



**COUNTRY  
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# **The Legal 500 Country Comparative Guides**

## **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.

German civil law is based on the principle of “two-party litigation,” and class actions have therefore long been absent from German law. However, there are exceptions to this principle.

Model lawsuit under Kapitalanleger-Musterverfahrensgesetz (KapMuG) have existed in Germany since 2005. It has existed in its current form since 2012. It was introduced in 2000 in response to proceedings for damages brought by around 17,000 investors against Deutsche Telekom AG on account of missing information in the stock market prospectus. It enables model lawsuits for investors for damages to securities and other investments as a result of false, misleading or omitted public capital market information. The proceedings focus on the existence or non-existence of conditions that give rise to or exclude claims or the clarification of legal issues (“declaratory objectives”). The proceedings do not enable claims to be enforced. The investors must then sue for their claims again individually.

The “Musterfeststellungsklage” (hereinafter MFK), the model declaratory action, has been in existence since November 2018. It is regulated in procedural law in §§ 606-614 ZPO. It was also introduced in response to the diesel scandal cases and allows consumers to take action against entrepreneurs with the help of qualified entities. The objective is the positive or negative determination of factual or legal requirements of claims or legal relationships (“declaratory objectives”) between consumers and an entrepreneur (b2c). However, the action does not enable the enforcement of claims. The MFK does not lead to an enforceable title. For this, consumers must file a lawsuit again individually.

In June 2023, the application of a consumer class action, the “representative action” for redress will come into force. It is based on EU Directive 2020/1828 “representative actions directive” and must be applied in

the EU Member States by June 25, 2023. Consumers and small entrepreneurs will then for the first time be able to jointly assert claims against an entrepreneur with the help of qualified entities if the claims are comparable on the merits. This applies to injunctions as well as remedies, i.e. the enforcement of claims, in particular for damages, replacement deliveries, etc.

The new remedial action will be standardized in a new law, the “Verbraucherrechtsetzungsgesetz”. The MFK will also be integrated into this. So far, there is only a draft bill.

Not to be confused with collective redress is the subjective accumulation of claims. In this case, several injured parties appear together in the lawsuit. However, this only combines several lawsuits and the claimant continue to appear in their own names. Therefore, it is not collective redress.

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

Model lawsuits under the KapMuG may be instituted at the request of the claimant or the defendant. The applicant must show that the decision in the model lawsuit may have significance beyond the individual legal dispute for other similar legal disputes.

The other two class actions can be initiated only by qualified entities. Consumers or small entrepreneurs cannot bring actions independently.

The requirements for the qualified entities of the MFK are standardized in § 606 I 2 ZPO. There are requirements for the size, age and purpose of the entity. The qualified entity asserts consumer rights on its own behalf in the interest of consumers.

Entitled to bring a remedial action are national entities or entities qualified by the EU Member States or public bodies representing consumer interests, in particular consumer associations. Qualified entities may also

represent the interests of small businesses that employ fewer than 50 people and whose annual turnover does not exceed 10 million Euro. It is not yet clear whether the entity will assert its claims in its own name or, like MFK, third-party rights in its own name.

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

The competent court for class actions is the Higher Regional Court.

For the model lawsuit under the KapMuG, this follows from §§ 118, 119 III GVG.

For the MFK this is regulated so far in § 119 III GVG.

For the remedial action, this will be standardized in the new Verbraucherrecht durchsetzungsgesetz.

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

The cause of action for the model lawsuit under the KapMuG is the determination of a declaratory objective. The aim is to establish the existence or non-existence of preconditions giving rise to a claim or excluding a claim or to clarify legal issues ("declaratory objectives"). For the model lawsuit, identical model lawsuits must be filed in at least ten individual claims for damages.

The cause of action of the MFK is also the determination of a declaratory objective. The determination of the existence or non-existence of factual and legal requirements for the existence or non-existence of claims or legal relationships between consumers and entrepreneurs is sought ("declaratory objectives"). The claims or legal relationships of at least 10 consumers must depend on the declaratory objective. The legal relationships must already exist and not only arise in the future. There is no limitation to certain types of claims. For example, the positive clarification of individual claim elements can be established or it can be established in negative terms that certain objection and defense requirements are not met.

