
Options for Eastern European Countries to Restrict the Influx of Second-Hand Diesel Vehicles

INTRODUCTION

The influx of second-hand diesel vehicles into Eastern European countries, no longer desirable in many Western European countries due to bans on their use in major cities, threatens to harm public health and reduce air quality in Eastern Europe. Some of these second-hand diesel vehicles are implicated in the emissions-cheating scandal known as dieselgate, where defeat devices and other methods were employed to get around emission limit values, while others were approved before stricter emission limits were set out.

The following provides a review of near-term options available to Eastern European countries to restrict the influx of highly polluting second-hand diesel vehicles under *Directive 2007/46/EC* (on type-approval of new vehicles, in particular its recall provisions) and *Directive 2008/50/EC* (on air quality).

NON-CONFORMITY WITH TYPE APPROVAL

Type-approval for new light passenger and commercial vehicles is currently governed by *Directive 2007/46/EC establishing a framework for the approval of motor vehicle and their trailers, and of systems, components and separate technical units intended for such vehicles*.¹ Following the dieselgate scandal, *Regulation (EU) 2018/858* was adopted with application from 1 September 2020 onward but, until then, *Directive 2007/46/EC* applies.²

Directive 2007/46/EC generally prohibits Member States from prohibiting, restricting or impeding the registration, sale, entry into service or circulation of vehicles on grounds related to aspects of their construction and functioning covered by *Directive 2007/46/EC* where the requirements set out in that directive are met.³ Among other requirements, new vehicles receiving type-approval must meet emission limits set out in relevant EU legislation, most recently *Regulation (EC) No 715/2007* (Euro 5 and Euro 6).⁴ The general prohibition cited above does not preclude, however, authorities from advancing a prohibition, restriction or impediment on the registration, sale, entry into service or circulation of second-hand diesel vehicles on grounds that those vehicles are deemed not to be in conformity with *Directive 2007/46/EC* because, among other things, they do not meet the requisite emission limits.* The Commission has acknowledged the possibility of such measures, noting that such measures would likely violate Article 34 of the Treaty on the Functioning of the European Union (TFEU) by constituting obstacles to the free movement of goods among Member States but could still be acceptable under Article 36 TFEU (which contains exceptions to Article 34 TFEU) if certain conditions are met.⁵ Articles 34 and 36 TFEU are discussed in detail in the next section below, and those considerations are relevant here. In addition, a Member State electing to restrict imports on second-hand diesel vehicles on grounds that they do not conform to *Directive 2007/46/EC* must also take care to ensure compliance with Article 114 TFEU, which governs the adoption of more stringent protective measures at the national level that go beyond legislation adopted under an internal-market legal base, as *Directive 2007/46/EC* was.

* Article 29 of *Directive 2007/46/EC* allows a Member State to refuse to register or permit the sale or entry into service in its territory of new vehicles, for a maximum of six months, where such vehicles would “seriously harm the environment or public health.”

Article 114 TFEU allows Member States to adopt more stringent national measures to protect the environment or public health where certain substantive and procedural requirements are met. In particular, if a Member State “deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment... arising after the adoption of the harmonisation measure,” it shall “notify the Commission of the envisaged provisions as well as the ground for introducing them.”⁶ The Commission shall then review those provisions, approving or rejecting them within six months “after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.”⁷ Article 114 TFEU thus requires the Member State to produce new scientific evidence that postdates the harmonisation measure in question while also giving the Commission discretion to reject the national measures as, for example, being an obstacle to the functioning of the internal market.⁸ Article 114 TFEU therefore restricts the ability of Member States to adopt environmental protection measures but it is not an insurmountable hurdle.

Directive 2007/46/EC also contains certain safeguard clauses that Member States could be used to compel manufacturers to recall certain non-compliant vehicles or otherwise prevent their use, such as when vehicles pose a “serious risk to... public health or the environment.”⁹ For vehicles that have already been sold, registered or put into service, where a serious risk to public health or the environment is found, Article 32 requires manufacturers to recall vehicles and present to the approval authority a set of remedies to neutralise the risk, which in turn shall be communicated to the authorities of the other Member States without delay who must then ensure the measures are effectively implemented in their respective territories.¹⁰ If the measures are considered to be insufficient or not implemented quickly enough, authorities of other Member States may inform the approval authority that granted the type-approval, who shall in turn ensure the manufacturer takes corrective measures. The threshold question for a recall under Article 32 is thus whether the non-conformity presents a high risk to public health and the environment, not just a “marginal impact on the environment.”¹¹ Where that is found, authorities of other Member States have the means to pressure the manufacturer to take corrective measures in their territories by notifying the Member State that granted type-approval. However, a significant amount of discretion is afforded to the Member State that granted type-approval to determine whether the measures of the manufacturer are satisfactory,¹² which was a major impetus for the adoption of *Regulation (EU) 2018/858*.

