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New Class Action Regime in Germany

Client Alert | October 17, 2023

As of 13 October 2023, Germany has adopted a new type of class action. The new law is an incremental step towards more collective redress in Germany. The new regime maintains the existing restriction that requires qualified consumer protection organizations to bring the action. However, these entities may now seek damages from defendants directly on behalf of the class. Together with the several coinciding factors detailed below, the new class action might lead to a more fundamental change in the German litigation landscape.

The previous collective redress regime only allowed for declaratory judgments. After obtaining a judgment, plaintiffs had to file individual lawsuits to get the desired relief, i.e. payment of damages. This two-tier mechanism was one of several factors that evoked substantial criticism in Germany. It also made the so called “Declaratory Model Action” (“DMA”) unpopular with plaintiffs. In the five years since its inception in 2018, only roughly 35 DMAs were filed. The German legislator estimated in 2018 that 450 DMAs would be filed *per year*.

The new class action aims to address the deficiencies of the existing regime. It is based on the EU Directive 2020/1828 on Representative Actions (which we discussed in a prior client alert). The EU Directive requires all EU member states to implement new class action regimes by 2023 while allowing them considerable leeway to implement the directive’s broad requirements into their national legal systems. The Netherlands, for example, have created a plaintiff-friendly class action system with an opt-out mechanism.

Germany, on the other hand, has opted for a cautious evolution of its collective redress provisions. The hallmarks of the new German regime and our predictions for its future relevance are set forth below:

Qualified Entities as Plaintiffs

Just like under the previous regime, the new class action can only be brought by qualified consumer protection organizations under German law as well as qualified entities from other EU member states (so-called qualified entities – QEs). This requirement is meant to prevent frivolous class actions.

The consumer protection organizations are required to inform consumers on their homepages about all representative actions they are planning to or have already filed, as well as the status of all pending actions. Potential defendants may be able to use this as an early-warning system for new class actions against them.

Permissible Relief

Qualified entities can now directly sue defendants for damages or other forms of relief on behalf of the consumers concerned. After a favorable verdict for the class, the court will request the parties to devise a settlement on how to distribute the funds. If no settlement is reached, the court will appoint a claims administrator to distribute the funds. Funds which are not claimed by consumers or cannot be distributed to class members are transferred back to the defendant. There is no potential for a cy-pres award like in the U.S.

Broad Scope

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Under the EU Directive, the member states are only obliged to allow class actions with regard to an exhaustive list of EU provisions on consumer protection. Germany has not restricted the scope of collective redress. All matters that could be litigated in an individual civil lawsuit in Germany can be litigated in the new class action. This includes classic subject matters for collective redress such as product safety and mass torts as well as the emerging litigation issues around ESG, data privacy, and private enforcement of new EU legislation (i.e. the EU Digital Markets Act or its proposed AI Regulation).

Class Definition

Unlike many class actions in the U.S., consumers have to opt-in to join a German class action and there is no requirement for class certification. However, the qualified entity acting as plaintiff will have to show in its statement of claim that at least 50 consumers are affected by the class action and that the consumers' claims present substantially similar questions of law or fact. These two prongs are reminiscent of the numerosity and commonality requirements in U.S. class actions under Rule 23 (a) FRCP.

Consumers will have a longer period for considering an opt-in than before. They can opt into the class until three weeks after the conclusion of the oral hearing. This allows consumers to react to positive developments late in the proceedings.

Limitations on Third-Party Funding

The new law allows third-party funding for class actions, but imposes fairly strict requirements. If the requirements are not met, the class action will be dismissed. Any third party funding a class action may not be a competitor of the defendant or in any way (economically) dependent on the defendant. More importantly, the third-party funder must not be promised more than ten percent of the proceeds from the class action. If a class action is funded by a third-party, the plaintiff is obliged to disclose its arrangements with the funder.

These prerequisites will likely deter many third-party funders from entering the German class action litigation market.

No Additional Discovery Provisions

Germany has not made use of the leeway under the EU Directive to allow for more discovery in consumer class actions. While courts can order a party to produce certain documents clearly defined by the other party, there will be no U.S.-style discovery in German class actions.

However, courts may now repeatedly fine parties up to EUR 250,000 if they fail to comply with a court order to produce the requested document or item.

Parallel Individual Actions

Consumers who have not opted into the class action will be able to sue the same defendant individually for the same claims as in the class action. Defendants will, therefore, have to prepare to defend numerous individual lawsuits in parallel to the new class action.

Cost Recovery

As is customary in Germany and the EU, the losing party will be required to bear the costs of the class action. This again is meant to discourage frivolous lawsuits. In theory, this also includes the opposing party's legal fees. However, the recoverable amount is limited by statute and depends on the amount in dispute. The new German law caps the amount in dispute at EUR 300,000. This equals a maximum amount for recoverable legal fees in the range of EUR 10,000.

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Tolling of Statutes of Limitations

Opting into a class action suspends the statute of limitations for consumers – even for consumers who later opt out again.

Therefore, consumers can toll the statute of limitations by opting into a class action as a mere precaution. They are free to opt out at a later stage and pursue individual claims against the defendant, as long as they opt out before the cut-off point three weeks after the first oral hearing on the merits.

Settlements

Similar to U.S. class actions, all settlements in German class actions must be scrutinized by the court. The court will reject the settlement if it is not “fair”. Settlements are final and binding for the parties as well as the consumers who have opted into the class action. However, consumers may opt out of a settlement within a month after the settlement was published in the class action register.

Outlook

The new law has been met with both approval and criticism from stakeholders and interested parties. For the time being, the new class action regime as such will certainly not turn Germany into a class action hot spot. However, in combination with ever increasing regulatory activity by national and European rule makers, an increasing focus on private enforcement of regulations, and a German judiciary that is generally willing to create consumer-friendly law, such as in the context of the diesel emissions cases, this may provide to be just the perfect mix for a more fundamental change of the German litigation landscape in the long run. Companies are certainly well advised to monitor closely whether they may be the target of class actions under the new German regime, and to prepare accordingly.

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