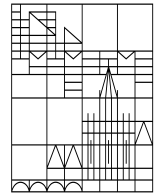


Implementation of Directive 2020/1828 on representative actions in Germany

Prof. Dr. Astrid Stadler
Kyoto, October 2023



Outline



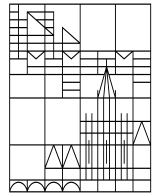
- I. Introduction
- II. The European framework for representative actions
- III. Implementation in Germany
 1. General structure of representative actions
 2. Legal standing and requirements for admissibility
 3. No opt-out mechanism
 4. Late opt-in of consumers
 5. Settlements
 6. Distribution of funds
 7. Funding
- IV. Outlook



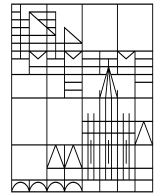
I. Overview

- Discussion on collective redress in EU since 2002
- Directive 2020/1828 (RAD) – political trade-off triggered by VW Dieselgate
 - model declaratory actions (MFK) since 2018
 - not successful, only few actions
 - only 1/3 of 2,3 mio. car owners took legal action
 - settlement in MFK action for 250.000 car owners
 - approx. 100.000 cases still pending
- Deadline for implementation of RAD: December 2022 (June 2023)
- Germany: implementation by Consumer Rights Enforcement Act (*Verbraucherrecht durchsetzungsgesetz*)

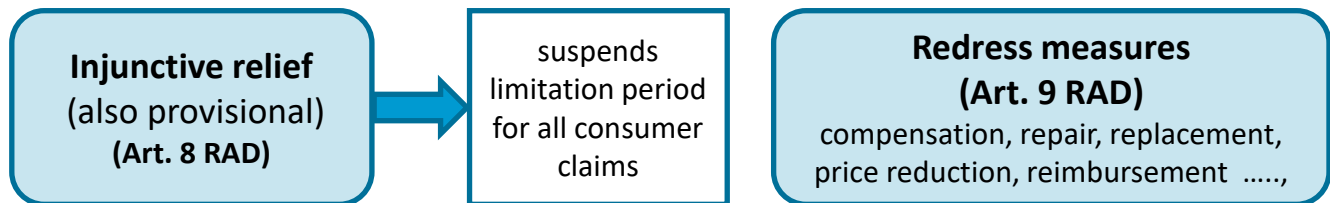
Universität
Konstanz



II. European Framework



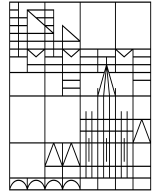
- Directive applies to consumer cases only
- Minimum harmonization – MS may keep other instruments
- ‚Qualified entities‘ (consumer associations) represent consumers‘ interests
- Domestic & cross-border representative actions
- Requirements for qualified entities for cross-border actions
 - ✓ 12 months of existence
 - ✓ Public activities in consumer law
 - ✓ Non-profit making character
 - ✓ Ad hoc founded associations for particular mass harm events?



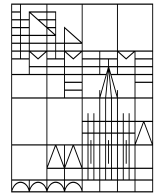
Great leeway for implementation

- Opt-in /opt-out
(opt-in only mandatory for foreign consumers)
- Details for proceedings left to Member States
- Loser pays principle must apply
- Individual consumers must not pay costs of proceedings
- Funding of representative actions: third-party funding neither allowed nor prohibited by RAD
- In case of third-party funding: no conflict of interests, no undue influence by funder on proceedings

