The Implementation of the Representative Action Directive (EU 2020/1828) in Germany

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I. Introduction

After more than 20 years of intensive discussion about collective redress in Europe, in 2020 the European legislator enacted a Directive on representative actions for the protection of the collective interest of consumers.[1] The Directive is unsurprisingly a political trade-off due to the difficulty of finding a balance between the conflicting interests of consumer protection and the business sector which fears a US class action style "litigation industry" in Europe. As a result, the Directive leaves the Member States a lot of room for implementation and the results will differ from one Member State to another depending on the political forces that prevail in the legislative process. Not least the VW diesel scandal contributed to the fact that the political will in Europe was finally there to create such

[1] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (Text with EEA relevance)

an instrument.[2] The political pressure was necessary because many Member States, in particular Germany, had not succeeded in introducing an effective instrument of collective redress due to lack of political unity.

In Germany, the VW diesel scandal at least forced the introduction of the *Musterfeststellungsklage* – so-called action for a model declaratory judgment (hereinafter: MFK actions) in 2018. The mechanism, however, did not contribute to an effective, especially not to a nationwide enforcement of consumer rights. The figures alone speak for themselves: The German legislator, who was very convinced of his model despite all initial criticism, assumed 450 MFK proceedings per year in the draft law. The reality is somewhat different: Since its entry into force in November 2018, only 37 proceedings have been pending so far and only 3 of them are related to the diesel scandal. Although approx. 2,3 million German car owners are affected by the *Volkswagen* scandal alone (today all big car manufacturers face similar problems due to the use of prohibited software in their engines) only approx. 1/3 took legal action. More than 250.000 car owners took benefit from a out-of-cour settlement by the biggest German consumer association *Verbraucherzentrale-Bundesverband*, approx. 40.000 assigned their claims to a legal tech company ("*myRight"*). Only those with coverage by a legal expense insurance took the risk of suing Volkswagen individually – the estimated number is 420.000. Of these individual claims, approx. 2.100 are still pending in the second appelate instance before the *Bundesgerichtshof*. Approx. 100.000 case are still pending before lower courts. The average amount in controversy per case is 26.000 Euros[3] - so we are not talking about small damages.

Disappointment with the German MFK action was pre-programmed, because it requires consumers to become active twice in order to realise their claims (registration + action for performance after a successful model declaratory action). This was ultimately also the reason for the European Commission not to allow such a two-stage procedure for the European model of collective redress.[4] The focus of the Directive is now (in addition to the well-known action for injunctive relief) on a representative action by associations for redress measures. Member States must implement such an instrument in their procedural system and it may take various forms: actions may be brought for damages, repair, price reduction, termination or rescission of contracts etc. Consumers must directly benefit from the representative action and must not be forced to bring individual follow-up actions to enforce their rights.

The implementation of the Representative Actions Directive 2020/1828 (hereinafter: RAD) should have been completed in the Member States by the 25 December 2022, the new rules should apply from 25 June 2023. Many member states were (or still are) late with the implementation.[5] In Germany the draft proposal passed the Parliament in the first week of July 2023. Provided that in September 2023 the Second Chamber also approves the act, it can enter into force this year – with a couple of months of delay. There has been a fierce dispute on the implementation within the governing coalition and a couple of last minute changes prevent that the act provides a consistent and consumer-friendly mechanism. In particular, the fact that funding possibilities were practically ruled out at the last

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[2] *Augenhofer* NJW 2021, 113; *Röthemeyer* VuR 2021, 43; the EU Commissions Draft 2018 (COM [2018] 184 final) p. 2 also referred to the VW case.

[3] https://www.zdf.de/nachrichten/politik/bundesgerichtshof-dieselskandal-entscheidung-100.html

[4] Art. 9 para 6 Directive 2020/1828.

[5] The EU Commission sent letters of formal notice to the following Member States that did not implement the Directive until 25 December 2022: Belgium, Bulgaria, Czechia, Denmark, Germany, Estonia, Ireland, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Luxembourg, Malta, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland and Sweden.

minute due to pressure from the business community will prevent the new mechanism from being used frequently.

II. The European framework for representative actions in the collective interest of consumers

For reasons of competence,[6] the RAD formally replaces the Injunctions Directive of 2009 and is located in the core area of consumer protection. Member States are, however, free to grant a broader scope of application. The RAD is an instrument for a minimum harmonisation of collective redress in Europe. According to its Article 1 para 2 it

> "does not prevent Member States from adopting or retaining in force procedural means for the protection of the collective interests of consumers at national level. However, Member States shall ensure that at least one procedural mechanism that allows qualified entities to bring representative actions for the purpose of both injunctive measures and redress measures complies with this Directive."

