

The Consumer Voice in Europe

SEVEN YEARS OF DIESELGATE

A never-ending story



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EC register for interest representatives: identification number 9505781573-45



Co-funded by the European Union

Ref: BEUC-X-2022-130 – 12/12/2022

About this report

Seven years ago, the Volkswagen Dieseldgate fraud came to light. Since then, clear evidence has surfaced showing that, not only Volkswagen, but also an entire industry has equipped its vehicles with manipulation devices. The Court of Justice of the European Union has made it clear that such defeat devices are illegal and that the affected consumers are entitled to obtain compensation. Yet the number of European consumers who received or still have a chance of receiving compensation remains limited today. Due to the lack of collective redress procedures in many countries, only a few consumer organisations could go to court to demand justice for consumers. While these BEUC member organisations have continuously pursued their legal battles, their road to achieving compensation for consumers has been a bumpy one, paved with appeals and other procedural tricks leading to extensive delays. Consequently, even in countries where courts have ruled in favour of consumers, some time may still be needed before we can finally celebrate victory. Nevertheless, significant developments are eagerly awaited in 2023. This report is a follow-up to our previous reports taking stock of BEUC members' activities in the context of the Volkswagen Dieseldgate.

Contents

1. Introduction	3
2. A failure of public enforcement.....	4
2.1. The inconclusive action of the CPC-network.....	4
2.2. Facing new procedural obstacles: the application of the <i>ne bis in idem principle</i>	5
2.3. The Court of Justice of the European Union turning the tables	6
3. Updates on BEUC members' actions	8
3.1 Altroconsumo (Italy)	8
3.2. Consumentenbond (The Netherlands).....	8
3.3. DECO (Portugal)	8
3.4. Fédération Romande des Consommateurs – FRC (Switzerland)	9
3.5. Organización de Consumidores y Usuarios – OCU (Spain)	9
3.6. Test Achats / Test Aankoop (Belgium)	9
3.7. UFC-Que Choisir & CLCV (France)	9
3.8 Union Luxembourgeoise des Consommateurs – ULC (Luxembourg)	10
3.9. Verbraucherzentrale Bundesverband – vzbv (Germany)	10
3.10. Verein für Konsumenteninformation - VKI (Austria)	10
3.11. Zveza Potrošnikov Slovenije – ZPS (Slovenia).....	11
3.12. Intermediate result and what may be expected in a near future	11
4. Guide to a post-Dieselgate era	12
4.1. Sharper teeth for the CPC Regulation	12
4.2. The Representative Action Directive: hopefully a game-changer	12

1. Introduction

The story of the largest industrial fraud in modern history is unfortunately too well-known: on 23 September 2015, the US Environmental Protection Agency (EPA) announced that Volkswagen had admitted to using special software (known as a “defeat device”) to make its cars appear to meet emission standards whereas the engine's emissions in real life exceeded those permitted by law.¹ This fraud, as it later turned out, was not limited to the US: defeat devices had been embedded into approximately eleven million cars sold worldwide, and about eight million of these vehicles were marketed in the European Union.²

In the wake of the fraud, several consumer organisations took action to protect the interests of concerned consumers and claimed compensation for VW’s manipulation of its cars’ emissions. Wherever possible, BEUC member organisations filed collective redress actions to defend their consumers. However, due to the lack of collective redress tools in some countries, BEUC members were not able to seek justice for all their consumers or had no choice but bring actions on behalf of individual consumers as test cases.

In 2019 and 2020, BEUC published reports describing the state-of-play and stressed that the Dieselgate litigation was making little progress.³ This is because Volkswagen continuously tried to downplay its responsibility and used procedural tricks to slow down proceedings and to compartmentalise the litigation. Apart from the settlement between our member vzbv and VW concluded in January 2020 through which approximately 240,000 German consumers received compensation, in other EU countries, consumer organisations are still fighting Volkswagen in court. In May 2022,⁴ VW settled the dispute in the United Kingdom with a £193m pay-out but insisted that the settlement did not amount to any admission of liability, causation or loss, but was simply “the most prudent course of action commercially”. One may wonder why the same economic logic has not been applied by Volkswagen in other Member States, where costly court proceedings are still ongoing today. Even more recently, on 14 November 2022, VW refused the conciliation proposed by our member Test Achats/Test Aankoop before the Brussels Court of first instance.⁵

This report provides updates on the Dieselgate litigation, and the various actions launched by consumer organisations to get compensation for European consumers. It also provides intermediate conclusions from the latest developments and what may be expected in the near future.

