



Collective Redress in Europe: Comparing the European and German Framework

IN SHORT

The Situation: In 2018, Germany introduced a model declaratory action giving qualified institutions the right to [raise liability claims on behalf of groups of consumers](#) in a representative action. Once the court has issued a declaratory judgment against the defendant, consumers may initiate individual claims for compensation on the basis of the liability judgment.

The Development: Also in 2018, the [EU Commission proposed a directive](#) that gives additional rights to groups of consumers in litigation against defendants. Under the proposed directive, Member States would have to give qualified entities not only the right to ask for a liability judgment but also the right to pursue claims for damages against defendants.

Looking ahead: The German legislature will therefore have to amend its legislation if it is to be aligned with the EU Commission's proposal.

Germany's Model Declaratory Action

On November 1, 2018, the [model declaratory action \(*Musterfeststellungsverfahren*\) came into force in Germany](#). This procedure allows certain qualified institutions to raise a claim for declaratory judgment on behalf of a group of consumers. If the court issues a declaratory judgment, its findings have a binding effect on any consumer who joined the proceedings. With this in hand, the consumer must then initiate proceedings for damages based on the declaratory judgment. The German legislature enacted this law to lower the bar for consumers in the enforcement of their rights.

A total of four claims have been filed under this new law, while hundreds were expected. One claim was filed by the Federation of the German Consumer Organizations ("vzbv") [against Volkswagen](#) ("VW") based on the allegation that VW used a defeat device in some of its engines.

Three other cases have been raised by the protection association for bank customers *Schutzgemeinschaft für Bankkunden e.V.* ("SfB") against Volkswagen Bank, Mercedes Benz Bank, and a credit rating agency alleging that the terms and conditions of certain of their credit agreements are invalid. Recently, the Regional Court of Stuttgart dismissed the case against Mercedes Benz Bank on the basis that the SfB has not met the requirements necessary to be deemed a qualified institution. In particular, the SfB failed to show: (i) that it has the required number of 350 members, (ii) that it fulfills its function; and (iii) that it filed the model action on a non-profit basis. In view of this finding, it seems likely that the other cases initiated by the SfB will also be dismissed. This would leave the defeat device case against VW as the only example for a declaratory action in Germany.

Even before the dismissal of the SfB case, the number of model claims initiated in Germany was low in comparison with the legislature's expectation. In the draft act on the model declaratory action, the legislator anticipated that a total of 450 actions would be raised per year. The initiation of only four cases in four months is obviously well below that expectation.

The same applies with regard to the number of consumers

joining the model actions. While the total number of consumers that joined the first action against VW is considerable—by January 2019, more than 370,000 consumers had joined that case—the number of consumers joining the other three cases is remarkably low by comparison. As an example, only around 600 consumers declared their joinder in the recently dismissed claim against Mercedes Benz Bank, a high number of which was invalid since many consumers mistakenly either joined the wrong case or declared their joinder in several cases at the same time.

Additionally, it may well be that Germany's model declaratory action will soon have to be amended. The EU Commission sees a systematic shortcoming in these proceedings as they take several years to complete and—unless the case is settled—result in a mere declaratory judgment establishing whether the company has committed the alleged wrongdoing. Once the model proceeding has ended, each consumer needs to file an additional claim to obtain damages.

The VW case is expected to last particularly long, as VW has already indicated that it is willing to take this case (as well as the follow-on damages claims) to the Federal Supreme Court of Germany (BGH). Such an appeal would prolong the total case duration to four to five years until the consumers' claims are ultimately decided.

European Union Proposes a New Deal for Consumers Amending Representative Actions

In parallel to the developments in Germany, the EU Commission made a proposal last year suggesting that the EU Member States [amend their representative action legislation](#) (the "New Deal for Consumers"). Under the suggested legislation, qualified institutions would be able to initiate claims not only for declaratory judgments but also directly for damages. [On March 26, 2019, the EU Parliament approved the Commission's proposal](#). Europe-wide, the Netherlands is at the forefront of amending its law. A bill introducing a collective damages action [has been enacted and will come into force on July 1, 2019](#). So far, no action has been taken in this regard in Germany.

Future Outlook for Germany and the European Union

Further amendments to the German legislation are therefore to be expected. They will become necessary at the latest once the EU Directive providing for collective damages actions has been approved in order to align the German regulation with EU law.



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THREE KEY TAKEAWAYS

1. Currently, almost 400,000 consumers have joined model declaratory actions in Germany raised by consumer protection associations against defendants. This demonstrates that under certain circumstances the model declaratory action may create a litigation risk for consumer-facing companies.
2. However, the total number of cases filed and consumers joining the lesser known cases falls far short of the initial expectations, which seems to be due to the need to initiate a damages action after the declaratory action.
3. Further changes to the legislation of the German—and other EU Member States'—representative action legislation are to be expected. Such changes will be needed to align these laws with the expectations of the European Union regarding collective redress.



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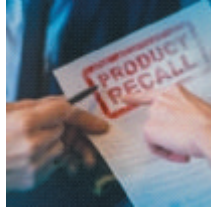
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