

# **The VW Diesel Case: Towards Collective Redress for Consumers in Europe**

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by Jakob Lohmann, Julia Sagasser and Clara Thiemann  
(Team Germany)

## **The VW Diesel Case: Towards Collective Redress for Consumers in Europe**

### **Abstract**

*The paper discusses possibilities for consumers in the European Union to seek redress collectively using the example of the current Volkswagen Diesel case. First, it examines whether a cross-border collective action could be brought to a Member State court under the prevailing EU laws, in particular the Brussels I Regulation Recast, which was interpreted by the European Court of Justice. Given that the current legal framework does not provide a sufficient basis to do so, the paper then focuses on the feasibility of an amendment or new legislation by the European bodies in order to introduce mechanisms for collective redress.*

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## I. Introduction

In September 2015, there was a large public outcry when the United States Environmental Protection Agency discovered that Diesel cars sold by the German car manufacturer Volkswagen (VW) had been equipped with so called “defeat devices”. This “defeat device” is a device or software that is able to detect a testing situation and thereby change the performance of Diesel cars by lowering their exhaust gas emissions in comparison to real-world driving conditions.<sup>1</sup> In theory, this was an innovative solution to adjust consumption levels; however, in practice the effects of this “defeat device” were far reaching and resulted in exhaust gas values exceeding the allowed emission levels. This in turn caused more pollution than expected by customers and affected approximately 11 million cars, eight million of which were sold in Europe.<sup>2</sup>

In the US, the matter was resolved by a settlement agreement between VW and VW Diesel car owners, which included compensation packages and buyback offers.<sup>3</sup> These settlement and redress mechanisms did not however extend to Europe and the situation for Volkswagen customers in Europe remains uncertain. It is thus of no surprise that Diesel car owners continue to bring lawsuits to courts across Europe. That said, these lawsuits are met with both legal and practical challenges, as cases are being decided on a case-by-case basis with the giant company VW fighting every claim individually.<sup>4</sup>

As a result, the demand for a collective redress mechanism for European consumers has grown in support. A collective redress mechanism would allow consumers to join forces, even across borders, in aims of addressing the imbalance between themselves and its powerful commercial counterpart. This would streamline the decision making process and create transparency and uniformity among all those affected and seeking redress. In addition,

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<sup>1</sup> 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 (hereinafter “**Regulation (EC) No 715/2007**”), Article 3 no. 10.

<sup>2</sup> *Hotten*, Volkswagen: The scandal explained, available at <http://www.bbc.com/news/business-34324772> (accessed 7 May 2018).

<sup>3</sup> *Shepardson*, Volkswagen settles U.S. diesel owner lawsuit on eve of trial, available at <https://www.reuters.com/article/us-volkswagen-emissions/volkswagen-settles-u-s-diesel-owner-lawsuit-on-eve-of-trial-idUSKCNIG72RA> (accessed 7 May 2018).

<sup>4</sup> *McGee*, VW car owners in EU face battle for compensation over scandal, available at <https://www.ft.com/content/0b9bf1d2-e486-11e6-9645-c9357a75844a> (accessed 7 May 2018).

this would also alleviate the workload of the courts and state apparatus by ensuring the efficient allocation of judicial resources.

Although judicial collective redress does exist in a number of EU Member States<sup>5</sup> and for partial areas also in EU law,<sup>6</sup> the status of development as well as the models and effectiveness of the mechanisms vary significantly. The Commission already initiated efforts to promote the introduction of collective redress mechanisms in the Member States in the 1980s.<sup>7</sup> This has been followed up by several reports and further recommendations.<sup>8</sup>

However, to date, the introduction of a regional collective redress model that works across borders for consumers from various Member States has not yet been adopted. This leads to dissimilar treatment of consumers amongst the different EU Member States, therefore giving them inequitable access to justice<sup>9</sup> – despite consumer law having become a matter essentially dominated by European legislation.<sup>10</sup>

Accordingly, this paper accepts the lack of a collective redress mechanism in the European Union for consumer matters as aforementioned and aims to explore a number of possibilities of how citizens can yet jointly litigate their consumer claims in front of one court.

First, the different forms of collective redress will be outlined (II.). This is followed by a brief summary of the Diesel case including technical and legal background information (III.). Then, the paper explores how joint consumer actions could be brought in this case under the existing provisions of the Brussels I Regulation Recast (IV.) as well as bases on which collective redress could be introduced into the European legal framework (V.).

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<sup>5</sup> Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU), COM(2018) 40 final, 25 January 2018, p. 3 et seq.

<sup>6</sup> See e.g. Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests.

<sup>7</sup> Consumer redress, Commission memorandum to the Council transmitted on 4 January 1985, Bulletin of the European Communities, Suppl. 2/85.

<sup>8</sup> See e.g. Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU) (hereinafter: “**Commission Recommendation of 11 June 2013**”).

<sup>9</sup> *BEUC*, European Collective Redress – What is the EU waiting for? BEUC initial contribution to the 2017-2018 initiatives on collective redress, 2017, p. 1 et seq.

<sup>10</sup> *Valant*, Consumer protection in the EU, Policy overview, 2015, available at [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS\\_IDA\(2015\)565904\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA(2015)565904_EN.pdf) (accessed 7 May 2018).