¹ <https://www.bbc.com/news/business-34345210>; VW’s admission came after the EPA and Californian Air Resources Board (CARB) sent a formal ‘Notice of Violation’ to Volkswagen on 18 September 2015 and made the letter public: <https://www.epa.gov/sites/default/files/2015-10/documents/vw-nov-cao-09-18-15.pdf>

² The number of VW diesel vehicles affected by Dieselgate was revealed by Volkswagen in a letter to the Members of the European Parliament from countries with VW Group facilities, dated 8 December 2015: <https://www.politico.eu/wp-content/uploads/2015/10/VW-letter-to-MEPs.pdf>

³ [Volkswagen Dieselgate four years down the road: an overview of the enforcement actions and policy work by BEUC and its members since the Dieselgate scandal](#); [Five years of Dieselgate: a bitter anniversary. 2015-2020: a long and bumpy road towards compensation for European consumers](#)

⁴ <https://www.theguardian.com/business/2022/may/25/volkswagen-settles-uk-dieselgate-claims-with-193m-payout>

⁵ <https://www.test-achats.be/mobilite/autos/presse/dieselgate-verzoeningszitting>

2. A failure of public enforcement

2.1. The inconclusive action of the CPC-network

In September 2017, the CPC-network took action under the lead of the Netherlands Authority for Consumers and Markets (ACM).⁶ The CPC authorities jointly reached out to Volkswagen with a common position expressing concerns regarding the repair process and guarantee of the affected cars after the update and urging VW to provide consumers with detailed information about its “Trust Building measure”.⁷ When responding to the CPC-network’s concerns, Volkswagen openly refused to fulfil some important demands, namely making the ‘Trust Building measure’ legally binding and without conditions and clearly informing consumers about the exact reasons why the repairs were needed (e.g., the existence of software prohibited by EU law).⁸

In September 2020, EU Commissioner Reynders sent a formal letter to Volkswagen strongly encouraging it to offer fair and comparable compensation to all affected consumers in the Union.⁹ Earlier that year, VW had settled a model declaratory action brought by our member vzbv in Germany and had agreed to pay compensation to hundreds of thousands of consumers domiciled in Germany.¹⁰ However, car owners that did not have their legal residence established in Germany at the time of the purchase were excluded from the settlement. With that letter, the European Commission intended to react to VW’s unequal treatment of EU consumers, which has been denounced by consumer organisations. The letter, however, did not achieve the desired effect. VW argued that the settlement reached with German consumers reflected a “specific situation of that jurisdiction” and that voluntary payments to European consumers residing outside Germany were not justified, because the affected cars had been altered to meet legal requirements.

On 28 September 2021, the CPC authorities issued another declaration and called for the protection of all EU consumers.¹¹ The authorities argued that “compensatory protection may be considered one of the adequate and effective means to combat unfair commercial practices” required by Article 11 UCPD. However, Volkswagen did not make the requested move.

Clearly, **the Dieselgate fraud unfortunately showed the limited deterrence of the CPC enforcement system and the need for its revision.** Under existing rules, most CPC authorities lack power to order VW (or other traders in similar cases) to compensate consumers. The Regulation only provides that a trader may propose to the authorities an undertaking to provide appropriate remedies to consumers affected by an infringement falling in the remit of the CPC Regulation, but this is precisely what VW refused and still refuses in most countries.

⁶ The EU Consumer Protection Cooperation (CPC) [Regulation](#) links national consumer authorities in a pan-European enforcement network. Thanks to this framework, a national authority in one EU country can call on their counterparts in another EU country to ask them to intervene in case of a cross-border infringement of EU consumer rules.

⁷ <https://ec.europa.eu/info/sites/default/files/cpcvwcommonposition.pdf>

⁸ https://ec.europa.eu/info/sites/default/files/2017-10-09cpcantwortanschreiben_0.pdf

⁹ https://ec.europa.eu/info/sites/default/files/2020_08_11_letter_from_commissioner_reynders_to_volkswage_n_on_compensation.pdf

¹⁰ https://www.vzbv.de/sites/default/files/downloads/2020/02/28/20-02-28_vzbv_pm_vergleich_vw_en.pdf

¹¹ https://ec.europa.eu/info/sites/default/files/declaration_of_the_cpc_network_on_vw_-_final.docx.pdf

Overall, the response of consumer authorities to the fraud has been disappointing. Not even a handful of authorities started procedures and imposed fines on Volkswagen. Apart from the €27m (PLN 120 million) fine imposed on VW by the Polish Office of Competition and Consumer Protection (UOKiK) for issuing false information in advertising materials,¹² in most cases the fines were “drops in the ocean”. In 2016, the Italian Competition and Market Authority (AGCM) was the first to act and fined Volkswagen AG and Volkswagen Italia €5m (equivalent to 0.0068% of VW’s turnover),¹³ while in November 2017, the Dutch Authority for Consumers and Markets (ACM) imposed an even lower fine of €450,000 on VW.¹⁴ Yet these consumer authorities acted, while the majority did not take measures at the national level.

