



Representative actions for redress: a new option since 13 October 2023

The redress action allows consumer associations to collectively sue companies for performance claims of consumers. The law has entered into force on 13 October 2023.

October 2023

What does the redress action mean for the companies that could face such lawsuits? Numerous practical questions about the details are still unresolved.

The Consumer Rights Enforcement Act (*Verbraucherrecht durchsetzungsgesetz, VDuG*) creates a new type of lawsuit: the redress action. This allows consumer associations to assert claims for performance on behalf of many affected consumers against companies. The Act implements the EU Representative Action Directive and also adapts other laws that concern consumer protection. The Federal Assembly ("*Bundesrat*") has approved the bill on 29 September 2023. It is likely to enter into force in October 2023, one day after promulgation in the Federal Law Gazette.

The Legal Affairs Committee ("*Rechtsausschuss*") of the Bundestag has amended the government draft (see our Client Alert titled "**New collective redress action for consumers in Germany** ") in some places in order to find a better balance between the interests of consumers and companies. For example, only very small companies are entitled to join the proceedings alongside consumers. Litigation funders may only receive up to 10% of the performance obtained. The thresholds for the affectation of consumers and the similarity of claims have been lowered. In the case of disputes over the implementation of the remedial decision by the trustee, a court can be called upon.

The new procedure enables direct enforcement of consumer rights

So far, only the collective redress by assignment model offers a direct enforcement of claims. The claimants have no cost risk there, but usually have to pay a high commission in case of success. This model will continue to exist alongside the redress action. For small and medium-sized enterprises especially, which cannot benefit from the redress action, this is an alternative to an individual action.

The redress action complements the existing options for proceedings against companies in mass damages cases:

- With the **model declaratory action** (with some special features also in the form of the capital market model declaratory action), common preliminary questions for many individual proceedings can be clarified. However, the claims must then be enforced in individual proceedings. This can be lengthy and expensive.
- In the case of many similar actions, a court can, with the consent of the parties, select a **pilot proceeding** and decide there on fundamental questions that are important for all proceedings. Here, too, the other proceedings must still be concluded individually. The federal government plans that for Federal Court of Justice ("*Bundesgerichtshof*") to be able to issue a **guiding decision** in such cases, which provides orientation for all proceedings. This is intended to prevent the parties from avoiding a supreme court clarification by means of settlements or appeals.
- Associations can also sue companies for **injunctions** under the Injunctions Act (UKlaG) or under the Act against Unfair Competition (UWG). The UWG also allows for the removal or disgorgement of profits for the benefit of the federal budget. The new law strengthens the injunction actions: they now suspend the limitation period of consumer claims; actions under UKlaG can cover more areas of law than before (especially EU law); and disgorgement

of profits under UWG is possible even in cases of gross negligence. However, consumers cannot directly enforce their claims with this.

In contrast to these options, the redress action offers a direct enforcement of consumer claims against the company.

Associations can sue companies to enforce the claims of many consumers

The redress action allows qualified consumer associations or entities from other EU countries to sue on behalf of a large number of consumers against a company, if it unjustifiably rejects their claims or violates legal relationships. This also includes small companies with up to ten employees and an annual turnover or balance sheet of no more than EUR 2 million as consumers.

The consumers themselves cannot bring a redress action, but must be represented by an association or entity that meets certain requirements. The associations must be listed in a register that previously applied to injunction actions. To be included in this register, they must have been non-commercially representing the interests of consumers through education and advice for at least one year and be adequately equipped for this. In addition, they may not favour members or employees nor receive more than 5% of their funds from businesses. The foreign entities must be listed in a directory maintained by the EU Commission.

Several associations or entities from Germany or abroad can jointly sue one or more companies if the affected consumers come from Germany or abroad. However, they must coordinate beforehand: a later action for the same facts and with the same objectives against the same company is excluded; also a joinder of actions is then no longer possible.

The funding of redress actions by third parties is only allowed under very strict conditions, which the legal committee of the Bundestag has further tightened. A third party may only finance if it is neither a competitor nor dependent on the sued company and receives at most 10% of the performance obtained from the defendant company.

Moreover, the association must disclose the financing agreements in the proceedings.

At least 50 consumers must have "essentially similar" claims against a company

Consumer associations can use a redress action to enforce civil claims against companies. This applies to all areas except labour law. Thus, the law goes beyond the EU directive, which only mentions certain EU provisions on consumer protection. The redress action can aim at different performances, eg payment, improvement or replacement delivery.

