

Representative Civil Actions in Germany

I. Draft law introducing the first representative redress civil action in Germany published

On March 29, 2023, the German Federal Government published a [draft law](#) (“[Verbraucherrecht durchsetzungsgesetz](#)”) concerning representative civil action mechanisms for consumers. Although representative civil actions, enabling qualified organizations to represent the collective interest of a particular group without the individual members of the group becoming parties to the proceedings, already exist in Germany, the suing qualified organizations have so far only been able to bring actions for injunctive relief or declaratory decisions. For the first time ever in Germany, the draft law allows groups of consumers to claim damages with a representative action filed by a qualified consumer organization (which can also make other redress claims such as for repairs, replacement, contract termination etc.) instead of having to file individual actions. While not a class action as known in the United States, the new law would allow the bundling of consumer claims, resulting in very significant exposure in just a single case given the size of the German economy. The German Federal Government expects the draft law leading to in average fifteen representative redress actions being brought per year and replacing approx. 22,500 individual civil actions. Germany has to implement the underlying EU Directive by June 25, 2023.

II. Background

With this draft law, the German Federal Government aims to implement the [EU Directive on representative actions](#) of November 25, 2020 into German law. Although the Member States had been obligated to transpose the EU Directive into national law by December 25, 2022, the transposition deadline expired without an appropriate law having been passed by most of the Member States, including Germany. After a long debate, both Ministries involved in drafting the law (the Federal Ministry of Justice and the Federal Ministry of Consumer Protection) have finally found a consensus. The draft law still must go through the legislative procedure in Germany and it can be expected that the intense debate about details of the implementation will continue in the German Parliament. However, there is a certain degree of time pressure for those debates, as the EU Directive requires the law to enter into force by June 25, 2023. Otherwise, the EU Commission might be triggered to initiate an infringement procedure against Germany for breach of EU law.

III. Status quo in Germany: Only representative injunctive and declaratory civil actions

Representative civil actions as such are not completely novel to German law since several representative injunctive actions have already been provided in various fields of German law (e.g., competition law). In 2005, the first representative declaratory civil action was introduced in Germany, which is only applicable to breaches of capital market laws (“[Kapitalanleger-Musterverfahrensgesetz](#)”). This was followed by another representative civil action for declaratory measures (“[Musterfeststellungsklage](#)”) in 2018, which allows qualified organizations to bring actions on behalf of a variety of concerned consumers in private law matters. In the case of a positive outcome for the suing entities, both actions require each member of the concerned group on whose behalf the action had been brought to bring separate individual civil actions to actually make their own claims (i.e., in particular, getting compensated and paid damages). Those subsequent individual

actions can then be based on the findings in the representative declaratory action and only have to, for example, deal with the quantum of damages owed.

IV. Key elements of the current draft law

- *First representative civil redress measure.* The draft law provides for representative actions being brought for the purpose of remedies such as compensation, reparation, replacement, contract termination etc. Remedies can be sought on an individual basis, as well as in form of a collective total amount, which can be estimated by the court and will be distributed to all registered consumers after the conclusion of the proceedings. Since German law does not allow punitive damages, such damages cannot be sought with representative redress actions.
- *Locus standi: Only qualified consumer organizations.* The representative civil redress actions can only be brought by certain qualified consumer organizations. German consumer organizations are qualified, if they are listed with the German Federal Ministry of Justice and do not receive more than five percent of their financial resources through donations of enterprises. Consumer organizations from other Member States of the European Union are required to be listed in the European Union's list of qualified entities. Such qualified consumer organizations have standing to bring actions on behalf of a group of consumers, which are "homogenously concerned" by the action's matter in dispute. The representative action is only admissible if the matter in dispute concerns a group of at least fifty consumers. Other parties, including competitors, are not allowed to file representative civil actions in Germany.
- *Possible opt-in of consumers and small companies.* The EU Directive on representative actions allows the Member States to decide whether the representative action should be based on an opt-out or an opt-in mechanism and the German Federal Government chose the latter. This means concerned consumers who want to be represented by the qualified organizations must explicitly opt in by registering at the registry for representative actions at the Federal Ministry of Justice. According to the draft law, consumers have time to register to a specific representative civil action up until two months after the first hearing of the proceedings. By way of "gold-plating", the draft law exceeds the minimum standards set out by the [EU Directive on representative actions, also allowing](#) small companies to register to the representative action. The draft law defines small companies as enterprises which employ fewer than fifty persons and whose annual turnover or annual balance sheet total does not exceed ten million Euro (in compliance with the definition of small enterprises by the [European Commission's Recommendation concerning the definition of small enterprises of May 6, 2003](#)).
- *Restricted possibilities for litigation funding.* To prevent any conflict of interest, the draft law restricts the possibilities for third-party funded representative civil actions. Litigation funding shall be prohibited, if the funding third party is a competitor of the defendant, reliant on the defendant or if the third party is expected to influence the litigation at the cost of the consumers. Further information on the latest developments related to third-party litigation funding can be found in our [February 2023 EU Litigation Update](#).