2.2. Facing new procedural obstacles: the application of the *ne bis in idem* principle

Lately, Volkswagen has objected against all fines and raised the application of the *ne bis in idem* principle to avoid additional sanctions. The *ne bis in idem* principle provides that no one should be prosecuted or punished twice for the same facts. The case law of the Court of Justice of the EU has established strict criteria for this principle to apply.¹⁵ In parallel, the CPC Regulation (Recital 29) states that the *ne bis in idem* principle should be respected, and that “if the same trader repeats the same act or omission that constituted an infringement covered by this Regulation which had already been addressed by enforcement proceedings that resulted in the cessation or prohibition of that infringement, it should be considered to be a new infringement and the competent authorities should address it”. However, as the wording explicitly refers to “repeated” infringements, there is a lack of guidance as to whether CPC authorities in different Member States can take enforcement measures against a trader for the “same” infringement.

Volkswagen’s argument led to a deadlock: several courts (e.g., in Belgium¹⁶, Spain¹⁷) in the EU have suspended their investigations or prosecutions against VW because they are unclear as to whether the *ne bis in idem* principle may apply (namely, whether it is permissible to impose additional sanctions after the high penalties imposed by the German prosecutor in Braunschweig¹⁸). In France, the Paris Court of Appeal rejected the application of the *ne bis in idem* in the ongoing criminal proceedings.¹⁹

Finally, in December 2021, the Italian Council of State submitted a request for a preliminary ruling to the Court of Justice of the EU raising questions on the implications of the *ne bis in idem* principle to the sanctions imposed to VW by the Italian Competition Authority (AGCM).²⁰ The question raised by the Council was whether an administrative fine imposed at the end of a proceeding commenced prior to criminal proceedings and concerning the same facts and against the same (legal) person, should be annulled where such criminal proceeding is finally concluded by a court of another Member State, even if commenced subsequently, and payment of the penalty imposed has been made. The Court of Justice of the EU will among other things have to verify whether

¹² https://uokik.gov.pl/news.php?news_id=16127

¹³ <https://en.agcm.it/en/media/detail?id=0899f747-5c9e-4642-b866-c4ac22cc60e0>

¹⁴ <https://www.acm.nl/en/publications/acm-fines-volkswagen-misleading-practices-diesel-scandal>

¹⁵ In several cases (e.g., C-489/10, C-617/10), the CJEU applied the criteria known as Engel criteria, drawing inspiration from the case law of the European Court of Human Rights (Engel and Others v. Netherlands, ECtHR).

¹⁶ <https://www.lecho.be/entreprises/auto/la-justice-belge-refuse-de-poursuivre-volkswagen-au-penal/10294695.html> La justice belge refuse de poursuivre Volkswagen au pénal

¹⁷ <https://www.poderjudicial.es/search/openDocument/41cdcc5174068125>

¹⁸ <https://staatsanwaltschaft-braunschweig.niedersachsen.de/startseite/aktuelles/presseinformationen/vw-muss-bugeld-zahlen-174880.html>

¹⁹ <https://www.quechoisir.org/actualite-affaire-volkswagen-encore-un-peu-d-espoir-pour-les-consommateurs-francais-n98272/>

²⁰ [Case C-27/22](#) Request for a preliminary ruling from the Consiglio di Stato (Italy) lodged on 11 January 2022. Volkswagen v Autorità Garante della Concorrenza e del Mercato (AGCM).

penalties imposed on the basis of the UCPD may qualify as penalties of a “criminal nature”. Until the Court provides the necessary clarifications on the implications of the *ne bis in idem principle*, criminal and administrative proceedings are on hold.

2.3. The Court of Justice of the European Union turning the tables

From the outset, CJEU rulings and opinions of the Advocates General have been instrumental in unravelling the reel of Dieseltgate litigation across the EU.

On 17 December 2020, the Court of Justice of the European Union decided that a car manufacturer cannot install a defeat device that improves, during approval procedures, the performance of the vehicle emission control system and thus obtains a certification that the vehicle meets the required legal emission standards.²¹ Volkswagen had argued in favour of a restrictive interpretation of the law, which would have limited the definition of a defeat device to any technologies and strategies operating “downstream” of the engine (namely, after the production of exhaust gases). However, the CJEU ruled that the law should also apply to “upstream” technology, which by definition also includes software used to manipulate diesel exhaust emissions under test conditions. **The Court, therefore, concluded that VW’s defeat devices were unlawful.**

Additional recent rulings have had significant ramifications for the ongoing actions against Volkswagen.

