

New Options for European Collective Redress Emerge from the Fumes of ‘Dieselgate’

The 2015 Volkswagen emissions scandal, which laid bare European consumers’ difficulties in obtaining monetary compensation for mass harm, is now fueling a continental shift toward group litigation—one that will give defrauded investors new legal options to consider.

In April, the European Commission unveiled a proposed directive that would require all 28 EU member countries to establish representative actions for collective redress. Two months later, the German parliament enacted a new law expanding the use of model proceedings.

While both measures fall far short of offering plaintiffs the advantages of U.S.-style class actions, they are seen by proponents and critics alike as a step in that direction. Under the proposed European Commission directive, the outcome of a representative action in one EU country will be binding on all similarly harmed consumers in that same country, and a finding of infringement will provide a rebuttable presumption for consumers harmed by the same behavior in any other EU country. The directive also would allow entities representing investors in various member states to join forces in a single action.

Of course, it will take years of real-life briefing, arguments, declaratory judgments, settlements, and appeals before the true impact of the new laws can be measured. Still, for institutional investors who purchase securities on international exchanges, the developments suggest legal protections will continue to expand in the European Union. This is important given that investors in non-U.S. markets cannot rely on U.S. federal law for protection since the Supreme Court’s sweeping *Morrison* ruling in 2010.

“WHILE THE EU ALREADY HAS SOME OF THE STRONGEST RULES ON CONSUMER PROTECTION IN THE WORLD, RECENT CASES LIKE THE DIESELGATE SCANDAL HAVE SHOWN THAT IT IS DIFFICULT TO ENFORCE THEM FULLY IN PRACTICE.”

EUROPEAN COMMISSION
ANNOUNCING ITS “NEW DEAL FOR CONSUMERS”

In announcing the two measures, both the European Commission and the German government cited the “Dieselgate” scandal that erupted in September 2015 when the U.S. Environmental Protection Agency accused VW of violating clean air laws by rigging diesel-powered vehicles to shut off anti-pollution devices when tested.



BY RICHARD E. LORANT
202.408.3622
rlorant@cohenmilstein.com
[V-CARD](#)

IN ANNOUNCING THE TWO MEASURES, BOTH THE EUROPEAN COMMISSION AND THE GERMAN GOVERNMENT CITED THE “DIESELGATE” SCANDAL THAT ERUPTED IN SEPTEMBER 2015

Volkswagen eventually admitted it had sold 11 million offending vehicles worldwide, including 8.5 million in Europe, where executives have been jailed and the company has paid billions of euros in fines. But while U.S. consumers benefited from class action settlements providing generous cash compensation and the right to sell their vehicles at pre-scandal prices, VW offered European owners only a free “fix” to reduce emissions to lawful (arguably still dangerous) levels.

“While the EU already has some of the strongest rules on consumer protection in the world, recent cases like the Dieselgate scandal have shown that it is difficult to enforce them fully in practice,” the European Commission said in announcing its “New Deal for Consumers,” which includes the proposed directive on representative actions.

The EU directive, which member countries will have two years to implement after it undergoes review by the European Parliament and the European Council, comes too late to help VW owners. The German law, in turn, is set to take effect in November, two months before the country’s Volkswagen diesel car owners are time-barred from filing claims against the company. Germany’s Justice Minister said up to 2 million consumers could register to seek compensation under the new law.

The European Commission, the independent executive body responsible for proposing and implementing EU laws, decided to strengthen measures after concluding that existing laws discourage consumers suffering mass harm from pursuing relief, especially those with small individual claims. The new directive will extend representative actions seeking collective compensation to all EU countries.

Under the directive, “[c]onsumers will be able to claim their rights not only individually but also through collective actions and will be able to seek at the same time redress, such as obtaining the compensation due to them,” the Commission said in a fact sheet. The directive notes that EU representative actions will be different from U.S.-style class actions due to safeguards to avoid “abusive” litigation that could harm EU businesses.

The directive provides that certain “qualified entities,” such as consumer groups, may bring representative actions on behalf of at least 10 individuals harmed by the same allegedly unlawful practice. For the case to proceed, the court must certify that the qualified entity meets certain standards—it must be a non-profit organization with a “legitimate” interest in ensuring compliance with the law in question, for example. The qualified entity must also fulfill certain transparency requirements, including disclosure of third-party litigation funding arrangements to the court for evaluation.

Plaintiffs can seek injunctive relief and a range of redress—including cash compensation—but no punitive damages. If similar harm was suffered by all potential plaintiffs, the lawsuit can ask for collective compensation. If not, a favorable ruling could be used to establish harm for subsequent individual negotiations. The defendant company will have limited obligations to produce evidence, subject to confidentiality laws.

A case can end in one of several ways: the court can rule against plaintiffs; it can issue an injunction order, “stopping, prohibiting and/or stating the breach of law;” it can provide redress or approve an out-of-court settlement; and, finally, if damages are too complex to assess, it can establish that a company is liable so that individual consumers can seek their own damages. All outcomes are binding in the EU country

“*Consumers will be able to claim their rights not only individually but also through collective actions and will be able to seek at the same time redress, such as obtaining the compensation due to them.*”

EUROPEAN COMMISSION
FACT SHEET

where the lawsuit is brought. An order stating a breach of law in one EU country would provide a rebuttable presumption of infringement in any other EU country. The directive also requires the defendant company to widely notify affected consumers at its own expense of any outcome in their favor. Consumers would have an opportunity to accept or reject any settlement. The directive, however, would not change “loser pays” and other jurisdictional rules already in place in member countries.

While similar in some ways, the German law is more restrictive and more limited. The EU proposal would theoretically permit a suit by a qualified entity created for the purposes of the litigation. The German law would only allow a consumer association that has already been registered for at least four years to file. Once model proceedings have begun, affected consumers must register with a government agency prior to oral hearing to participate in any resolution. Perhaps most importantly, the German law requires registered consumers to follow a two-step process to obtain redress, seeking damages individually after the court in the model case establishes liability.

Some of the German provisions, however, may be moot once the European Commission directive is finalized, since Germany, a founding EU member state, would be required to adapt its laws accordingly to comply.

With institutional investors seeking diversification from highly priced U.S. stocks—a recent Natixis survey of 500 institutional investors worldwide found that 33% planned to increase their allocation to European equities and 24% looking to add to their holdings in emerging markets—the continued development of collective redress in foreign jurisdictions offers some welcome news. ■

A RECENT NATIXIS SURVEY OF 500 INSTITUTIONAL INVESTORS WORLDWIDE FOUND THAT 33% PLANNED TO INCREASE THEIR ALLOCATION TO EUROPEAN EQUITIES AND 24% LOOKING TO ADD TO THEIR HOLDINGS IN EMERGING MARKETS

Richard E. Lorant is Director of Institutional Client Relations for the firm.

