

Commissioner Didier Reynders
Rue de la Loi, 200
1049 Brussels
Belgium

20th October 2020

Your letter of 10 August 2020 / Ares(2020)s4604327

Dear Commissioner,

Thank you for your letter dated 10 August 2020.

In your letter you refer to the settlement reached between Volkswagen AG (**Volkswagen**) and Verbraucherzentrale Bundesverband e.V. (**vzbv**) dated 28 February 2020 (the **Settlement**) in the Declaratory Model Action against Volkswagen. Against this background, you encourage Volkswagen to consider offering fair compensation to all affected consumers in other Member States.

Unique procedural situation created by German Declaratory Model Action legislation

The newly-introduced German Declaratory Model Action regime, which you refer to in your letter, created an unprecedented and unique procedural situation in Germany:

- The regime which is set out in sections 606 – 614 of the German Code of Civil Procedure came into effect on 1 November 2018. On the very same date, vzbv filed its action against Volkswagen with the Higher Regional Court (*Oberlandesgericht*) of Brunswick.
- Within the next months, more than 500,000 claims were filed with the German register for the Declaratory Model Actions. Subsequently, ten-thousands of consumers de-registered their claims again prior to the date of the first oral hearing. The preliminary list of registrations provided by the Federal Office of Justice (*Bundesamt für Justiz*) showed around 445 000 registrations on the date of the first oral hearing.
- In accordance with the design of the German Declaratory Model Action regime, vzbv requested that the court should render a declaratory judgment on numerous legal questions relating to alleged damage claims against Volkswagen.
- Absent a settlement, the Declaratory Model Action would have been litigated before the Higher Regional Court (*Oberlandesgericht*) of Brunswick and the German Federal Court of Justice (*Bundesgerichtshof*) until a final judgment would have been rendered. If the Federal Court of Justice had decided individual legal questions against Volkswagen as requested by vzbv, then hundreds of thousands of registered consumers could have relied on such judgment and pursued individual follow-on payment claims against Volkswagen before more than 100 different Regional Courts in Germany. These courts would have assessed the individual damage, if any.

- Even if such final declaratory judgment had been rendered promptly, it would have taken many years before there would have been individual legally binding rulings on the amounts, if any, to be paid by Volkswagen to individual consumers.
- The German civil court system likely would have collapsed under the sudden influx of hundreds of thousands of follow-on claims, since those single-handedly would have roughly doubled the total number of claims that the competent German Regional Courts have to deal with on an annual basis.
- In addition to the courts, the resulting very long legal process also would have put a tremendous strain on consumers and Volkswagen alike.
- Against this background, the Higher Regional Court (*Oberlandesgericht*) of Brunswick suggested that the parties to the Declaratory Model Action consider settlement.

The financial burden on Volkswagen created by the Settlement was painful. However, faced with the alternative of pursuing very lengthy and extremely costly litigation, the Settlement was necessary. By now, around 245,000 individual settlements with consumers who registered for the Declaratory Model Action and met the settlement requirements agreed upon with vzbv have been concluded and a corresponding number of claims to be dealt with by the German courts has been avoided.

Claims based on foreign law were excluded from the Declaratory Model Action before settling

Volkswagen realizes that the Settlement offers a solution only for those consumers who registered to participate in the Declaratory Model Action and meet the Settlement terms agreed between the parties, one of which provides that the Settlement only applies to consumers who resided in Germany at the time of purchase of the affected vehicle.

However, this approach had to be taken because following a provisional ruling of the Court to that effect, vzbv had explicitly limited the scope of the Declaratory Model Action to claims and legal questions governed by German law. Pursuant to Art. 4 (1) of the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (*Rome II*), the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs. Vzbv alleged that consumers suffered damage as a result of tort/delict committed by Volkswagen. Consequently, limiting vzbv's requests to German law meant that the court would have had to deal only with questions relevant for German consumers, as German law only applies to damage claims by consumers who resided in Germany at the time of purchase of the affected vehicle. Accordingly, consumers that resided in other Member States at the time no longer could have relied on any judgment ultimately rendered in the Declaratory Model Action against Volkswagen.

Since they had thus effectively been excluded from the ambit of the Declaratory Model Action, there hence was no scope to nevertheless include consumers who were residing in other Member States at the time of the purchase in the Settlement.

Distinct material situation based on applicable German law

Volkswagen remains of the firm believe that European consumers did not suffer any compensable financial or economic loss. The technical measures to remove the switching logic from the vehicles have been implemented in the vast majority of vehicles in Europe and resolve the issue without negative impact on vehicles or consumers. Accordingly, vehicle values have not been affected by the issue either.

