



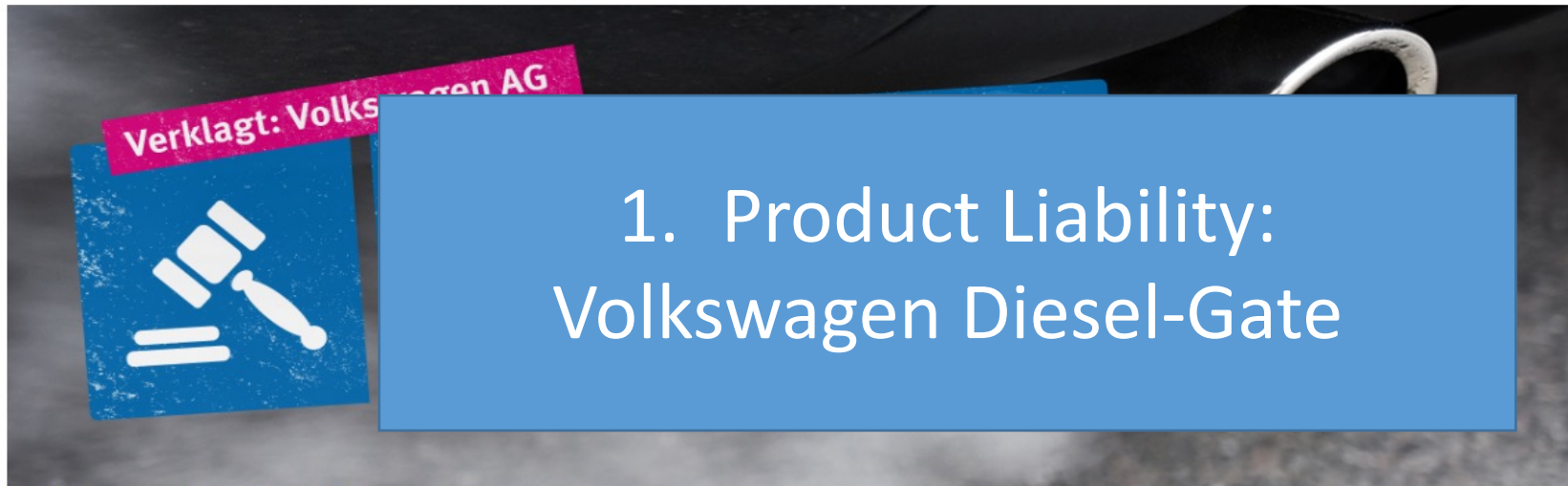
Max Planck Institute
LUXEMBOURG
for Procedural Law

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Collective Redress in the European Union and Private International Law - Current Developments -

Jeune Barreau, 8 June 2021

I. Introduction: Current Developments in Collective Litigation



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Die Musterfeststellungsklage gegen VW

- Am 1. November 2018 hat der Verbraucherzentrale Bundesverband (vzbv) in Kooperation mit dem ADAC eine Musterfeststellungsklage gegen die Volkswagen AG eingereicht. Umfasst sind Fahrzeuge der Marken Volkswagen, Audi, Skoda und Seat mit Dieselmotoren des Typs EA189.
- Verbraucher können sich weiterhin kostenlos für ein Register des Bundesamtes für Justiz anmelden, um sich der Klage anzuschließen.
- Anmeldungen sind ausschließlich an das Bundesamt für Justiz zu richten. Bitte senden Sie keine Anmeldungen an den vzbv.



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Hotline zur VW-Klage:

Wir haben für Sie eine Hotline eingerichtet. Sie können sich Montag bis Freitag von 9 bis 17 Uhr zur VW-Klage informieren. Die Hotline wird von erfahrenen Mitarbeitern der Verbraucherzentrale Nordrhein-Westfalen betreut. Tel: 030 / 325 027 00

Passt mein Fall zur VW-Klage?

Hier geht es zu unserem Klage-Check!

Die FAQ zum Ausfüllen der Register-Anmeldung finden Sie hier!