The cause of action in a remedial action is the assertion of claims. All claims and legal relationships of consumers against entrepreneurs can be asserted. Similar claims of at least 50 consumers or small businesses must be demonstrably affected.

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

The model lawsuit under the KapMuG is limited to the determination of one of the declaratory objectives (see question 4). The declaratory objectives may only concern proceedings for damages due to false, misleading or omitted public capital market information.

The MFK is also limited to the determination of one of the declaratory objectives (see question 4). Within this, all consumer law matters are admissible and all claims can be established positively or negatively.

The remedial action is not subject to any limitation on specific claims that may be asserted thereby.

### 6. How frequently are class actions brought?

Since the introduction of model lawsuit under the KapMuG, around 1,000 procedural motions have been entered in the register of actions and around 115 orders for reference (see question 9) have been issued for the purpose of conducting model lawsuits. To date, approximately 55 model decisions have been issued.

The most recent model decisions relate to Deutsche Bank AG, Deutsche Telekom AG and Volkswagen AG.

The MFK has existed in Germany since 2018 and is therefore a young type of lawsuit.

Since then, the Federal Office of Justice has made 33 MFKs public.

Thematically, these proceedings concern consumer credit law, warranty and tort law, capital investment law, tenancy law, and the interface of consumer contract and insolvency law.

The best-known MFKs took place against Daimler (Mercedes), VW and the energy supplier BEV.

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

The risks arising from class actions relate not only to the financial situation of the defendant companies, but also to technical challenges that they now have to face, in contrast to individual lawsuits.

Due to the considerable expense of class actions and the

association of several consumers with the help of qualified entities (see question 2), major law firms with great capacity are now also more frequently on the plaintiff side. This is rarely the case with individual consumer lawsuits. As a rule, the defendant companies will have to counter the great expertise of the major law firms with increased costs on their part.

In principle, the remedial action can be financed by third parties, subject to certain requirements. Nevertheless, class actions can become a business model for permissible litigation financiers and companies could be heavily pressured by the media staging of class actions.

Finally, in the context of class actions, it is possible for a single court decision to titrate damages for a large number of claims. The remedial action makes this possible immediately, whereas the MFK still requires the intermediate step of an individual action by the consumer. Nevertheless, the sum of the class action decision potentially determines a company's ability to perform and survive.

### 8. Is your jurisdiction an “opt in” or “opt out” jurisdiction?

For the German class actions, the “opt in” jurisdiction applies.

In the case of model lawsuits under the KapMuG, the claimants file a model application to participate in the proceedings, § 2 I KapMuG, or additional claimants subsequently register for the proceedings, § 10 II KapMuG.

If a court settlement is reached in the course of the model lawsuit pursuant to § 7 KapMuG, the claimants have a right to withdraw.

In the case of MFK, consumers must register in the official register of actions by the day before the start of the first hearing. The requirements for an effective registration are legally standardized in § 608 II ZPO.

The application can be withdrawn until the end of the day of the beginning of the oral proceedings in the first instance.

If a court settlement is reached in the MFK, the consumers have one month to withdraw from the settlement according to § 611 IV ZPO.

In the case of the remedial action, a registration must be made with the respective court no later than the day before the oral proceedings.

In contrast to the MFK, in the case of a court settlement of the remedial action, the possibility of withdrawal could be absent, because consumers are precisely consenting to the substantive law as well, when they register for the remedial action. Exact details are expected in the new law.

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

In principle, German law sets out general litigation requirements that must be met by lawsuits.

In addition to that, at least ten applications for model lawsuits from individual proceedings for damages are required for the assertion of the model lawsuit under the KapMuG. The applications must be filed within six months. It does not matter whether the model lawsuit applications are filed in the context of individual or class actions. The competent initial court then issues a reference order, which is submitted to the Higher Regional Court for consideration. The Higher Regional Court selects a model claimant and makes the claimant and the defendant publicly known. While the model case is pending, the original damage suits are suspended. The remaining claimants in the suspended damages proceedings shall be invitees to the model lawsuit. Pursuant to § 10 II KapMuG, additional invitees may again register for the model lawsuit within a period of six months, provided they have not yet filed a lawsuit.

In addition to the general litigation requirements, for the MFK and the remedial action, a qualified entity is required for the assertion of class actions (see question 2).