## II. Forms of Collective Redress

For the purpose of this paper, “collective redress” and “collective action” are used in a broad sense and refer to a legal mechanism that ensures the possibility to claim compensation collectively by two or more natural or legal persons who have been harmed in a mass harm situation or by an entity entitled to bring a representative action.<sup>11</sup>

As mentioned before, the mechanisms for collective redress available within the European Union vary from Member State to Member State. Generally, one can categorize collective redress into three main categories, namely into group action proceedings, model case proceedings, and representative actions.<sup>12</sup>

As part of collective redress, group action proceedings<sup>13</sup> refer to the consolidation of individual claims with similar issues of law and fact that are adjudicated together in *one* procedure before *one* court. Within group action proceedings, a distinction is made between the “opt-in” option, under which only individuals who expressly join the action will benefit from the outcome and the “opt-out” option, under which all individuals are bound by the outcome unless they have explicitly abandoned the group. Being aware of the restraint of Member States towards the practice in Common Law countries, for the purpose of this paper, collective redress should be distinguished from the “class action” known in the US.<sup>14</sup>

In model case proceedings,<sup>15</sup> a leading decision is given in one case, deciding the common factual and legal issues of similar legal actions. The leading case therefore serves as an example for other similar cases but claimants will nevertheless have their cases decided on an individual basis.

Finally, collective redress also encompasses representative actions that are brought by an organization, an authority or an individual on behalf of a group of individuals, who do not appear as parties to the litigation in court. For instance, France introduced a representative

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<sup>11</sup> See Commission Recommendation of 11 June 2013, Part II.

<sup>12</sup> See *Tang*, Journal of Private International Law, Vol. 7 No. 1, 2011, 101 (103).

<sup>13</sup> Sweden for instance introduced a group action through the *Group Proceedings Act (2002:599)*; see for an overview of group actions in the EU: *U.S. Chamber Institute for Legal Reform, The Growth of Collective Redress in the EU*, May 2017, available at [http://www.instituteforlegalreform.com/uploads/sites/1/The\\_Growth\\_of\\_Collective\\_Redress\\_in\\_the\\_EU\\_A\\_Survey\\_of\\_Developments\\_in\\_10\\_Member\\_States\\_April\\_2017.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/The_Growth_of_Collective_Redress_in_the_EU_A_Survey_of_Developments_in_10_Member_States_April_2017.pdf) (accessed on 7 May 2018).

<sup>14</sup> *Deutmoser*, EuZW 2013, 652 (653).

<sup>15</sup> Germany for instance introduced a model case system for market related actions (*Kapitalanleger-Musterverfahrensgesetz* of 6 August 2005).

action, whereby consumers may mandate a consumer association to initiate proceedings for damage claims on their behalf.<sup>16</sup>

### III. The VW Diesel Case

#### 1. Technical Background

The European Union has been fighting against nitrogen oxide (NO<sub>x</sub>) emissions for some time. NO<sub>x</sub> (comprising NO<sub>1</sub> and NO<sub>2</sub>) leads to respiratory diseases and has further negative implications on the human health.<sup>17</sup> The main industrial sector involved in the emission of NO<sub>x</sub> is the road transportation sector.<sup>18</sup> Diesel engines produce more NO<sub>x</sub> than Otto engines. The maximum emissions allowed for cars are defined in Regulation (EC) No 715/2007. Technical possibilities to reduce the level of NO<sub>x</sub> emissions to the prescribed levels defined in the Regulation exist and are being used,<sup>19</sup> but they are costly, need a certain temperature range and reduce the fuel efficiency. As a result of these downsides, VW decided to use the maximum NO<sub>x</sub> reduction potential only when the cars were officially tested. Once a VW car was on a testing stand and detected the NEDC pattern,<sup>20</sup> the more efficient cleaning mode 1 was activated, so that the car complied with the regulatory thresholds.<sup>21</sup> Outside of the testing environment, the car switched from testing mode 1 to mode 0. This means that the enhanced cleaning features were deactivated and the emissions of NO<sub>x</sub> multiplied while in use under real-world driving conditions.

#### 2. Legal Problems

From a substantive point of view, it would be conceivable that VW car owners ask for recovery based on tort law for unlawful conduct or assert a contract claim on the ground that

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<sup>16</sup> See for instance Section L.622-1 et seqq. of the French Consumer Code; see also as an example for representative actions Section 227 of the Austrian Civil Procedural Act indirectly allowing a representative action.

<sup>17</sup> <https://www.eea.europa.eu/signals/signals-2013/infographics/health-impacts-of-air-pollution/view> (accessed 7 May 2018).

<sup>18</sup> *European Environment Agency*, European Union Emission Inventory Report 1990–2015 under the UNECE Convention on Long-range Transboundary Air Pollution (LRTAP), p. 44.

<sup>19</sup> There are three main possibilities to reduce the emission level: The Lean NO<sub>x</sub> Trap, the redirection of the exhaust gases back into the engine and the scr catalytic converter, see *Yang et al*, NO<sub>x</sub> control technologies for Euro 6 diesel passenger cars, 2015, p. 2.

<sup>20</sup> The NEDC (New European Driving Cycle) is a fixed sequence of acceleration and braking that is defined in UNECE Regulation No. 101 Carbon Dioxide Emissions and Fuel/Energy Consumption. It is supposed to represent the typical usage of a car.