Options to reduce second-hand diesel vehicles under *Directive 2007/46/EC* include:

- Member States could consider notifying the Commission of their intention to adopt an immediate prohibition on the registration, sale, entry into service or circulation of new and second-hand diesel vehicles that are non-compliant with type-approval for, among other things, their impact on public health and the environment, following the process as set out in Article 114 TFEU.
- In addition, the following specific actions could be undertaken on second-hand diesel vehicles within the framework of *Directive 2007/46/EC*. **First**, for second-hand diesel vehicles subject to a recall for being non-compliant with their type-approval, authorities could set out to determine the number of un-recalled vehicles operating within their borders and, for those vehicles, determine whether “a serious risk to... public health or environmental protection” is present and, if so, communicate this to the authority of the Member State that granted type-approval to ensure the manufacturer takes additional corrective measures. **Second**, for second-hand diesel vehicles not yet subject to a recall for being non-compliant with their type-approval, where such vehicles are suspected of being non-compliant, authorities could set out to determine whether a “serious risk to public health or environmental protection” is present and, if so, inform the Member State that granted type-approval to ensure a set of measures to neutralise the risk is undertaken by the manufacturer.

MEASURES ADOPTED UNDER THE AIR QUALITY DIRECTIVE

Directive 2008/50/EC on ambient air quality and cleaner air for Europe (the “Air Quality Directive”) requires Member States to meet ambient air-quality standards for nitrogen dioxide and oxides of nitrogen (NO_x) as well as particulate matter (PM)—referred to as limit values—in specific geographical zones or agglomerations. Where limit values are exceeded, Member States must set out plans to address the violation,¹³ an obligation that has justified the introduction of several bans on high-polluting vehicles in cities by local authorities.¹⁴ Conversely, where ambient air is below the specified limit value, “Member States shall maintain the levels of those pollutants below the limit values and *shall endeavour to preserve the best ambient air quality*, compatible with sustainable development.”¹⁵ To achieve these objectives, national authorities may consider measures to restrict the influx of second-hand diesel vehicles operating within their territory. Where such measures are not necessarily restricted to specific geographic zones or agglomerations where exceedances of limit values occur, and thus do not necessarily stem from an obligation in the Air Quality Directive to set out plans to address the violation, Article 193 TFEU is implicated, which governs the adoption of more stringent protective measures for legislation adopted under an environment legal base, which the Air Quality Directive was.

Since the Air Quality Directive was adopted under Article 192 TFEU (ex Article 175 TEC), in addition to meeting the limit values set out therein, Article 193 TFEU allows Member States to maintain or introduce more stringent protective measures that go beyond it to protect the environment so long as compatible with the Treaties and subject to notification:

Article 193 TFEU

The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.

The Court of Justice of the European Union (CJEU) and multiple scholarly publications provide context for when a protective measure at the national level is more stringent, when it shall be deemed as “compatible with the Treaties” and what it means to notify the Commission.¹⁶

First, any national measure must advance the environmental objective in the EU legislation at issue. In other words, the protective measures must be “more stringent.” Courts have found that Member States may neither lower the level of protection nor undermine the effectiveness of EU legislation,¹⁷ and that the national measure cannot release Member States from their original obligations.¹⁸

Second, any national measure must also be compatible with the Treaties. In particular, this implicates the free movement of goods between Member States under Article 34 TFEU,¹⁹ which prohibits “quantitative restrictions on imports and all measures of equivalent effect... between Member States.”²⁰

Despite Article 34 TFEU, however, measures may be maintained if they fall under one of the exceptions in Article 36 TFEU, namely:

The provisions of Articles 34 and 35 [TFEU] shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

In addition to the clear public health basis for restricting second-hand diesel vehicles, the CJEU also considers the protection of the environment as falling within the scope of Article 36 TFEU.²¹ Article 36 TFEU therefore allows Member States to maintain a quantitative restriction if justified on public health or environmental grounds and it is effective toward that end.²² The inquiry under Article 36 TFEU relates to the objective—whether public health or environmental—and the effectiveness of the measure toward achieving it. There is little reason to conclude that restrictions on older diesel vehicles would not be effective in protecting public health or the environment, a product of their higher emissions. On this, however, it is important that any more stringent protective measures set out an objective standard to be met—such as real-world driving emissions (RDE) above a certain amount—rather than just penalizing second-hand diesel vehicles for the sake of being second-hand since not all second-hand diesel vehicles emit equally.

