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Germany and Europe Broaden Consumer Collective Action Regimes

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During the past years, Europe has seen a push for increased protection of consumers (including securities investors) through private enforcement procedures, including “class-action” style collective litigation procedures. Several EU member states (e.g. the Netherlands) have already implemented such procedures.¹

Germany: As a result of the emission control defeat device events involving various German carmakers, Germany has followed this trend and effective since November 1, 2018, introduced a procedure for collective actions on behalf of consumers – the Model Declaratory Action Act (*Musterfeststellungsklagengesetz*). The first complaint under the new law was [filed](#) by a German consumer rights association against VW, seeking to have VW held liable for willful deceit in the sale of certain Diesel engine cars with emission control devices. A [second class action has been filed](#) against Mercedes Bank AG with respect to the use of certain terms on customers' rescission rights in their terms and conditions. 185,000 car purchasers are [reported](#) to have registered a claim just six weeks after filing.

European Union: The new German law precedes a directive proposed by the European Commission (the “Directive”) on April 11, 2018, to expand the scope of existing (limited) collective action procedures on an EU-wide basis. Once enacted, the Directive will have to be transposed into national laws in all EU member states and supersede existing national legislation – including the German law. The Directive expressly permits “gold-plating” (i.e. national legislation facilitating consumer class actions), but will not permit sustaining stricter requirements. As a result, following passing and implementation of the Directive, certain consumer class-actions can be expected to become easier in Germany.

Below are some of the key features of both pieces of legislation. For the quick read, a synopsis highlighting the key differences between the current German legislation and the Directive can be found at the end of this page.

Germany — The Model Declaratory Action Act (*Musterfeststellungsklagengesetz*)

Qualified Entities and Standing: Only "Qualified entities" have standing to file complaints on behalf of consumers for declaratory relief in German courts regarding matters of fact or law in legal relationships between a business enterprise and a "class" of consumers. The complaint will be registered in a public register. At least 50 consumers must "opt in" to the class action within two months by registering their claim for the complaint to proceed as a consumer "class" action.

A "Qualified Entity" must:

- have been incorporated for at least four years;
- be a non-profit organization whose primary purpose is to advise consumers; and
- not receive more than 5% of its funding through contributions from business enterprises.

Financing: No express limitation exists on the funding of the class action *per se*, i.e., fees (including success fees) paid to litigation funders or lawyers. This is not surprising given that a declaratory judgment does not yield any monetary benefits in which lawyers or a third-party funder could participate; it may increase the likelihood of a Qualified Entity aiming for a settlement (which can provide for monetary compensation to consumers) if the litigation was funded by a third party.

Other collective redress procedures: Existing German law collective redress procedures for [securities](#) and [competition law](#) breaches will remain in place. However, if a certain practice by a defendant can be pursued under several of these categories (e.g. an incorrect stock exchange filing), registering a claim under the consumer class action will prevent this plaintiff from filing an (individual) claim under securities class action laws.

Available only for claims under B2C relationships: Due to its restriction on business-to-consumer (B2C) relationships, the consumer class action is unlikely to become an effective tool for typical class-action litigation cases, such as antitrust or securities laws breaches.

Effect of judgment on class "Opt-In " system: Unlike class actions in the U.S., a judgment is only binding on a consumer who "opted in" by registering a claim. Once "opted in," an "opt out" is only possible until the end of the day of the first court hearing, and within one month following a settlement, or again should a settlement be agreed (see below).

Any judgment will only be of a declaratory nature with respect to the matters of fact or law concerned. Each consumer will have to sue for, and prove its individual damage, in a subsequent action, unless the defendant makes voluntary payments.

Settlements: With court approval, the parties can enter into a settlement directly providing for monetary compensation. The approved settlement is binding on each consumer who "opted in," but **not** on consumers who have not opted in, or consumers who opt out within one month after notice of the settlement. If more than 30 percent of consumers opt out, the settlement is not binding on anyone. After an "opt in," an "opt out" is only possible until the end of the day of the first court hearing.

Enforcement: Jurisdiction, recognition and enforcement of declaratory relief judgments and settlements in other jurisdictions is subject to general law, in particular the [Recast Judgments Regulation](#), the [Hague Convention on Choice of Court Agreements](#) and other treaties, or national laws. In cross-border cases, it is presently not clear whether a judgment or settlement under the new German Consumer Model Action Act could be enforced under the Recast Judgments Regulation in other EU member states.

European Union – Draft Directive on Representative Actions for the Protection of the Collective Interests of Consumers

As part of a "New Deal for Consumers," the European Commission on April 11, 2018, presented a [draft Directive on Representative Actions for the Protection of the Collective Interests of Consumers](#), replacing the prior "[Injunctions Directive](#) ." The draft Directive differs in several aspects from the new German legal situation. Once passed, the Directive will need to be transposed in all EU member states, including Germany, superseding any prior legislation where that legislation provides for more restrictive access by consumers. It is generally expected that the Directive will, if passed in its current draft form, make it easier to file a consumer class action compared to the current situation in Germany, in particular as the requirements for standing as a "Qualified Entity" may be less restrictive, and no "opt in" will be required. However, the

Committee for Legal Affairs (JURI) of the European Parliament has [proposed](#) several amendments to scale back the scope of the Directive.

