

9 Hallmarks Of The New German Class Action Regime

By **Markus Rieder, Alexander Horn and Annekathrin Schmoll** (November 6, 2023, 12:18 PM GMT)

On Oct. 13, Germany adopted a new type of class action.

The new regime is based on European Union Directive 2020/1828, which requires that all member states allow qualified consumer protection organizations to file collective actions on behalf of a class of consumers starting in June.

While the Netherlands, for example, embraced the opportunity and created a plaintiff-friendly class action regime, other member states were slow to act.

Some, like Germany and France, even missed the EU's deadline for transferring the directive into national law. The new German class action now satisfies the EU's requirements.

The previous collective redress regime in Germany 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, or DMA, unpopular with plaintiffs.

In the five years since its inception, in 2018, only roughly 35 DMAs were filed. The German legislator had estimated in 2018 that 450 DMAs would be filed per year.

The new law is an incremental step toward more collective redress in Germany and aims to address the deficiencies of the previous regime. It maintains the existing restriction that requires qualified consumer protection organizations to bring the action so-called qualified entities, or QEs.

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 nine hallmarks of the new German regime and our predictions for its future relevance are set forth below.



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1. 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 that 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.

2. Broad Scope

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 environmental, social and governance, data privacy, and private enforcement of new EU legislation, i.e., the EU Digital Markets Act or its proposed Artificial Intelligence Regulation.

3. 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 may be 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) of the Federal Rules of Civil Procedure.

In contrast to the DMA, consumers will now have a longer period for considering an opt-in under the new class action. They can opt into the class until three weeks after the conclusion of the oral hearing in the case.

The oral hearing is typically scheduled after several rounds of briefing by the parties. In practice, consumers will have anywhere from several months to more than a year to opt into the class after the lawsuit was filed. This allows consumers to react to developments late in the proceedings.

If the court communicates preliminary views during the oral hearing or otherwise, e.g., in writing, which are favorable for consumers, consumers can opt in to profit from a potentially favorable verdict.

If the preliminary views favor the defendant, consumers can consider an opt-out and potentially bring

an individual lawsuit against the defendant in front of a different court. This will make it difficult to predict the ultimate size of the class and therefore the maximum exposure for defendants.

4. 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 that funds 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 10% 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 might deter third-party funders from entering the German class action litigation market.

5. 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 which were 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 €250,000 (\$265,524) if they fail to comply with a court order to produce the requested document or item.

6. 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 may therefore have to prepare to defend numerous individual lawsuits in parallel to the new class action.

7. 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 €300,000. This equals a maximum amount for recoverable legal fees in the range of €10,000.

8. 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 cutoff point three weeks after the conclusion of the oral hearing on the merits.

9. 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 rulemakers, an increasing focus on private enforcement of regulations, and a German judiciary that is generally willing to create consumer-friendly law, this may be just the perfect mix for a more fundamental change of the German litigation landscape in the long run.

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