

Collective Redress in Germany and the Transposition of the Representative Actions Directive

Henner Schläfke and Tobias Lühmann¹

Germany is known to be hesitant and sometimes even reluctant when it comes to collective redress and has been somewhat late to the party. Is this also true when it comes to the transposition of the Representative Actions Directive? The German Act on the Transposition of the Representative Actions Directive came into force on 13 October 2023. It is the result of much debate within the government and parliament and, as such, a compromise that seeks to strike a balance between the interests of consumers and businesses. Although the scope of representative actions for redress measures goes well beyond what is required by the Directive, the German law's strict regulation of third-party funding, requirement of similarity of claims and lack of reasonable statutory compensation for lawyers make it unlikely that redress actions in Germany will be able to compete with established business models run by professional claimant law firms and legal service providers that are increasingly being supported by third-party litigation funders. Hence, even after transposition of the Directive, Germany's regime for collective actions might not be consumers' bright star of hope. But it has efficient elements to enforce consumer rights and hold companies responsible for infringements of consumer protection law.

1. Introduction

As many other Member States of the European Union, Germany was unable to transpose the Representative Actions Directive of 25 November 2020² (hereinafter the 'Directive') by 25 December 2022 and failed to do so even within the deadline for the applicability of national law transposing the Directive (25 June 2023).³ The Act on the Transposition of the Representative Actions Directive⁴ did not enter into force until 13 October 2023. As with prior legislation for which court cases were needed as stepping stones,⁵ the transposition

process was slow. It got off to a bad start due to the timing of the federal elections in September 2021, as there was no real prospect of transposing the Directive before the date set for elections. This did not leave much time for the new three-party government to agree on the rather controversial subject of what the future system of collective redress should look like.⁶

The preparations for the ministerial draft were accompanied by expert opinions commissioned by the Federation of German Consumer Organisations (*Verbraucherzentrale Bundesverband e.V.*)⁷ on the one

1. Henner Schläfke and Tobias B. Lühmann are lawyers at Noerr Partnerschaftsgesellschaft mbB in Berlin, Germany. Henner Schläfke is the head of Noerr's Class & Mass Action Defense practice group.

2. 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 (O) L 409, 4 December 2020, 1.

3. See the European Commission's infringement decision of 27 January 2023 stating that 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 failed to meet the deadline of 25 December 2022. For the status of collective redress after the transposition of the Directive in the 27 Member States, see Tobias B. Lühmann, *Collective Actions and Redress in Europe* (Beck/Hart/Nomos, planned for the end of 2024).

4. *Verbandsklagenrichtlinienumsetzungsgesetz (VRUG)*, Federal Law Gazette 2023 I No. 272.

5. Fabian Reuschle, 'German Experience: Court Cases as a Stepping Stone for Legislation' (2022) *Mass Claims*, 1 et seqq.

6. For an overview of the legislative process see Peter Röthemeyer, *VDuG Verbraucherrecht durchsetzungsgesetz* (1st ed., Nomos 2023), *Einleitung*, paras. 114 et seqq.

7. Beate Gsell and Caroline Meller-Hannich, 'Die Umsetzung der neuen EU-Verbandsklagenrichtlinie. Gutachten über die Umsetzung der europäischen Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher (RL (EU) 2020/1828) ins deutsche Recht' (4 February 2021), www.vzbv.de/sites/default/files/downloads/2021/02/03/21-02-04_vzbv_verbandsklagen-rl_gutachten_gsell_meller-hannich.pdf (accessed on 20 December 2023).

8. Alexander Bruns, 'Rechtsgutachten zur Umsetzung der EU-Verbandsklagenrichtlinie in deutsches Recht' (October 2021).

hand and 14 trade associations⁸ on the other hand, which is just one indication of the potential for conflict in the process of the transposition of the Directive. This potential later materialized within the German government, mainly between the Liberal party and the Greens. Major points of disagreement concerned the requirements for legal standing to bring a representative action, the point in time by which consumers must have opted in, the effect of measures for representative actions for redress (hereinafter ‘actions for redress measures’ or ‘actions for redress’) on the statute of limitations and the need for additional rules on substantiation and the burden of proof.⁹ The ministerial draft of September 2022 was not officially published but was debated for months within the government while its content was the subject of public debate. Not until February 2023 did the government publish the draft,¹⁰ expressly stating the aspects on which there was still no consensus. On 29 March 2023, the government finally agreed on a draft,¹¹ many aspects of which were subsequently revised in the parliamentary process, leading to a final draft in July 2023 which passed the *Bundestag* (Federal Parliament) on 7 July 2023 and – after the parliamentary summer break – the *Bundesrat* (Federal Council) on 29 September 2023.¹²

2. New representative actions for redress measures

The key part of the Act on the Transposition of the Representative Actions Directive is the Consumer Rights Enforcement Act¹³ which combines provisions regarding the German model declaratory action and the new action for redress measures. The latter is the first collective redress instrument that allows a qualified entity to enforce consumer claims for performance.¹⁴

2.1. Scope of actions for redress measures

Actions for redress measures are in principle available in all civil law disputes concerning consumers’ claims against traders.¹⁵ The action for redress covers any kind of performance available under applicable substantive law (e.g. payment, repair or replacement of a product). The Directive’s limitation to alleged infringements of Union law (including such provisions as transposed into national law)¹⁶ was rejected in order to uphold the standard of consumer protection established in November 2018 by the German declaratory model action, which had and still has the same scope.