- In his Opinion delivered in June 2022, in Case C-100/21 (QB v Mercedes-Benz Group AG), Advocate General Athanasios Rantos stated that **EU law requires Member States to provide that a purchaser of a vehicle has a right to compensation against that vehicle manufacturer where that vehicle is equipped with an unlawful defeat device.** It is for the Member States to calculate such compensation insofar as it is commensurate with law or damage sustained by the consumer.²²
- On 14 July 2022, the Court of Justice of the EU held in a series of joint judgments that the German car manufacturer’s software update – for cars that were programmed to cheat in lab-based nitrogen oxide (NOx) emission tests – also constitute so-called defeat devices that are contrary to EU law.²³ Volkswagen’s **software update only ensures compliance with EU NOx emission limits when driven at temperatures between 15-33°C and below altitudes of 1,000 metres.** Beyond those limits, the manufacturer’s diesel engines stop the exhaust recirculation process aimed at reducing NOx emissions, the court concluded. “Ambient temperatures below 15°C are to be considered as normal within the territory of the European Union,” reads an ECJ summary of the ruling. Therefore, the Court finds that a device which ensures compliance with the NOx emission limits only in the temperature window does in principle constitute a defeat device prohibited under Article 5(2) of Regulation No 715/2007”. Considering that the lack of conformity cannot be considered as ‘minor’, the Court of Justice of the EU secured European consumers’ fundamental right to have their purchase contracts of Volkswagen vehicles to be rescinded.

²¹ In [Case C-693/18](#), CLCV and others.

²² [Opinion of Advocate General Rantos delivered on 2 June 2022](#), Case C-100/21 (QB v Mercedes-Benz Group AG, formerly Daimler AG).

²³ Judgement in [Case C-134/20](#), IR v Volkswagen AG.

"Software in diesel vehicles which reduces the effectiveness of the emission control system at normal temperatures during most of the year constitutes a prohibited defeat device. Since such a vehicle defect is not minor, rescission of the sale contract in respect of the vehicle is not, in principle, precluded".

Judgment of the Court of Justice of the European Union in Cases C-128/20, C-134/20, C-145/20

This series of joint judgements issued by the Court of Justice of the EU in July had its first important effect in October 2022, when a Spanish court near Alicante (*Primera Instancia e Instrucción número 1 de Ibi*) upheld the action of the owner of an Audi vehicle equipped with a defeat device.²⁴ The court decided that the contract between the car dealer and the consumer was void and that the latter was therefore entitled to a full refund of the purchase price (i.e. €35,000). The court also highlighted that "the selling entity failed to comply with its pre-contractual, contractual and post-contractual information obligations. This could have influenced the formation of the consumer's consent and induced him to make an error as to the nature of the product he was contracting". According to the judge, if he had been informed of the deficiencies of the software regarding "the misleading emission of gas emissions" he would not have purchased the vehicle.

- Recently, on 8 November 2022, the Court issued an important ruling in Case C-873/10,²⁵ bringing consumer and environmental organisations even closer together in their battle for consumer and environment protection. First, the Court provided for an interpretation of the Aarhus Convention, in conjunction with the EU Charter of Fundamental Rights and with the Regulation No 715/2007.²⁶ It stated that **an environmental association**, authorised to bring legal proceedings in accordance with national law, **must be able to challenge before a national court an administrative decision granting or amending EC type-approval which may be contrary to the prohibition on the use of defeat devices**. Precluding this legal standing would reduce the effectiveness of the emission control systems. Second, the Court once again confirmed that software in diesel vehicles which reduces the effectiveness of the emission control system at normal temperatures during most of the year constitutes a prohibited defeat device. The Court stressed that, **even if one of the exceptions justifying the use of defeat device was applicable, a defeat device that under normal driving conditions operated during most of the year would still be considered prohibited**.²⁷ To accept such a device could result in the exception being applied more frequently than the prohibition and would, therefore, result in a disproportionate infringement of the principle of limiting nitrogen oxide (NOx) emissions.

²⁴ <https://www.lainformacion.com/empresas/juzgado-declara-nulo-compraventa-coche/2875283/>

²⁵ Case C-873/19 | Deutsche Umwelthilfe (Approval of motor vehicles)

²⁶ 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.