This remains to be true even considering the recent jurisprudence of the German Federal Court of Justice:

- On 25 May 2020, the German Federal Court of Justice decided that under German law the claimant who had bought his vehicle in 2014 suffered damage merely by entering into the purchase agreement, as he would not have done so if he had been informed of the switching logic in his vehicle. Against this background, the Federal Court of Justice held that the claimant could rescind the purchase contract, return the vehicle and claim a refund of the purchase price (minus deductibles for usage).
- In a judgment dated 30 July 2020, the German Federal Court of Justice held that the deduction for usage of the vehicle can ultimately lead to the entire consumption of the damage and, consequently, the dismissal of the customer's claim if the claimant has driven his vehicle extensively.
- In another judgment dated 30 July 2020, the German Federal Court of Justice moreover clarified that customers who bought their vehicle after 22 September 2015 (the date of Volkswagen's ad hoc notification relating to the EA189 issue) did not under German law suffer any damage to begin with.

It is only against this background that Volkswagen, in line with these landmark decisions, announced to extend individual settlement offers to individual claimants whose situation is comparable to the case decided by the German Federal Court of Justice on 25 May 2020. Meanwhile, it has done so in over 25,000 cases.

Situation in other Member States not comparable to that in Germany

However, the legal situation in other Member States is quite distinct from the German situation:

- The concept of suffering damage merely by entering into a contract is unique to the German legal system. The distinct laws of other Member State generally require that claimants demonstrate a financial or economic loss which, as described above, they did not suffer in Volkswagen's assessment.
- The consumer class actions or collective actions against Volkswagen in nine other Member States (Austria, Belgium, Czech Republic, France, Italy, Netherlands, Poland, Portugal, Spain) and the UK are still in their early stages. Some of the relevant actions, such as the class action in France, have only recently been filed. In none of these proceedings has any judgment on the full merits been rendered. The question of whether customers suffered any damage and if so, in which amount, has not been decided yet in these proceedings under the distinct laws of the relevant jurisdictions by any court - not to mention any court of last instance.
- In 14 other Members States, individual damage actions have been brought by individual consumers. Applying the distinctive laws of the relevant jurisdictions, many competent courts (e.g. courts in Belgium, Italy, Poland and Spain) have dismissed such actions. Moreover, the challenges posed by the design of the German Declaratory Model Action regime do not exist in other Member States, where collective and class actions are conducted in a more efficient, legally certain and much more cost-effective manner within tested structures.

Claims in many Member States have become time-barred

In addition, the alleged claims of consumers in many Member States, including the majority of Member States where no consumer litigation is pending, have already become time-barred under the applicable statutes of limitations. Even if, contrary to Volkswagen's position, they had suffered a compensable loss, those consumers' compensation claims would therefore no longer be valid.

Volkswagen implemented various measures in the interest of all European customers

Volkswagen stands by its responsibility towards its customers. Irrespective of any litigation, Volkswagen therefore implemented various measures in the interest of its European customers. At the conclusion of Volkswagen's extensive dialogue with the European Commission and the national consumer authorities on 16 July 2018, Commissioner Jourová thus recognized Volkswagen's efforts:

- Volkswagen undertook additional efforts to build trust in the free-of-charge technical measures and to enhance the information provided to consumers on its websites.
- Volkswagen implemented the EU action plan agreed upon with Commissioner Jourová, the rate of the technical measures being applied now reaching 84 %.
- Volkswagen continues the free-of-charge technical measures and the related trust building measures to solve any potential complaints after the technical measures until the end of 2020.

Payments to all European customers neither justified nor possible

In addition to its responsibility to customers, however, Volkswagen also has responsibilities to a range of other stakeholders, including our hundreds of thousands of employees and their families, our suppliers and dealers along with their employees, as well as our shareholders. The latter responsibilities weigh all the heavier given the economic turmoil caused by the ongoing COVID19 pandemic.

Against this background, German Corporate Law generally prevents Volkswagen from making payments to consumers without firm legal grounds. Moreover, there is no legal basis under EU Law to extend payments made to a very specific set of customers in one Member State to entirely different groups of customers in other Member States to whom distinctly different laws and circumstances apply. There is no scope for equal treatment where there is no equality between different groups in the first place. Therefore, every jurisdiction and its distinct legal situation must be seen and addressed individually.

Because of these material as well as procedural differences to the situation in Germany, pending last instance decisions by the competent Member State courts on the above-mentioned issues, there is no sufficient legal basis for Volkswagen to make payments to all claimants in other Member States let alone all consumers.

Against this background, Volkswagen is of the view that voluntary payments to European consumers would neither be justified nor legally possible at this point.

Yours sincerely,

