

Legal 500

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Germany

Class Actions

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This country-specific Q&A provides an overview of class actions laws and regulations applicable in Germany.

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Germany: Class Actions

1. Do you have a class action or collective redress mechanism? If so, please describe the mechanism.

Traditionally, class action or collective redress mechanisms have not been a key feature of German law. German law typically requires a violation of individual rights for the assertion of claims and the initiation of legal proceedings which outcome then only binds the parties to the proceedings (*inter partes* effect).

In recent years, however, specific forms of collective actions have emerged:

1. **Injunctions Act:** Introduced in 2002, the proceedings under the Injunctions Act allow qualified consumer associations, qualified business associations and chambers of industry commerce (*Industrie- und Handelskammern*) to file injunctions based on practices contrary to consumer protection laws as well as the use of invalid general terms and conditions.
2. **Model Proceedings in Capital Market Disputes:** Established in 2005, the model proceedings address disputes relating to mass damages in capital markets, allowing certain issues to be decided in a model proceedings with a binding effect on similar pending lawsuits.
3. **Model Declaratory Action:** Introduced in 2018, the model declaratory action combines elements of the previous attempts and aims at facilitating collective redress for consumers in cases of mass damages caused by companies. It allows qualified institutions to initiate claims, with individual consumers opting in. The general approach of the model declaratory action is, however, rather limited as the action only aims at establishing the factual and legal groundwork of the case and does not allow for a claim for a direct relief.
4. **Redress actions:** Being the newest addition to the available collective redress mechanisms in Germany, the redress action was introduced in order to implement the Representative Action Directive (EU) 2020/1828. It is built upon the Model Declaratory Action but allows qualified entities to directly claim damages or other forms of relief on behalf of consumers.

Injunctions Act / Model Proceedings in Capital Market Disputes

Until a couple of years ago, the German legal system has permitted collective redress only under specific conditions, in particular in proceedings under the Injunctions Act (*Unterlassungsklagengesetz*, UKlaG) pertaining to unfair business practices by companies towards consumers and in proceedings under the Act on Model Proceedings in Capital Market Disputes (*Kapitalanleger-Musterverfahrensgesetz*, KapMuG) relating to claims based on false, misleading, or omitted capital market information.

Implemented in 2005, the proceedings under the KapMuG entitle investors to assert their claims through so-called model proceedings (*Musterverfahren*). The proceedings allow certain legal or factual issues related to false, misleading, or incomplete capital market information to be resolved collectively in model proceedings. The decision in the model proceedings then has a binding effect on all pending lawsuits. An application for model proceedings can be filed by the both, claimant and defendant.

The introduction of the KapMuG was prompted by cases like the Deutsche Telekom AG IPO, where thousands of lawsuits were initiated based on alleged false prospectus information. Other notable proceedings under the KapMuG include lawsuits involving Volkswagen AG and Mercedes-Benz Group AG over diesel emissions, Wirecard AG regarding its annual reports, and Bayer AG in relation to the acquisition of Monsanto.

Under the KapMuG, a model proceeding is admissible in situations where at least ten individual claims for damages are brought by investors which all have the same legal and factual basis. Where a model proceeding is permitted, the courts will suspend all other proceedings until a judgment in the model proceedings is reached. This judgment has a binding effect relating to the main issues on all other cases based on the same facts. However, unique features of the individual actions will still have to be decided by the courts in the individual proceedings.

Model Declaratory Action

In 2018, in response to the diesel emissions claims against Volkswagen, Germany introduced the **model**

declaratory action (*Musterfeststellungsklage*). This legislation took effect in November 2018, just weeks before many claims against VW would have expired due to the statute of limitation.

The model declaratory action is initiated by qualified entities such as consumer protection organizations, rather than by consumers themselves, who do not have standing to initiate these proceedings on their own. Consumers interested in joining a model declaratory action must opt-in by registering their claims in a publicly accessible online claim register (*Klageregister*). This register includes detailed information about ongoing model declaratory actions, providing summaries of the facts and procedural developments.

Once a model declaratory action has been filed, no other model declaratory action based on the same facts can be initiated, nor can individual lawsuits by consumers who have opted into the action. A judgment in a model declaratory action proceeding binds the participating parties. Consumers who did not opt-in remain unaffected by the judgment. Even for those bound by the outcome, subsequent individual lawsuits may still be necessary to pursue personal damages claims, as the model declaratory action primarily seeks to establish the factual and legal groundwork of the case and does not allow for a claim for direct relief.