This was a necessary concession to the Member States, which had already implemented their own instruments of collective redress in recent years (such as The Netherlands, France, Belgium and the Nordic countries).

The key points of the Directive are as follows: Member States must ensure that consumers' interests in representative actions are represented by qualified entities and that those qualified entities have the rights and obligations of a claimant party in the proceedings. The RAD distinguishes between domestic proceedings and cross-border proceedings with respect to legal standing. Whereas Member States are free to identifiy representative claimants for domestic cases, the Directive grants legal standing for cross-border cases exclusively to consumer organisations that can demonstrate at least 12 months of actual public activitiy in consumer law, have a non-profit making character and have been established primarily for protecting consumer interests. The Directive does not prohibit, but also does not encourage that *ad hoc* founded entities may represent the victims of a particular mass harm event as "qualified entities".[7] There is a European wide concern that these entities may be used (or misused) by law firms as claim vehicles for making profit. The Directive does not specify whether the qualified entities file the action based on their own entitlement or whether they enforce the consumers' claims in their own name as nominal plaintiffs (*Prozessstandschaft*).

Qualified entities can chose between provisional and/or definitive injunctive measures (the traditional instrument in consumer law since the 1960s)[8] and redress measures.[9] Member States shall ensure that a pending representative action for an injunctive measure has the effect of suspending or interrupting applicable limitation periods in respect of the consumers concerned by that representative action, so that those consumers are not prevented from subsequently bringing an action for redress measures concerning the alleged infringement.[10] As this type of representative action does not require an opt-in or opt-out by consumers, they have indeed a very broad effect with

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[6] The European legislature has legal competence to implement legal acts in consumer law, but there is no general competence to regulate or harmonize civil procedure law. In this respect the judicial power of the EU is restricted to cross-border cases and judicial cooperation within the EU.

[7] Art. 4 para 6 Directive 2020/1828: "Member States may designate an entity as a qualified entity on an ad hoc basis for the purpose of bringing a particular domestic representative action, at the request of that entity if it complies with the criteria for designation as a qualified entity as provided for in national law."

[8] Art. 8 Directive 2020/1828.

[9] Art. 9 Directive 2020/1828.

[10] Art. 16 para 1 Directive 2020/1828.

respect to the suspension of the statute of limitations. For actions for a redress measure the effect is less clear and Member States like Germany took the position that only consumers who have registered for the action will benefit from this effect.

The Directive leaves it to the implemenation by Member States whether an opt-in or opt-out mechanism will take place for actions for redress measures.[11] Only consumer not residing in the forum state can only participate in representative actions based on an active opt-in.[12] Also details of the proceedings are within the discretion of national legislatures provided that there is mechanism "to dismiss manifestly unfounded cases at the earliest possible stage of the proceedings."[13] With respect to litigation costs the RAD insists on the loser pays principle (subject to conditions and exceptions provided for by national law). Individual consumers shall not pay the cost of the proceedings[14] and consumer associations may charge only "a modest entry fee or similar charge" for those who join in the preparation of a represenative action.[15]

With respect to funding of represenative actions the RAD takes a very cautious approach. It does neither forbid nor order that third-party funding be allowed. Member States can forbid third-party funding exclusively although consumer associations across Europe often do not have sufficient budgets to bring expensive mass claims before court. Where a representative action is funded by third party, Article 10 of the Directive requires that conflicts of interests are prevented and that funding by third parties that have an economic interest in the bringing or the outcome of the representative action for redress measures does not divert the representative action away from the protection of the collective interests of consumers. In detail, Member States must ensure that

- "the decisions of qualified entities in the context of a representative action, including decisions on settlement, are not unduly influenced by a third party in a manner that would be detrimental to the collective interests of the consumers concerned by the representative action;
- the representative action is not brought against a defendant that is a competitor of the funding provider or against a defendant on which the funding provider is dependent."[16]

III. Implementation in Germany

1. General structure of representative actions

Before the German Ministry of Justice came up with a draft for the implementation, two legal expert opinions on the implementation had been published: one study was financed by the biggest and most important German consumer association – *vzbv*[17] -,[18] the other one initiated and financed by German

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[11] Art. 9 para 3 Directive 2020/1828 provides, however, a special rule for cross-border settings: "Member States shall ensure that individual consumers who are not habitually resident in the Member State of the court or administrative authority before which a representative action has been brought have to explicitly express their wish to be represented in that representative action in order for those consumers to be bound by the outcome of that representative action."