<sup>21</sup> Technically this mode maximized the redirection of the exhaust gases back into the engine (EURO 5 engines), or the amount of Ad-Blue used in the scr catalytic converter was increased (EURO 6 engines) or the Lean NO<sub>x</sub> Trap was regenerated more often.

the cars were defective. Yet, the legal problems resulting from the defeat devices are plentiful.

The first discussion concerns the question as to whether the devices are illegal or not. VW argues that the software that switches between modes 0 and 1 is not an illegal defeat device because the Regulation (EC) No 715/2007 only relates to the emissions on testing stands. It would not and cannot regulate the real driving emissions, as these are too dependent on factors such as driving style, weather and route. In this case, this distinction is relevant for VW customers, as it would not cause the product to be considered defective. So far, no courts have accepted this interpretation of Regulation (EC) No 715/2007. The general understanding is that there has to be a nexus between the emissions on the testing stand and the real driving emissions.<sup>22</sup> All devices that destroy such nexus are deemed illegal, irrespective of the technical procedure.<sup>23</sup>

Less consensus exists on the question as to whether the cars are considered to be free of defects after VW performed software updates on the affected cars. Some higher regional courts decided that after the software update, the cars were not deficient anymore and therefore dismissed the action brought by car owners.<sup>24</sup> Conversely, many other regional courts argued and decided that the cars were still deemed defective either on grounds of reduced performance or because of still existing narrow temperature windows in which the cleaning system works properly.<sup>25</sup> These conflicting decisions emphasize the need for jurisprudential uniformity. It further illustrates the burden placed on claimants and the courts in relation to the availability of resources for purposes of a comprehensive evidence collection process: not only does the software have to be analyzed, but there also needs to be an assessment of the long-term effects of the software. Thus, having a collective redress mechanism would efficiently allocate the resources and alleviate the cost burden for these enquiries.

A third legal challenge is the lack of a direct contractual relation between VW and the buyers of VW cars. In a number of cases, customers bought their car from local retailers. These retailers are independent legal entities that sell the cars in their own name. Without a direct contract with VW, warranty claims against VW cannot be asserted. In this case, the most

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<sup>22</sup> Regulation (EC) No 715/2007, Article 3 no. 10.

<sup>23</sup> See for instance Regional Court of Frankfurt (Oder), Case 13 O 174/16 of 17 July 2017.

<sup>24</sup> Higher Regional Court of Dresden, Case 10 U 1561/17 of 1 March 2018.

<sup>25</sup> Regional Court of Frankfurt (Oder), Case 13 O 174/16 of 17 July 2017; Regional Court of Stuttgart, Case 20 O 425/16 of 30 June 2017.

promising claims in collective redress procedures are tort claims against VW for unlawful conduct. These claims were granted by German courts based on Section 826 of the German Civil Code. Case data collected by the German Automotive Club shows that there were 169 successful claims against VW. Most of them were based on willful damage, *contra bonos mores*, of VW.<sup>26</sup> This gives rise to subsequent problems due to the lack of centralized EU law in the area of tort law. The EU Regulations and Directives provide no overarching substantive law regarding tort claims and more specifically, claims based on the willful damage *contra bonos mores*. Therefore, even if a collective action is possible by procedural law, different substantive law will apply. That said, there will be many important questions of fact and law that will be the same in all cases connected to the Diesel scandal, notwithstanding different national laws.

#### **IV. The Collective Enforcement of Claims under Brussels I Regulation Recast**

There are no specific rules in the Brussels I Regulation Recast (“**Brussels I Regulation**”)<sup>27</sup> to determine whether or not a court has international jurisdiction over cross-border collective claims. A similar provision to Article 8 (1) Brussels I Regulation, allowing a claimant to pursue connected claims against multiple defendants, who are domiciled in different Member States, in a single court, does not exist for actions brought by several claimants. The following chapter analyzes if, and to what extent, the existing provisions of the Brussels I Regulation do confer international jurisdiction over a collective claim to a court of one Member State.

##### **1. No Collective Enforcement of Claims under Article 18 Brussels I Regulation: the *Schrems II*-Ruling**

Section 4 of the Brussels I Regulation grants jurisdiction over claims arising under consumer contracts. According to Article 18 (1) Brussels I Regulation “*a consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.*” If applicable, Article 18 Brussels I Regulation would allow consumers to bring a collective action, for instance through assignment of their rights to another consumer.

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<sup>26</sup> ADAC, Rechtsprechungsübersicht zur Abgasthematik (EA 189), available at <https://www.adac.de/-/media/adac/pdf/jze/rechtssprechungsuebersicht-vw-abgasskandal-zu-ea189-motoren.pdf?la=de-de&hash=AB21A2ACCCA034528606508FBE30624FF1217BE3> (accessed 7 May 2018).