Compatibility with Article 36 TFEU also requires that the national measure not constitute arbitrary discrimination or a disguised restriction on trade. *On the one hand*, to avoid being considered a disguised restriction on trade, a measure cannot be adopted for protectionist reasons.²³ Many CJEU cases have stricken down prohibitions deemed to have discriminatory effect rising to the level of protectionism,²⁴ but other CJEU cases allow such measures “so long as [those provisions] affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.”²⁵ There is no indication that a protectionist reason would exist but the case for maintaining a measure on second-hand diesel vehicles would be further strengthened if the measure is designed to give equal treatment to older diesel vehicles placed on the national market internally. *On the other hand*, a measure cannot constitute arbitrary discrimination, meaning it should make sense and be the least restrictive option to secure its objective.²⁶ A ban on imports is, by its nature, the most restrictive option and thus the objective for such a measure would need to be clearly defined and substantiated—*i.e.* the immediate elimination of any increase in the fleet of older diesel vehicles on national roads for public health or environmental reasons—so as to justify it. Overall, the CJEU has been open to measures that seek to address current public health and environmental issues.²⁷

Arbitrary discrimination is closely related to the well-settled principle of proportionality.²⁸ In particular, national measures liable to obstruct intra-EU trade must be “proportionate to the objective sought.”²⁹ The CJEU will regard a measure as suitable for securing the attainment of the objective pursued—and therefore proportionate—“only if it genuinely reflects a concern to attain that objective in a consistent and systematic manner.”³⁰ In *Commission v Republic of Austria*, a case in which Austria sought to ban larger lorries carrying certain types of goods from a stretch of road to improve air quality, the CJEU set out a two-part inquiry: first, whether the national measure pushes toward the objective; and, second, whether the restriction of the free movement of goods goes beyond what is necessary to attain that objective.³¹ There, Austria had not met its “duty to examine carefully the possibility of using measures less restrictive of freedom of movement, and discount them only if their inappropriateness to the objective pursued was clearly established.”³²

Third, following adoption, Member States must notify the Commission when exercising their discretion to adopt a more stringent protective measure under Article 193 TFEU. No formal requirements, however, such as time limits, are contained in Article 193 TFEU. Instead, Member States should simply notify their provisions as soon as possible in order to enable the Commission to carry out its review.³³

Together, the above considerations outline the contours of how Member States could proceed with restrictions on second-hand diesel vehicles to protect public health and the environment under the Air Quality Directive. Of those, the most relevant considerations are the concept of arbitrariness in Article 36 TFEU and the principle of proportionality. In effect, there is a sliding scale of measures one could envision Member States taking to restrict second-hand diesel vehicles. For example, some measures could narrowly target specific cities or regions with bans on driving diesel vehicles that emit above certain amount, justified on the need to avoid exceedances of air-quality limit values set out in the Air Quality Directive. But other measures could be broader

in scope, such as bans on imports of second-hand diesel vehicles that emit above a certain amount (coupled with domestic restrictions on registration of similarly situated second-hand diesel vehicles of domestic origin) in order to achieve certain limit values and otherwise preserve the best ambient air quality, thus seeking to protect public health in general within the Member State. To this end, Member States should clearly articulate the level of protection being sought, and craft the measure narrowly to achieve this objective without unduly restricting trade beyond what is necessary. Where the level of protection sought is higher, more trade-restrictiveness will be tolerable to achieve it if deemed necessary.

Recommendations to reduce second-hand diesel vehicles under the Air Quality Directive:

- Member States should set out to determine the implications of the influx of second-hand diesel vehicles on preserving the best ambient air quality within their territory as well as the potential impact on exceedances of limit values in specific cities or regions, articulating the desired level of protection so as to facilitate measures addressing second-hand diesel vehicles.
- Member States should then review various measures available to achieve this desired level of protection, including those specific to second-hand diesel vehicles as well as more general measures against any diesel vehicle that emits above certain emission limits, selecting the least trade-restrictive measure possible, as required under Article 36 TFEU, and otherwise ensuring compliance with the other requirements in Article 193 TFEU.