[12] Art. 9 para 3 Directive 2020/1828.

[13] Art. 7 para 6 Directive 2020/1828.

[14] Art. 12 Directive 2020/1828.

[15] Art. 20 para 3 Directive 2020/1828.

[16] Art. 10 para 2 lit a, b Directive 2020/1828.

[17] Verbraucherzentrale-Bundesverband – it is the umbrella organisation of German consumer associations.

[18] *Gsell/Meller-Hannich*, Die Umsetzung der neuen EU-Verbandsklagerichtlinie, Gutachten 4.2.2021, available at: https://www.vzbv.de/sites/default/files/downloads/2021/02/03/21-02-04_vzbv_verbandsklagen-rl_gutachten_gsell_meller-hannich.pdf. Both authors published a supplementary legal expert opinion in

business associations.[19] The final version adopted by the German Parliament is a kind of mixture of both proposals.[20]

In Germany, representative actions will be heard by the appelate courts as courts of first instance. Beyond the Directive, the new instrument for collective redress actions is not only applicable for consumers, but also for the claims of small companies with less than 10 employees.[21] It is also applicable not only to infringements of the 66 EU acts on consumer law listed in the Annex to the Directive, but in all civil disputes.[22] This includes tort claims such as those lititgated in the diesel scandal and , at least in theory, antitrust damages claims. The new Consumer Rights Enforcement Act (VDuG[23]) combines the slightly modified MFK actions with actions for redress; associations are free to choose between them because the act expressly abolishes the principle of subsidiarity of declaratory actions.[24] The free choice of remedies implies a certain risk that German associations will avoid the complex actions for redress and continue to resort to the simpler and less expensive, but for consumers much less attractive, MFK proceedings. Should this happen in practice to a large extent, it would contradict the requirement of effective implementation of the Directive.

According to the Consumer Rights Enforcement Act, there are two possibilities for qualified entities to bring actions for damages in the interest of consumers: Either the consumer association sues for payment of a specific amount to individual consumers known by name. This rather unproblematic case will not occur frequently and will regularly affect a rather small circle of aggrieved parties. Consumer asociations can already deal with such cases *de lege lata* by pre-litigation assignment or authorisation, but have not done so in the past. The second and more important possibility is to sue for damages of a collective total amount to be paid by the defendant. The court will then establish a fund to the distributed by a court-appointed administrator to consumers who can prove that they have suffered damage. The court will have to define the group of consumers entitled to claim compensation by general criteria and will also specify the type of evidence they have to provide. The court may estimate the collective total amount. If it turns out during the distribution procedure that the amount is not sufficient, an additional payment can be demanded from the defendant.

2. Legal standing and requirements for admissibility

a) Requirements for qualified entities

The German Consumer Enforcement Act provides different criteria for the legal standing of qualified entities for cross-border case and domestic cases. Whereas for cross-border actions the Directive

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February 2022: „Folgegutachten über die Umsetzung der Richtlinie über Verbandsklagen zum Schutz von Kollektivinteressen der Verbraucher ins deutsche Recht - 23.2.2022", available at: https://www.vzbv.de/sites/default/files/2022-02/22-02-23_vzbv_EU-Verbandsklage_Folgegutachten_final.pdf.

[19] *Bruns*, Die Umsetzung der EU-Verbandsklagerichtlinie in deutsches Recht, Veröffentlichungen zum Verfahrensrecht, Bd. 188, Tübingen 2022; also available at: https://www.dihk.de/resource/blob/60208/dc65ef7b610a1d1c5c9c769d3f82aa1f/gutachten-verbandsklagerichtlinie-data.pdf.

[20] For a detailled review of the proposals see *Stadler*, Umsetzungsprobleme bei der RiLi 2020/1828 - wie kann ein effizienter verfahrensrechtlicher Verbraucherschutz doch noch gelingen?, Referat 21. Österreichischer Juristentag, 1.-3. Juni 2022, Wien; *Stadler* ZZP 2/2023, p. 129-151.

[21] Sec. 1 para 2 Consumer Rights Enforcement Act.