Volkswagen in Germany: consumer protection and product liability

Vzvb filed the master claim (on 1 November 2018) the very day when the master proceedings (secs. 606 et seq. CPC) entered into force.

In the following weeks 440.000 petitioners registered on the platform.

In the preliminary hearing on September 30, 2019, the Court indicated that the case was admissible and with prospects of success.

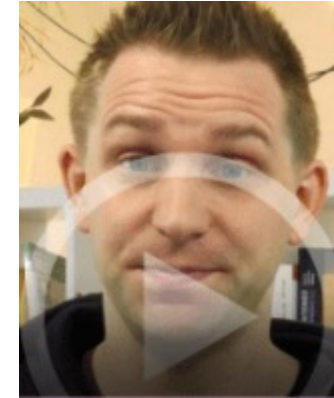
Parties started settlement negotiations in December 2019.

A Settlement was reached in 2020: Volkswagen paid 830.000.000 EuR to around 262.000 plaintiffs.

In addition, more than 70.000 individual lawsuits were filed in Germany; most of them have been settled, too.

I. Introduction: Current Developments in Collective Litigation

2. Data protection litigation



Mainly driven by the activist Max Schrems and his platform noyb.

ECJ, 25.1.2018, case C-498/16, *Schrems II*, EU:C:2018:37 (article 17 Brussels Ibis Regulation does not provide a head of jurisdiction when claims of consumers are assigned to another consumer).

Austrian Supreme Court, 11.6.2019, case 6 Ob 91/19d (M. Schrems has standing under articles 77 and 79 General Data Protection Regulation)



1. Introduction: current developments in collective litigation

2. Data protection

Comprehensive substantial harmonization by Regulation (EU) 2016/679 (GDPR)

Procedural harmonization is included: Articles 79 and 80 permit collective redress in cross-border settings.

Combination of public and private enforcement.

Cross-border settings are addressed with regard to public enforcement by Articles 56, 60 (one stop shop) and articles 69 et seq. (consistency mechanism) and in article 79 (2) GDPR regarding private enforcement.



I. Introduction: current developments in collective litigation

3. Capital Market Disputes



Aktuelle Fälle Presse Über Uns Kontakt

Mainly driven by specialized lawfirms
and litigation funders

Der Fall Wirecard AG

Der Fall Wirecard AG:
TILP hat Kapitalanleger-
Musterverfahren beantragt.

JETZT KOSTENFREI
REGISTRIEREN

Vorname*:

I. Introduction: recent developments in collective litigation



4. Cartel Damages –
Truck Cartel, currently
pending at the CJEU,
case C-30/20

5. Climate Change and Human Rights Litigation

» Climate Case Shell

The Climate Case against Shell

Help us win this case

I. Introduction: Different Fields of (Cross-Border) Collective Litigation

1. Consumer dispute resolution
2. Data protection
3. Financial disputes
4. Cartel damages
5. Human rights and climate change litigation

II. European Legislation: Directive (EU) 1828/2020 on Collective Consumer Redress

1. Background and Basic Structure of the Directive
2. Domestic and Cross-Border Cases
3. Mutual Recognition of the Standing of Qualified Entities
4. Foreign Consumers in Domestic Proceedings
5. The “Probative Value” of Decisions in Collective Cases



III. Main Issues of Cross Border Collective Litigation

1. Procedural Coordination
2. Substantial Coordination
3. Private and Public Enforcement

IV. The Answers of European Law to Collective Cross-Border Litigation

1. Jurisdiction
2. Pendency and stay of parallel actions
3. Applicable law
4. Recognition of preclusive effects of judgments and settlements



II. European Legislation: the Directive (EU) 1828/2020 on Collective Consumer Redress of November 25, 2020 (CCRD)

1. Basic Structure of the Directive: Minimum Harmonisation of Collective Consumer Redress

- a) The Directive provides for Injunctive Relief (article 8 CCRD) and for Redress Measures (article 9 CCRD), including the compensation of damages (articles 3, no 10, 9 (1) CCRD).
- b) Member States remain free to adopt additional far reaching instruments, article 9 (9) CCRD.