The introduction of the model declaratory action has been met with considerable concerns. Some critics noted that the two-step approach, i.e. the differentiation between the model declaratory action as the determination stage and the subsequent individual proceedings in order to obtain an enforceable judgement as inefficient. Furthermore, it was argued that granting consumer associations the right to sue is contrary to core principles of the civil proceedings, which is built upon the concept of private autonomy. Additionally, it was contended that the potential numbers and diversity of potential legal actions in a Model Declaratory Action could overwhelm the financial and organizational resources of the qualified entities.

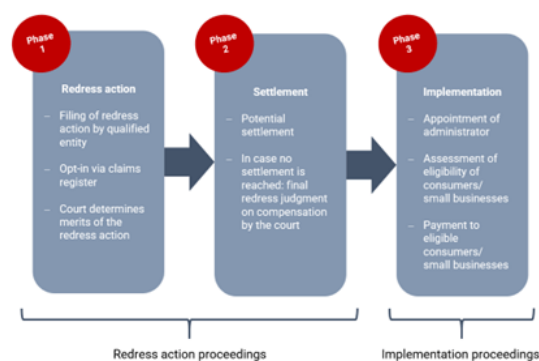
Redress Action

Most recently, Germany has implemented the EU Representative Action Directive (EU) 2020/1828 by means of the Consumer Rights Enforcement Act (*Verbraucherrecht durchsetzungsgesetz – VDuG*) which provides for **redress actions** as a new collective redress mechanism which will complement the existing mechanisms. Whereas the model declaratory action only allows for declaratory judgments and requires the individual claimants to subsequently initiate individual

proceedings to get the desired relief, i.e. payment of damages, the new redress action allows qualified entities to directly claim damages or other forms of relief on behalf of consumers and small businesses, e.g. repair, contract termination, price reduction or purchase price reimbursement.

The relief sought may also be the payment of a total collective amount (*kollektiver Gesamtbetrag*). The application for a total collective amount is, however, only optional, so that in rather simple cases the claim may also be directed at a direct payment to the consumers.

The general structure and procedure of the redress action aims at addressing the main deficiency of the model declaratory action, namely its two level approach, and is structured as follows:



Whereas the initial steps (filing of the redress action by a qualified entity, registration of consumers and small businesses with the claim register) are the same as with the model declaratory action, the proceedings before the court are structured differently. In case the court finds the redress action to be generally justified, it shall render a basic redress judgment on the merits of the case (*Abhilfegrundurteil*). On the other hand, if the court considers the action for redress to be inadmissible or unfounded, it shall dismiss the action by judgment.

In the basic redress judgment the court sets out the specific conditions by which the eligibility of the consumers is determined and the proof of eligibility that is to be provided by each individual consumer in the potential implementation proceedings. After the basic redress judgment has been issued, the court will request the parties to submit a settlement proposal in order to implement the decision by the court. If a settlement cannot be reached and the basic redress judgment becomes legally binding, the court shall continue the redress action proceedings and shall order the initiation of the implementation proceedings (*Umsetzungsverfahren*) by means of a final redress judgment (*Abhilfeendurteil*). In the final redress judgment

the court shall further render a cost decision.

The implementation proceedings involve the distribution of compensation by an administrator (*Sachwalter*) who is responsible for establishing an implementation fund (*Umsetzungsfonds*). The administrator is responsible for determining and verifying the eligibility of the registered customers and small businesses in accordance with the basic redress judgment.

So far, five redress actions have been filed of which not all have been published in the claims register, yet. All of them are linked to price adjustment clauses in General Terms & Conditions (*Allgemeine Geschäftsbedingungen*). Three of the redress actions concern the alleged invalidity of price increases imposed by energy suppliers upon their customers. One is directed against Vodafone GmbH and also concerns a unilateral price adjustment for internet and telephone services rendered. The newest redress action pertains to the streaming provider DAZN Limited which has increased its prices in 2021 and 2022 several times for existing contracts.

Other proceedings

The rather limited options of collective redress mechanisms available under German law until the implementation of the Representative Action Directive (EU) 2020/1828 have resulted in a rise of claimants filing bundled claims against a single defendant, thereby somehow attempting to mimic a class action-style procedure. Under this **assignment model**, multiple original claim holder assign their individual claims by means of a fiduciary assignment to a single claimant, which then brings a consolidated action against the defendant. This business model has been gaining traction over recent years due to specialised online platforms.