[22] Sec. 1 para 1 Consumer Rights Enforcement Act.

[23] Verbraucherrechtedurchsetzungsgesetz (draft version)

[24] In general, German civil procedural law does not allow actions for a mere declaration if the claimant could also file an action for payment or other performance. The claimant should use the wider remedy in order to prevent a series of actions.

specifies clearly the requirements to be fulfilled,[25] there was room for national decisions when it comes to domestic cases. For these actions qualified entities must not longer meet the strict requirements established for MFK actions in the German Civil Procedure Code.

In the past, consumer associations that intended to file an MFK action had to be in existence for at least 4 years and they had to prove that the focus of their activities was on the advice of consumers by way of non-commercial information and counselling. The 4 year rule was established to prevent activities of ad hoc founded associations. As claims become time-barred under German law after 3 years, entities founded to enforce the claims arising from a particular mass harm event could not successfully enforce these claims. According to the new law qualified entities must have existed only for a minimum of 1 year, they must have as members 3 associations or 75 natural persons, must prove that they do not bring claims primarily in order to generate income and that they do not obtain more than 5% of their financial resources from companies.[26] This means that actions by associations established *ad hoc* on the occasion of particular mass harm event can act as qualified entities.

We will have to wait and see whether such associations will be established in Germany in the future. As they need to be of a non-profit character, it will not be easy for them to find financial ressources to support their work. The RAD allows only “a modest entry fee” to be asked to be paid by consumers, and third-party funding is limited under German law to a 10% cap of the success fee. In the Netherlands ad hoc founded claim vehicles have been quite successful in negotiating settlements since 2005 and are now also allowed to bring actions for damages on behalf of consumers. They have normally financial support from law firms, mostly from the US, that hope to receive generous fees in the event of a settlement or work on a contingency fee basis. Both options are not available in Germany: in case of a successful litigation and a judgment the reimbursement of lawyers’ fees is restricted to clearly regulated legal tariffs, contingency fee arrangements are allowed only for the enforcement of claims up to an amount of 2.000 Euros.

The establishment of such claim vehicles in Germany is therefore not very attractive for law firms and the RAD provides another threshold: associations founded on an ad hoc basis for a particular mass harm event elsewhere in Europe do not benefit from the principle of mutual recognition. Art. 4 RAD accepts them for “a particular domestic representative action” only, but does not oblige Member States to accept ad hoc established foreign qualified entities to bring cross-border actions.[27]

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[25] Art. 4 Directive 2020/1828: Qualified entities must fulfill the following requirments: a) it is a legal person that is constituted in accordance with the national law of the Member State of its designation and can demonstrate 12 months of actual public activity in the protection of consumer interests prior to its request for designation;
(b) its statutory purpose demonstrates that it has a legitimate interest in protecting consumer interests as provided for in the provisions of Union law referred to in Annex I;
(c) it has a non-profit-making character;
(d) it is not the subject of insolvency proceedings and is not declared insolvent;
(e) it is independent and not influenced by persons other than consumers, in particular by traders, who have an economic interest in the bringing of any representative action, including in the event of funding by third parties, and, to that end, has established procedures to prevent such influence as well as to prevent conflicts of interest between itself, its funding providers and the interests of consumers;
(f) it makes publicly available in plain and intelligible language by any appropriate means, in particular on its website, information that demonstrates that the entity complies with the criteria listed in points (a) to (e) and information about the sources of its funding in general, its organisational, management and membership structure, its statutory purpose and its activities.

[26] § 2 Consumer Rights Enforcement Act.

[27] Only long-standing qualified entities included in a list managed by the European Commission must be granted legal standing across all Member States.

b) Collective interest of consumers

The RAD obliges Member States to implement the described mechanisms for "for the protection of the collective interests of consumers", but it does not define what a mass harm event is or how many consumers must be affected in order to allow a representative action. In Germany, the qualified entities that filed an MFK action had to demonstrated in their claim statement that at least 10 consumers were affected by the defendant's wrongdoing. The action became admissible only when 50 consumer had registered their claims at the beginning of the litigation. This threshold for representative actions has been modified: plaintiffs must now demonstrate for MFK and redress actions that at least 50 consumer are affected by the case. There is no longer any need for a particular number of registrations by consumers - which is a logical step because registrations can be made until shortly before the judgment is rendered.