Universität
Konstanz

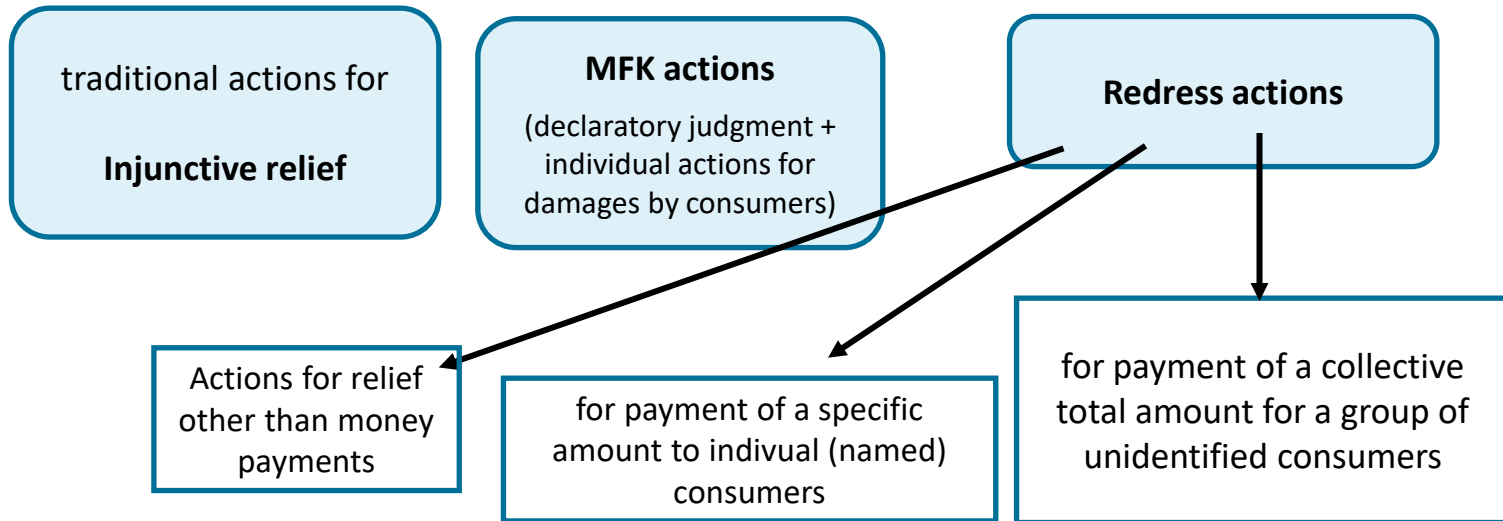


III. Implementation in Germany by Consumer Rights Enforcement Act

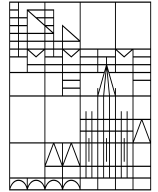


1. General Structure of representative actions

- ✓ Jurisdiction: Courts of Appeal
- ✓ Scope of application: consumers and small companies
- ✓ Not only violations of consumer law, but all civil actions including tort law



2. Legal standing & requirements for admissibility



Requirements for qualified entities for domestic representative actions

- ✓ Minimum existence of qualified entity reduced from 4 yrs to 1 year
- ✓ Members: 3 associations or 75 natural persons
- ✓ No-profit making character
- ✓ No funding of more than 5% of the budget from companies

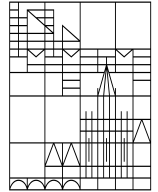
Admissibility of actions:

- Q.E. must demonstrate that more than 50 consumers might be affected
- no minimum number of registrations necessary
- All claims must be „essentially similar“

Ad hoc founded associations for particular mass harm event?

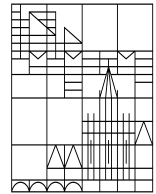
- in principle allowed
- associations must also represent general consumer interests (e.g. information on website)
- financial resources?
 - only „modest entry fee“ by consumers allowed by RAD
 - Third-party funding limited: maximum of 10% success fee allowed
 - Contingency fee arrangements with lawyers: only for small claims up to 2.000 Euros
- no cross-border recognition of ad hoc founded qualified entities