Based on the assumption that enterprises with limited (legal) resources face the same or at least similar obstacles as consumers with regard to the enforcement of claims against traders,¹⁷ actions for redress measures can also be initiated with regard to claims of enterprises that have fewer than ten employees and an annual turnover or balance sheet of not more than 2 million euros (‘small enterprises’).¹⁸ This extension of scope is one of the distinguishing elements of the transposition of the Directive.

Actions for redress measures are thus in principle available for a wide range of areas of law such as data protection, ESG, cartel damages claims, product liability and tort law in general. Since 10 December 2023, four actions for redress measures have reportedly been filed, all by the Federation of German Consumer Organisations. These actions concern claims based on the alleged invalidity of price increases for gas, electricity and district heating (three cases) as well as for telecommunication services. Another action that is reportedly planned targets online shop payment reminder fees.

ber 2021), www.dihk.de/resource/blob/60208/dc65ef7b610a1d1c5c9c769d3f82aa1f/gutachten-verbandsklagerichtlinie-data.pdf (accessed on 20 December 2023).

9. For an overview, see Tobias B. Lühmann, ‘Der holprige Weg zur Umsetzung der EU-Verbandsklagen-Richtlinie’ (28 February 2023), anwaltsblatt.anwaltverein.de/de/zpoblog/umsetzung-eu-verbandsklagen-richtlinie-referentenentwurf-luehmann (accessed on 20 December 2023).
10. Referentenentwurf eines Gesetzes zur Umsetzung der Richtlinie (EU) 2020/1828 über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher und zur Aufhebung der Richtlinie 2009/22/EG, www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/RefE/RefE_VRUG.pdf?__blob=publicationFile&v=2 (accessed on 20 December 2023).
11. Regierungsentwurf eines Gesetzes zur Umsetzung der Richtlinie (EU) 2020/1828 über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher und zur Aufhebung der Richtlinie 2009/22/EG, www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/RegE/RegE_VRUG.pdf?__blob=publicationFile&v=2 (accessed on 20 December 2023).
12. The question of whether group actions (class actions) should be introduced was raised but not seriously considered or discussed by the political stakeholders.
13. Verbraucherrechtgedurchsetzungsgesetz (VDuG).
14. However, there have been discussions on whether the repayment of fees is a remedy as part of (mandate-free) injunctive relief, see Axel Halfmeier, ‘Collective Litigation in German Civil Procedure’ in Brian T. Fitzpatrick and Randell S. Thomas (eds), *The Cambridge Handbook of Class Actions. An International Survey* (Cambridge 2021) 233, 236. The majority view rejects such a claim, see Oberlandesgericht Düsseldorf of 21 September 2023, GRUR-RS 2023, 28816 para. 68; Wolfgang Büscher, ‘Zur Streitfrage eines auf Entgeltrückzahlung gerichteten Beseitigungsanspruchs gemäß § 8 Abs. 1 S. 1 UWG’ (2023) WRP 513 et seqq., 639 et seqq.
15. See section 1(1) of the Consumer Rights Enforcement Act.
16. See Article 2(1) of the Directive.
17. For the legislators’ rationale, see Federal Parliament publication BT-Drs. 20/7631, 107.
18. See section 1(2) of the Consumer Rights Enforcement Act. The requirements for constituting a small enterprise must be given at the time of the opt in, see Federal Parliament publication BT-Drs. 20/6520, 69. If not otherwise indicated, a reference to consumers in this article includes small enterprises.

2.2. Jurisdiction of higher regional courts

In order to expedite proceedings, local and subject matter jurisdiction is conferred on the higher regional court (*Oberlandesgericht*) of the defendant's domicile.¹⁹ If the defendant is domiciled outside of Germany, the relevant provisions regarding international jurisdiction apply, in particular the Brussel I-bis Regulation.

2.3. Legal standing

Legal standing is granted to representative bodies only, for domestic actions to qualified consumer organisations (qualifizierte *Verbraucherverbände*) and for cross-border actions to qualified entities (qualifizierte *Einrichtungen*) (qualified consumer organisations and qualified entities, together hereinafter also 'qualified claimants'). The criteria for legal standing for domestic and cross-border actions differ.

2.3.1. Domestic actions

Under the old regime applicable to declaratory model actions, the requirements for legal standing were rather strict in order to prevent abusive litigation.²⁰ As a result, standing to file admissible collective actions was limited to a small number of organisations. The most relevant of these organisations is the Federation of German Consumer Organisations. As the umbrella organisation for 16 non-profit German consumer associations in each of Germany's states, it is supported by public funds and broadly backed by other member organisations.