<sup>27</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

Section 4 of the Brussels I Regulation provides special protection to consumers because they are deemed to be economically weaker and less experienced in legal matters than their counterparty.<sup>28</sup> The application of Section 4 is subject to strict conditions. Firstly, the contract must include a consumer on one side, and a person acting in the course of a trade or profession on the other; secondly, a contract must have been concluded, and finally, the contract must fall within one of the categories referred to in Article 17 (1) Brussels I Regulation.<sup>29</sup>

The European Court of Justice (“ECJ”) has always taken a narrow approach when determining whether a court has international jurisdiction pursuant to Article 17 Brussels I Regulation. In previous cases, the ECJ refused to confer international jurisdiction under the provisions relating to consumer contracts, where consumers assigned their rights to a third party that brought an action in court.<sup>30</sup> The ECJ based its reasoning on the fact that the claimant was not a party to the consumer contract and therefore, could not benefit from the special rules governing jurisdiction over consumer contracts.<sup>31</sup> For the same reason, the ECJ found that Section 4 of the Brussels I Regulation does not apply to the consumer protection association that brings a claim on behalf of consumers.<sup>32</sup>

Recently, in the *Schrems II* case,<sup>33</sup> the ECJ adopted an even stricter approach, holding that regardless of whether a party to a proceeding is a consumer, he may not represent other consumers before a national court under Articles 17 et seqq. Brussels I Regulation.

In *Schrems II*, the claimant, Mr. Maximilian Schrems, who is domiciled in Austria, brought an action against Facebook Ireland Limited, which has its registered office in Ireland, before the court in Austria. The claimant sought *inter alia* damages for numerous infringements of data protection provisions. However, the claimant not only brought a claim with respect to his own Facebook account but also on behalf of seven other Facebook users, who were domiciled in Austria, Germany and India and who had previously assigned their rights to the claimant.

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<sup>28</sup> ECJ Case C-89/91 of 19 January 1993 – *Shearson Lehman Hutton Inc. and TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH*, para. 18; see also ECJ Case C-464/01 of 20 January 2005 – *Johann Gruber v Bay Wa AG*, para. 34.

<sup>29</sup> See *Dickinson/Lein*, The Brussels I Regulation Recast, 1st edition 2015, para. 6.01.

<sup>30</sup> ECJ, *Shearson Lehman Hutton*, see Fn. 28.

<sup>31</sup> *Id.*, para. 24.

<sup>32</sup> ECJ Case C-167/00 of 1 October 2002, *Verein für Konsumenteninformation and Karl Heinz Henkel*, para. 32 et seqq.

<sup>33</sup> ECJ Case C-498/16 of 25 January 2018 – *Maximilian Schrems v Facebook Ireland Limited* (hereinafter “*Schrems II*”).

Seized by the Austrian courts, the ECJ held that the rules of special jurisdiction with respect to consumer contracts do not give jurisdiction “to the proceedings brought by a consumer for the purpose of asserting, in the courts of the place where he is domiciled, not only his own claims, but also claims assigned by other consumers domiciled in the same Member State, in other Member States or in non-member countries.” The ECJ added that “the jurisdiction of courts [...] cannot be established through the concentration of several claims in the person of a single applicant.”

In short, the ECJ held that even though a consumer may bring his own claim, he cannot benefit as the assignee of other consumers’ claims from the consumer forum for the purposes of a collective action.<sup>34</sup>

The ECJ recalled that the rules of special jurisdiction, such as those relating to consumer contracts, as a derogation to the general rules of jurisdiction must be strictly interpreted.<sup>35</sup> Therefore, a consumer is only protected if he brings an action in his own personal capacity as a claimant or as a defendant. Thus, according to the ECJ, the claimant must be party to the consumer contract in order to enjoy the benefit of special jurisdiction – the assignment of rights is not enough to confer jurisdiction on a court.<sup>36</sup> The ECJ – relying on previous case-law<sup>37</sup> – pointed out that the assignment of rights does not have an impact on the determination of whether a court has jurisdiction. Otherwise, as held in *ÖFAB*, it would become unpredictable for a defendant to know in which court he will be sued.<sup>38</sup>

Interestingly, the ECJ emphasized that consumer protection, as set out in Article 169 (1) TFEU, includes the right of consumers to organize themselves in order to safeguard their interests. With regard to Article 169 (1) TFEU, the ECJ held that, the fact that a consumer represents rights and interests of other consumers, does not deprive him of his status as a consumer within the scope of the Brussels I Regulation.<sup>39</sup> However, a court does not have international jurisdiction over claims that have been assigned by other consumers to the claimant.<sup>40</sup> In other words, the claimant is entitled to bring his action before the Austrian

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<sup>34</sup> ECJ, *Schrems II*, para. 43; see also Press Release No 07/18 of the CJEU dated 25 January 2018, available at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-01/cp180007en.pdf> (accessed 7 May 2018).

<sup>35</sup> ECJ, *Schrems II*, para. 43.

<sup>36</sup> ECJ, *Schrems II*, para. 44 et seqq.

<sup>37</sup> ECJ Case C-147/12 of 19 January 1993 – *ÖFAB, Östergötlands Fastigheter AB v Frank Koot, Evergreen Investments BV* (Hereinafter “*ÖFAB*”), para. 58; ECJ Case C-352/13 of 21 May 2015, *CDC Hydrogen Peroxide*.

<sup>38</sup> ECJ, *ÖFAB*, para. 58.

<sup>39</sup> ECJ, *Schrems II*, para. 39 et seq.

<sup>40</sup> *Id.*, para. 48.

courts, since his assurance to represent other consumer's rights does not affect his own status as a consumer. At the same time, he is deprived of the right to bring his action as an assignee of other consumers' interests and rights.