Under environmental and nature conservation laws, it is further possible for environmental associations to initiate proceedings in administrative courts without being affected in their own rights. This so-called **environmental association lawsuit** (*Umweltverbandsklage*) has its legal basis in the Environmental Remedies Act (UmwRG) and the Federal Nature Conservation Act (BNatSchG), as well as the corresponding state regulations. Associations aiming to bring an environmental association lawsuit need to be recognized as environmental or nature conservation associations under § 3 UmwRG.

Besides the above mechanisms, German law provides for further traditional options for two or more claimants to assert claims in civil proceedings, which can, however, not be characterised as collective redress mechanisms. For a **simple joinder of parties** (*einfache*

Streitgenossenschaft), claimants must either form a community of interest (such as co-owners or joint creditors) or if they are entitled or obligated for the same factual and legal cause. Within a simple joinder of parties, several claims are being combined in joint proceedings which also includes a joint taking of evidence. However, claimants still act independently from one another and are treated individually. German procedural law further provides for a **necessary joinder of parties** (*notwendige Streitgenossenschaft*). This mechanism applies where the legal relationship at issue can be established vis-à-vis all parties only uniformly, e.g. in cases that involve issues of joint ownership. Finally, the **consolidation of proceedings** (*Verfahrensverbundung*) aims to increase procedural efficiency by consolidating separate proceedings, which have legal ties to one another or which could have been asserted in a single proceeding.

Note: For reasons of clarity and brevity, the following overview focuses on the individual aspects of the model declaratory action and the newly introduced redress action, which are not as highly specific as the proceedings under the UKlaG and the KapMuG, but are broader in scope.

2. Who may bring class action or collective redress proceeding? (e.g. qualified entities, consumers etc)

Both, the model declaratory action and the redress action, may only be filed by so-called qualified entities on behalf of consumers and/or small businesses, respectively. The term qualified entity refers to qualified consumer protection organizations under German law as well as qualified entities from other EU member states, sec. 2 VDUG.

In order for consumer protection organizations to qualify as a qualified entity it is required that these organisations are registered in the list according to Section 4 of the Injunctions Act (Unterlassungsklagengesetz) and receive no more than 5 percent of their financial resources from company donations. This requirement aims at preventing frivolous collective redress actions.

Small businesses are also considered consumers. Therefore, if a redress action is filed, accession to the proceedings is also possible for small companies. Small companies are those that employ fewer than 10 people and whose annual turnover or annual balance sheet do not exceed EUR 2 million. This extension could particularly become relevant in antitrust actions for damages, which may affect consumers and small businesses alike. The provision that was introduced

along with the redress action takes into account the fact that small companies can find themselves in similar economic and psychological situations as consumers. The legal approach of the former model declaratory action regime which did not allow for small business to opt-in via the claims register was subject to criticism in connection with the model declaratory action against VW, as it did preclude commercial vehicle owners from joining the action. Whereas the initial draft of the redress action bill provided to allow redress actions to be joined by small companies with fewer than 50 employees and an annual turnover of up to EUR 10 million, these numbers were reduced in the deliberation process in order to only comprise so-called microenterprises (Kleinstunternehmen).

3. Which courts deal with class actions or collective redress proceedings?

In general, the Higher Regional Court (Oberlandesgericht) in whose jurisdiction the defendant has its seat is responsible for handling model declaratory or redress actions, sec. 3 (1) VDuG. In order to increase the efficiency of the proceedings and improve the overall quality of the decisions, the Länder governments are authorized to concentrate local jurisdiction for model declaratory and redress action at a specific Higher Regional Court (in case there is more than one in the respective Land). It remains to be seen whether (some of) the Länder will make use of this authorization.

The basic redress judgment granting or dismissing the asserted claims may be subject to an appeal by the defendant or the qualified entity to the Federal Court of Justice (Bundesgerichtshof).

4. What types of conduct and causes of action can be relied upon as the basis for a class action or collective redress mechanism?

When transposing the Representative Action Directive (EU) 2020/1828 into its national laws, Germany has neither restricted the scope of the model declaratory action nor the redress action. Thus, all matters between consumers and businesses that are eligible to be subject in individual proceedings may also be the subject of collective redress proceedings. This means that, for example, claims for cartel damages, which were not explicitly specified in the directive, as well as general tort claims, can potentially be the subject of redress actions.

5. Are there any limitations of types of claims that may be brought on a collective basis?

See question 4 above.

A redress action is only admissible if the claims of the affected consumers are of a similar nature (Gleichartigkeit), sec 15 VDuG. Claims of consumers are considered similar if: (i) they are based on the same factual situation or a series of comparable factual situations, or (ii) they involve the same material facts and legal issues that are relevant to the decision. The interpretation of this criteria by the courts will be crucial in determining the extent to which the redress action will apply in the future, whether it will have a narrow or broad scope.