3. No opt-out mechanism

The Directives leaves it up to the Member States whether they choose an opt-in or opt-out mode for the representative redress action. Representative actions for injunctive relief do not require any participation of individual consumers at all. It was to be expected that Germany did not even consider the opt-out option. An opt-out system was always rejected with reference to the consumers' right of disposition, their right to be heard and the argument that and opt-out mechanism would lead to better participation rates in the case of minor damages never prevailed. The decision of the Consumer Rights Enforcement Act in favour of an opt-in model is, however, acceptable because the Act improves another important redress mechanism. Since 2005, consumer associations were in the position of bringing actions for skimming-off illegally gained profits from companies in case of violations of competition law (Sec. 10 Unfair Competition Act). The mechanism was intended to deal with cases of small individual damages suffered by a large group of consumers and to overcome the rational passivitiy of consumers. The amount skimmed off goes into the Federal budget. It is thus, in theory, an alternative to opt-out representative actions for damages in which funds are often not drawn down because consumer do not claim the small amounts. The instrument was, however, of no pratical importance because it required the proof of an intentional violation of competition law – a very high threshold. Moreover, the Federal High Cout had decided in 2018 and 2019[28] that consumer associations were not allowed to use third-party funding for these actions. The court emphasized the risk that the profit-making attitude of funders may prevail over the enforcement of consumer interests. This was the end of this type of lawsuits in practice.

The Consumer Rights Enforcement Act improves the situation considerably: the requirement of fault is now reduced to gross negligence, the calculation of profits is made somewhat easier and the legislator also explicitly allows commercial litigation funding for these actions. This means that for genuine small claims, which otherwise could only be combated with the help of an opt-out action, a reasonably manageable instrument will exist alongside the representative redress action.

4. Late opt-in of consumers

During the legislative process those who were in favour of the protection of consumer interests favoured a rather late opt-in of consumers, preferably even after the issuance of a judgment.[29] This would have followed the example of French group actions in which consumers can wait for the outcome of the action and then decide to participate or not. The German Federal Ministry of Justice suggested a period for opt-ins at the beginning of the proceedings, but had to give in finally. Now the

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[28] BGH NJW 2018, 3581 (for a review cf. *Stadle*r JZ 2019, 198); BGH NJW 2019, 2691.

[29] *Gsell/Meller-Hannich*, Die Umsetzung der neuen EU-Verbandsklagerichtlinie, Gutachten, 4.2.2021, available at: https://www.vzbv.de/sites/default/files/downloads/2021/02/03/21-02-04_vzbv_verbandsklagen-rl_gutachten_gsell_meller-hannich.pdf, p. 25.

Consumer Rights Enforcement Act provides that consumers may opt-in until the expiry of 3 weeks after the formal end of oral proceedings.[30] In practice this means for representative actions for a group of consumer who can be described only by general criteria: the qualified entity, the defendant and the court will not know throughout the proceedings how many consumers will be interested to participate and how their claims be differ from each other. In a sense, one is litigating in the dark without detailed knowledge of the individual cases. Qualified entities will need to investigate the case in detail before bringing a representative action in order to demonstrate that the claims are similar and what criteria may be used to distribute damages to the whole group or sub-groups.

If the action, which is for a collective total amount, is well founded, the court shall give a interlocutory judgment on the defendants liability. The judgment must contain the following: the concrete conditions according to which the consumer's eligibility is determined and the evidence to be provided by each consumer. Since it will often not be possible to award specific individual damages, the judgement must indicate the method by which damages are to be calculated for the entitled consumers.[31] Before such an interlocutory judgment can be pronounced, consumers have the final chance to opt-in. The judgment shall not be handed down before the expiry of six weeks after the conclusion of the oral proceedings in order to allow the court to take into consideration the claims registered. In a final judgment the court will then order the payment of the collective total amount of damages to the administrator of the fund.[32] In many cases, the court will, however, first have to re-open the oral proceedings because based on the registrations new facts will be submitted which require to be discussed with the parties.

It was a clear intention of the new law to reduce the burden of mass litigation for German civil courts. With the possibility of a late opt-in to a representative action, German courts will probably still face a large number of parallel proceedings. Consumers are barred from bringing an individual action against the defendant of a representative action only once they have registered their claim in the representative action. If the represenative actions takes very long, consumers who have not registered their claims yet and who have adopted a “wait and see” attitude will need to file individual actions to avoid that their claims become time-barred. The reason is that according to the German implementation of the RAD the filing of the representative action does not suspend the limitation period in general, but only for claims of consumers who have registered their claims. It is not clear whether this regulation is in line with the RAD. Article 16 RAD requires that the filing of a motion for an *injunction* by a qualified entity suspends the limitation period for the claims of all consumers affected by the alleged wrongdoing of the defendant. It is very likely that paragraph 2 of Article 16 establishes the same consequence for *redress* actions, but the wording is not clear.