- Key aspects of the draft Directive:
 - **“Qualified Entities” and Standing (Art. 4):** While each member can determine its own national requirements for being designated as a “Qualified Entity” (which may be stricter than the minimum requirements in the Directive), “Qualified Entities” from other EU member states will have standing to bring a consumer class action before the courts of every other member state. EU member states will also have the flexibility to designate “Qualified Entities” on an ad hoc basis.
 - **Financing (Art. 7):** The Qualified Entity will have to disclose the sources of its funding (a) generally and (b) specifically for the pending action. Third-party funding is permitted provided that the third-party funder:
 - does not influence the decisions taken by the Qualified Entity; and
 - is not a competitor of, or dependent on, the defendant in the class-action.

Failure of the terms of the third-party funding to comply with these requirements will result in the Qualified Entity losing its standing.

- **Action for Compensation (Art. 6):** Member states will have flexibility to determine whether actions shall generally aim at a compensation, return or other consideration of the defendant, or just a declaratory judgment. However, in cases where a “class” of consumers is identifiable and suffered comparable harm by the same practice during a certain period in time, or in cases where the individual consumer’s damage is low and distribution would be disproportionate, an action and ruling must be for compensation only. Non-compliance with the ruling will result in a penalty or fine.
- **“Opt-In” vs. “Opt-Out” (Art. 6(1) and (3)):** Member states will have flexibility whether consumers will need to “opt in” to be bound by a ruling, or whether it is binding on all consumers concerned. A ruling needs to have a binding effect on all consumers in those cases where an action for compensation is mandatory (see paragraph above). Settlements shall always allow for an “opt-out.”
- **Effects of Judgment (Art. 10):** A judgment awarding compensation to a consumer will have the effect of (a) an irrebuttable presumption of the defendant’s breach in the member state where the judgment was awarded and (b) a rebuttable presumption of such breach in all other EU member states.
 - This seems to imply that even though judgments generally should (and in certain cases must) provide for compensation, consumers will have to individually file a

follow-on action to enforce that compensation if the defendant does not, and cannot take direct enforcement action from that judgment.

- It further seems to imply that a judgment will not be automatically recognized in another EU member state under the [Recast Judgments Regulation](#).
- A judgment has no binding effect on the consumer – i.e. even if the collective action is dismissed, a consumer can still bring an individual action.

	Germany	EC Draft Directive
Scope	Any matters of fact or law in relation to claims or legal relationships between a consumer and a business enterprise	Breaches of any of the 59 legislative acts listed in Annex I
Class Certification	10+ consumers must be affected 50+ consumers must have registered claim within two months ("Opt-In")	"Collective Interests" of consumers must be affected "Opt-In" must not be made a requirement in national law for binding nature of a judgment if <ul style="list-style-type: none"> • consumers affected are identifiable and have suffered comparable harm caused by the same practice over a period of time; or • consumers have suffered small losses and distribution would be disproportionate
Standing	Qualified Entities (as defined in German law)	Qualified Entities (as defined in the national law of any EU member state)
Qualified	Registered since 4+ years with	Properly constituted under laws

Entities	<p>list of designated entities</p> <p>350+ individuals or 10+ associations in same business as members</p> <p>Non-profit organization</p> <p>Primary business purpose to advise consumers</p> <p><5% of funding from business enterprises</p>	<p>of member state</p> <p>Legitimate interest in ensuring compliance of EU law provisions</p> <p>Non-profit organization</p> <p>Can be on "ad hoc" basis</p>
Third-party Litigation Funding	<p>No requirements or restrictions (except for general funding restrictions of "Qualified Entity")</p>	<p>Third-party funders must not</p> <ul style="list-style-type: none"> • influence decisions in context of litigation; and • be competitors of, or dependent on, defendant
Evidence Production	<p>General German Civil Procedure Code rules, in particular no document discovery procedure against defendant</p>	<p>Court can order "in accordance with national rules" production of documents in control of defendant if Qualified Entity has submitted sufficient evidence to support the representative action</p>
Effect of Judgment	<p>Declaratory only</p>	<p>Monetary (or other remedy to set aside effects of defendant's breaches)</p> <p>Declaratory only where determination of remedy is complex due to individuality of damage of consumers (to be followed by a settlement procedure)</p>

		<p>Compensation as remedy is mandatory in cases where</p> <ul style="list-style-type: none"> • consumers affected are identifiable and have suffered comparable harm caused by the same practice over a period of time; or • consumers have suffered small losses and distribution would be disproportionate
Settlements	<p>Can provide for monetary compensation</p> <p>Binding only on consumers who “opted in”</p> <p>Not binding if rejected by >30% of consumers who “opted in”</p>	<p>Always provides for monetary compensation</p> <p>Consumers shall be given right to accept or reject settlement</p>
Opt-In/Opt-Out	Opt-In	Open: National law can provide for either “opt-in” or “opt-out”

1. An overview of collective redress procedures in EU member states as of November 2017 can be found in [a study by the British Institute of International and Comparative Law.](#)↔

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Suggested Reading

- 5 December 2018 Kirkland Alert Germany and Europe Broaden Consumer Collective Action Regimes
- 18 October 2018 Award BTI Litigation Outlook 2019
- 17 October 2018 In the News The Four Firms That GCs Fear the Most

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