

Proposal for amendments to ECE/TRANS/WP.29/GRPE/2023/2 on a new 08 series of amendments to UN Regulation No. 83 (Emissions of M1 and N1 vehicles)

Submitted by the Clean Air Association

The text reproduced below was prepared by members of the Clean Air Association with the aim of promoting harmonization, legal certainty, and environmental protection in the 08 series of amendments to UN Regulation No. 83 as proposed in the working document ECE/TRANS/WP.29/GRPE/2023/2.

I. Proposal

Paragraph 2.16., amend to read:

- "2.16. "Defeat device" means any element of design which senses temperature, vehicle speed, engine rotational speed, 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. Such an element of design may not be considered a defeat device if:
- 2.16.1. The need for the device is justified in terms of protecting the engine against **immediate** damage or accident and for safe operation of the vehicle; **The need for a defeat device is justified only where, at the time of application for approval of the vehicle type, no other technical solution makes it possible to avoid the immediate damage or accident;** or
- 2.16.2. The device does not function beyond the requirements of engine starting; or

Paragraph 5.1.7., amended to read:

- "5.1.7. The use of defeat devices that reduce the effectiveness of emission control systems shall be prohibited. The prohibition shall not apply where:
- (a) The need for the device is justified in terms of protecting the engine against **immediate** damage or accident and for safe operation of the vehicle. **The need for a defeat device is justified only where, at the time of application for approval of the vehicle type, no other technical solution makes it possible to avoid the immediate damage or accident;**
- (b) The device does not function beyond the requirements of engine starting;

- (c) The conditions are substantially included in the test procedures for verifying evaporative emissions and average tailpipe emissions.”

II. Justification

1. Background

1. This proposal seeks to amend aspects of the European Commission’s (“EC”) working document Proposal for a new 08 series of amendments to UN Regulation No. 83 (Emissions of M1 and N1 vehicles) (the “**EC Proposal**”). The EC’s amendments relate to Defeat Devices.

2. This proposal follows the Clean Air Association’s proposal on this issue (Informal document GRPE-86-20) at the 86th session of the Working Party on Pollution and Energy (“**WP.29/GRPE**”) on this issue. At the session the EC noted that litigation on this issue was ongoing and that, once litigation on the matter has been settled, the GRPE could reconsider the issue. The Chair of the WP.29/GRPE acknowledged the importance of the issue and suggested that the WP.29/GRPE could reconsider the matter as it addresses the 08 series of amendments to UN Regulation No 83.

3. The Court of Justice of the European Union (“**CJEU**”) has since ruled on Case C-128/20 *GSMB Invest GmbH & Co. KG v Auto Krainer Gesellschaft GmbH* [2022] ECLI:EU:C:2022:570 (“**GSMB Invest**”), Case C-134/20 *IR v Volkswagen AG* [2022] ECLI:EU:C:2022:571, Case C-145-20 *DS v Porsche Inter Auto GmbH & Co. KG, Volkswagen AG* ECLI:EU:C:2022:572, and Case C-873/19 *Deutsche Umwelthilfe eV v Bundesrepublik Deutschland* [2022] ECLI:EU:C:2022:857 (“**DUH v BRD**”). The Clean Air Association considers these rulings to have resolved the substantive issue of Defeat Devices referred to in the 86th WP.29/GRPE session. This is also supported by the EC Proposal, which considers aspects addressed in these rulings. Nevertheless, the 08 series of amendments should not affect any ongoing litigation *retroactively*.

4. The proposal aims to make it irrefutable, across the relevant regions and regardless of whether an emissions strategy falls within the scope of the AES definition, that:

- a. The use of a defeat device can be justified for the purposes of Paragraph 2.16.1 and 5.17(a) only where there are immediate risks of damage which create a specific hazard when the vehicle is driven; and
- b. The ‘need’ for a defeat device, within the meaning of that provision, exists only where, at the time of the type-approval of that device or of the vehicle equipped with it, no other technical solution makes it possible to avoid immediate risks of damage or accident to the engine.

2. Harmonization of technical UN Regulations

5. The contracting parties to the 1958 Agreement, among other concerns, desired to reduce technical barriers to international trade by harmonizing technical UN regulations. A key aim of this proposal is to harmonize how defeat devices are justified across regions.

6. Litigation with respect to defeat devices has taken place in various jurisdictions, including France, Germany, Austria, Italy, the Netherlands, Belgium, Spain, The United Kingdom

(“UK”), Canada, the United States of America (“USA”), Australia, and Brazil. The CJEU has also ruled on the matter in several seminal cases.

7. The proposed amendments conform with jurisprudence adopted in various jurisdictions regarding defeat devices. However, it is imperative that the common approach adopted in jurisprudence is given uniform regulatory authority. This proposal gives regulatory authority throughout the relevant regions regardless of whether national jurisdictions have established the principles considered in this proposal.

