



Volkswagen and a new landscape for product stewardship

Background

To understand the full impact of the Volkswagen emissions scandal, it helps to know something of the background to air quality legislation and problems in applying it.

Air quality legislation applies at the international level, with high level international conventions, and non-binding but very significant health guidelines in particular from the World Health Organisation.

At regional level, for example in the EU, there are key controls on emissions standards in instruments such as the Ambient Air Quality Directive, the Fourth Daughter Directive, the Industrial Emissions Directive, and detailed technical legislation applying Euro 1-6 standards for different forms of vehicles.

At national level, in the UK the Environment Act 1995 set up the framework of Air Quality Management Areas 'AQMAs' and a National Air Quality Strategy for England, Scotland, Wales and Northern Ireland. Air quality standards regulations are applied in each such jurisdiction, and local authorities have limited but important powers foregoing local Air Quality Management.

Before September 2015, it was already clear that this system was under significant strain in a number of key respects.

First, the number of people across Europe estimated to die prematurely per year from the effects of air pollution remained stubbornly high – 250,000 in 2005, 406,000 in 2010, according to the European Commission, 29,000 per year in the UK according to the UK government.

Secondly, there was concern at the EU level as to the adequacy of EU legislation to address air pollution. The European Commission's Clean Air Package of 2013 brought forward a new Medium Combustion Plants Directive and a revised National Emissions Ceiling Directive.

Third, the Commission, Member States and the European Parliament have been mired in protracted negotiations to try to address the fact that vehicle emissions standards do not address real life driving conditions, and therefore that real emissions may be far higher than Euro 1-6 standards indicate. This was already identified as a major issue in a number of technical and industry studies going back many years, and it has become very clear that it has not been effectively

addressed for the 23 years in which the Euro 1-6 standards have been operating, with EU Member State governments with car manufacturing capacity arguing as recently as February 2016 that standards should be lowered further. In stark contrast, one University of York study reported in January 2016 that diesel emissions in winter might be as much as 74 times greater than estimated.

Fourthly, and allied to the previous point, there has been an issue of whether the Euro 1-6 standards are precise enough, so that it is always and immediately clear what is a 'defeat device' and when a standard has been breached. It is notable that clearly drawn laws in the US obliged the company to admit that it had fitted 'defeat devices', while less sharply drawn laws in the EU have enabled it to withhold that admission.

Fifthly, there has been a wholesale problem of compliance, or lack of it, with existing EU legislation, with (at the time of writing) 17 EU Member States facing infringement proceedings for breaching five dust standards under the Ambient Air Quality Directive and 6 other EU Member States, including the UK, facing such infringement proceedings for breaches of No_2 standards. In the case of the UK, compliance issues were compounded by the landmark *ClientEarth* case ruling of the Supreme Court in April 2015, which not only stated that the UK was in breach of the Ambient Air Quality Directive but also made a mandatory order that it should lodge revised air quality management plans with the European Commission by 31 December 2015 showing how it planned to achieve such compliance.

Well before September 2015, therefore, the combination of a number of key factors were already resulting in intense public and political attention being focussed on issues of air quality, air pollution, the contribution to those of vehicle emissions, and the effectiveness of the legal framework to address this.

Volkswagen

In September 2015, news broke that Volkswagen had been found by US authorities applying emissions testing based on the Clean Air Act to have fitted 'defeat devices' designed to show lower emissions in the course of testing. Volkswagen admitted that the issue affected 11 million cars worldwide,

about 600,000 in the USA, about 1.2 million in the UK. This has been, and continues to be a developing international story with massive implications for one of Europe's largest companies. A number of aspects of the story have major implications for wider product stewardship issues in this and other industries.

Legal clarity

One theme has been the need for clarity in legislation, so that it is completely clear when a line has been crossed or a law broken. This is reflected in contrasting evidence given by Volkswagen CEO in the USA and UK.

On 8 October 2015 in evidence to the US House Committee on Energy and Commerce, Michael Mann, President and CEO of Volkswagen Group of America said:

“On behalf of our company and my colleagues in Germany, I would like to offer a sincere apology for Volkswagen’s use of a software programme that served to defeat the regular emissions testing regime”.

By contrast, in written evidence to the UK House of Commons Transport Select Committee dated 21 December 2015, Paul Willis, Managing Director of Volkswagen Group UK Limited stated:

“1.1 We accept that software was fitted that enabled the vehicle to recognise that it was undergoing testing and which changed the NOx emission characteristics in that testing. We sincerely apologise for that...”

1.3 Volkswagen accepts that a defeat device was used in the USA in certain models, in the context of the very different regulatory framework and factual circumstances there. However, we do not think that it is possible to make the same definitive legal determination in relation to the software that was fitted to those differently configured vehicles in the UK and the EU. Given that there is the potential for this to be an issue that is examined in litigation, both in the English courts and elsewhere, and further given that Volkswagen is not taking this point to delay or withhold implementing any of the technical measures as soon as possible, regrettably we are unable to provide any further (potentially legally privileged) details in relation to our legal views on this issue.”