Even though the reasoning of the ECJ could be seen as inconsistent, the decision provides a level of certainty for defendants and therefore, is in line with the objectives set out in Recital 15 of the preamble to the Brussels I Regulation stating that the "*rules of jurisdiction should be highly predictable.*"

## **2. Collective Enforcement of Claims under Article 4 Brussels I Regulation**

Despite the difficulty of bringing a collective claim under Articles 17 et seqq. Brussels I Regulation, the Brussels I Regulation does not prevent consumers from bringing a collective claim in the courts of the Member State where the defendant is domiciled. Under Article 4 Brussels I Regulation, "*persons domiciled in a Member State shall ... be sued in the courts of that Member State.*" Article 4 establishes general jurisdiction, regardless of whether there is any specific connection between the claim and the forum.<sup>41</sup> Thus, under Article 4 Brussels I Regulation, German courts would have jurisdiction over a collective claim against Volkswagen since it is domiciled in Germany. Volkswagen could not then argue that it was unforeseeable to be sued in Germany as Recital 15 of the Brussels I Regulation's preamble states that "*the rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile*" (emphasis added).

However, even though a claim could be brought in German courts under Article 4 Brussels I Regulation, Germany currently lacks the necessary mechanism to bring collective claims, despite some efforts to establish collective redress.<sup>42</sup>

The German Civil Procedure Law allows the accumulation of individual claims, meaning that multiple claimants may jointly bring individual claims against the same party.<sup>43</sup> Alternatively, one could consider whether a representative action, similar to Mr. Schrems' action, is possible on behalf of the car owners. Yet, it is likely that German courts will find such representative claims against Volkswagen to be unfounded. The District Court of Braunschweig has already expressed its reluctance with regards to a representative claim

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<sup>41</sup> See *Dickinson/Lein*, The Brussels I Regulation Recast, 1st edition 2015, para. 3.05.

<sup>42</sup> As mentioned before, Germany introduced a model case system for market related actions.

<sup>43</sup> See Sect. 59 et seqq. of the German Code of Civil Procedure.

brought by myRight.<sup>44</sup> MyRight filed a claim against Volkswagen on behalf of more than 15,000 German car owners, who had previously assigned their rights to myRights.<sup>45</sup> The court pointed out its concerns about whether the assignment of rights was valid under German law.<sup>46</sup> Under German law, a party to a proceeding can only assert the rights of a third party under specific circumstances. From a procedural perspective, to bring a claim on behalf of a third party in German courts, (i) the third party must empower the claimant to bring the action, and (ii) the claimant must have a legitimate interest to assert the rights and interests of such third party.<sup>47</sup> Since even an economic interest is considered legitimate,<sup>48</sup> little concern arises from a procedural point of view. However, from a substantive perspective, the court will assess whether the assignment was valid. Here, German courts will assess whether the defendant's right to obtain reimbursement of their litigation costs would be at risk when allowing the assignee to bring the claim. In other words, whether a defendant's recovery will be limited, in the event that the assignee and claimant lacks financial resources to reimburse the defendant, if the case is dismissed. Relying on the latter ground, the Higher Regional Court of Düsseldorf rejected a claim filed by a Belgian corporation, the Cartel Damage Claims, on behalf of multiple companies that were victims of international cartels.<sup>49</sup> The German Court found that the assignment was contrary to public policy under Section 138 of the German Civil Code and therefore, invalid because it shifted the litigation risk to the detriment of the defendant.<sup>50</sup>

Thus, even though Article 4 Brussels I Regulation allows collective actions to be brought against Volkswagen before a German Court, problems arise on a national level since national courts might be reluctant to allow a representative claim.

### **3. Means to Harmonize Jurisprudence: Article 30 Brussels I Regulation**

Another alternative to gain an effect similar to that of a collective action could be through the application of Article 30 Brussels I Regulation. This Article, while not well recognized or

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<sup>44</sup> <https://www.myright.de/abgasskandal/sammelklage-gegen-vw-lg-braunschweig-verneint-befangenheit/> (accessed 7 May 2018).

<sup>45</sup> <https://www.hausfeld.com/news-press/hausfeld-files-for-15000-volkswagen-customers-in-single-largest-consumer-co> (accessed 7 May 2018).

<sup>46</sup> <https://www.myright.de/abgasskandal/sammelklage-gegen-vw-lg-braunschweig-verneint-befangenheit/> (accessed 7 May 2018).

<sup>47</sup> *Hübsch*, in Vorwerk/Wolf (eds.), Code of Civil Procedural, Beck Online Commentary, 28. Edition, Sec. 51, para. 46 et seqq.

<sup>48</sup> *Hübsch*, in Vorwerk/Wolf (eds.), Code of Civil Procedural, Beck Online Commentary, 28. Edition, Sec. 51, para. 50.

<sup>49</sup> Higher Regional Court of Düsseldorf, Case VI- U (Kart) 3/14 of 18 February 2015.

<sup>50</sup> *Id.*

frequently implemented, stipulates that a court can stay its proceedings if a related action is pending in a court of a different Member State. In the case of VW, this would mean that all, but one, court proceeding would be stayed until there is a decided lead case which would form a precedent for all other courts to follow.

For the application of Article 30 (1) Brussels I Regulation there are two main requirements: firstly, there must be a pending action in a different Member State and secondly, the actions must be related. Cases are deemed related under Article 30 (3) Brussels I Regulation when they “*are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments.*” The ECJ ruled on the former version of the Article,<sup>51</sup> that the interpretation of the Article must be broad and cover all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive.<sup>52</sup> This broad definition of “related action” promotes a coherent application of the law throughout the European Union.<sup>53</sup> Therefore, it is sufficient for the stay of proceedings if two cases have the same questions of law or fact.