In any case, the current limitation rule for redress action does not help to relieve the courts. Moreover, from this description of the proceedings you can see that the whole structure has become quite complex. I would have preferred a mechanism with an early opt-in deadline for consumer. Although this might have deterred some from registering, it would have been much clearer for the court and the parties what the whole dispute is about.

There are, of course, a number of practically important cases in which at least the defendant's side knows or can know the extent of the damage caused very well itself. One should think of the many cases of unlawful general terms and conditions of insurance companies, banks and telecommunication providers, on the basis of which they have unlawfully collected fees from their

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[30] Sec. 46 Consumer Rights Enforcement Act.

[31] Sec. 16 para 2 Consumer Rights Enforcement Act.

[32] For details see Sec. 18 Consumer Rights Enforcement Act.

customers for certain transactions.[33] There is one prominent example in Germany: In 2021, the Federal Supreme Court decided that a tacit consent by bank customers to change general contract terms and to allow the trade to charge higher fees is invalid. Practically all banks are affected by the judgment because they had all used such a mechanism for years. This means that fee increases of approx. 40 million bank customers were invalid. On average, each customer can demand a refund of 120 €. There have hardly been any voluntary repayments so far - this is where the new action by associations could help.

In cases like this an abstract categorisation of the consumers affected and a very late opt-in of the customers is manageable and does not affect the procedure. In other cases the late opt-in may cause problems. In any case it may increase the burden for the judiciary as described above, because due to the late opt-in deadline a large number of individual lawsuits could be filed parallel to the representative action.

5. Settlements

The qualified entity is authorized to settle the whole case on behalf of registered consumers.[34] A settlement is, however, not allowed before the deadline for consumer registrations has expired.[35] Once the court has decided on the defendant's liability in principle in an interlocutory judgment (*Abhilfegrundurteil)* it shall invite the partis to submit a proposal for a settlement. Settlements are subject to court approval and become binding for the registered consumers if they do not opt-out of the settlement within one month.[36]

6. Distribution of funds

In cases in which a collective total amount of damages must be paid by the defendant, the court will appoint an administrator and order the opening of proceedings for distribution.[37] His position is to some extent similar to the position of the adminstrator in insolvency proceedings. The administrator will pay compensation directly from the fund.[38] He will set a deadline for the submission of evidence by registered consumers and will check the eligibility according to the requirements of the judgment.[39] Based on a disbursement plan he may ask the qualified entity to sue the defendant for an additional payment, if the total amount paid so far was not sufficent to satisfy all claims.[40] The distribution proceedings can therefore become rather complex. Defendants and claimants have the right to appeal to the court if they do not accept the administrator's decision to accept or reject a claim.[41] Claimants can sue the defendant individually, if the court also rejects their claim and they will benefit in a follow-on action from a binding effect the court's decision that the defendant is liable in principle.[42] Defendants will also be tempted to object to the administrator's decisions in order to avoid the obligation to make additional contributions. The distribution proceedings are therefore vulnerable to dispute.[43]

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[33] Federal Supreme Court (*Bundesgerichtshof*) NJW 2021, 2273.
[34] Sec. 9 Consumer Rights Enforcement Act.
[35] Sec. 9 Consumer Rights Enforcement Act.
[36] Sec. 10 Consumer Rights Enforcement Act.
[37] The costs are to be paid by the defendant, Sec. 20 Consumer Rights Enforcement Act.
[38] Sec. 25 Consumer Rights Enforcement Act.
[39] Sec. 27 Consumer Rights Enforcement Act.
[40] Sec. 21 Consumer Rights Enforcement Act.
[41] Sec. 28 Consumer Rights Enforcement Act.
[42] Sec. 11 para 3, 39 Consumer Rights Enforcement Act.
[43] The administrator can be held liable for damage by the defendant and by consumers if he violates his legal obligations, Sec. 31 Consumer Rights Enforcement Act.