Contrasting approaches to enforcement

The American approach to enforcement in the Volkswagen matter has involved investigations by congress, 30 State Attorneys General, the US EPA, the US Department of Justice and so on.

The contrast with the European approach to enforcement issues was in some cases stark. The US government on 4 January 2016 filed a multimillion dollar civil suit against the Volkswagen group seeking compensation of up to \$37,500 per vehicle.

Contrasting approaches to enforcement

The American approach to enforcement in the Volkswagen matter has involved investigations by congress, 30 State Attorneys General, the US EPA, the US Department of Justice and so on.

The contrast with the European approach to enforcement issues was in some cases stark. The US government on 4 January 2016 filed a multimillion dollar civil suit against the Volkswagen group seeking compensation of up to \$37,500 per vehicle.

The initial response of the UK's Secretary of State for Transport was to write to the European Commission saying that he hoped they would investigate this matter thoroughly and take appropriate action to avoid a reoccurrence. Some European countries have started criminal investigations: others appear to be awaiting the outcome of German investigations, type approved rulings and political negotiations between EU Member State governments and the European Parliament.

Integrity and effectiveness of emissions testing

It is particularly striking that none of this came to light as a result of European vehicle emissions testing. All of the immediate investigations were triggered by the findings of US testing applied by the US EPA and the California Air Resources Board. This has raised fundamental questions about both the independence of EU testing facilities from the industries they purport to regulate and the overall effectiveness.

New proposed legislation from the European Commission

In an apparent response to the torrent of criticism and public debate on these key issues, the European Commission, which had already been working on proposals to reflect Real Driving Emissions, published on 27 January 2016 radical and far reaching legislative proposals.

These would repeal and replace the Framework Directive 2007/46/EC, overhaul the whole EU type approval framework, and provide much stronger powers for European Commission intervention. The aim is to:

- Reinforce the independence and quality of testing that allows a car to be placed on the market;
- Introduce an effective market surveillance system to control the conformity of cars already in circulation;
- Reinforce the type approval system with greater European oversight.

The Commission proposes to regulate the financial independence of testing facilities, to carry out spot checks of vehicles already on the market, and to be able to initiate recalls and to impose financial penalties (to strengthen provisions such as the ban on 'defeat devices') of up to €30,000 per vehicle.

These will be very controversial new powers mainly because of the proposed direct intervention by the European Commission in the operation of the criminal law and product stewardship regulation in Member States. They represent a major shift in the product stewardship landscape, and something of a vote of no confidence in the existing framework and its enforcement at national level, and will no doubt be hotly debated between EU Member States, the Commission, the Council and the European Parliament.

Who may be affected by this issue

In the immediate term, all motor manufacturers, motor distributor networks and Volkswagen owners will be amongst the first to be affected by these issues.

In the medium term, we can see the issues affecting all transport companies, operators of bus, lorry, van, and car fleets being closely affected, together with city governments and local authorities applying Air Quality Management Areas or considering setting up Clean Air Zones or Low Emission Zones. Such local authorities are not limited to the UK government's 'six cities' (see below), but Low Emission Zones are already applied by, for example, Brighton and Norwich and are being considered by many more cities. We also see these issues as having a knock on effect upon rail operators and the aviation and shipping sectors, as well as other industrial emitters, as the overall legal and social pressure to achieve pollution reductions takes effect.

Indirectly, we see these issues as having an increasing impact upon Environmental Permit holders. We also see the implications of the review of testing for vehicle emissions as having significance for other industries which may be heavily reliant upon testing systems to establish product performance or environmental performance, such as mobile phones, electrical goods and energy-rated products.

Some conclusions on the lessons of Volkswagen for wider product stewardship

Testing

The Volkswagen scandal has focussed attention as never before upon the issue of the effectiveness, quality, independence and integrity of the testing regime for, in this case, vehicle emissions. Searching questions are being asked about how and why US tests disclosed a problem while EU tests did not; why EU testing has failed to relate to real driving conditions for 23 years; why it will take many more years for this issue to be addressed; and whether overall the quality, independence from the regulated industry and integrity of vehicle emissions testing in the EU is adequate.

With both the European Commission, the German government and other EU governments proposing much more rigorous spot checks applied at random, and new technologies such

as on the spot laser analysis of vehicle emissions becoming available, there are profound implications for non-compliant vehicles and their operators, who can expect much more determined and better informed testing, and little public tolerance for the status quo.

For vehicle manufacturers there are clear implications, but it would be very surprising if this was the only industry heavily dependent upon testing for its environmental performance ratings, categorisation and reputation. As Volkswagen embarks on its "BP moment" and the full consequences continue to develop, other industries such as electronic goods, mobile telephone makers and others would do well to consider how their own branding and reputations would be affected by similar challenges to the integrity of testing to support their own claims to performance or meeting environmental standards.