The consumer associations must credibly demonstrate that the redress claim can affect at least 50 consumers. This is a lower hurdle than in the original draft law, which required proof that 50 consumers were actually affected.

The claims of the consumers must be essentially similar ("*im Wesentlichen gleichartig*"). This means that they must be based on the same or a comparable factual situation and that the same facts and legal questions are decisive. The law is more flexible here than in the original draft, which still provided for a "stereotypical" ("*schablonenhaft*") examination of the claims. However, the legal committee did not clarify what "essentially" means. It believes that the wording is "sufficiently open to achieve appropriate results in individual cases" ("*hinreichend offen, um zu im Einzelfall sachgerechten Ergebnissen zu gelangen*").

It is unclear how the courts should deal with claims that differ in some points, eg if a product has different defects or a contractual clause has been changed several times. Are these claims still similar enough, or do several redress actions need to be filed, each of which must affect 50 consumers? In view of the changes of the draft bill by the legal committee, it is still unclear whether the examples given in the government draft are still useful for delimitation. According to this, claims should not be similar, for example, if it has to be clarified in individual cases whether a product is defective, or whether a consumer knew a circumstance at the time of conclusion of the contract.

Consumers need to take action in order for the procedure to have an effect for and against them

Consumers can participate in a redress action by registering their claims in the collective action register. The collective action register previously only contained model declaratory actions. In the future, it will also publish injunction actions and all details on the redress procedure, such as:

- Who is suing and who is being sued,
- Which court is competent,
- What the association demands from the company,
- Which claims are affected,
- What facts are the basis,
- How and until when consumers can register,
- What decisions the court makes or plans (also dates and notices),
- Whether and how a settlement is reached and how consumers can opt out,
- What the judgment says and whether it is appealed,
- Who represents the interests of the consumers as a trustee and how he is appointed or dismissed, and
- How the implementation procedure works.

Registration is possible as soon as the action has been served on the company and until three weeks after the oral hearing. This deadline has been extended to give consumers enough information to make a decision. The court may not issue a judgment until six weeks after the oral hearing.

When registering, consumers must provide some information about themselves, the court, the company and the claim and confirm that they are correct and complete. The substantive examination takes place later in the implementation procedure.

Consumers can withdraw their registration within two months. The registration suspends the limitation period of the claim. After registration, consumers can no longer sue the company themselves on the same subject. If they have already done so, their individual procedure is suspended.

The data of the registered consumers are not public. Only the court, the trustee and the parties to the remedial action can access them. The associations must also outline on their website their planned and ongoing collective actions and the consequences for consumers.

The procedure before the court is divided into three stages

The procedure before the court is divided into three stages: preliminary relief judgment, settlement negotiations, and final relief judgment.

The Higher Regional Court at the seat of the defendant company is competent for the lawsuit. The rules for civil proceedings of first instance before the Regional Courts apply accordingly.

1) Until the preliminary relief judgment

The court first examines whether the lawsuit is admissible and justified. If it is not, it is dismissed. If it is, the judgment depends on whether the association has named the affected consumers individually or not. In the first case, the court issues a payment judgment. In the second case, it issues a preliminary relief judgment.

In this judgment, the court determines which conditions the consumers must meet to assert claims, and how they must prove this in the further procedure. The court also determines the amount or the calculation method for each consumer.

The preliminary relief judgment can be appealed with revision to the Federal Court of Justice.

2) Settlement negotiations

In the second stage, the association and the company should try to reach a settlement on how to implement the preliminary relief judgment. The court can set deadlines for them. If a settlement is

hopeless from the outset, the parties can ask the court to issue a complete judgment that covers stages 1 and 3. This was added to the law by the Legal Affairs Committee.

The settlement should cover a verification and distribution system that the company carries out itself. The court must approve the settlement and check its appropriateness and consumer interests.

The settlement is announced in the collective action register and binds the consumers who have registered there. However, they can declare their withdrawal from the settlement within one month and sue for their claims individually.

3) Final relief judgment

If no settlement is reached or a revision is decided, the court issues a final relief judgment. If a collective total amount is demanded, the court orders the company to pay an amount to the trustee. The court can estimate the amount and assume that all registered claims are justified. However, the association must provide indications for the amount of the claims.

The court also provisionally determines the remuneration and expenses of the trustee for the following implementation procedure and orders the company to pay them to the trustee.