²⁷ The software at issue establishes a temperature window under which the exhaust gas recirculation (EGR) rate is 0% when the outside temperature is below -9 °C, 85% when it is between -9 and 11°C, and increases above 11 °C to be 100% operational only at outside temperatures above 15 °C. The EGR rate is, therefore, reduced to 85% where the average temperatures recorded in Germany — which for 2018 would have been 10.4 °C — are reached.

3. Updates on BEUC members' actions

3.1. Altroconsumo (Italy)

Altroconsumo (AC) filed a [collective redress action](#) against VW AG and VW Italia in 2016, on behalf of nearly 80,000 consumers. The case was successfully won by AC in July 2021, when the District Court of Venice awarded approximately €3,300 to 63,000 consumers participating in the action.²⁸ The Court also awarded moral damages resulting from VW's criminal conduct (i.e., fraud and fraudulent trading). In addition, the Court ordered the losing parties to pay double court costs in accordance with Article 96 (3) of the Italian Code of Civil Procedure for the so-called "abuse of process". The Court indeed took the view that VW had hindered the reaching of a timely decision through dilatory and unfair procedural practices. VW AG and VW Italia [appealed](#) this decision to the Court of Appeal of Venice in February 2022. In June 2022, the Court temporarily suspended the enforceability of the Court of first instance's decision. The next hearing before the Court of Appeal of Venice will be held in May 2023.

3.2. Consumentenbond (The Netherlands)

In 2016, [Consumentenbond](#) (CB) filed a complaint ("enforcement request") to the Dutch Authority for Consumers and Markets (ACM) for unfair commercial practices. In 2018, the ACM investigations led to a (at that time) maximum fine of €450,000 on the Volkswagen Group. This was challenged by the car manufacturer. The Rotterdam Court will consider the case once the European Court of Justice has ruled on the preliminary question raised by the Italian Council of State. CB is involved as an interested party.

In 2020 and 2021, together with the Volkswagen Group Diesel Efficiency Foundation (VGDES), CB initiated four ["bellwether trials"](#) (test-cases), on behalf of four consumers. The actions are still ongoing, and the first substantive hearing will take place on 21 December 2022 before the Subdistrict Court of Groningen. The others will follow during the course of 2023. In parallel, CB and the Stichting Car Claim (SCC) have announced [new actions](#) against Citroen, Dacia, Mercedes Benz and other car manufacturers.

Other foundations are also active on behalf of Dieselgate-disadvantaged diesel owners in the Netherlands. In a case for collective redress, brought by SCC, the [Amsterdam Court ruled in June 2021](#) that buyers of a diesel equipped with cheating software are entitled to a price reduction of €3,000 (new vehicles) or €1,500 (second-hand vehicles). The ruling has been appealed by VW. Consumentenbond was not involved in this procedure, but the verdict may favourably influence the bellwether cases.

3.3. DECO (Portugal)

In October 2016, DECO filed an opt-out collective redress action against VW, SEAT, and the Portuguese main importer SIVA. In 2020, the Lisbon Civil Court ruled that it lacked jurisdiction to hear the case but, later in 2021, the Lisbon Court of Appeal and the [Supreme Court of Justice confirmed](#) the jurisdiction of the Portuguese court.²⁹ VW also challenged DECO's legal standing to represent all Portuguese affected consumers. The Supreme Court of Portugal will rule on this issue in 2023.

²⁸ [Venice District Court's judgment of 7 July 2021, Altroconsumo v. Volkswagen AG & Volkswagen Group Italia S.p.A.](#)

²⁹ Supreme Court Judgment of 14 October 2021, DECO v Volkswagen, confirming the Lisbon Appeal Court judgment of 27 April 2021, which had overturned the Lisbon District Court judgment of 21 October 2020.

3.4. Fédération Romande des Consommateurs – FRC (Switzerland)

Due to the absence of collective redress instruments in Switzerland, in 2017, [FRC](#) encouraged all Swiss car owners to file an action in cooperation with the law firm Hausfeld and the German online platform MyRight before the Regional Court in Braunschweig, Germany. Approximately 2,000 Swiss car owners took part in the action. In a first ruling on 4 May 2020, the judges had refused MyRight's standing on the grounds that the company was not entitled to be assigned claims of persons domiciled outside Germany. Two years later, on 13 June 2022, the German Federal Court overturned this interpretation and confirmed the possibility for MyRight to represent Swiss clients in these proceedings.³⁰ The Regional Court in Braunschweig will now have to address the issue of compensation for Swiss consumers and is expected to decide in 2023.