V. Proceedings of the representative civil redress action

- *Initiation of the proceedings.* The proceedings are initiated by the filing of a complaint by a qualified consumer organization with the competent Higher Regional Court. For a complaint to be admissible, it must be credibly shown that at least fifty consumers or small companies are

affected by the action's matter in dispute. Pending representative civil actions are published in the registry for representative actions at the Federal Ministry of Justice, at which affected consumers and small companies can register up until two months after the first hearing of the proceedings.

- *Procedural bar of pending representative civil actions.* From the moment the representative civil action is pending, no other representative civil action may be brought on the same matter in dispute. This procedural bar shall cease to apply if the pending representative civil action is terminated without any decision on the matter in dispute (e.g. through abandonment of the action). An affected consumer or small company, which has registered to a pending representative action, cannot bring an individual action concerning the same matter in dispute. Individual proceedings, which had been brought before the representative civil action was published in the registry for representative actions, will be stayed until a termination of the representative civil action proceedings, if the consumer or small company subsequently registers to the representative action.
- *Court settlements.* During the proceedings, the parties may agree on a court settlement. However, such court settlement is subject to the Court's authorization which the Court shall grant if it deems the settlement appropriate in particular taking into account the consumers' interests. Registered consumers or small companies can opt out from the settlement up to one month after publication of the settlement in the registry for representative actions at the Federal Ministry of Justice.
- *Decision on the merits.* If no settlement is reached during the proceedings, the Court decides on the merits of the action by ordering the defendant to provide remedy to specific consumers or small companies. If the representative action seeks a collective total amount, the Court shall decide on the amount being paid to each individual consumer or small company or on a method for calculating the amount to be received by each affected consumer or small company.
- *Settlement proposal for the execution of the decision on the merits.* After issuing the decision on the merits, the Court orders the parties to submit settlement proposals for the execution of the decision on the merits. If no settlement is reached, the representative action proceedings continue with a final decision.
- *Final decision.* With the final decision the Court orders the execution of its decision on the merits. The final decision shall also contain a decision on the costs of the proceedings and a preliminary fixing of the costs of the subsequent execution proceeding, which the defendant must bear.
- *Execution proceedings.* The purpose of the execution proceedings is to satisfy the compensation awarded to the consumers and small companies. Therefore the Court appoints a suitable and neutral trustee, who is under the Court's supervision. The defendant shall pay the costs of the execution proceedings as preliminary fixed in the final decision, and the collective total amount, if any, to the trustee, who shall establish a fund and fulfill the consumers' and small companies' claims in accordance to the Court's final decision. If the collective total amount awarded is not sufficient to satisfy all claims, the qualified consumer organization may request an increase in the collective total amount during the execution proceedings. In case that the trustee refuses to satisfy a consumer's or small company's claim, the consumer or small company may bring an individual action.

VI. Controversial points of the draft law

As the draft law is a novelty in German law and, on the one hand, strengthens consumers' rights, but on the other hand also entails a major risk for the companies sued, the legislative procedure so far has been accompanied by intensive discussions, which are likely to continue in the German Parliament. While the proponents of the most extensive consumer protection possible have argued for a late opt-in option, low requirements for the qualified consumer organizations and a low minimum number of affected consumers, the representatives of companies' interests have advocated for the opposite and justified their opinion with legal certainty for the companies sued and the prevention of misuse of the representative action. There was also controversy over whether the suspension of the statute of limitations should begin for all affected consumers and small companies when the representative action is filed, or for each individual consumer and small company with its registration to the representative action as well as over the fact that the draft law allows small companies to register to the representative action.

VII. Outlook

It remains to be seen whether the draft law of the German Federal Government will be passed in this current form or if the upcoming debates of the German Parliament will lead to further amendments. In any case, the possibility to seek remedies – in particular, damages – through representative civil actions will be a novelty under German law and is expected to be frequently used (and replace a large number of individual civil actions).

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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