Driving Into Disaster

How the EU's Better Regulation agenda fuelled Dieselgate

Corporate Europe Observatory
Friends of the Earth Europe

Introduction

The European Parliament's inquiry into 'Dieselgate' has revealed that problems with emission tests went far beyond Volkswagen's use of illegal defeat devices. It exposes a culture of looking the other way: the European Commission and Member States turned a blind-eye to industry-wide abuse of the system for emission regulation, and, in fact, even invited the car industry to shape the regulatory agenda and its enforcement. This meant that the car industry's needs were prioritised in the name of 'better regulation' and at the expense of the health and wellbeing of European citizens.

Despite clear evidence of the health impacts of diesel pollution, the car industry was able to delay the implementation of existing standards and to shape new rules in its own favour. As a result, cities across the European Union are left choking, as toxic traffic fumes have led to an air pollution crisis.

An estimated 75,000 people died prematurely due to nitrogen dioxide (NO2) pollution in Europe in 2015.[1]

Dieselgate

The 'Dieselgate' scandal erupted in September 2015 when United States (US) regulators discovered that German car maker Volkswagen was using 'defeat device' software in diesel engines to reduce vehicles' emissions during testing, effectively manipulating the results.

Other car manufacturers, including Fiat, Renault, Mercedes, Opel, and Ford, were subsequently also found to have been "optimising" test results,[2] with on-the-road nitrous oxide emission levels 5-10 times higher than legal limits permit, exposing European citizens to dangerously high levels of pollution.[3]

What the European Parliament's inquiry found:

The Commission and Member States knew in 2004-2005 that there were discrepancies between the emission test results obtained from diesel cars in laboratory conditions, which met legal limits, and the emissions measured in real driving conditions which exceeded those limits.[4]

Despite knowing this, and despite a legal mandate to review the testing procedure, the European Commission delayed the introduction of "real driving emission" (RDE) testing because of a political desire to avoid burdening industry in the aftermath of the 2008 financial crisis. Within the Commission, DG Enterprise, headed by then Commissioner Antonio Tajani, argued that more reliable testing methods would not be politically opportune.[5]

When a working group was eventually set up to pave the way for RDE testing, Member States' failure to participate hampered the progress. Member States are responsible for enforcing the emission regulations - the European Parliament's 'Dieselgate' report assessed their failure to participate to constitute "maladministration".[6]

The report also finds that Member States failed to apply financial or legal penalties on car manufacturers in the aftermath of 'Dieselgate'. No manufacturers were ordered to recall or retrofit vehicles, and no approvals were withdrawn.[7] In the US, in contrast, six Volkswagen executives were indicted following the scandal.[8]

"Dieselgate would not have happened if our national governments and the European Commission would have acted on their legal and administrative responsibilities."

Gerben-Jan Gerbrandy[9]

The EU's drive for light-touch regulation

The Parliament's draft report has revealed merely the tip of the iceberg. The car industry had been working to shape the EU's regulatory agenda for decades – and the European Commission and Member States were apparently happy to let it dictate the terms.

> **"European governments have been acting tough with car makers recently, but in reality over the past decade they have viewed the motor industry more as a job-creation partner than a sector in need of scrutiny."**
> Peter Teffer, EU Observer[10]

The start of this cosy relationship can be traced back to 2002, when the European Commission launched its Action Plan for Better Regulation. This opened the door to industry, allowing them access to the legislative process and an opportunity to co-write the rules.

The Action Plan included a commitment to use "certain alternatives to legislation, where appropriate, such as self-regulation, sectoral voluntary agreements or the open coordination method. The Commission will propose more frequent use of co-regulation to the legislator."[11]

What is 'Better Regulation'

The agenda identified four key elements of Better Regulation:[13]

1. Impact assessments: under the guise of 'evidence-based policy-making', impact assessments were introduced for all policy decisions to consider economic costs and benefits. This tends to pit social and environmental benefits - by default difficult to quantify - against economic costs, with an emphasis on ensuring that regulated industries retain 'competitiveness'. Costs for business tend to be prioritised over benefits for society.