3.5. Organización de Consumidores y Usuarios – OCU (Spain)

In 2016, OCU filed a [collective action](#) against VW-Audi Spain Group before the Mercantil Court in Madrid n°1 on behalf of 7,500 consumers. In January 2021, the [Spanish Commercial Court upheld the action](#) and declared that the installation of software that manipulates air pollution tests amounts to an unfair commercial practice. The Court ordered its cessation and the removal of its effects and awarded a total of €16m to approximately 5,000 Spanish consumers, with each consumer receiving €3,000. The ruling has been appealed by Volkswagen and the case is pending before the Madrid Court of Appeal.

3.6. Test Achats / Test Aankoop (Belgium)

Test Achats/Test Aankoop (TA) filed a [collective action](#) against VW in 2016 and was granted an opt-out by the court to represent all Dieselpgate victims in Belgium. The discussions to reach a settlement agreement during the mandatory negotiation period foreseen under Belgian law failed because Volkswagen refused to settle. The proceedings are currently ongoing. Because of the pandemic backlog of court cases, the hearings were postponed to April 2022 and then again to 15 May 2023.

In parallel, in September 2022, TA initiated a [formal conciliation proceeding](#) under Article 731 of the Belgian Judicial Code before the competent court in Brussels, requesting the appearance of the VW CEO in person. Although the Brussels court of first instance compelled Volkswagen's board of directors and CEO Oliver Blume to attend the court hearing in person, at the hearing on 14 November 2022, only VW's lawyers were present, to report that their client had not accepted the conciliation agreement. As a result, the case will take its normal legal course with a hearing on the merits in May 2023.

3.7. UFC-Que Choisir & CLCV (France)

In 2016, UFC-Que Choisir and Consommation Logement Cadre de Vie (CLCV) joined as private parties ("partie civile") four criminal proceedings against VW, Renault, Fiat and Peugeot-Citroen. In October 2018, the Paris High Court of first instance made a request for a preliminary ruling to the Court of Justice of the EU seeking clarifications on the notion of "defeat device". In December 2020, the Court clarified that a device adjusting upwards the operation of the emission control system of diesel vehicles during the approval testing should be considered as a "defeat device" prohibited under EU law ([case C-693/18](#), CLCV and others). The criminal proceedings were then resumed before the Paris Court. The trial is not expected to take place before 2023.

³⁰ [Bundesgerichtshof, Urteil vom 13. Juni 2022 - VIa ZR 418/21 – OLG Braunschweig](#)

In parallel, CLCV has supported several individual cases. One of them was [successful in appeal in 2021](#).³¹ The judge ruled that the concerned consumer had suffered an economic harm of € 4,000, which was in line with the considerations of the national courts of other Member States (e.g., Italy and Spain).

Finally, CLCV filed a [group action](#) in September 2020 against Volkswagen Group Automotive Retail France and Volkswagen AG. This is an opt-in action in which the affected consumers are not required to join in until a legally final judgment is rendered. The group action is currently still ongoing. No additional developments are foreseen before the criminal proceedings highlighted above come to an end.

3.8 Union Luxembourgeoise des Consommateurs – ULC (Luxembourg)

In 2018, ULC brought four [individual cases](#) against the car sellers, general importer and VW AG before the Court of Luxembourg of first instance. On request by the court, the parties agreed to select one case to be tried as a “model case”. Pleadings ended in July 2022 and defendants have been given time until 9 January 2023 to respond to ULC’s lawyer’s final ECJ strengthened conclusions. A decision from the Court of Luxembourg is expected in the first half of 2023.

3.9. Verbraucherzentrale Bundesverband – vzbv (Germany)

In February 2020, the *Musterfeststellungsklage* (model declaratory action) that vzbv had brought against VW was [settled](#). In the agreement, the car manufacturer committed itself to offer about 260,000 consumers a payment between €1,350 and €6,257 each, depending on the model and the age of the vehicle. 240,000 consumers ultimately accepted this offer, so VW had to pay a total of €750m euros.

In July 2021, vzbv filed another [model declaratory action](#) against Mercedes-Benz Group (formerly Daimler AG). The register was closed in July 2022, with more than 2,800 consumers who joined the action. Soon after, the first oral hearing before the Higher Regional Court of Stuttgart took place and formal aspects and questions about the burden of proof were discussed. For further clarification, the Court demanded Mercedes-Benz to name the persons responsible for developing the engines. The next hearing is scheduled for 24 January 2023.