3. & 4. No-opt mechanism/ late opt-in

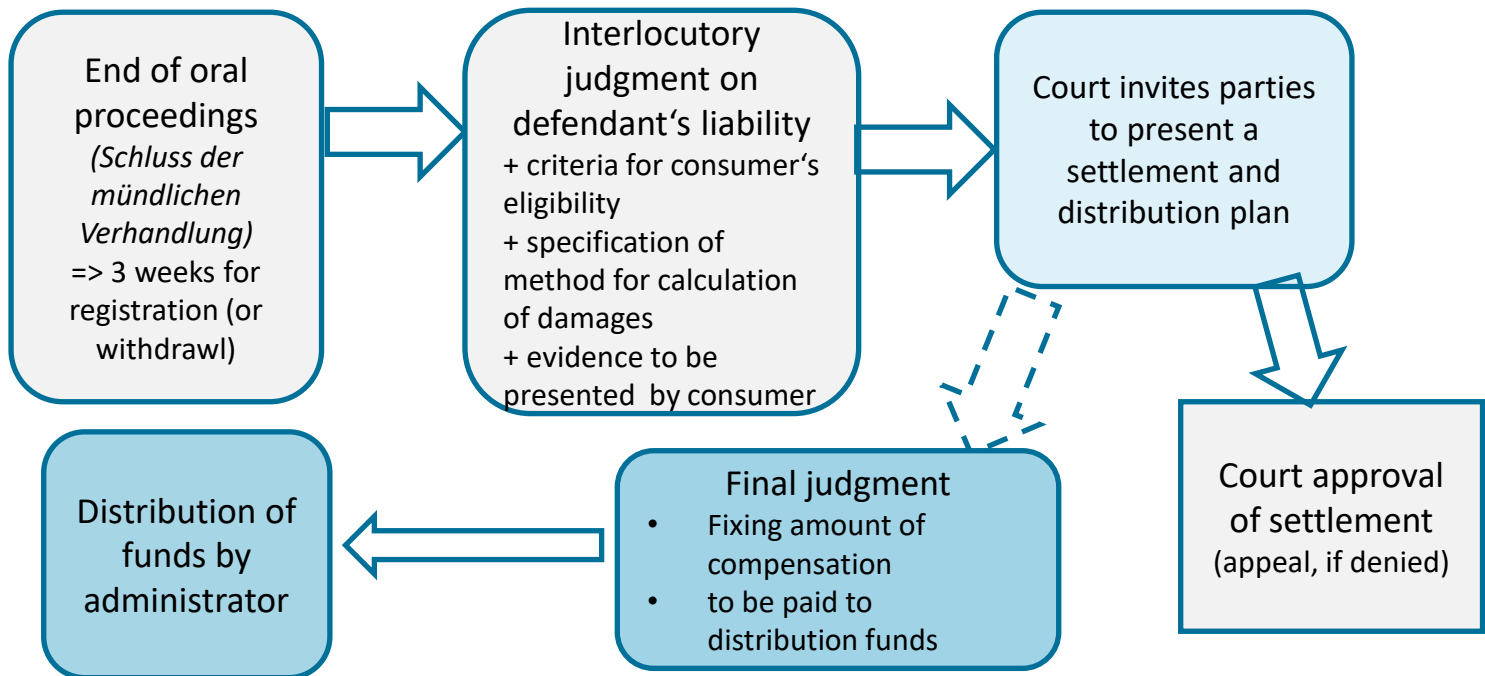


- Member States may choose between opt-in & opt-out
- Germany: only opt-in
- for small consumer claims instead:
 - => actions for stripping-off illegally gained profit (Sec. 10 Unfair Competition Act)
 - => thresholds lowered, third-party funding allowed without any cap of success fee
- Time frame for consumers' opt-in very controversial issue
- Now: opt-in from start of proceedings until 3 weeks after the formal end of oral proceedings (before judgment !)
- Judgment must not be handed down before 6 weeks after the formal end of oral proceedings
- Probably high number of parallel individual proceedings based on the same case (barred only once consumer has registered)
- Relief for court system?

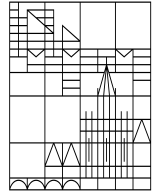
5. Settlements



- In general: no settlement before expiry of registration time
- in case of actions for payment of a collective amount of compensation following procedure:



6. Distribution of funds



- Only in actions for the payment of a collective amount of compensation
- Court appointed administrator responsible for distribution
- Position similar to administrator in insolvency proceedings (under supervision of the court, fiduciary duties (consumers & defendant))
- Consumers must present evidence as specified in the judgment (in practice limited to documents!) - no complex fact finding
- If total amount paid by defendant insufficient => **action for additional payment**
- defendant & consumers may appeal to the court if they do not accept administrator's decision on individual claim, but evidence limited
- **Individual claims by consumers** with full evidence allowed, if appeal is not successful
- Defendant may also sue consumers **for repayment**, if objections were not taken into account by in distribution proceedings (limited evidence!)

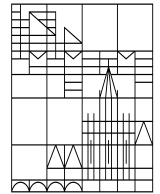
7. Funding



- funding issues not adequately addressed during legislative process – consumer associations have small budgets!
- Last minute decision in favour of a 10% cap of third-party funders' success fee
- average success fee in Europe: 25-35% depending on risk
- Requirement of complete disclosure of funding agreement
 - => only to the court or also to defendant?
- Difficulty for funders to calculate funding risk due to late opt-in of consumers
- How to conclude a funding agreement without the consent of consumers before filing of the action?
- Commercial funders will not support representative actions
- General suspicion against commercial third-party funders in Europe (initiative of the European Parliament for strict regulation)
- Alternatives: contingency fees very limited/no state-administrated „access-to-justice“ fund

IV. Outlook

- Implementation of RAD is (small) step forward
- Consumer Rights Enforcement Act does not provide the best possible solution
- Main problem: limited budgets of consumer associations and restrictions on third-party funding
- Qualified entities may strategically bring only actions for injunctive relief or declaratory judgments => consumer must sue defendants individually
- Still a broad field of activity for legal tech companies which operate on assignments and ask for a success fee
- State-run ‚access-to-justice fund‘ better solution for consumers & defendants (no success fees, no frivolous actions)



Thanks for listening !

Prof. Dr. Astrid Stadler

Tel.: +49 (0) 75 31/88 - 2331
astrid.stadler@uni-konstanz.de