6. How frequently are class actions brought?

Although there have been some prominent collective redress proceedings filed so far, collective redress is far from becoming a mass phenomenon in Germany. When the German legislator introduced the model declaratory action back in 2018 it estimated that approximately 450 model declaratory actions would be filed within a single year. So far, a total number of 35 model declaratory actions and 5 redress actions have been filed. The most popular and prominent one to date being the model declaratory action against Volkswagen AG for which 449,000 consumers have registered their individuals claims via the claims register. Besides proceedings in connection with diesel emissions, the most common fields for redress actions are currently the banking and energy sectors as well as tenancy law.

7. What are the top three emerging business risks that are the focus of class action or collective redress litigation?

Although the areas in which model declaratory and/or redress actions are currently initiated are rather narrow (see questions 1 and 6), the authors expect that there are the following areas which may especially be in the focus of future collective redress actions:

- **Data Privacy and Cybersecurity Breaches:** As businesses increasingly rely on digital technologies, the risk of data breaches and cybersecurity incidents has increased significantly. Thus, redress actions related to alleged data privacy violations are likely to become more common, in particular with a view to the ever-growing regulatory

approaches in this area.

- **Environmental Impact and Climate Change:** There is likely to be a growing trend of collective redress actions targeting companies for their environmental practices, particularly concerning their contributions to climate change, misleading environmental claims ("greenwashing"), and the impact of their business models on local communities. These cases may range from claims about misleading investors or consumers regarding their environmental impact to direct claims for damage caused by environmental practices.
- **Employment Practices:** With the changing dynamics of workplaces, including the rise of short-term jobs ('gig economy') and remote working, employment practices may be subject to stricter scrutiny. Collective redress actions may, thus, be increasingly initiated over issues such as wrongful classification of employees as independent contractors, failure to provide adequate health and safety measures as well as systemic discrimination or wage and hour violations.

8. Is your jurisdiction an "opt in" or "opt out" jurisdiction?

German Law provides for an opt-in model for all collective redress mechanisms.

9. What is required (i.e. procedural formalities) in order to start a class action or collective redress claim?

In order for model declaratory or redress actions to be admissible the qualified entity needs to demonstrate that the action may affect the claims of at least 50 consumers.

Furthermore, the statement of claim must include information regarding the similarity of the affected claims of consumers (see question 5). If the qualified entity filing the redress action requests payment of a collective total amount, the statement of claim must also specify the amount of each individual consumer's claim if all claims of the affected consumers are equal in amount. Otherwise, the method by which the respective individual claims of the affected consumers can be calculated should be indicated.

10. What remedies are available to claimants in class action or collective redress proceedings?

See question 1. Whereas the model declaratory action only aims at establishing the factual and legal groundwork of the case and does not provide for direct relief, the redress action allows the qualified entity to directly assert claims for damages on behalf of the consumers. Besides compensation for damages the redress action may also inter alia be directed at repairment of defective products, termination of contracts, price reductions or purchase price reimbursements.

11. Are punitive or exemplary damages available for class actions or collective redress proceedings?

No.

12. Are class actions or collective redress proceedings subject to juries? If so, what is the role of juries?

No.

13. What is the measure of damages for class actions or collective redress proceedings?

The court may determine the amount of the collective total amount on the basis of its own judgement, taking into account all the circumstances.

14. Are there any jurisdictional obstacles to class actions or collective redress proceedings?

The EU Representative Actions Directive does not regulate international jurisdiction, but refers to the general provisions of the applicable EU law in this regard. This reference particularly links to Regulation No. 1215/2012 (Brussels I Regulation).

In general, the Brussels I Regulation provides that companies must be sued in their country of domicile, i.e. German companies must be sued in German courts, Art. 4, 63 (1) Brussels I Regulation. However, the Brussels I Regulation provides for various exceptions to this general rule. For example, the regulation provides for special jurisdiction in in matter relating to consumer contracts, Art 17, 18 Brussels I Regulation. In such matters, the consumer may choose to bring proceedings against the

other party either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled. According to the case law of the European Court of Justice (ECJ), only the consumer himself can file a claim at the consumer's place of jurisdiction, but not, for example, a third party to whom the consumer has assigned his claims, even if the third party is himself a consumer (ECJ, judgement of 25.01.2018 – C498/16, ECLI:EU:C:2918:37 – Schrems). The ECJ will have to decide whether this also applies to redress actions or whether qualified entities may be eligible to file a redress action under the special jurisdiction for consumer matters for this purpose, as it is suggested by some legal scholars.