The requirements are standardized for the MFK in § 606 I 2 ZPO and are also expected to be. The MFK also requires a declaratory objective (see question 4). The claims or legal relationships of at least 10 consumers must demonstrably depend on the declaratory objective. Two months after the public announcement of the MFK, at least 50 consumers must have effectively filed their claims or legal relationships for entry in the register of actions. In addition, no other action in the same matter may be pending, § 610 ZPO.

In order to bring a remedial action claims of at least 50 consumers or small businesses must be demonstrably affected. There is no restriction to specific claims. Consumers are expected to register in the same way as for MFK.

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

Pursuant to § 20 KapMuG, an appeal against the model decision may be lodged with the highest German civil court, the Federal Court of Justice (Bundesgerichtshof), pursuant to § 574 II No. 1 ZPO. Once the model decision has become final, the proceedings continue at the courts of origin.

The MFK is subject to appeal pursuant to § 614 ZPO. The matter is of fundamental importance pursuant to § 543 II No. 1 ZPO.

The remedies for the remedial action have not yet been determined.

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

No, German law does not provide for punitive or exemplary damages as in the USA. The principle of in rem restitution applies and precisely no enrichment of the injured party.

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

No, class actions are not subject to jury participation.

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

On the basis of the model lawsuit under the KapMuG and the MFK only a declaratory target is set and the consumer must then sue for damages himself. Therefore, in Germany, the new remedial action is the only way to obtain damages directly by way of collective redress.

In the context of the action for redress, the court shall in principle first work towards a settlement.

If this is not achieved, the court may order the defendant entrepreneur to pay a collective total amount. The court shall assess the amount of damages in its own discretion, considering all the circumstances. It shall determine the damages within the framework of the estimate of damages pursuant to § 287 ZPO.

A custodian is appointed to distribute the total amount to participating consumers. The remedial action for performance may be directed directly to the consumers or for payment of a collective total amount to an implementation fund. The costs incurred for the distribution shall be paid by the defendant company.

If the total amount is not sufficient, an increase is possible. Likewise, the defendant has a claim for repayment if the total amount was set too high.

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

If an order for reference has already been issued in the context of model litigation under the KapMuG, it is not possible to initiate further model litigation for the initial proceedings pursuant to § 7 KapMuG.

The MFK is not admissible in court insofar as another action is pending in the same matter.

Otherwise, the assertion of the claims may be precluded by the statute of limitations for the respective claims.

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

In principle, cross-border conflicts do not prevent class actions.

The parties to model lawsuits under the KapMuG may be any of the civil litigants under § 13 GVG. Foreign as well as domestic parties are eligible in this respect.

With regard to qualified entities, they may only file an MFK if they are registered in the list maintained by the Federal Office of Justice pursuant to § 4 UKlaG or in the list of the European Commission. § 606 I 2 ZPO imposes further substantive requirements on the size, age and purpose of the institution.

Foreign associations have the same right of action as domestic associations, provided they are entered in the register of the European Commission and meet the requirements of § 606 I 2 ZPO. Among other things, this means that foreign chambers of industry and commerce that are on the European Commission's list, for example, may file an MFK in Germany, but not German chambers of industry and commerce.

The remedial action requires as claimants national qualified entities or those from other EU Member States.

Above all, consumer centers and other consumer associations are expected.

No restriction is apparent with regard to the consumers concerned, so that they can be domestic or foreign for both actions.

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

Because cross-border cases are conceivable (see question 15), claims of the consumers concerned may be governed by different substantive laws. In this respect, the general rules of the Rome I and II Regulations apply to conflicts of law concerning contractual and non-contractual obligations in civil and commercial matters.

The introduction of the MFK is based on the recommendations of the EU Commission 2013/396/EU.

The remedial action is based on the EU Representative Actions Directive from 2020 and implements it into German law through the Verbraucherrechtsetzungsgesetz.

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

For the model lawsuit under the KapMuG, the possibility of a court settlement is regulated in § 17 KapMuG. This opens up the possibility for the parties to conclude an overall settlement which includes all suspended proceedings. The fact that the model claimant can initially make this declaration alone is unobjectionable because of the subsequent possibility of withdrawal of all the invitees.

