkswagen in respect of his involvement in the alleged fraud. The US Justice Department has launched its own criminal investigation into the scandal and the EU is considering separate action.

Should UK prosecutors follow the lead of their German and American counterparts, it is possible that criminal charges will be brought against Volkswagen, its officials, or both.

Under UK law, Volkswagen, as a legal entity (or group of entities), may be held liable for an act of its officials where the acts and state of mind of the officials who represent the "directing mind" of Volkswagen will be attributed to the company. Criminal acts of these "controlling officers", who carry out functions of management and speak and act as the company, will not only be offences for which they can be prosecuted as individuals, but also offences for which the company can be prosecuted because of the status of those individuals within the company. The challenge in demonstrating that the officials who had knowledge of, and engaged in, the practice of fitting the defeat technology to

the vehicles are "controlling officers" of the company is, however, a significant one. Indeed, the challenge has been insurmountable in many such attempted prosecutions of corporates.

On the other hand, the Fraud Act 2006 restates the principle that, in certain circumstances, officers of companies can be liable where the company itself has been found guilty of a criminal offence and where that person has "connived" with or "consented" to the criminal offence. Under the provisions of the act, therefore, directors, managers, secretaries or other similar officers of Volkswagen, who are proved to have consented to or connived with the commission of the offence, are liable to be proceeded against and punished along with the corporation. These provisions are mirrored in the Consumer Protection from Unfair Trading Regulations 2009 in making an officer of the company liable for the offence along with the body corporate.

Potential offences

Whether the SFO pursue Volkswagen companies, or officials, or both, what offences could it seek to bring prosecutions under?

Fraud by False Representation

Section 2 of the Fraud Act 2006 creates the offence of Fraud by False Representation. The offence is committed when a person dishonestly makes a representation which he knows, or suspects, to be untrue or misleading. The representation must be made with the intention of making an economic gain or exposing another to the risk of economic loss. The focus of the offence is upon the state of mind of the offender, rather than its effect. The offence is completed when the offender makes a false representation with a fraudulent intention.

Volkswagen appears to have admitted making false representations to customers regarding the emissions of its vehicles and the vehicles' compliance with EU emissions standards. It is unlikely that prosecutors will struggle to establish that these false representations were made with the intention of making an economic gain. Prosecutors are also likely to be able to establish that the conduct was performed with the required state of mind.

The maximum penalty for this offence is ten years in prison, a fine, or both.

Articles for use in Fraud

Section 7 of the Fraud Act 2006 creates an offence of making, or being in possession of, articles for use in fraud. The offence is committed where a person has in his possession, or under his control, any article for use in the course of, or in connection with, fraud. The person must have the intention that the article will

be used in the commission of fraud; whether by the defendant directly or by another. The definition of "article" specifically includes computer software.

Again, it would appear that Volkswagen installed software into its vehicles with the objective of fraudulently misstating vehicle emissions outputs. On indictment, the penalty for this offence is imprisonment for up to five years, or a fine, or both.

Conspiracy to Defraud

The common law offence of Conspiracy to Defraud is established when two or more individuals dishonestly agree to pursue a course of conduct which would, if carried out, cause unlawful prejudice to another person. "Prejudice" is a broad concept and is not limited to economic loss; it is established if a person is induced to behave in a way they would not otherwise have done but for the fraud.

Therefore, the offence would be committed if two or more officials at Volkswagen agreed to the practice of installing the defeat device. In these circumstances, it is likely that UK consumers will have suffered significant prejudice. Again, the maximum penalty for this offence is ten years in prison, a fine, or both.

Prohibited Commercial Practices

The Consumer Protection from Unfair Trading Regulations 2009 is designed to protect consumers and prevent manufacturers participating in unfair commercial practices or making misleading statements about their products.

Under the Regulations, it is a false or misleading practice to provide false information or deliver an overall impression that deceives, or is likely to deceive, consumers about the main characteristics of the product. This is a strict offence, it is not necessary to establish fault.

Public authorities enforce the regulations using criminal law to prosecute offenders. The penalties for offences under the regulations include a fine, or up to two year's imprisonment, or both.

Providing inaccurate information to a regulator

Before vehicles can be approved for sale in the UK, they must meet emissions standards set-out in EU law. The Vehicle Certification Authority is the designated UK authority for assessing whether these standards have been met.

Under the Road Vehicles (Approval) Regulations 2009, a person commits an offence if, in supplying information to the regulator, he makes a statement which that person knows to be false in a material particular, or is reckless as to whether it is false.

Volkswagen appears to have admitted that it provided false information to the Vehicle Certification Authority. The offence carries a penalty of an unlimited fine.

Comment

It remains to be seen which, if any, criminal charges will be brought against Volkswagen and/or any of its officials.

Senior judges and investigating authorities have stated that the offence of Conspiracy to Defraud is the most effective charge in a case where multiple defendants are engaged in a fraudulent course of conduct. Indeed, the CPS guidance to prosecutors states that the offence is appropriate where the aim of the offending is to defraud a large number of people. The SFO has endorsed this view in bringing recent prosecutions under the common law provision – the most high-profile being in relation to LIBOR fixing.

The government, however, has made it clear that Conspiracy to Defraud should be used sparingly, and the attorney general has stated that prosecutors are first to consider whether prosecutions could be brought under the Fraud Act 2006.

Clearly, the success of any prosecution will depend on the evidence prosecutors are able to obtain. This is especially true in relation to establishing which individuals consented to and connived with the alleged fraud. Volkswagen has already been criticised by three US state attorneys for withholding documents from investigators, including emails and other communications between its executives. Despite pledging full cooperation, the US Justice Department states that the company has been slow to produce documents from its US files and is delaying responses until after it has completed its own internal investigation into the scandal; a process which could take months.

It is likely that the SFO is in the process of investigating Volkswagen. In light of recent guidance emanating from the SFO, behaviours deemed to delay or hinder its investigation are likely to militate against the use of Deferred Prosecution Agreements or civil settlements and are likely to persuade the SFO that bringing a criminal prosecution is, instead, in the public interest.

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