The final relief judgment can also be appealed with revision.

An independent trustee distributes the funds to the consumers

The Higher Regional Court appoints an independent trustee ("*Sachwalter*") who distributes the funds to the consumers. That can be a lawyer, tax consultant, business economist, insolvency administrator or auditor who has the necessary personnel and technical resources. The parties can make suggestions, but these do not bind the court. They can also reject the trustee for bias or lack of suitability. The company bears the costs of the trustee and the implementation procedure.

The trustee receives the collective total amount and the provisional costs from the company. He invests them in a separate implementation fund and pays out the claims of the consumers who have registered with the collective action register. He checks the claims according to the standards of the relief judgment and requires the corresponding evidence from the consumers. He can set deadlines, set up an online portal and/or use legal tech tools for this purpose. He informs the parties of his examination results. The parties can object to them. The trustee decides on the objection himself at first. The parties can then each request a judicial decision from the competent Higher Regional Court, which is final.

The possibility of judicial review was introduced by the Legal Affairs Committee of the Bundestag. It limits the individual possibility of action of the parties at a later stage: this is only possible if the respective plaintiff could not have asserted his claim in the objection procedure. This can be the case, for example, if a consumer can only prove his claim with other evidence than the one provided for in the relief judgment. The company can also pursue individual objections against the consumer's claim that were inadmissible in the redress procedure.

The trustee informs the parties if the collective total amount is not sufficient for all claims. Then he distributes the funds equally. The association can apply to the Higher Regional Court for an increase of the collective total amount. Then the implementation procedure is suspended. The court can condemn the company to a further collective total amount.

The court supervises the trustee and determines his remuneration and expenses. At the end, the trustee submits a final invoice and a final report. The company can challenge the final invoice. The court checks the report and determines the termination of the implementation procedure and the final costs by order. Any remaining amount from the total amount and/or the provisional costs is paid back by the trustee to the company.

The parties can hold the trustee liable for damages if he has intentionally or negligently violated his duties to their detriment. The court can require the

trustee to have an appropriate professional liability insurance.

The law leaves many practical questions unanswered

The feasibility of the new procedure is completely uncertain. The VDuG only provides a rough framework; many relevant questions have to be clarified in practice. For example, it is questionable how the court can estimate the collective total amount; in many cases, there might be later increase procedures or substantial repayments. The courts can draw on their experience in other forms of mass proceedings. But they also need the necessary resources to cope with mass proceedings - enough judges and modern digital technology.

The implementation procedure also raises many questions, especially about the way the administrator verifies the claims of consumers. The practice will depend on how concretely the court has defined the evidence of claims and the calculation method in the relief judgment.

The implementation procedure is also likely to take a very long time and hardly save court capacities, as intended by the legislator. The administrator makes individual decisions, albeit according to predetermined criteria. Consumers and companies can each object and request a judicial review. At least then a trained higher regional court decides and not numerous different courts. In addition, individual court proceedings before other courts are also possible for questions that the administrator cannot decide upon schematically.

The federal government expects that consumers will refrain from individual lawsuits and join a collective action to avoid judicial follow-up proceedings to enforce performance claims. However, consumers give up the complete control of the litigation to an association by registering. Therefore, there will be - especially legal protection-insured - claimants who prefer to assert their claims individually.

The redress action will rather result in more claimants pursuing lower amounts in court, as registration with the collective action is a lower

hurdle than filing a lawsuit or mandating a lawyer. The registration in the collective action register after the oral hearing allows consumers a better prognosis of the success of the remedial action. Hence, there will be more disputes in total.

Companies have to weigh up the pros and cons of the procedural handling

The redress action is a double-edged sword for companies: it can contribute to an effective and fast resolution of mass disputes, but also lead to a significant burden and uncertainty.

The new redress action procedure could be advantageous for companies if they can avoid individual lawsuits and fend off claims in a bundled way. However, this will probably remain an exceptional case.

The implementation of court decisions can be as time-consuming as consumers' individual lawsuits, which, according to previous experience with the model declaratory judgment procedure, can drag on for years. Our attached visualisation of the redress procedure illustrates that half of the required steps are solely for the implementation. In addition, the implementation procedure after the redress action court proceedings can be very costly for the companies, as they have to bear all the costs.

Companies should weigh whether it is more advantageous to avoid such a procedure from the outset by communicating transparently with consumers and improving the complaint management for consumer claims. Material settlements with the association in the proceedings before the remedial judgment are unlikely anyway, because the affected consumers are not yet determined.