It should be underscored that the types of measures available to Member States are varied and involve different considerations. For example, a general import ban on second-hand diesel vehicles raises different considerations than a ban on driving diesel vehicles that emit above certain emission limits, in particular since the former applies only to vehicles imported from outside the Member State whereas the latter applies equally regardless of origin to all diesel vehicles operating within the Member State. In general, there should be little concern regarding the legality of restrictions on second-hand diesel vehicle in specific geographical locations, such as cities or regions, justified on exceedances of limit values (or threat thereof) set out in the Air Quality Directive, however, greater care should be exercised for measures that are broader in scope.

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References

- ¹ Directive 2007/46/EC establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles.
- ² Regulation (EU) 2018/858 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, Article 91.
- ³ Directive 2007/46/EC, Article 4(3).
- ⁴ See Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information.
- ⁵ Letter from Elżbieta Bieńkowska to Ms Van Brempt (9 September 2016), A 012506, Annex, p. 5 available at <http://www.europarl.europa.eu/cmsdata/111604/2016.09.09%20-%20Commissioner%20Bienkowska%20answers%20on%20recall%20programmes.pdf>
- ⁶ Article 114(5) TFEU
- ⁷ Article 114(6) TFEU
- ⁸ See e.g. Case T-182/06 *Kingdom of the Netherlands v Commission of the European Communities* [2007] ECR II-01983.
- ⁹ Directive 2007/46/EC, Articles 29-33 (Articles 29 and 30 set out obligations on new vehicles and the sale and entry into service of parts of equipment).
- ¹⁰ Directive 2007/46/EC, Article 32(1)-(2).
- ¹¹ Case-668/16 *European Commission v Federal Republic of Germany* [2018] ECLI:EU:C:2018:802, paragraph 59.
- ¹² Directive 2007/46/EC, Article 33(3).
- ¹³ Directive 2008/50/EC, Articles 13-19, 23-24.
- ¹⁴ See e.g. Transport & Environment, How To Get Rid of Dirty Diesels on City Roads: analysis of Diesel Restriction Measures in European Cities to Date (March 2018), available at https://www.transportenvironment.org/sites/te/files/publications/TE%20Air%20Quality%20Report_FINAL_12032018%20NEW.pdf
- ¹⁵ Directive 2008/50/EC, Article 12 (emphasis added).
- ¹⁶ See e.g. Nicolas de Sadeleer, *EU Environmental Law and the Internal Market*, Oxford University Press (2 January 2014); Fisher, Bettina Lange and Eloise Scotford, *Environmental Law: Text, Case & Materials* (Oxford, 10 June 2013); Peeters, Marjan et al, *Climate Law in EU Member States: Towards National Legislation for Climate Protection* (New Horizons in Environmental and Energy Law, 1 January 2012); L. Krämer, *EC Environmental Law*, 6th edition (London: Sweet & Maxwell, 2007).
- ¹⁷ Case C-194/01 *Commission v Austria* [2004] ECR I-4579, para. 39 (Member States are not released from adopting measures where they consider that their national provisions are better than the provisions concerned and that the national provisions are therefore better able to ensure that the objective pursued by the directive is achieved).
- ¹⁸ Case C-184/97 *Commission v Germany* [1999] ECR I-7837, para 41 (decided in relation to the Aquatic Pollution Directive); see also Case C-378/08 *Agusta* [2010] ECR I-1919, paras 48-70.
- ¹⁹ Case C-6/03 *Deponiezweckverband Eiterkö* [2005] ECR I-02753, para. 64.
- ²⁰ See e.g. Case C-100/08 *Commission v Belgium* [2009] ECR I-140, paras 94 *et seq* (Belgian regulation preventing the marketing of indigenous European birds born and bred in captivity, which were legally marketed in the territory of other Member States, constituted a quantitative restriction within the meaning of Article 34 TFEU).
- ²¹ See e.g. Case C-2/10 *Azienda Agro-Zootecnica Franchini Sarl* [2010] ECR I-5031, para. 57 (the prohibition on locating new wind turbines in Natura 2000 sites would not jeopardize developing new and renewable forms of energy in the European Union); see also Case C-6/03 *Deponiezweckverband Eiterköpfe* [2005] ECR I-2753, para. 61 (the principle of proportionality is not applicable so far as it concerns MSPM adopted under Article 193 TFEU; see also Case C-100/08 *Commission v Belgium* [2009] ECR I-140, paras 94 *et seq* (Belgian regulation preventing the marketing of indigenous European birds born and bred in captivity, which were legally marketed in the territory of other Member States, constituted a quantitative restriction within the meaning of Article 34 TFEU).
- ²² Case C-192/01 *Commission v Denmark* [2003] ECR I-9693; Case C-217/99 *Commission v Belgium* [2000] ECR I-10251; Case 55/99 *Commission v France* [2000] ECR I-11499.
- ²³ See Case 4/75 *Rewe-Zentralfinanz GmbH v Landwirtschaftskammer Bonn* [1975] ECR 843 (different treatment of foreign apples was justifiable and therefore not arbitrary); Case 104/75 *Officier van Justitie v De Peijper* [1976] ECR 613; Case 34/79 *R v Henn and Darby* [1979] ECR 3975; Case 4/75 *Rewe-Zentralfinanz GmbH v Landwirtschaftskammer Bonn* [1975] ECR 843; Case C-324/93 *Evans Medical* [1995] ECR I-563.
- ²⁴ See e.g. Case C-320/03 *Commission v. Austria* [2005] ECR I-9871 (Austrian measure prohibiting heavy goods traffic from an alpine motorway); Case C-142/05 *Åklagaren v Mickelsson and Roos*, Judgment (4 June 2009) (Finnish measure prohibiting jet skis except on designated waterways, which there were none); Case C-265/06 *Commission v Portugal* [2008] ECR I-2245 (Portugal measure prohibiting sticking tinted plastic to car windows to make them tinted windows); Case C-110/05 *Commission v Italy*, Judgment (10 February 2009) (Italian measure prohibiting motorcycles from towing trailers).
- ²⁵ See Joined Cases 267/91-268/91 *Keck and Mithouard* [1993] ECR I-6097, paras 11-17; see also Case C-368/95 *Familiapress v Heinrich Bauer Verlag* [1997] ECR I-3689; Case C-159/00 *Sapod Audic* [2002] ECR I-5031; see also Case C-391/92 *Commission v Greece (Greek Milk)* [1995] ECR I-1621; Joined Cases 69/93 and 258/93 *Punto Casa v Sindaco del Comune di Capena* [1994] ECR I-2355.
- ²⁶ Case 104/75 *Officier van Justitie v De Peijper* [1976] ECR 613.
- ²⁷ See e.g. Case C-389/96 *Aher-Waggon v Federal Republic of Germany* [1998] ECR I-4473 (German restriction on permissible noise from aircraft, which were stricter than those permitted by EU legislation, were upheld because other measures restricting the