3.10. Verein für Konsumenteninformation - VKI (Austria)

In 2018, VKI had brought 16 group actions in front of 16 courts representing a total of 10,000 consumers. The split of separate proceedings was necessary due to the lack of a genuine collective redress procedure in Austria. One of the main preliminary issues raised by VW regarded the competence of Austrian courts. Volkswagen, whose registered office is in Wolfsburg (Germany), argued that Austrian courts were not internationally competent for the dispute between VW and the Austrian car holders represented by VKI. On 27 March 2019, the Regional Court (*Landesgericht*) in Klagenfurt made a reference for a preliminary ruling to the Court of Justice of the EU to seek clarification in relation to the competence of Austrian courts for extracontractual lawsuits against VW. In July 2020, the Court confirmed the jurisdiction of Austrian courts ([case C-343/19](#), VKI v. Volkswagen)³². The

³¹ [Cour d'appel de Pau, 1ère chambre, 27 avril 2021, n° 19/03176](#)

³² [C-343/19, Verein für Konsumenteninformation v. Volkswagen AG](#)

court took the view that “where a manufacturer in a Member State (Germany) has unlawfully equipped its vehicles with software that manipulates data relating to exhaust gas emissions before those vehicles are purchased from a third party in another Member State (Austria), the place where the damage occurs is in that latter Member State (Austria)”.

Due to financial and tactical considerations (i.e., expensive expert reports deemed necessary by the courts to determine damage compensations), VKI decided to only pursue the proceedings pending before four courts (Vienna, Feldkirch, Leoben, St.Pölten). All other proceedings are suspended until decisions in these four courts are reached.

3.11. Zveza Potrošnikov Slovenije – ZPS (Slovenia)

The Slovene Consumers’ Association [Zveza potrošnikov Slovenije \(ZPS\)](#) teamed up with FinancialRight GmbH, which stands behind the online platform MyRight, to assert the claims of 6,024 Slovenian consumers affected by Dieselpgate before the Regional Court of Braunschweig. The consumers concerned assigned their claims to FinancialRight which legally became the owner of the claims. In return, FinancialRight committed to undertake the legal proceedings to enforce the claims and to bear all costs. VW challenged the validity of assignment agreements and the legal standing of FinancialRight. VW argued that FinancialRight GmbH required specific permission under the German Legal Service Act because the claims were subject to foreign law (i.e., Slovenian substantive law). In June 2022, the German Federal Court of Justice (Bundesgerichtshof) validated FinancialRight’s standing in a model case involving a Swiss consumer and confirmed that it met the formal requirements to ultimately collect the claims through collective lawsuits. The Regional Court of Braunschweig will now have to assess whether the consumers have a claim for compensation under Slovenian law. It is very likely that the court will require an expert opinion on Slovenian law for this purpose.

3.12. Intermediate result and what may be expected in a near future

Several courts from several Member States have ruled in favour of consumers. Yet Volkswagen reacted to these positive developments by systematic appeals, ultimately delaying consumers’ due compensation. Despite the legal clarifications by the Court of Justice of the EU, which provide robust grounds for damage claims against VW, the company still refuses settlement negotiations, thereby causing additional frustration, and unnecessary costs. To date, the Volkswagen Dieselpgate fraud has only been resolved in Germany and the UK, but we remain hopeful that efforts of our member organisations in other countries will also bring successful results.

Significant developments are expected in 2023. Both collective redress actions brought by Altroconsumo in Italy and OCU in Spain are pending before second instance courts. By the end of 2023, the Venice Court of Appeal and the Madrid Court of Appeal will issue their decisions, which hopefully will confirm the previous decisions that awarded Italian and Spanish consumers around €3,000 in compensation for economic and moral damages. In Portugal, the Supreme Court will decide if DECO has legal standing to represent all Portuguese consumers affected by Volkswagen Dieselpgate in a collective redress action by the end of 2023.

The proceedings in Belgium and Luxembourg are also expected to reach a breakthrough in the first half of 2023. The Court of Luxembourg will hear the case brought by ULC, which had the opportunity to strengthen its conclusions thanks to the ruling that the Court of Justice of the EU delivered in July 2022. In Belgium, the first hearing on the merits of the group action filed by Test Achats/Test Aankoop will finally take place in May 2023. In 2023,

hearings on the new actions led by vzbv in Germany and Consumentenbond in the Netherlands will also take place. By the end of 2023, a decision is also expected from the Regional Court of Braunschweig on the legal proceeding initiated by FinancialRight (teaming up with ZPS and FRC) before the German Court. After the German Federal Court of Justice validated in June 2022 FinancialRight's legal standing to represent Swiss and Slovenian consumers in the collective proceeding, the Regional Court will now assess whether Swiss and Slovenian consumers are entitled to compensation under the applicable national law.