Evaluation and outlook

The introduction of the redress action marks the beginning of a new era in the procedural handling of mass damages. However, this change of times does not take the form of a revolution. Rather, the VDuG relies on a cautious further development of the existing system. Practice will show to what extent these possibilities will be used.

The EU Representative Action Directive prompted significant changes in the area of collective redress in many European countries at the same time. In view of the increasing European harmonisation in the field of consumer protection, companies should also keep an eye on the possibilities abroad, which in some cases provide or introduce more far-reaching instruments for collective redress, such as "class actions". The field of consumer protection remains dynamic and is subject to constant change, which brings new challenges and opportunities for all parties involved.

Summary

The redress action is a new instrument that allows consumer associations to collectively sue companies for performance claims of consumers. The law has entered into force on 13 October 2023; it aims to strengthen consumer protection and facilitate legal enforcement. However, numerous details for the practice are still unclear.

- The redress action is a possible alternative to model declaratory proceedings, pilot proceedings, injunction actions or collective claim collections by assignment model.
- The redress action can cover all civil disputes between consumers and companies that essentially enable similar claims of at least 50 consumers. The consumers cannot actively influence the procedure, but they can register their claims in the collective action register until three weeks after the oral hearing.
- The court procedure is divided into three stages: in the first stage, the higher regional court at the seat of the defendant company decides whether the claims exist and how they are calculated (preliminary relief judgment). In the second stage, the parties are supposed to negotiate a settlement on how the claims can be fulfilled (settlement phase). If this fails, the third stage follows: the court determines a collective total amount in a second judgment (final relief judgment).

- After the court procedure, a trustee appointed by the court takes over the examination and payment of the individual claims of the consumers (implementation procedure). The consumers and the company can have the decisions of the trustee reviewed by the court.

The redress action entails some risks and challenges for the companies: they have to expect a high number of potential claimants who might feel motivated by the comparatively low hurdle to assert their claims, being the registration in the collective action register. They have to prepare for a lengthy legal dispute. They have to accept a trustee who monitors and enforces their payment obligations. And they have to bear the costs of the procedure if they lose.

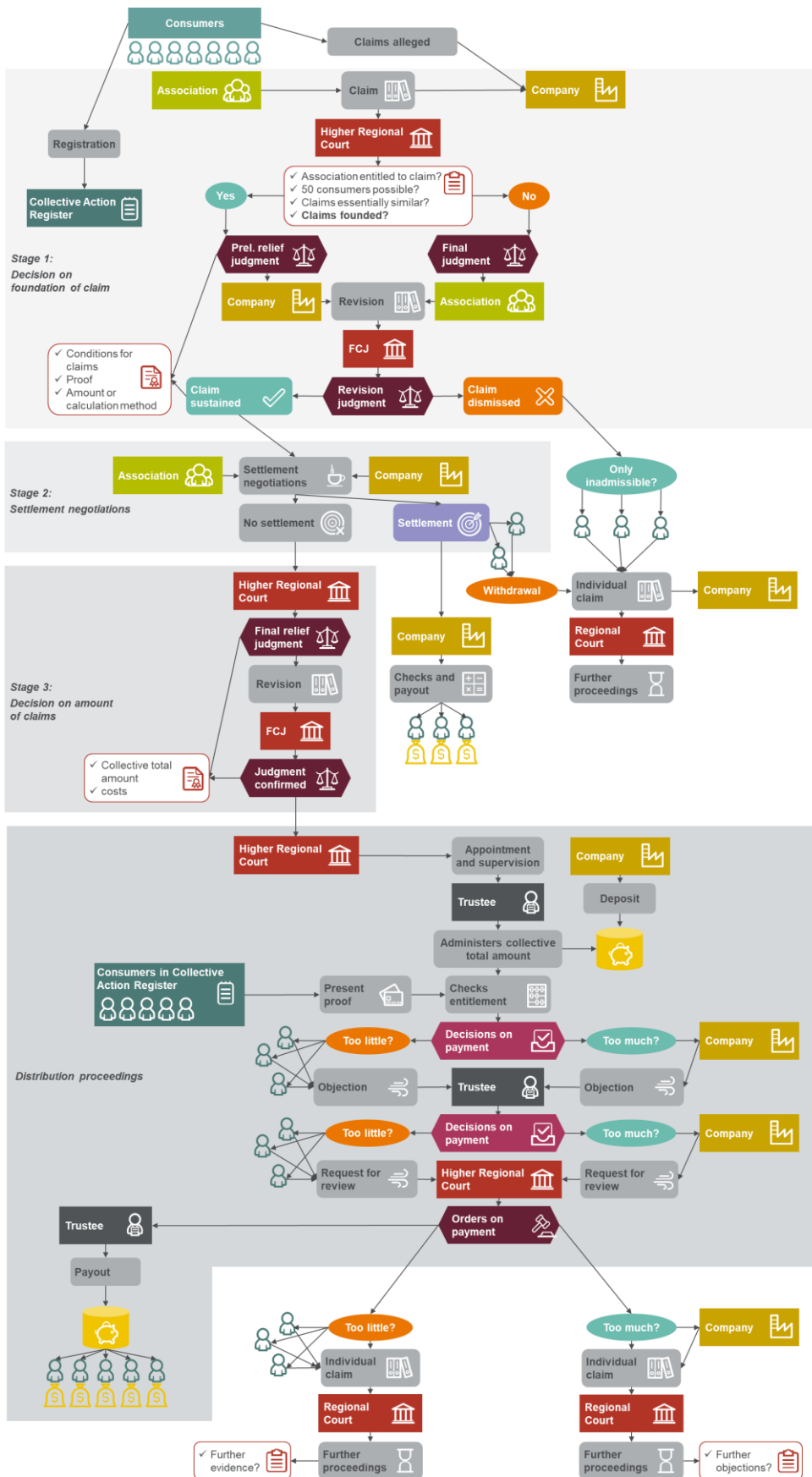
The procedure seems cumbersome (see visualisation) and many questions in practice are open. Whether the redress action will be accepted as a helpful alternative to the current possibilities remains to be seen. There will be disputes particularly over the eligibility of associations and the similarity of claims. Companies should therefore develop strategies on how to defend themselves in the new procedure or avoid it from the outset.