2. Focus on co- and self-regulation: to 'simplify' the regulatory environment and minimise costs, industry is encouraged to self- or co-regulate, or alternatives in the form of voluntary agreements or market-driven solutions are sought.

3. Increasing stakeholder engagement and the use of consultations: stakeholder consultations, while open to others, in fact mean greater, earlier and more frequent opportunities for business to influence policy making.

4. REFIT and fitness checks: rules already in place are subject to REFIT (Regulatory Fitness and Performance programme) to see whether they can be removed, simplified, or weakened with the aim to reduce costs for business.[14]

The Action Plan was then followed by the launch of the Commission's Better Regulation agenda in 2005, which set out to ensure that the "regulatory burdens on businesses [...] are kept to a minimum",[12] which effectively put the interests of business centre-stage and gave lobbyists carte blanche to set out their demands.

Although launched twelve years ago, the Better Regulation agenda remains a priority for the current Juncker Commission. In 2015, the Commission established a Regulatory Scrutiny Board, which can veto legislative proposals. As a result, rules providing social, environmental, health and safety measures are being increasingly portrayed as burdens on businesses that need to be cut or reduced.[15]

Better regulation and the car industry

This approach to regulation was particularly apparent in 2005, when the European Commission set up an advisory group to look at improving competitiveness in the European car industry.

The Competitive Automotive Regulatory System for the 21st Century group (CARS 21) brought together representatives from the car industry and government officials. It was chaired by the EU Commissioner for Industry, Günter Verheugen. EU-wide car lobby group the European Automobile Manufacturers Association (ACEA)[16] was also invited, with their president, Volkswagen's Bernd Pischetsrieder, playing a leading role.

In this, the car lobby recognised an opportunity to shape the rules in the industry's favour. They emphasise the need for greater competitiveness and pushed for deregulation.[17] A key target for ACEA was the way in which cars are tested to ensure they meet environmental, safety and security standards.

ACEA wanted to see 'Better Regulation' principles applied to CO_2 emission reductions and future legislation on emission standards.[18] Their strategy was based on what they framed as a "Three Pillars Approach."[19]

ACEA's 'Three Pillars Approach'

1. Deregulation principles to govern EU policy for car industry: "[D]evelop better Regulation principles on which to base effective EU automotive policy (incl. review of regulatory process)".

2. Upcoming rules to be reviewed with a view to costs to industry: Pending legislation proposals – like the 'type approval' framework directive – should be reviewed, "apply[ing] better Regulation principles to reduce the cost of legislation".

3. Push lawmakers to adopt deregulatory approach to car industry legislation, stop any rules not following these principles: "Policy makers should apply better Regulation principles & pro-competitive regulatory process to all future legislation" while "put[ting] on hold any legislation proposal not respecting these principles."

A dedicated sub-group within CARS 21 was tasked specifically "to scrutinise the regulatory framework and to identify possibilities for withdrawing or simplifying the legislation in force".[20]

The Commission had proposed a 'type approval' system, which would enable a single vehicle test to provide the data for sales approval across the EU[21] and thereby replace the previous national-based system. Commissioner Verheugen promised "to make life easier for the industry by simplification of the car type approval in the EU".[22]

ACEA saw this as an opportunity for "cutting the cost of regulation and promoting market-driven solutions that help global competitiveness."[23] The lobby group ensured that CARS 21 focused on the principles and aims of 'Better Regulation' from its very first meeting.[24]

Industry dominance in CARS 21

CARS 21 was dominated by industry interests. Aside from the President of ACEA being Volkswagen's chief executive Bernd Pischetsrieder, the high-level group also included the chief executives of Renault, Ford, Fiat, and Volvo, the President of the Association of Automotive Suppliers (CLEPA) and the President of the European Petroleum Association (then called EUROPIA). David Baldock, Director of the Institute for European Environmental Policy (IEEP), was the single member representing an environmental NGO.

The only other non-corporate participants were the presidents of a motorist lobby club and of the European Metalworkers' Federation, as well as two pro-industry MEPs, Malcolm Harbour, rapporteur of the EU Parliament for the negotiations of the EU type approval directive in 2004[25], and Garrelt Duin, chair of the German Social Democratic Party (SPD) in Lower Saxony (2005 – 2010),[26] which partly owns Volkswagen.

