



## Collective actions on the horizon after this week's BGH rulings on damages in emission matters

On 26 June 2023 the German Federal Court of Justice (BGH) issued three landmark decisions (VIa ZR 335/21, VIa ZR 533/21 and VIa ZR 1031/22) in which it paved the way for further damage claims, following the European Court of Justice's ruling (judgment of 21 March 2023, C-100/21).

The BGH ruled that a vehicle manufacturer may be liable for negligence if an inadmissible defeat device was used. In that case, the buyer can claim the difference between the purchase price and the reduced purchase price. The compensation granted amounts to at least 5% and at most 15% of the purchase price paid.



### Why are these rulings a game changer?

- For the first time, the BGH decided that a civil damage claim serves as a sanction against the manufacturer, comparable to punitive damages.
- The BGH ruled that the violation of a regulatory provision might lead to damages.
- Negligent violations suffice, and the court can assume negligence unless rebutted by the manufacturer.
- Hence, the manufacturer has to prove lack of negligence. Reliance on statements made by the German Federal Motor Transport Authority (KBA) might not be sufficient to do that.

This dangerous mix might lead to multiple claims in the future.



### Thermal window: Which buyers could sue?

Buyers who claim that their vehicle contains an inadmissible thermal window could sue. As most vehicles with a diesel engine containing an EGR system have a thermal window, buyers of such vehicles could argue that the thermal window in their vehicle is inadmissible. This might lead to a large number of lawsuits.



### Why are the rulings so dangerous for manufacturers?

These rulings could prompt more buyers to claim damages. However, since individual damages in each individual case might be low, financial incentive for plaintiff's lawyers might be limited. But the decision comes at a point in time when Germany is about to introduce representative actions in the collective interest of consumers aiming at compensation or other remedies. Furthermore, Germany already provides for collective action for declaratory rulings which might also be used by claimant's law firms, as seen in the past.

## Emission matters and beyond?

The impact of the BGH rulings is not limited to emission matters. These new guidelines will also be applicable when violating other regulatory provisions, in the automotive industry and beyond. “Punitive damages” in the sense of these rulings can be expected for different kinds of regulatory violations in the future.



## Why ‘collective action’ actions?

Buyers will face two main problems with their legal action:

- First, it has to be established for each vehicle that it contains an inadmissible defeat device (or in general, that a regulatory provision is violated).
- Second, each claim will be rather low which means that bringing individual actions is not lucrative for plaintiff’s law firms (those firms often charge statutory fees, depending on the value in dispute).

Both problems could be overcome with a soon to come representative action for compensation, brought forward in the collective interest of consumers. Consumers can register their claims in connection with such representative actions and benefit from the ruling.

Until the representative action for compensation has been introduced, collective action for declaratory rulings might be brought forward in which the court could determine for a greater number of vehicles if they contain an inadmissible defeat device and if the buyers have in general a claim for damages.



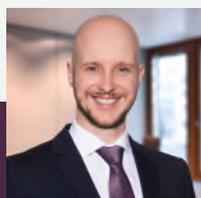
## Are these options already available?

A collective action for declaratory rulings is already available and has been used in Diesel emissions cases. The collective action for compensation is about to be introduced into German law. The German law implementing Directive (EU) 2020/1828 is not yet final and the date for entry into force is not confirmed, but since implementation is already overdue it is very likely that representative actions for damages will become available in Q3 or Q4 2023.

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## How could a collective action for compensation look like in these matters?

Representative actions are close on the horizon. They will be brought in order to achieve a uniform application of the BGH rulings and to create leverage for settlement discussions by having a large number of consumers participating in that action. The redress proceedings to be introduced have basically three steps: (1) merits phase concluded by a redress judgment, establishing general liability, (2) settlement phase, (3) if no successful settlement: quantum and enforcement phase, handled by court appointed administrator.

Until the new action for compensation becomes available, qualified consumer associations (e.g. Verbraucherzentrale Bundesverband, Deutsche Umwelthilfe e.V. and similar entities), can bring a collective action for declaratory rulings on legal or factual questions.



## What about cross-border actions concerning a European class of consumers?

While Directive (EU) 2020/1828 generally enables cross-border action by one or more qualified entities, as well as cross-border participation of consumers, this scenario is less likely in the case at hand. As the applicable law will likely differ for various groups of claimants in the different Member States, there is rather no European-wide class. Having said that, it is important to keep in mind that Directive (EU) 2020/1828 is being implemented in all Member States of the EU, i.e. representative actions for compensation are possible across the EU.



## A silver lining?

There are multiple ways to defend those claims, such as ...

... specific technical arguments that can be used to counter the allegation of a breach of law; manufacturer was advised by an external law firm; broad and explicit type approval; hypothetical approval; clarification and behavioural change by the manufacturer (e.g. public statements, software updates); statute of limitations; benefits buyer has gained to be deducted ...

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