After a relief judgment to their detriment, companies can at least avoid the lengthy and expensive implementation procedure with the trustee by reaching a settlement agreement. This gives them more control over the distribution and can lead to overall cost savings.

However, companies can also benefit from an association action if they can avoid or fend off individual actions by doing so.

The area of consumer protection remains dynamic. Due to the EU directive on representative actions, significant changes in the field of collective legal enforcement have been initiated in many European countries at the same time. Companies should also keep an eye on the possibilities of legal enforcement abroad.

Overview: Redress Action



Contacts

If your company is facing complex and high-stakes litigation involving multiple claimants, you need a trusted and experienced partner to protect your interests and reputation. A&O's Litigation practice group regularly advises clients on defending against:

- **Capital investor model proceedings**, where investors seek compensation for losses caused by alleged breaches of capital market laws or regulations;
- **Model declaratory actions**, where consumers or associations seek a binding declaration of their rights or obligations in relation to a common issue;
- **Representative actions**, where a qualified entity acts on behalf of a group of consumers or investors to enforce their claims or interests;
- **Structured litigation vehicles**, where claimants pool their resources and assign their claims to a third party entity that pursues them in court or arbitration;
- **Mass actions**, where a large number of individual claimants file separate but similar lawsuits against the same defendant or defendants.

Our team has successfully defended clients from various sectors, such as banking, automotive, energy, pharmaceutical, technology and telecommunications, in some of the most challenging and high-profile class and mass actions in Europe and beyond. We have the expertise, resources and network to handle cross-border and multi-jurisdictional disputes, as well as to advise on risk management and prevention strategies.

To find out how we can help you with your class and mass action defence needs, please contact us. We would be happy to discuss your situation and provide you with a tailored and pragmatic solution.

Please contact us to find out how we can help you. We look forward to discussing your situation and offering you a tailored and pragmatic solution.



Dr Anja Schelling
Counsel - Frankfurt
Tel +49 69 2648 5838
anja.schelling@allenoverly.com



Dr Wolf Bussian
Partner - Frankfurt
Tel +49 69 2648 5571
wolf.bussian@allenoverly.com



Stefanie Guenther
Senior Associate – Frankfurt
Tel +49 69 2648 5554
stefanie.guenther@allenoverly.com



Dr Vincent Winkler
Associate – Frankfurt
Tel +49 69 2648 5654
vincent.winkler@allenoverly.com