Transposition: until 25 December 2022



II. European Legislation: the Directive (EU) 1828/2020 on Collective Consumer Redress

2. Domestic and Cross-Border Cases

a) Article 3 (7) CCPR:

“cross-border representative action” means a representative action brought by a qualified entity in a Member State other than that in which the qualified entity was designated;”

b) Article 9 (3) CCPR (“quasi domestic cases”):

“Notwithstanding paragraph 2, **Member States shall ensure that individual consumers who are not habitually resident in the Member State of the court** or administrative authority **before which a representative action has been brought have to explicitly express their wish to be represented in that representative action** in order for those consumers to be bound by the outcome of that representative action.”

In cross-border settings only opt-in is permitted.

II. European Legislation: the Directive (EU) 1828/2020 on Collective Consumer Redress

3. Mutual Recognition of the Standing of Qualified Entities, Article 4(3) CCRD

“Member States shall designate an entity as referred to in paragraph 2 that has made a request for designation as a qualified entity for the purpose of bringing cross-border representative actions if that entity complies with all of the following criteria:

- (a) it is a legal person that is constituted in accordance with the national law of the Member State of its designation and can demonstrate **12 months of actual public activity** in the protection of consumer interests prior to its request for designation;
- (b) its **statutory purpose** demonstrates that it has a legitimate interest **in protecting consumer** interests as provided for in the provisions of Union law referred to in Annex I;



II. European Legislation: the Directive (EU) 1828/2020 on Collective Consumer Redress

3. Mutual Recognition of the Standing of Qualified Entities

- (c) it has a **non-profit-making** character;
- (d) it is not the subject of insolvency proceedings ...;
- (e) it is **independent** and not influenced by persons other than consumers, in particular by traders, who have an economic interest in the bringing of any representative action, including in the event of funding by third parties, and, to that end, has established procedures to prevent such influence as well as to prevent conflicts of interest between itself, its funding providers and the interests of consumers;



III. The Role of Private International Law in Cross Border Collective Litigation

1. Procedural Coordination

With regard to jurisdiction, pendency and recognition, the Brussels Ibis Regulation applies.

Standing: addressed in Articles 3 and 4 CCRD.

2. Substantial Coordination

Relates mainly to private international law, especially to articles 4 – 6 of the Rome II Regulation . These provisions usually do not entail the application of one substantive law to several individual actions. The fragmentation of substantive law impedes the collective enforcement.

3. Private and Public Enforcement

Delineation of parallel proceedings brought by authorities and by qualified entities (and individuals).

Example: Art.77 and 79 General Data Protection Regulation.

In case C-73/19 *Movic* the ECJ held that a lawsuit brought by a Consumer Protection Agency in civil courts qualifies as “civil matter” and the Brussels 1^{bis} Regulation applies.



IV. Answers of Current European Law to Collective Cross-Border Litigation

1. Jurisdiction

The Brussels' Regime, Regulation (EU) 2012/1215 (JR):

- **Art. 18 JR (jurisdiction at the consumer's domicile)** is not applicable to collective claims, ECJ, case C-167/00, *Henkel* (injunction); ECJ, case C-498/16, *Schrems II* (assignment), ECJ, case 609/19, *Effektenbezitters* (action for damages).
- **Art. 4 JR** is applicable and permits bundling claims at the **defendant's domicile**. Art. 3 (6) CCRD supposes that qualified entities start litigation in other MS (primarily) at the defendant's domicile.
- Under **Art. 8 no 1 JR** lawsuits arising out of the same event (connectivity) can be brought against several defendants, ECJ, case C-352/13, *CDC*. However, connectivity was not present in case C-343/19, *VKI ./.* *Volkswagen* regarding the parallel lawsuits against Volkswagen and the Austrian general car importer of Volkswagen.