As shown above, the questions of fact as to how the engine management software works and the levels of NOx emissions are not only related in all VW cases, but virtually the same. Furthermore, the questions of law regarding the Regulation (EC) No 715/2007 are also related throughout the entire European Union.<sup>54</sup>

Also, pending cases in a different Member States exist.<sup>55</sup> One problem might arise, when there is more than one pending case in one Member State. Article 30 only applies in an international context. It allows a national court to stay proceedings when a related case is pending in the court of *another* Member State. As a consequence, a court can stay the proceedings until the court of another Member State has rendered its judgment – however, unless the procedural law of the Member States provides for it, it cannot stay its proceedings because a court of the *same* Member State is ruling on a related case and therefore does not promote the harmonization of jurisprudence on a national level.

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<sup>51</sup> Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, Article 22.

<sup>52</sup> ECJ Case C-406/92 of 6 December 1994, para. 53.

<sup>53</sup> ECJ Case C-406/92 of 6 December 1994, para. 55 and the Opinion of the Advocate General on the same case, para. 28 (“encourage harmonious judicial decisions”). A similar view regarding Article 28 of the Brussels I Regulation of 22 December 2000 (Regulation (EC) No 44/2001) was taken in the Opinion of the Advocate General delivered on 30 January 2014 in the ECJ Case C-438/12, para. 95, as well as by the German Federal Court of Justice, Case VI ZR 45/12 of 19 February 2013.

<sup>54</sup> However, there is no relation between legal issues regarding tort law as this area of law has not been harmonized yet and thus is different in each Member State.

<sup>55</sup> <https://www.theguardian.com/business/2017/mar/20/thousands-join-uk-legal-case-against-vw-over-emissions-scandal> (accessed 7 May 2018).

In the VW case, all courts in the EU could then stay their own proceedings and wait for a lead case to reach a conclusion. Of course, this lead decision would not dispense with individual case rulings and certainly not with the redress available to affected individuals to sue VW. Therefore, this will not be as effective as a collective action. But in any event, a clear lead case, deciding all questions regarding Regulation (EC) No 715/2007, determining for example if the software update can be considered successful would make all following court procedures easier to handle.

Nevertheless, even this limited opportunity is not being used. The main reason for this is that no party can formally request that a court stay the proceedings. Article 30 Brussels I Regulation does not confer any right upon the claimant or the defendant. The wording says that the court “may” stay the proceedings, giving the court broad discretion on whether or not to make use of the norm. The decision of the court to stay the proceeding has to be justified, but the standard for the justification is rather low. The German Federal Court defines the following aspects as relevant for the justification: the level of connection between the cases; the risk of contradicting decisions; the interests of both parties; the effect on the efficiency of the court proceedings; the situation and the expected duration of the case in the other Member State; the proximity to the evidence and the reasons for the jurisdiction of the court in the other Member State.<sup>56</sup> As long as the court takes into account some of these aspects and does not obviously infringe the interests of the claimant or defendant, its decision will be upheld.<sup>57</sup> An additional problem is the lack of knowledge about the norm. As many national codes of procedural law do not include any corresponding norms, judges do not examine the existence of related cases pending at other courts on their own account. Even if a judge does verify the existence of a related case, she will have difficulties, as not all records are easily accessible. In fact, in Germany, one district court does not know about the pending cases at another district court – sometimes, even judges at the same court do not know the cases of their colleagues. In this kind of environment, it would seem virtually impossible to become aware of any related case in another court, of another Member State, adjudicating in another language. Quite often, the parties themselves are more informed about pending cases in other Member States: it can be assumed that VW knows about all claims brought against the company in different places as well as the law firms, representing the customers and usually

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<sup>56</sup> German Federal Court of Justice, Case VI ZR 45/12 of 19 February 2013.

<sup>57</sup> Regional Higher Court of Düsseldorf, Case Az. I-2 W 6/13 of 4 March 2014; the ECJ was consulted on the possible reasons for the application of Article 30 in ECJ Case C-438/12 of 3 April 2014, but did not comment on it due to the irrelevance of the question for the case.

working on more than one case. However, as mentioned before, the parties have no right to formally demand a stay of proceedings.

The parties could overcome this obstacle regarding the lack of a formal right by simply suggesting the use of Article 30 (1) Brussels I Regulation to the judges. If one party can furnish the judge with sufficiently accurate data on a similar case in another Member State, with reference to Article 30, the judge might follow that lead. In terms of the VW Diesel cases, no court made use of Article 30 (1) Brussels I Regulation nor was this possibility considered by any party to the case so far. One can only speculate as to the reasons for this. VW might be trying to inhibit a court ruling by a higher regional court or the federal court.<sup>58</sup> A company may consider the use of Article 30 as a risk for the company to be bound by a precedent that is economically detrimental. Thus, it is understandable that VW tries to avoid the creation of “binding” precedent. From the customers’ point of view, it may be more favorable, in the interests of expediency, to litigate their cases individually instead of waiting for a ruling on another case.

To sum up, Article 30 (1) Brussels I Regulation could be a feasible option to establish a lead case system throughout the European Union. However, because of the lack of an obligatory stay, the lack of knowledge about the provision and of the existence of related cases in other Member States, the system is not used at the moment and probably will not be of much practical gain in the future either.