7. Funding

a) Restrictions in the Consume Rights Enforcement Act

Funding of representative actions is a key issue and it was discussed at length in legal literature. The German legislature, however, did not consider the question in detail, but included in the very last minute a strict restriction on third-party funding. Represenative actions are not admissible if the qualified entity has entered into a funding agreement which promises the funder a success fee of more than 10% of the amount paid by the defendant.[44] The margin customary in Europe is 25-35%, in some cases even more depending on the procedural risks involved. 10% is an arbitrary number and much too low. Funders have already announced that they will not be able to support representative actions under these conditions. Another deterrence for funders is the fact that qualified entities are obliged to disclose funding agreements to the court. Courts are held to check whether funders may unduly influence the proceedings to the detriment of consumers, e.g. by having the right of a final decision in settlement negotiations. Funding agreements are typically confidential and the conditions of funding must not become known to the defendant in order to prevent that he will use the information strategically against the claimant. Under the new provisions it is, however, not clear, whether courts will inspect funding agreements in camera or whether the defendant will have access to them.

Another obstacle for third-party funding is the late opt-in of consumers. Normally, the qualified entities will enter into a funding agreement prior to the filing of the representative action. In any case, the funder will need to have information about the number and size of the claims to be enforced in order to calculate his risks. If qualified entity is not in contact with the consumers affected by the mass harm event prior to the action, it is difficult to provide the necessary information and information provided by a late opt-in of consumers will be to late. Qualified entities also face legal and practical obstacles to enter into such an agreement with a funder which will include a success fee for the funder at the expense of the consumer's compensation. The consumers concerned must agree to such an agreement reducing their compensation entitlement. It could be assumed that consumers who register their claims also subsequently approve the conclusion of the financing agreement by the qualified entity - provided that they are sufficiently informed about it. With the late opt-in, however, this approval comes very late in individual cases and the funder will not want to rely on it.

b) General suspicion against third-party funding

The restriction came as surprise for funders and qualified entities, but is in line with a general suspicion against third-party funding in Europe, and particularly in Germany. When it became clear that a Directive on representative actions can no longer be avoided, the conservative parties in the European Parliamant started a political initiative to strictly regulate third-party funding in Europe.[45] The Parliament's proposal for a Directive on "Responsible private funding of litigation" of September 2022 intends to implement a strict supervisory system for litigation funders in the EU similar to the one for banks and insurance companies and also suggests severe restrictions of the principle of freedom of contract for funders and their clients. According to recital 6 it

> "recommends the establishment of a system of authorisation for litigation funders, thereby ensuring that effective opportunities are provided to claimants to make use of TPLF and that adequate safeguards are put in place, including through the introduction of corporate

[44] Sec. 4 para 2 no. 3 Consumer Rights Enforcement Act.

[45] P9_TA(2022)0308: Responsible private funding of litigation European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)) (2023/C 125/01), OJEU 5 April 2023.

governance requirements and supervisory powers to protect claimants and to ensure that funding is only provided by entities that are committed to complying with minimum standards in terms of transparency, independence, governance and capital adequacy, and to observing a fiduciary relationship vis-à-vis claimants and intended beneficiaries."

It is, however, apparently an attempt to cut off funding opportunities and to deter funders from the European market. The only argument brought forward is that funders increase the risk that civil litigation will be dominated by the greed for profit and Europe will face a "litigation industry" like the United States (there based on lawyers' contigency fee arrangements). The market for litigation funding in Europe is still developping. So far no severe problems have been reported and – as said before – third-party funding is essential for the access to justice in many constellations. It is not clear whether the European Commission will take up the Parliament's proposal, but it is very likely that their will be some legislative activity in this respect in the near future.

c) Other options for funding representative actions?

With the lack of third party funding, how can qualified entities finance representative actions? German consumer associations' budgets are paid by taxpayers money and to a small extent by contributions by members. They thus depend to a large extent on how much money the Government is ready to give them. Compared to other consumer associations in Europe, the budget is acceptable, but it does not allow the associations to bring a large number of lawsuits. The largest part of the budget goes to consumer counselling, the rest permits to finance some selected actions only.

Contingency fees for lawyer are no longer completely prohibited in Germany, but still rather strictly regulated. According to a reform of 2021, a lawyer's contingency fee can only be considered if the individual claim amounts to a maximum of 2,000 euros.[46] For qualified entities it will, however, be difficult to enter into such agreements. As the lawyer's success fee will have to be paid from the consumers' compensation, consumer must agree to such an arrangement. Therefore qualified entites will consider such an agreement only if they are in contact with consumers before filing an action.