IV. Answers of Current European Law to Collective Cross-Border Litigation

1. Jurisdiction

The Brussels' Regime (JR) – special heads of jurisdiction (cont'd):

- **Art. 7 no 2 JR: tortious liability.** The provision refers to each individual claim and entails fragmentation (especially when it refers to the place of the damage sustained). The determination of the place of damage depends on previsibility for the parties and the proximity to the evidence to be used in the proceedings. These general criteria have generated a case law of the ECJ that assesses each individual case at stake individually:
 - + ECJ, case C-343/19, *VKI ./. Volkswagen* (place of the acquisition of the car).
 - + ECJ, case 609/19, *Effektenbezitters* (place of the listening of shares regarding reporting duties)
- **Jurisdiction clauses (Art. 25 JR)** do not exclude the bundling of claims in cartel matters, ECJ, case C-352/13, *CDC*.



IV. Answers of Current European Law to Collective Cross-Border Litigation

1. Jurisdiction

Enlarged regimes

- **Article 79 (2) GDPR:** - European establishment of a third state defendant

“(2) Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an **establishment**. Alternatively, **such proceedings may be brought before the courts of the Member State where the data subject has his or her habitual residence**, unless the controller or processor is a public authority of a Member State acting in the exercise of its public powers.”



IV. Answers of Current European Law to Collective Cross-Border Litigation

2. Applicable law - a nightmare?

Collective redress is based on the aggregation of similar individual claims. Similarity requires essential common issues of facts and laws. European conflict of laws rules relate to each individual claim and often lead to different applicable laws:

Art. 4 (1) Rome II Regulation: designates the law of the country where the damage occurred (*lex loci damni*). In case of multi-state torts Art. 4 entails fragmentation. The aggregation of claims usually follows the different applicable national laws, ex. ECJ, case C-191/15, *VKI* ./ *Amazon*, paras 39 *et seq.*

Art. 6 Rome II Regulation: In unfair competition cases the the law of the country applies where competitive relations or the collective interests of consumers are affected.



IV. Answers of Current European Law to Collective Cross-Border Litigation

2. Applicable law – a nightmare?

Art. 5 Rome II Regulation: In product liability different connecting factors entail different applicable laws.

Art. 4 Rome I Regulation: In contractual cases, the place of performance at the vendor's seat entails the application

Art. 6 Rome I Regulation: In consumer cases, the law of the consumer habitual residence applies and a choice of law clause cannot not have the result of depriving the consumer of the protection afforded to him by mandatory law. As a result, different national laws apply according to the consumers residence.

In consumer cases, the harmonization of core questions by EU law does not necessarily entail a uniform application in the context of national laws, ECJ, 16/2/2017, case C-219/15, *Schmidt*, EU:C:2017:128.



IV. Answers of Current European Law to Collective Cross-Border Litigation

3. Recognition of binding effects

Art. 36 *et seq.* Regulation Brussels Ibis apply. These provisions primarily address two party proceedings. Several issues are controversial:

- Can the preclusive effect of a judgment be recognized as part of *res judicata*? (differences between opt in and opt out)
- Can a (confirmed) settlement be assimilated to a court judgment?
- Grounds for non-recognition (Art. 45 JR):
- Does Art. 45 (1) (b) JR apply to represented “plaintiffs” (WCAM)?
- Which procedural fairness standards form part of the public policy defense, Art. 45 (1) a) JR?



IV. Answers of Current European Law to Collective Cross-Border Litigation

3. Recognition of binding effects

Uncertainties surrounding Art. 15 CCRD

- “M This provision raises fundamental questions:
- Recognition is about the legal (binding) effects of a decision – this is obviously not intended but the final objective
 - Means of evidence are about facts – a binding effect concerning findings obtained in a third party procedure is not in line with article 47 Charta of Fundamental Rights).



V. Final Remark

Collective Redress is on its way within Europe.

Collective Redress under the CCRD envisages domestic and cross-border actions.

The effective protection of consumers in the Internal Market is the main objective of the new EU-instrument. However, it only provides for minimum harmonization.

Therefore, its implementation will impact on the competitiveness and attractiveness of EU-member states for investors from abroad.

Members States should carefully assess to what extent collective redress will affect economic and fiscal benefits of defendants. However, they must equally assure the effective protection of consumers – not only of domestic parties, but also of those coming from other EU-Member States.





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