#### **4. Summary**

In summary, the Brussels I Regulation does not give an adequate solution to handle a collective consumer action brought against VW. The ECJ made clear in its *Schrems II*-ruling that it will not allow a claimant to bring a claim on behalf of other consumers at the claimant’s forum. It thereby pointed out that it is not for the ECJ, but for the European legislature to introduce a collective redress mechanism. Furthermore, a claim brought against VW at its domicile in Germany is conceivable, but a defendant will face the difficulty that German courts are hostile to representative actions and collective redress in general. Though Article 30 Brussels I Regulation bears potential for harmonizing jurisprudence, it faces hurdles on a practical level.

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<sup>58</sup> The previously mentioned decision of the Higher Regional Court of Dresden, Case 10 U 1561/17 of 1 March 2018 did not concern VW directly but an independent retailer.

## V. Solutions

Since there is no convincing possibility to achieve collective redress under current EU law, the last part of this paper focuses on a possible amendment of the Brussels I Regulation (1.) and on Article 169 in conjunction with Article 114 TFEU (2.) as a basis for introducing collective redress.

### 1. Amending the Brussels I Regulation

One possible solution to introduce collective redress to the European legal landscape could entail the amendment of the Brussels I Regulation. As seen above, according to Article 18 (1) Brussels I Regulation, a consumer can currently bring proceedings related to consumer matters either in the court of the Member State in which the defendant or in which the consumer himself is domiciled. This provision could be extended to consumer matters brought jointly by a number of consumers in cases of the same nature, even if some of them are domiciled in different Member States.

The Brussels I Regulation is based on Article 81 (2)(a)(c)(e) TFEU, according to which the European Parliament and the Council can adopt measures in the interest of judicial cooperation in civil matters having cross-border implications. Such measures can *inter alia* aim at ensuring the compatibility of rules concerning jurisdiction and the effective access to justice. Amending the regulation requires the relevant EU bodies to act in accordance with the ordinary legislative procedure.<sup>59</sup> In this context, the Commission submits its proposal to the European Parliament and the Council, which is then adopted, amended or rejected in a number of readings, if need be.<sup>60</sup>

Affirming such extended jurisdiction over consumer matters would allow for the so-called “forum shopping” where consumers can benefit from the domestic legal order of a Member State with collective redress procedures in place. For example, German consumers who lack the opportunity to file a collective action could then join litigants in other Member States in their collective procedure under those procedural rules.

This amendment has the advantage that it does not require complex and costly revisions of each national laws of civil procedure in order to insert collective actions that are alien to some existing systems. It would work under the assumption that all national laws remain the same, while the protection of consumers is enhanced by providing jurisdiction in another Member State where collective procedures are already available.

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<sup>59</sup> Article 294 TFEU.

<sup>60</sup> For details, see *Schoo*, in Schwarze/Becker/Hatje/Schoo (eds.), TFEU Commentary, 2012, Article 294.

However, concerns remain since such a change could interfere with the conditions of the judiciary in Member States. The availability of collective action in a Member State could lead to an overload of pending cases if thousands of foreign consumer claims were added by those who cannot find recourse in their own state. This would be especially burdensome to smaller countries and their financial and judicial means to cope with such outsized and demanding lawsuits.

For the defendant, it would become less certain where and under which laws consumers would take action against him.<sup>61</sup> This conflicts with the objective of Recital 15 of the preamble of the Brussels I Regulation, which asks that the rules of jurisdiction be highly predictable.<sup>62</sup> In the VW Diesel case in particular, VW would not know which forum German customers would choose. Not only could they search for a forum which allows for collective action, but also take into account other procedural advantages that go beyond the intended idea of protecting consumer rights.

In conclusion, while the amendment of Article 18 Brussels I Regulation is a viable option, it brings along a few unwanted consequences.

## **2. Article 169 TFEU – Harmonizing Consumer Protection**

Another possibility for the EU to introduce a collective redress mechanism could be a Directive aimed at harmonizing the different existing procedures in the Member States. Based on Article 169 TFEU, the European Union is entrusted with the task to promote the interests of consumers. Strong emphasis lies on consumer protection and the aim to achieve a high level of protection in all EU countries.<sup>63</sup> To this end, the EU can adopt measures pursuant to Article 114 TFEU in the context of the completion of the internal market.<sup>64</sup> This refers to the competence of the EU to adopt measures for the approximation of the national provisions laid down by law, regulation or administrative action in the Member States, which have as their object the establishment and functioning of the internal market.<sup>65</sup> Indeed, it can be argued that collective redress for consumers is crucial to the progressive realization of the internal market. The functioning of the internal market is closely linked to the fundamental

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<sup>61</sup> On suggestions to limit the number of potential courts, see *Strong*, Cross-Border Collective Redress in the European Union: Constitutional Rights in the Face of the Brussels I Regulation, available at <https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1363&context=facpubs> (accessed 7 May 2018), p. 43 et seqq.

<sup>62</sup> See above Part IV.

<sup>63</sup> Article 169 (3) TFEU.

<sup>64</sup> Article 169 (2)(a) TFEU.

