

How the Dieselgate scandal helped bring American-style legal conflict resolution to Europe

In 2015, the Environmental Protection Agency in the United States uncovered a software modification implemented by Volkswagen that was capable of distorting the results of emissions tests of diesel engines. Drawing on a new study, Katharina van Elten and Britta Rehder explain what the accompanying scandal – dubbed ‘Dieselgate’ – has meant for legal conflict resolution in Europe.

The Dieselgate emissions scandal is one of the largest and most far-reaching industrial scandals of the postwar period. It caused enormous financial damage and a considerable loss of reputation for the German car industry. However, it also had a substantial influence on consumer protection in Europe and Germany.

Consumers are now much more likely to assert their interests in court, since the scandal enhanced legal consciousness, opened the legal market to new players and led to the introduction of new collective redress rights in Germany and the EU. The events surrounding the scandal thereby contributed to the longstanding debate over whether European legal systems are becoming more American, specifically if the concept of [‘Adversarial Legalism’](#) is transferring to Europe in a form of [‘Eurolegalism’](#).

Adversarial Legalism is [defined](#) as ‘policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation’ (p. 3) and explains why there is a more organised use of the legal system by interest groups as a second channel of interest politics in the US. That is partly because of the highly fragmented and decentralised American political system, but also because of certain incentives like extensive possibilities for compensation claims and collective rights of action. Moreover, the American legal system is highly market-oriented and lawyers have a strong interest in maintaining litigant activism to earn contingency fees.



Volkswagen Golf, Credit: Juanedc (CC BY 2.0)

In contrast, continental European countries lack these incentives and policymaking has relied on policy networks, trust and negotiation, making the probability of litigation as an instrument of conflict resolution rather unlikely. However, R. Daniel Kelemen and Eric C. Sibbitt [argue](#) that the EU is similarly fragmented to the United States due to its multi-level architecture. In addition, old policy networks lost importance in the course of the European Single Market and the associated liberalisation processes. There are indications that, at least in certain policy areas such as consumer protection, the juridification of interest mediation is gaining importance. This is all the more so because American law firms are noticeably pushing into the European market, introducing more aggressive and market-oriented strategies.

We argue that this process was fostered by Dieselgate for a variety of reasons. These include 'backfiring corporatism', the marketisation of legal proceedings by new actors, and new opportunity structures and changing attitudes in the EU and the member states toward class action rules and collective redress rights.

Backfiring corporatism

It has often been argued that corporatist networks prevent a turn to the legal system, and Germany is characterised by a pronounced and stable automotive corporatism. These networks were indeed very visible in the face of the scandal – partly to their disadvantage, though. The German government focused quite exclusively on damage limitation for the car industry. The blatant lobbying for the car companies (e.g. a further lowering of the emission limits at EU level) stood in stark contrast to the unwillingness to regulate the industry or show any political support for the affected customers. This led to a significant loss of legitimacy for automotive corporatism.

The marketisation of legal proceedings

Since no support was to be expected at the political level, legal action offered an alternative to the pursuit of interests. This benefited a new alliance of actors. In Germany and Europe, so-called legal tech providers cooperated with consumer protection organisations, but most importantly with renowned American law firms and litigation financiers, in order to collect the claims of affected customers and negotiate them in a bundled manner.

Legal tech providers exploit the technical feasibilities of digitalisation to bring together plaintiffs from all over the European continent. They seek to build alliances with experienced (American) law firms and (international) financiers to handle mass compensation cases. This (to Europe) new business model is based on a legal grey area, in which the legal tech companies bear the cost risk and, if successful, retain up to 35% of the amount of damages claimed. In this respect, Dieselgate had a huge impact on the marketisation and juridification of conflicts.

New opportunity structures

Dieselgate created a window of opportunity for the (long demanded) introduction of collective rights of action in Germany and the EU. Long sceptical about collective redress rights, the German government felt compelled to introduce the so-called '[Musterfeststellungsklage](#)' (model declaratory proceedings), which allows public interest groups to bundle claims and take them to court.

At the EU level, litigation rights for consumers had been under discussion for some time, and the '[New Deal for Consumers](#)' created the first European collective redress mechanism. In both cases, efforts were made to prevent marketisation and a 'litigation industry' by granting litigation rights exclusively to public interest groups and not to law firms.

The lasting effects of Dieselgate

These efforts were obviously aimed at preventing certain characteristics of the American system from spreading to Europe, specifically to contain the role of law firms and litigation financiers, but they will probably be unable to stop their growing influence. We argue that the dynamics triggered by the scandal will have a lasting effect.

The role of specialised law firms and the demand for collective litigation rights will probably expand for different reasons. The events around Dieselgate have increased legal consciousness enormously. Model declaratory proceedings have already been successfully applied by public interest organisations in Germany, not only [against Volkswagen](#), but also in other cases, such as with respect to [tenancy law](#). Legal tech providers have achieved a high level of awareness and are expanding their business in the legal market.

Many public interest groups have neither the resources nor the expertise to take on high profile cases and are dependent on law firms. Law firms can approach the organisations themselves and offer their services or look for first-mover-advantage. Furthermore, it has been shown that many affected persons try to achieve better results in court without participating in the collective legal action possibilities, further increasing the development of juridification of conflicts.

Recent developments show that the dynamics triggered have permanently changed the legal market and consumer protection, promoting Eurolegalism. This is underlined by the legal proceedings surrounding the latest scandals, bankruptcies and of course the Covid-19 pandemic: Legal tech companies, for example, were quick [to try to take profits from the Thomas Cook bankruptcy](#) and litigation financiers and the law firm Ernst & Young are already [collecting claims for a class action suit in the Wirecard scandal](#).

The pandemic generated more litigation and various legal disputes as well. [A law firm is trying to sue the German government](#) for damages by means of a US class action lawsuit in the United States, an Austrian consumer protection organisation has initiated test cases and is planning a European-wide [class action lawsuit against the town of Ischgl](#) (for not reacting adequately to the virus which led to the infection of many tourists) and [legal tech providers](#) are collecting cases of travel cancellations due to Covid-19.

In summary, we can say that the Dieselgate scandal has triggered processes that have encouraged the spread of Eurolegalism and increased the juridification of conflicts, especially in policy areas such as consumer protection. The increased legal consciousness, new actors and alliances in the legal market and the endowment of new collective rights of action mean that the mediation of interests in Europe will increasingly be carried out via legal strategies.

For more information, see the authors' accompanying paper in the [Journal of European Public Policy](#)

Note: This article gives the views of the authors, not the position of EUROPP – European Politics and Policy or the London School of Economics. Featured image credit: [Juanedc \(CC BY 2.0\)](#)
