



New collective redress action for consumers in Germany

Consumer associations will be eligible to bring collective claims against companies for various forms of redress

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The introduction of the collective redress action increases the risk that companies will have to expend time and resources to defend themselves against claims. The new rules are expected to apply from June 2023.

From 25 June 2023, consumer associations will have a new legal tool to seek collective redress from companies on behalf of consumers. The redress action (*Abhilfeklage*) will enable associations to claim damages and other remedies, such as repair, contract termination, price reduction or purchase price refund, for cases affecting at least 50 consumers. The draft bill implementing the EU Directive 2018/1828 on Representative Actions for the protection of the collective interests of consumers (**EU Directive**) was presented on 16 February 2023 and needs to pass the legislative process swiftly to meet the June deadline.

The redress action will complement the existing model declaratory action, which allows associations

to obtain a binding declaratory judgment on common factual or legal issues affecting registered consumers, such as the validity of a contract clause or the existence of a product defect. Consumers can then use the declaratory judgment to pursue their individual claims for damages or other remedies in separate proceedings or settlements. However, many consumers have been deterred by the costs and risks of such actions.

Under the new system, consumers will be able to choose between the model declaratory action and the redress action, depending on their preferences and circumstances. The introduction of the redress action will increase the risk for companies of facing collective claims and having to spend time and resources to defend themselves.

What can be claimed?

The new redress action will enable consumers to seek various forms of redress from a company, such as damages, performance or injunctive relief, for breaches of their rights.

The draft bill exceeds the EU Directive's scope and permits a collective action not only for violations of EU law, but also of national law. It covers all substantive legal claims of consumers against businesses in civil law. Consumer advocates have praised this extensive implementation, which is likely to have been influenced by the existing model declaratory action.

However, the claims asserted must be "of the same kind" (*gleichartig*). According to the law, claims are "of the same kind" if they rely on the same or comparable facts and the same or comparable law applies to them. The draft bill explanatory memorandum indicated that the court must be able to decide "schematically" (*schablonenhafte Prüfung*) for all claims.

The "sameness" requirement poses significant challenges. The draft bill seems to favour a rather narrow interpretation. This could result in many redress actions being dismissed at the admissibility stage in practice. The future development of this criterion's interpretation through the courts will be crucial.

Who has standing to sue?

The draft bill grants the right to sue to certain qualified consumer associations, similar to the existing model declaratory action. Unlike in the US class action, individual consumers cannot bring such proceedings themselves.

Consumers must register their claims in a plaintiff register by the day before the oral hearing, at the latest. The EU Directive left the joining mechanism to the discretion of the member states. Consumer advocates had proposed a model that would have allowed consumers to opt in even after the judgment. But fortunately, the legislator rejected this idea. A timely opt-in provides certainty about the scope of the action at an early stage.

Small businesses with fewer than 50 employees and an annual turnover of less than EUR 10 million can also opt in to the action. This goes beyond the EU Directive's requirements and reflects the coalition agreement of the current government. The similarity of the claims will be a crucial issue in actions involving both small businesses and consumers, as they may not be equally harmed by a legal violation.

The proposed threshold of at least 50 affected consumers is much lower than had previously been suggested during the discussion. For the proceedings to be admissible, it is even sufficient to show to the satisfaction of the court (*glaubhaft machen*) that 50 consumers are affected.

Foreign associations will also have standing to sue in Germany.

How does the procedure work?

The draft bill proposes a three-stage procedure for the redress action.

At the first stage, the court examines the admissibility of the action and the merits of the claim. If it upholds the claim, it can issue a basic remedial judgment on the grounds that is setting out the specific criteria and proof for the consumers' eligibility (*Abhilfegrundurteil*). The Higher Regional Courts have exclusive jurisdiction, subject to appeal to the Federal Court of Justice.