Government ministers in the group came from Germany, France, UK, Italy, and the Czech Republic – homes to big EU car manufacturers Volkswagen, Audi, Mercedes, BMW, Renault, Land Rover, Bentley, Aston Martin, Fiat and Skoda. Only one of the ministers, British Margaret Beckett, had environment policy in her portfolio. The Czech deputy Prime Minister, Martin Jahn, became the Moscow chief executive of Volkswagen in 2008.[27] EU Environment Commissioners Stavros Dimas and Transport Commissioner Jacques Barrot were also members.[28]

Key recommendations from CARS 21

Members of CARS 21 set out their policy priorities, echoing the EU's 'Better Regulation' agenda:

- **simplifying legislation**: complexity should be avoided and simple solutions should be found.[29]
- **impact assessments** should be introduced, favouring cost-benefit analysis to identify cumulative costs,[30] and ACEA called for existing and future laws to be reviewed as part of the impact assessment process, in consultation with industry.
- **regulation should be avoided,** with market-driven solutions or voluntary agreements used instead.[31]

ACEA also argued that **global test methods should be** introduced in place of EU-specific measures where possible, and wanted to see 38 European directives replaced by global regulations set by the United Nations Economic Commission for Europe (UNECE) - the secretariat for the World Forum for the Harmonization of Vehicle Regulation.[32] These would simplify the regulation procedure and minimise costs for manufacturers.

The advantage of the global regulations to the car industry was their relative leniency compared to the more stringent EU rules.[33] In one case, CARS 21 industry stakeholders did not support replacing the EC regulations with those set by UNECE – because the UNECE regulations in that case were stricter than those set by the European Commission.[34]

ACEA also called for **self-testing** to be introduced as part of the Commission's 'Better Regulation' approach,[35] and demanded **lead-in times for any new rules,** effectively delaying their implementation.[36]

Self-testing in the car industry

Self-testing allows car manufacturers to test components in their own laboratories – giving them control over the testing conditions. Approval would depend simply on the manufacturer providing the paperwork to the national authority.

Other procedures which constitute the type approval test, including emission testing, must be carried out under the supervision of a technical representative, who approves the procedure in the manufacturer's laboratory. Although this does not constitute self-testing, there are questions about the independence of the technical representatives, since these are hired by the car manufacturer. Conflicts of interest may arise between the role of the assessor and the commercial relationship between the two companies.

This process is sometimes referred to as "de-facto self-testing" because the representative is not able to scrutinise the test conditions and cannot necessarily determine whether a vehicle has been specially prepared for the test.

Virtual testing – also promoted by the industry[37] - uses computer models to carry out tests such as "destruction testing", to avoid physically destroying the vehicle in a simulated crash.

Deregulatory success

Working through CARS 21, ACEA used the introduction of the EU's type approval framework directive to introduce self-testing for some emission and safety tests previously conducted by national approval authorities, as was revealed by investigations of media outlet EU Observer.[38]

"At ACEA's suggestion, it was agreed that a step-by-step approach should be followed in introducing self-testing... starting with simple tests in selected, non-sensitive cases, in order to assess how it works in practice."[39]

CARS 21 recommended the introduction of self-testing by car manufacturers for 15 of the 60 steps in the type approval testing process. Virtual testing was recommended for a further 10 steps.[41] The report argued that these recommendations were put forward "to reduce regulatory compliance costs for industry by making administrative procedures less costly and time-consuming."[42]

The recommendation to allow self-testing was initially accepted by the EU Council in December 2006 for tyres.[43] In 2008, the directive was amended to include emissions from air conditioning systems,[44] and following further pressure from ACEA,[45] in 2010 the 15 steps recommended for self-testing by CARS 21 were also approved. [46]

The huge influence of CARS 21 on EU decision making is, perhaps, best illustrated by the fact that this shift to allow self-testing directly contradicted the European Commission's original proposal for a new type approval framework for the European market. [47]

The car industry's persistent lobbying strategy had paid off, with the Commission opening the door to self-testing.