For the MFK § 611 ZPO regulates the conclusion of a court settlement. The settlement may be concluded between the defendant company and the qualified entity with effect for and against the consumers concerned. The settlement may not be concluded before the first hearing.

Thereupon, the invitees for the model lawsuit as well as the MFK can equally withdraw from the settlement. Overall, the settlement is effective if less than 30% of the registered consumers have withdrawn from the settlement within one month.

Registered consumers are also free to settle individually out of court with the MFK defendant. In practice, this

becomes relevant if more than 30% have opted out of the settlement and it is therefore not effective.

Consumers who have rejected the settlement can then sue for their claims individually.

In the remedial action, a settlement phase is integrated into the judicial process (see question 13).

After the court first decides in a basic judgment whether it considers the action to be justified on the merits, a settlement phase follows in which the parties are to reach an amicable agreement.

If the parties do not reach an agreement, a remedial judgment by the court follows.

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

Yes, the court must review and approve the settlement (see question 17).

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

In addition to the possibility of monetary compensation under civil law, there is also monetary compensation for damages under criminal law. This allows the injurer to compensate the victim for his or her material damage or to pay compensation for pain and suffering. Civil law and criminal law stand side by side and do not influence each other.

German law does not provide for civil punitive damages as in the USA. (see question 11). The injured party is only compensated for his actual damage and should not be enriched.

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

Collective redress is filed in Germany to protect consumers. The reason is their inferiority compared to entrepreneurs.

While the model lawsuit under the KapMuG and the MFK refers to the determination of consumer issues, the remedial action allows for their assertion. The qualified



entities are primarily consumer protection entities. In this respect, social matters are involved.

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

Litigation financing is possible for the model lawsuit under the KapMuG and is also frequently requested and granted. However, the major litigation financiers often only participate if the amount in dispute exceeds EUR 100.000.

Under the MFA, qualified entities that obtain more than 5% of their financial resources through corporate contributions are excluded under § 606 I 2 No. 5 ZPO. Commercial litigation funding by others is generally not prohibited.

In the remedial action, qualified entities that obtain more than 5% of their financial resources from corporate grants are also excluded. However, litigation funding by a third party is possible. Third parties may not be anyone who is a competitor of the defendant or who influences the qualified entity to the detriment of consumers. Disclosure of litigation funding in court is expected.

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

Contingency fees for litigation financiers do not violate any legal regulations and are therefore possible in principle. The restrictions on contingency fees only apply to lawyers.

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

For the model lawsuit under the KapMuG, the costs incurred by the model claimant and the invitees in the model lawsuit at first instance shall be deemed to be part of the costs of the first instance of the respective initial proceedings under § 24 KapMuG. If the court

orders the model defendant to bear the costs, the latter shall reimburse the claimant for all necessary costs. These costs include those of the model lawsuit and the initial proceedings. The claims of the invitees who have withdrawn their initial action within one month of service of their stay order shall not be taken into account.

In the case of an MFK, the losing party bears the costs of the proceedings, including legal fees. In the event of a lost MFK, no additional costs are incurred by the registered consumers. The cost risk is borne solely by the qualified entity bringing the action.

The EU Representative Actions Directive also stipulates that the losing party of a remedial action must reimburse the costs of the proceedings incurred by the winning party in accordance with national law. In principle, it is not the individual consumers who bear the costs of the proceedings, but the qualified entity in the event of their defeat. Consumers should only have to bear costs in exceptional cases if they were caused by their conduct.

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

Within the framework of the model litigation under the KapMuG, there are reform proposals that serve the purpose of procedural economy. At present, it must first be determined whether the underlying disputes depend on the asserted declaratory objectives pursuant to § 3 III KapMuG. This takes time. In order to avoid procedural delays, a reform proposal has been submitted that aims to introduce mandatory oral proceedings. In addition, it is no longer the Higher Regional Court but the initial court that is to determine the model claimant. In order to curb unnecessary applications, the declaratory objectives are to be limited to those that are of fundamental importance. To this end, all other procedural requirements are to be adjusted in a restrictive manner.

As a result of the fact that the MFK has only been in existence in Germany since November 2018 and that the remedial action will not be applied until June 2023, no reform proposals have yet been announced.

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