At the second stage, the parties are expected to negotiate a settlement on the basis of the basic remedial judgment. If no settlement is reached, the court issues a final remedial judgment. The court determines a "collective total amount" to be paid to the affected consumers. The company must pay this amount into a remedial fund. The amount may be increased later, upon request, if it proves insufficient to compensate the consumers. While excess money is paid out to the company later, there is still a considerable financial risk for the respective company, as it ultimately faces an unlimited obligation to make additional payments.

At the third stage, the court appoints a "trustee" (*Sachwalter*) to distribute the total amount to the individual consumers according to a distribution plan. The trustee can be a lawyer, a tax advisor, a business economist, an insolvency administrator or an auditor. The consumers must register their claims with the trustee within a deadline. The trustee verifies the claims and prepares a distribution plan. The company has to pay for the costs of the distribution procedure.

The distribution plan may be contested by the affected company or the consumers within a specified period. However, such a challenge only triggers a re-examination of the claim by the trustee. The consumer whose claim is denied and the company that disputes an unfounded claim still have the option of pursuing their rights in the ordinary courts.

There was intensive discussion on how the consumers can obtain satisfaction in the event of a judgment in their favour without having to bring an individual lawsuit. This currently suggested procedure was inspired by the maritime distribution procedure (*seerechtliche Verteilungsverfahren*) in German law. This somewhat "exotic" procedure has the advantage that it does not provide for individual claims of the consumer in principle. However, there is still an individual examination by the trustee.

This examination is likely to become a bottleneck for the distribution of the proceeds from the collective redress action. Moreover, consumers whose claims are rejected by the trustee will probably resort to suing in the ordinary courts. On the other hand, the company will also have to examine all the asserted claims in order to lodge objections with the trustee

or defend itself in subsequent proceedings against allegedly erroneous claims. Depending on the scope of the redress action, this entails a considerable burden for the defendant companies and redress actions with their follow-up proceedings are likely to occupy the affected companies for a long time.

What other special features are there?

According to the draft bill, the court will be able to order the production of evidence and can impose fines if the defendant fails to do so. However, the draft does not extend the existing requirements for the scope of the disclosure obligation. German law only allows the court to order document production in very exceptional cases. The draft thus fortunately falls short of the scope of the EU Directive, which allowed for extensive orders for evidence similar to US or UK law.

Litigation funding will generally be permissible. However, those who have an economic interest in bringing or in the outcome of the lawsuit, such as competitors, will not be able to exert undue influence on the process. Suing consumer associations must disclose any funding by a third party.

Certain provisions prevent consumers from participating in an association lawsuit and suing individually at the same time.

The company bears the costs of the trustee and must advance them. The trustee can be liable for damages in case of culpable breach of duty.

Summary

The draft bill for the implementation of the EU Directive on Representative Actions aims to create a new legal mechanism for collective redress in Germany.

Under the current system, model declaratory proceedings only allow courts to establish legal or factual issues for a group of similar cases, but not to award damages or other remedies. Plaintiffs have to pursue their individual claims separately after the model declaratory judgment, unless they settle with the defendant.

The draft bill enables certain consumer associations to seek direct redress for consumers and small businesses affected by the same type of case, for the first time. It also extends the access to collective redress to small businesses (with up to 50 employees or EUR 10 million in annual turnover). Consumers or small businesses can opt in to the redress action until the start of the oral hearing at the latest.

The procedure consists of three stages. First, the court issues a basic remedy judgment if it finds the action well-founded. Second, the parties can try to settle the dispute amicably. If no settlement is reached, the court determines a total payment amount. Third, the court appoints a trustee to implement the judgment. The trustee verifies the eligibility of each consumer and distributes the amount accordingly.

Another novelty is that courts will be able to sanction an order to produce evidence. This goes beyond the current provision in the Code of Civil Procedure.

It could be particularly relevant that redress actions will also be possible cross-border within the EU. This means that associations from other EU Member States could also bring redress actions in Germany, provided they meet the requirements of the Directive. Conversely, German associations could also bring redress actions in other EU Member States.

The draft bill has not yet been adopted and may still be subject to changes. It is supposed to enter into force in June 2023.

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