Enforcement

This note has pointed out the stark contrast between the American style of civil and criminal enforcement and, at least, the initial European response. It is scarcely a coincidence that the Volkswagen group has been slightly more ready to discuss buy back proposals for affected vehicles in America, where it faces a multi-million dollar civil suit brought by government, but has declined to offer similar redress in Europe. This has already prompted the European Commission to step in with quite radical legislative proposals to give itself powers to order product recall and levy fines in the absence of robust national enforcement. These are significant developments of wider significance than for vehicle manufacturing alone, and could lead to a wider re-appraisal at the European level of how key environmental legislation is, to be effectively enforced, which will be of importance across a wider range of industries' approaches to product stewardship and consumer protection. Taken with already significant development in sentencing for environmental and health and safety offences, with potentially unlimited fines, we think that the long term implications for enforcement are significant.

Impact of wider air quality concerns on environmental permitting

Alongside the rather fevered debates about air pollution and air quality featured in the EJEU infringement cases, *ClientEarth* litigation and Volkswagen scandal, there is a very important agenda of the standard regulatory control of emissions through the Industrial Emissions Directive 'IED', Medium Combustion Plants Directive 'MCPD' and revised National Emissions Ceiling Directive 'NECD'. For many UK businesses these changes are working through in the short term in changes brought about by the IED to the way in which their Environmental Permits are applied, with the increasing realisation of the importance of the revised approach to Best Available Techniques, 'BAT'.

The Environmental Permitting system is not immune from being influenced by the wider debates on air quality and air

pollution and compliance with the Ambient Air Quality Directive, especially with revised legislation coming forward in response to the Volkswagen Scandal, and we can expect to see further moves to ensure that these wider impacts are properly reflected in environmental permitting and conditions.

Devolution and different levels of government

In some senses, the Volkswagen scandal shows some parts of government, and some parts of industry, continuing to pursue a regulatory agenda that the way to avoid unnecessary 'damage' to the car industry is to lower the emissions standards that it has to meet. This is a highly questionable strategy, and suggests that these parts of both government and industry have yet to understand the real damage done by the Volkswagen case to public trust, reputation and brand integrity and confidence that issues such as health impacts have been properly addressed.

What is also interesting is the way in which some aspects of leadership on these issues has passed from central government to devolved levels of government such as cities. When pressed by the *ClientEarth* litigation to develop revised proposals on air quality to demonstrate efforts to comply with the Ambient Air Quality Directive, the UK government response was based around Clean Air Zones, with particular attention on six cities, namely Birmingham, Leeds, Nottingham, Derby, Southampton and London. These are the cities which are still projected not to meet EU emission limit values by 2020.

As London plans to implement its Ultra Low Emission Zone and specific plans focus on city responses to air quality issues, it is hard to avoid the impression that some parts of the air quality agenda will now be driven by regulations made at city level. If you cannot take an older, more polluting vehicle to London and a series of other cities, it will start to drive national approaches to replacement of older diesel engines. Businesses need to take account of this shift in regulatory initiative.

The full impacts of the Volkswagen scandal on the product stewardship area will continue to be felt as the scandal unfolds. This briefing attempts to deliver a snapshot of some of the current trends, but we expect to continue to follow developments closely.

Contacts

For further information, please contact one of Burges Salmon's Product Stewardship team:



William Wilson
Barrister

+44 (0)117 939 2289
william.wilson@burges-salmon.com



Michael Barlow
Partner

+44 (0)117 902 7708
michael.barlow@burges-salmon.com



Simon Tilling
Senior Associate

+44 (0)117 902 7794
simon.tilling@burges-salmon.com

Burges Salmon LLP, One Glass Wharf, Bristol BS2 0ZX Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400
6 New Street Square, London EC4A 3BF Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7980 4966

www.burges-salmon.com

Burges Salmon LLP is a limited liability partnership registered in England and Wales (LLP number OC307212), and is authorised and regulated by the Solicitors Regulation Authority. It is also regulated by the Law Society of Scotland. Its registered office is at One Glass Wharf, Bristol BS2 0ZX. A list of the members may be inspected at its registered office. Further information about Burges Salmon entities, including details of their regulators, is set out in the 'Who we are' section of the Burges Salmon website at www.burges-salmon.com.

© Burges Salmon LLP 2016. All rights reserved. Extracts may be reproduced with our prior consent, provided that the source is acknowledged. Disclaimer: This briefing gives general information only and is not intended to be an exhaustive statement of the law. Although we have taken care over the information, you should not rely on it as legal advice. We do not accept any liability to anyone who does rely on its content.

Data Protection: Your details are processed and kept securely in accordance with the Data Protection Act 1998. We may use your personal information to send information to you about our products and services, newsletters and legal updates; to invite you to our training seminars and other events; and for analysis including generation of marketing reports. To help us keep our database up to date, please let us know if your contact details change or if you do not want to receive any further marketing material by contacting marketing@burges-salmon.com.