8. Particularly relevant to this matter are comments made by the representative of the UK at the 86th session of the WP.29/GRPE. The representative wondered if the amendment of the defeat device justification was necessary, noting that the CJEU ruling already clarified the matter. The comment made by the British representative concerned the addition of the term “immediate” in the first sentence of the equivalent of Paragraph 2.16.1. The CJEU case to which the British representative refers is Case C-693/18 CLCV and Others (Dispositif d’invalidation sur moteur diesel) [2020] ECLI:EU:C:2020:1040 (“*CLCV*”), in which the CJEU held:

“...only immediate risks of damage which create a specific hazard when the vehicle is driven are such as to justify the use of a defeat device”¹

9. The CJEU handed down its ruling in CLCV on 17 December 2020. Following the leaving of the UK from the EU on 31 December 2020 (“**IP Completion Date**”), according to the European Union (Withdrawal) Act 2018 (“**EUWA18**”), the ruling in CLCV is considered “retained EU case law”. This means that, although CLCV is currently legally binding in the UK, to Section 6 of the EUWA18 allows courts in the UK to depart from the ruling. Furthermore, rulings in cases such as GSMB Invest or DUH v BRD, which elaborated on the justification of defeat devices, were handed down post IP Completion Date. Therefore the jurisprudence in these cases is not legally binding in the UK save for Northern Ireland, where, because of the Northern Ireland Protocol, CJEU decisions are still binding as EU law. Thus, even within the UK, there is a disparity in the legal status afforded to the interpretation of defeat device provisions in the manner considered by the CJEU in its recent rulings. This disparity demonstrates the necessity of this proposal.

10. CJEU judgments are currently only binding as EU law in the EU and Northern Ireland. Hence there is a disparity in the legal authority of CJEU judgements which exists between regions subject to the CJEU and other regions relevant for the purposes of Regulation No 83 but not subject to the CJEU. Given the importance of the notions relating to defeat devices, it is imperative that a common approach is adopted across regions and not only those subject to EU law. The amendments considered in this proposal would establish a clear common approach within all relevant regions which would be subject to the relevant iteration of Regulation No 83.

3. Promoting legal certainty through the development of clear, precise and definitive Regulations

11. The text considered in this proposal has been subject to extensive litigation. While it is clear from the EC Proposal that the EC has considered the jurisprudence in this area, the implication of its consideration is sometimes unclear. This is primarily because the EC Proposal is limited in scope.

¹ Case C-693/18 CLCV and Others (Dispositif d’invalidation sur moteur diesel) [2021] ECLI:EU:C:2020:1040 paragraph 114

12. It is appreciated that Appendix 3a and 3b to Annex I of the EC Proposal considers the jurisprudence in CLCV, GSMB Invest, and DUH v BRD. However, the EC Proposal only considers this jurisprudence within the context of Auxiliary Emissions Strategies (“AES”). It fails to address circumstances where a defeat device is incorporated in the form of a Base Emissions Strategy (“BES”). By way of example, in GSMB Invest and DUH v BRD, the vehicles which were the subject of litigation contained thermal window defeat devices. Yet, for the majority of the year, temperatures in real driving conditions activated these defeat devices. The manufacturer sought to justify the use of such a defeat device by relying on an exemption akin to that in Paragraph 2.16.1. The German Government defended its granting of the vehicles’ type approval by reasoning that relevant emissions regulation did not require the manufacturer to avoid the use of a defeat device with state of art technical solutions. The Court rejected the submissions of the manufacturer and the German Government, instead finding such a defeat device unlawful. As this defeat strategy operated for most of the year, this arguably means that, within the framework of the EC Proposal, such a strategy would be considered a BES and would fall outside the scope of Appendix 3a and 3b. Hence, at least in jurisdictions where the CJEU judgements are not legally binding, a manufacturer might seek and obtain type approval where that vehicle incorporates a defeat strategy in the form of a BES. However, if not for this proposal, this defeat strategy could still be pursuant to a version of Regulation No 83 as updated in accordance with the EC Proposal

13. Furthermore, without the incorporation of this proposal, the EC Proposal’s emphasis on AES’ documentation and requirements for justifying the use of defeat devices creates an imbalance in Regulation No 83. In that jurisprudence on the justification of defeat devices is seen as being clearly codified and applied to the notion of AES but not with regards to overall notion of defeat devices. Were a court to interpret such provisions in the future, it might draw unintended inferences as to the intention of the regulation.

14. These implications of the EC Proposal along with the concerns raised above with regards to jurisdiction of CJEU rulings and the need for harmonization calls for legal certainty. This proposal introduced clear and precise language into the relevant defeat device provisions in order to promote legal certainty, which reduces barriers to trade.

4. Ensuring a high level of environmental protection

15. The 1958 Agreement also recognised the importance of environmental protection for the development of regulations. The litigation following the diesel-gate scandal has shown how manufacturers and type approval authorities consistently misinterpret regulations, often with particular interests in mind and in manners which are clearly unfounded. Often these misinterpretations have run counter to the relevant regulations, which sought to ensure a high level of protection for the environment.

16. This proposal seeks to ensure a high level of protection for the environment by introducing clear wording in a manner which would prevent manufactures and type approval authorities from interpreting and applying Paragraphs 2.16.1 and 5.1.7 in a manner which is contrary to the intentions of these provisions. In doing so, the proposal promotes the proper intention of the provisions, helping to ensure an adequate level of environmental protection.