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- amount of flights or planning restrictions for airports were not in fact feasible); Case C-67/97 *Bluhme* [1008] ECR I-8033 (considerable leeway given to Danish law that only allowed Laesø brown bees to be kept on an island); Case C-379/98 *PreussenElektra* [2001] ECR I-2099 (German requirement that electricity retailers must buy a proportion of their electricity from wind farms in Germany, which was designed to stimulate such farms and make them viable, was upheld since it was practical and other constraints in law, such as state aid limits on direct subsidy); see also Case C-341/95 *Bettati v Safety Hi-Tech* [1998] ECR I-4355.
- ²⁸ Case 120/78 *Rewe-Zentral ('Cassis de Dijon')* [1979] ECR 649; Case 302/86 *Commission v Denmark* [1988] ECR 4607, paragraph 9; Case C-270/02 *Commission v Italy* [2004] ECR I-1559, paragraph 21; Case C-463/01 *Commission v Germany* [2004] ECR I-11705, paragraph 75; and Case C-320/03 *Commission v Austria* [2005] ECR I-9871, paragraph 70
- ²⁹ Case C-28/09 *Commission v Austria* [2011] ECLI:EU:C:2011:854, paragraph 119.
- ³⁰ Case C-28/09 *Commission v Austria* [2011] ECLI:EU:C:2011:854, paragraph 126.
- ³¹ Case C-28/09 *Commission v Austria* [2011] ECLI:EU:C:2011:854, paragraph 126.
- ³² Case C-28/09 *European Commission v Republic of Austria* [2011] ECLI:EU:C:2011:854, paragraph 140, citing Case C-320/03 *Commission v Austria* [2005] ECR I-9871, paragraph 87.
- ³³ See e.g. Case C-319/97 A. Kortas [1999] ECR I-3143, para. 35; see also Case C-2/10 *Azienda Agro-Zootecnica* [2010] ECR I- 5031, para. 53.