Finally, in 2023, the Court of Justice of the EU is expected to rule on the preliminary question raised by the Italian Council of State on the application of the *ne bis in idem* principle to the administrative and criminal sanctions imposed on Volkswagen. As the Italian Council of State is the last instance of Italian administrative jurisdiction, after this ruling, the Council will be able to resume the proceedings and deliver a final decision on the administrative fines imposed by the Italian Competition and Market Authority (AGCM). Likewise, the Rotterdam Court will continue its proceeding on the sanctions imposed by the Dutch Authority for Consumers and Market (ACM) on Volkswagen.

4. Guide to a post-Dieselpgate era

As part of its Work Programme 2023,³³ the European Commission has announced important changes in the enforcement of consumer rights, with among other things a revision of the CPC Regulation. In parallel, Directive (EU) 2020/1828 which will make available representative actions across the EU will enter into force in June 2023 and is expected to be a game changer in improving the situation of consumers involved in mass harm situations like the Dieselpgate.

4.1. Sharper teeth for the CPC Regulation

Changes in the CPC Regulation are very much welcomed as the CPC-network clearly failed to show sufficiently strong teeth against the car manufacturer. Ultimately, a car manufacturer operating throughout the EU used the differences between Member States to treat consumers differently based on their place of domicile. As announced on the European Commission's [website](#), the work of the CPC-network has been to "continually work to ensure fair compensation for all affected consumers". However, to date, only a handful of CPC authorities have fined the car manufacturer and the declarations of the CPC-network calling on Volkswagen to compensate all EU consumers did not lead to meaningful results. It is essential that the upcoming reform give stronger teeth to the CPC-network to address EU-wide infringements with a Union Dimension.

4.2. The Representative Action Directive: hopefully a game-changer

The Dieselpgate fraud gave an important impetus to the development of a more incisive policy for strengthening consumer collective redress and ultimately to the adoption of the Representative Actions Directive (RAD). Whereas the transposition deadline is approaching fast (25 December 2022), it is noteworthy that several Member States will not meet this deadline. Importantly, the success of representative actions in Europe will strongly depend on the procedural choices made by the Member States. The latter have a large leeway to

³³ https://ec.europa.eu/info/strategy-documents/commission-work-programme/commission-work-programme-2023_en

decide on many issues, such as the use of opt-in or opt-out systems or ways to facilitate the financing of representative actions.

The Dieselgate litigation particularly showed how businesses can succeed in stonewalling at every stage of the proceedings, leading to costly actions that are not sustainable for consumer organisations. Therefore, in implementing the RAD, Member States should take measures to ensure that the costs of the representative actions will not prevent qualified entities from effectively bringing these actions forward. Measures envisaged in the RAD include, *inter alia*, public funding, structural support for qualified entities, and limitation of the applicable court or administrative fees. Member States should also allow commercial third parties to finance consumer representative actions. In a scenario where consumer organisations from all EU countries have adequate resources to initiate representative actions in parallel when an infringement occurs at European level, unfair traders will not get away easily. While parallel actions may create great public pressure on these traders, at the same time, it is important that cross-border and pan-European representative actions do not remain a chimera for European consumers. These actions can ultimately prevent traders' "["divide et impera"](#)" tactics from happening and provide an incentive for traders to settle disputes and offer remedies to all aggrieved consumers.

Additionally, the cross-border nature of the Dieselgate litigation has raised important issues regarding the suitability of existing EU private international rules to collective redress actions.³⁴ The RAD allows qualified entities meeting the criteria established in Article 4, paragraph 3 to bring cross-border representative actions before the courts or administrative authorities of a Member State other than the one in which they are designated. However, the Directive did not touch upon the existing rules of Private International Law, thus not resolving the uncertainties that are sure to arise. So far, cross-border representative actions (within the meaning of Article 6 RAD) have been brought in the defendant's *forum*.³⁵ This possibility of filing a collective action in the court of the defendant's domicile, however, eliminates the judicial power of a more closely connected forum. The Commission is currently evaluating the Brussels 1 bis Regulation, including from the perspective of collective redress, and may come up with suggestions to improve the rules in the years to come.

END

 [Private International Law and Cross-Border Collective Redress. A Legal Analysis of Jurisdiction, Applicable Law, Pendency, Recognition and Enforcement under the Representative Actions Directive 1828/2020](#)

³⁵ e.g., the *Sammelklage* filed by FinancialRight on behalf of Slovenian and Swiss consumers, and more recently the *Musterfeststellungsklage* filed by the Italian consumer organisation Centro Tutela Consumatori Utenti/*VerbraucherZentrum Süd Tirol* on behalf of Italian car owners.