<sup>65</sup> Article 114 TFEU in conjunction with Article 26 TFEU.

freedoms of European citizens, i.e. the free movement of goods, labor, services, and capital.<sup>66</sup> EU-wide collective redress can strengthen consumer confidence in the retail internal market and encourage companies to comply with EU law. This increases the exchange of products or services across borders while preventing further fragmentation of national laws, which possibly endangers the equal treatment of consumers.<sup>67</sup>

In April of 2018, the Commission finally distributed a draft Directive on representative actions for the protection of the collective interests of consumers on the basis of Article 169 in conjunction with Article 114 TFEU.<sup>68</sup> The proposal builds on the previous findings that in times where risks of infringements are increasing due to economic globalization and digitalization, consumers lack protection in many Member States, which do not allow them to enforce their rights collectively.<sup>69</sup> For the first time, the EU introduces a compensatory collective redress mechanism enabling qualified entities to bring representative actions for the purpose of redress for consumers harmed by infringements.<sup>70</sup> In this regard, the proposed mechanism aims to strike a balance between facilitating access to justice for consumers and ensuring adequate safeguards from abusive litigation.<sup>71</sup> These safeguards are for instance elements such as the prohibition of punitive damages and of absence of limitations as regards the entitlement to bring an action on behalf of harmed consumers.<sup>72</sup> Most importantly, it is set out in detail under which conditions qualified entities can bring representative actions. They need to be properly constituted according to the law of a Member State, have a legitimate interest in ensuring compliance with the relevant EU law, and have a non-profit making character.<sup>73</sup> Requirements also exist as to the funding of the entity itself and the supported action as well as the disclosure of the source of these funds.<sup>74</sup> In turn, qualified entities designated in one Member State will then be allowed to apply to the courts of another Member State who shall accept legal standing.<sup>75</sup>

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<sup>66</sup> Articles 28 et seqq., 45 et seqq., 56 et seqq., 63 et seqq. TFEU.

<sup>67</sup> Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM (2018) 184 final, 11 April 2018, p. 6.

<sup>68</sup> Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM (2018) 184 final, 11 April 2018.

<sup>69</sup> *Id.*, p. 1 et seq.

<sup>70</sup> *Id.*, Articles 5, 6.

<sup>71</sup> *Id.*, Recital 4; Article 1.

<sup>72</sup> *Id.*, Recital 4.

<sup>73</sup> *Id.*, Recital 10; Article 4.

<sup>74</sup> *Id.*, Article 7.

<sup>75</sup> *Id.*, Article 16.

Once the Directive is proclaimed, Member States will be under the obligation to transform the provisions into national law.<sup>76</sup> Compared to a Regulation, this has the advantage that Member States can take into account their national frameworks of civil procedure and their judicial traditions when making the necessary adjustments in order to introduce such representative actions. The EU grants flexibility to the Member States in this regard. For example, Member States will have the possibility to empower courts to decide whether to issue a declaratory decision regarding the liability of a company instead of a redress order in cases where the quantification of the harm of the consumers is complex due to the characteristics of their individual harm. In this case, a representative action would turn into the creation of a model case for subsequent individual claims. However, flexibility shall not be available in mass harm situations where consumers suffered comparable harm and are identifiable.<sup>77</sup>

At this time, it is difficult to assess when and whether this proposed Directive will become effective. It certainly would be a significant development for the protection of consumers and bring change to the rules of civil procedure in a number of Member States.

## **VI. Conclusion**

Though it is uncertain whether consumers will be successful in their claims against Volkswagen for the manipulations on Diesel engines, this case has created momentum for an even more vivid debate on the introduction of collective redress mechanisms. The paper has touched on technical and legal problems surrounding this specific case. Collective redress could be a means to lower some of the burdens that consumers face when litigating their claims, most importantly increase efficiency in the judicial proceedings by creating uniformity among the decisions.

At this time, the existing legal framework in the EU does not allow for any type of collective action. As seen, in the latest ruling in the *Schrems II* case, the ECJ rejected jurisdiction of courts for consumer claims that were assigned to a representative and brought to court on their behalf. Other options under the Brussels I Regulation, such as the application of Article 4 or Article 30 are not tailored to the situation at hand.

This result is owed to the fact that the introduction of collective redress requires a legislative change, as the ECJ also pointed out. Possibilities include the amendment of the Brussels I

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<sup>76</sup> “A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”, cf. Article 288 (3) TFEU.

<sup>77</sup> *Id.*, Recital 19.

Regulation to extend jurisdiction for collective actions, or an entirely new legislative act that introduces a collective redress mechanism.

The efforts to introduce a collective redress mechanism based on the Treaty of the European Union and thus to make it a European product at its heart, will only go as far as it is carried by the necessary political support of the Member States and their citizens. So far, the Commission – though interested in improving enforcement and access to justice for consumers – only acted modestly by repeating the principles, which should guide the introduction of collective redress mechanisms.<sup>78</sup> These include the loser-pays-principle, the rejection of punitive damages, the opportunity for out-of-court settlements, and adequate information channels.<sup>79</sup>

Only recently, the Commission released a concrete proposal for a Directive on representative actions for the protection of the collective interests of consumers. It remains to be seen whether this initiative will bear fruits.

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<sup>78</sup> *Fairgrieve/Howells*, *Collective Redress Procedures - European Debates*, *International & Comparative Law Quarterly*, Vol. 58, p. 379 et seq. (p. 380 et seq.).

<sup>79</sup> Commission Recommendation of 11 June 2013.