15. Are there any limits on the nationality or domicile of claimants in class actions or collective redress proceedings?

See question 2.

16. Do any international laws (e.g. EU Representative Actions Directive) impact the conduct of class actions or collective redress proceedings? If so, how?

The redress action is based on the EU Representative Action Directive.

17. Is there any mechanism for the collective settlement of class actions or collective redress proceedings?

See question 1.

The German law provides for a distinctive settlement phase in redress actions proceedings which follows the basic judgment (Abhilfegrundurteil). The court will request the parties to submit a settlement proposal within a deadline set by the court. If no settlement is reached, the court will issue a final judgment (Abhilfeendurteil).

18. Is there any judicial oversight for settlements of class actions or collective redress mechanisms?

Settlements in model declaratory or redress action proceedings require the approval of the court. The court shall approve the settlement by order if it considers it to

be an appropriate amicable settlement of the dispute, taking into account the facts of the case and the dispute, in particular the interests of the consumers concerned. Otherwise, the court shall refuse to approve the settlement by order.

19. How do class actions or collective redress proceedings typically interact with regulatory enforcement findings? e.g. competition or financial regulators?

In general, there is no general public enforcement of consumer protection in Germany. In contrast to many other jurisdictions, German law follows a special approach as it does not provide for a general consumer protection authority. Traditionally, consumer protection is predominantly enforced through civil actions. In these actions, qualified institutions, associations, and chambers of industry and commerce have the ability to challenge any alleged violations of laws committed by companies.

However, regulatory enforcement actions, e.g. by competition or financial regulatory bodies, such as the Federal Financial Supervisory Authority (BaFin), may serve as a basis for collective redress claims. When a regulator identifies wrongdoing or breaches of law, such findings may be used by qualified entities to bring model declaratory or redress action on behalf of consumers.

20. Are class actions or collective redress proceedings being brought for 'ESG' matters? If so, how are those claims being framed?

ESG issues may well be subject to collective redress claims in the future. For example, by promoting supposedly "green" credentials to enhance their profitability, reputation and competitiveness, companies potentially expose themselves to allegations of greenwashing. In addition to false or omitted claims, misleading advertising of products and investments may also give rise to redress claims.

See also question 7.

21. Is litigation funding for class actions or collective redress proceedings permitted?

Although third-party funding is generally permitted, it is excluded if the litigation funder is a competitor of the defendant, is dependent on the defendant or can be expected to influence the litigation of the entity entitled to

sue, including settlement decisions, to the detriment of consumers. In such cases, the redress action is inadmissible.

The statement of claim shall provide information on whether the redress action is funded by a third party. In such scenarios, the court may require the qualified entity to disclose the source of funds used to finance the action and any agreement entered into with financing third parties.

22. Are contingency fee arrangements permissible for the funding of class actions or collective redress proceedings?

In Germany, lawyers are in principle remunerated according to the Lawyers' Remuneration Act (Rechtsanwaltsvergütungsgesetz). For certain proceedings the lawyer receives a fixed fee as stipulated in this Act. The fee is usually determined by the amount in dispute (Streitwert). The amount of time the lawyer has spent on each activity is not considered in the Lawyers' Fees Scale fee calculation.

An agreement between a lawyer and his client to be paid on an hourly basis is, however, permitted and quite common. In case the claimant in a redress action were to agree on an hours-worked fee which exceeds the statutory fees calculated in accordance with the Lawyers' Remuneration Act the difference between the statutory

fees and the hours-worked fee is not compensable and has thus not to be refunded by the defendant.

The agreement of a contingency fee is generally possible, but subject to rather rigid requirements.

23. Can a court make an 'adverse costs' order against the unsuccessful party in class actions or collective redress proceedings?

In general, the loser pays-principle applies. Thus, the losing party is liable for the court costs and must pay compensation for legal representation to the other party. If both parties lose parts of the dispute, the costs will be allocated between the parties in proportion to win and loss. As a consequence, qualified entities will be obliged to cover the costs of the defendant when losing a model declaratory or redress action.

Both, court fees as well as the fees for legal representation are fixed charges which are calculated based on the amount in dispute.

24. Are there any proposals for the reform of class actions or collective redress proceedings? If so, what are those proposals?

Given the fact that the redress action has been implemented only very recently, there are no specific reform proposals addressing the model declaratory or redress actions, yet.

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