"Manufacturers will exploit the opportunity to optimize results in the context of type approval procedures, if they are given an opportunity to do so in the form of self-tests or virtual tests."
Jürgen Resch, Deutsche Umwelthilfe[48]

Keeping in line with the Better Regulation agenda, the Commission in 2011 turned to industry once more for advice, this time looking for expertise on how to measure vehicle emissions under driving conditions, so-called "real driving emissions" (RDE). It established a technical working group, known as the RDE-LDV working group, which was again dominated by representatives from the car industry, with large delegations from ACEA.[49] Few national government representatives attended meetings of the group, as has been highlighted by the European Parliament draft Dieselgate report.[50]

Slide from a 2006 presentation by ACEA promoting the successes of its work within the CARS 21 groupCARS2140

The drive continues

Likewise pushing ‘Better Regulation’ principles, industry called for “stakeholder engagement” throughout the process, demanded that the proposed regulations were simplified, and insisted on the need for impact assessments to ensure cost effectiveness.[52] This did not only delay the introduction of new regulation, it also ensured that industry concerns regarding costs were prioritised over impacts on health and the environment.

ACEA argued that more accurate testing posed a direct threat to profitability and claimed that tests that were to affect the market share of diesel vehicles would pose severe risks to the automotive industry.[53]

Real Driving Emissions (RDE)

The directive agreed by the EU Council in 2006 included a commitment to keep test cycles under review and revise them to adequately reflect emissions generated by driving on the road, amounts known to be much higher than those generated under laboratory conditions. This led to the development of Real Driving Emissions (RDE) testing using Portable Emission Measurement Systems (PEMS).[51]

Part of ACEA’s strategy was the use of key Member States to push arguments in favour of their national car industries. Hungary, for example, was reminded that Audi’s presence in the country supported more than 15,000 jobs.[54] On behalf of Germany, Chancellor Angela Merkel lobbied the Commission to support the car industry’s demands.[55]

And the Commission’s DG Enterprise was also revealed to have intervened in favour of the car industry’s interests, successfully seeking to delay enforcement of the new tests to help the industry remain competitive.[56]

The RDE tests are scheduled to come into force in 2019 – with the European Parliament report highlighting that the “excessive length of the process” must in part be “due to choices of political priorities, such as the focus of the Commission and the Member States on avoiding burdens on industry in the aftermath of the 2008 financial crisis.”[57]

Once again, the Commission’s adherence to ‘Better Regulation’ principles has allowed industry to delay and weaken the implementation of new regulation – with citizens paying the price.

Conclusion

The ‘Dieselgate’ scandal has lifted the lid on a culture of industry self-regulation and light-touch rule-making that is facilitated by European decision makers, including Member States, and lays bare the flaws in the EU’s ‘Better Regulation’ agenda. It reveals how the focus on simplified regulation that was meant to improve competitiveness has, in fact, allowed the car industry to set the agenda - a dynamic in which manufacturers cried wolf whenever suggested measures might have affected their profits. Rules were weakened and key responsibilities, including the enforcement of rules, were taken from the regulator and placed in the hands of the car industry. Companies’ commercial interests were prioritised over public interests.

The Commission and Member States effectively encouraged a push for a ‘simplification’ of the rules on type approval and introduced EU-wide self- and de facto self-testing. ‘Better Regulation’ principles have been an invitation to industry to delay, weaken and water down the EU’s commitment to more accurately test emissions from vehicles on the road.

Even in the wake of ‘Dieselgate’, the Commission’s trust in the car industry’s expertise seems to remain unquestioned, leaving EU citizens exposed to illegal levels of toxic nitrogen dioxide (NO_2) pollution from diesel cars, which contributed to an estimated 75,000 premature deaths in Europe in 2015 alone.

The EU must act now to remedy this situation. And it needs to urgently re-think its ‘Better Regulation’ agenda, not only to protect citizens from the abuse of the car lobby, but also to keep industry from shaping the rules in the future. Priority for an agenda to improve regulations should be to ensure that policies and legislation actually achieve their environmental, health or other public interest aims. Reduction of costs for business must be secondary to that.

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