

# Model proceedings for declaratory judgment against VW group

## Background:

On 1 November 2018, the new collective action regime will enter into force in Germany. Recognised and specifically qualified consumer organisations will have a new means to bring charges against companies. In cases involving a high number of persons suffering a loss now one single trial can be conducted without the affected consumers being required to file individual action first. The model proceedings for declaratory judgment are aimed at having a conclusive ruling on e.g.

- whether or not the consumers have a claim (e.g. claim for damages); or
- whether or not there is a legal relationship between the parties (which might give rise to a claim)

To bring a test-case action for declaratory judgment, consumer organisations need to meet strict requirements. This is to ensure that the proceedings are appropriately conducted in the interests of the consumers, and to prevent individual providers of legal services from misusing any such proceedings just to raise their profile or to target specific companies.

## Cooperation between ADAC and vzbv (Federation of German Consumer Organisations)

Germany's two largest consumer organisations, vzbv and ADAC e.V., decided to make first use of this new type of action for the benefit of the drivers affected by the VW emissions scandal. Both organisations agreed that vzbv will bring the charges, with ADAC contributing legal and technical knowhow. Chances of success are much higher when bundling the potential of two powerful consumer organisations instead of filing two separate lawsuits.

- The aim is to have a legally binding preventive adjudication that Volkswagen with their software manipulation deliberately and unethically caused damage to their customers and now owe damages to affected buyers.
- The test-case lawsuit addresses Volkswagen, Audi, Škoda and Seat branded vehicles with EA 189 diesel engines.

## Size of each claim to be clarified in individual second lawsuits

Unlike other instruments offering collective relief (as e.g. in the US), after a test action for declaratory judgment consumers will have no judgment confirming their individual claims. Rather, such proceedings are aimed at clarifying key legal issues (such as, e.g., whether or not the use of illegal software by a manufacturer is to be classified as unethical behaviour making the manufacturer liable to damages). If these issues are found in favour of the consumers, this will considerably facilitate and accelerate the enforcement of individual claims. However, affected consumers will still need to assert their claims in a second lawsuit, unless a reasonable compromise can be worked out in the wake of the test action. To cut a long story short: the test action for declaratory judgment is not aimed at establishing concrete heads of damages for individual consumers.

### **What do consumers need to do?**

Consumers who want to join the test-case lawsuit need to sign up in the litigation register which the German Federal Office of Justice will set up after 1 November 2018. For a test-case action to be permitted, a minimum of 50 affected consumers must have validly registered. They may opt out by the end of the day the first hearing is held. However, if the court declares in their favour, consumers need to enforce their own individual claims. So, interested consumers need to act only after the court opened the litigation register. In the matter at hand, this will not be before mid-November 2018.

### **Can European consumers join?**

vzbv and ADAC did not limit the group of affected persons to consumers whose vehicles were affected by the Federal Motor Transport Authority's recall in Germany. Rather, the demand for relief also covers persons whose vehicles were subject to a recall requested by a European licensing authority. This should enable European consumers to enter the litigation register. It is, however, still unclear to what extent a declaration under German law will have binding effect for the benefit of European consumers. Also, clarification is required whether European consumers would need to assert their individual claims in a German court or can bring charges in their own member state. ADAC have already commissioned legal experts to shed light on the above two issues.

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10 September 2018