Unfortunately, the German legislator did not take up proposals that have been made in literature for many years.[47] The best solution to finance the enforcement of consumer claims without asking them for a success fee would be to to set up a state financing fund for representative actions following the example of access-to-justice funds in Quebec and Ontaria.[48] Such a fund could be financed by fines and administrative penalties resulting from violations of consumer protection laws (indirectly, i.e.

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[46] §§ 4a Lawyers Remuneration Act (Rechtanwaltsvergütungsgesetz), 49b Federal Lawers Act (Bundesrechtsanwaltsordung). There is no cap on contingency fees for the out-of-court enforcement of claims.

[47] *Wagner*, Verhandlungen des 66. DJT Bd. I (2006) A 14; *Micklitz/Stadler*, Unrechtsgewinnabschöpfung (2003) 129; *Micklitz/Stadler*, Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft (Gutachten BMVEL 2005), 1142; *Voet*, Cultural Dimensions of Group Litigation: The Belgian Case, 41 Georgia Journal of International and Comparative Law 433, 469 (2013); *Buchner,* Kollektiver Rechtsschutz für Verbraucher in Europa (*2015) 202; Stadler,* Kollektiver Rechtsschutz quo vadis?, JZ 2018, 793 (801 f); *Meller-Hannich*, Gutachten 72. DJT (2018), A 60, A 88; *Stadler*, Third party funding of mass litigation in Germany: Entrepreneurial Parties – Curse or blessing?, in *Cadiet/Hess/Requejo Isidro* (eds), Privatizing Dispute Resolution, Trends and Limits (2019) 209–232; *Fezer*, Zweckgebundene Verwendung von Unrechtserlösen und Kartellbußen zur Finanzierung der Verbraucherarbeit: https://kopsuni-konstanz.de/handle/123456789/23103; *Woopen*, Kollektiver Rechtsschutz – Chancen der Umsetzung. Die Europäische Verbandsklage auf dem Weg ins deutsche Recht, JZ 2021, 601 (610); *BEUC*, Litigation funding in relation to the establishment of a European mechanism of collective redress, https://www.beuc.eu/publications/2012-00074-01-e.pdf.

[48] Quebec ('Fonds d'aide aux recours collectifs': http:/www.farc.justice.gouv.qc.ca/; Ontario: 'Access to Justice Funds', http://www.lawfoundation.on.ca/what-we-do/access-to-justice-fund-cy-pres.

from taxpayers' money), but above all also from leftovers that experience has shown to be left over from the distribution of compensation funds after representative redress actions. Such a state fund would have many advantages: The associations could submit applications for funding, which would be subject to legal review. This would also eliminate the danger of abusive lawsuits, which is always conjured up by the business community. The funding would not be accompanied by a success fee, i.e. the aggrieved consumers would receive the full amount of damages awarded to them in case of success. Politically, such a fund would also be the right signal to those who fear a commercialisation of lawsuits and a "lawsuit industry".

IV. Outlook

The implementation of the RAD is definitely a step forward with respect to the enforcement of consumer claims compared to the situation in the past. The German Consumer Rights Enforcement Act is, however, not the best possible solution. The new instrument has some technical deficencies, but may be manageable in practice, although it cannot relieve the judiciary to any significant extent. The greatest disadvantages are the restrictions imposed on third-party funding. Consumer associations in Germany will have considerable problems to finance representative actions beyond a small number of large cases unless Parliament grants a significantly larger budget. It is likely that consumer associations will continue to bring only actions for injunctive relief or MFK actions from which consumers do not directly benefit. Consumer will then have to sue traders individually either backed by legal expense insurance or by an assignment of their claims to legaltech companies. Such claim vehicles have conquered already a large part of the market. In competition law, the enforcement of cartel damages claims (currently more or less excusively companies' claims) is illusory without the support of claim vehicles and third-party funding. Legaltech companies also enforce consumer claims based on EU regulations which provide compensation in case of delayed or cancelled flights in Europe and they have filed numerous actions in the Dieselgate cases. They offer the enforcement of claims based on an assignment model, free of charge and litigations risks, but for a success fee of 25-35%. For them third-party funding is not legally restricted so far and thus there is no level playing field with lawyers or consumer associations. All in all, the German legislator missed the opportunity to establish an enforcement mechanism for consumer claims that is completely free for consumers and that may have a deterrent effect for traders.