Whether this strict standard should apply to qualified entities designated for the purpose of bringing domestic actions for redress was the subject of intense discussions.²¹ As part of a general compromise, the requirements for qualified consumer organisations to have such legal standing have been lowered considerably. Pursuant to section 2(1) no. 1 of the Consumer Rights Enforcement Act, an organisation must (only) have been listed as a quali-

fied entity/qualified consumer organisation for one year (previously four years).²² If the court has reasonable doubts whether the claimant (still) fulfils the requirements for being listed, it may suspend the proceeding and request the public body responsible for the designation, i.e. the German Federal Office of Justice (*Bundesamt für Justiz*), to review the listing.²³

In addition, the organisation must not obtain more than 5% of its financial resources from contributions made by companies.²⁴ This requirement is irrefutably presumed to have been fulfilled by consumer associations that are predominantly funded by public contributions. Considering the relatively short listing period of one year, the new law has opened the doors for de facto *ad hoc* designation of qualified consumer organisations.²⁵

In the past, a further (unwritten) requirement for legal standing was that the subject matter of the specific action falls within the scope of the statutory purpose of the claimant.²⁶ This requirement is also applicable to the legal standing of qualified consumer organisations in case of an action for redress measures. Arguably, it becomes relevant if the claimant alleges claims of small enterprises which would not be possible if the statutory purpose were limited to the protection of consumer interests.

2.3.2. Cross-border actions

As required by Article 6 of the Directive, a qualified entity from another Member State has legal standing to bring an action if it is included in the European Commission's list of entities designated for the purpose of bringing cross-border actions.²⁷

2.4. Electronic register and late pre-judgment opt in

Once the court has received a statement of claim in an action for redress, it must forward all relevant information to the Federal Office of Justice, which

19. See section 3(1) of the Consumer Rights Enforcement Act.

20. See section 606(1) of the Code of Civil Procedure (repealed as of 13 October 2023). According to this provision, legal standing was limited to qualified entities with a minimum number of members (at least ten associations or 350 natural persons) which had been registered as qualified entities for at least four years. In addition, the statutory purpose of the qualified entity had to be to protect consumer interests mainly by means of non-commercial educational or advisory activities. Further, the qualified entity was required not to bring the model declaratory action for the purpose of making profit, and it was not allowed to obtain more than 5% of its financial resources through contributions from companies.

21. See *Lühmann* (n 9).

22. See section 4 of the German Injunctive Relief Act (*Unterlassungsklagengesetz — UKlaG*) for the listing requirements. These are in particular (i) statutory purpose to protect consumer interests mainly by means of non-commercial educational advisory activities, (ii) a min-

imum number of members (at least three associations or 75 natural persons), (iii) registration as an association for at least one year and fulfilment of statutory purpose for at least one year.

23. See section 4a(2) of the Injunctive Relief Act.

24. This requirement is intended to prevent a company from being able to influence a qualified entity in order to harm a competitor or a company on which it is dependent by bringing an action, Federal Parliament publication BT-Drs. 19/2507, 22 (regarding legal standing for a model declaratory action). For a very similar reason regarding financing of the specific action, see Article 10(2)(b) of the Directive.

25. See Astrid Stadler, 'Die neue Verbands(abhilfe)klage – Umsetzung der Richtlinie 2020/1828' (2023) ZJP 129, 135.

26. Bundesgerichtshof of 22 September 2011, NJW 2012, 1812, 1813.

27. See section 2(1) no. 2 of the Consumer Rights Enforcement Act.

publishes the information in an electronic register (*Verbandsklageregister*).²⁸

In order to benefit from an action for redress measures, consumers must register their claims with the electronic register. The point in time by which the registration must have taken place was changed several times in the legislative process. Consumer organisations advocated for a post-judgment opt in, while business associations argued for the status quo, i.e. an opt in before the first oral hearing. As a compromise, consumers now must register their claims by three weeks after the closing of the oral hearing.²⁹ This provides consumers with an opportunity to determine whether they are affected (presumably in a positive way) by the action based on the court's remarks in the oral hearing (if any) and the press coverage.³⁰

2.5. Procedural steps and types of redress actions

Pursuant to Article 9(5) and Recital 50 of the Directive, redress measures should identify the individual consumer, or at least describe the group of consumers, entitled to the remedies provided by those redress measures. Under the Consumer Rights Enforcement Act, a qualified claimant can freely choose which kind of redress measures it seeks. Three different types of redress actions are available.

2.5.1. Type 1: Single-stage proceedings with consumers identified by name

A redress action can be brought for the benefit of consumers who have been identified by name in the statement of claim. If the object of the action is to order the defendant to pay a certain amount of money directly to the consumers, the court will either dis-

miss the case or order the defendant to make such payments.³¹ Thus, there is no need for implementation proceedings and the involvement of a trustee.³² If the defendant fails to pay on the judgment, it is the qualified claimant and not an individual consumer that must enforce the judgment.³³ As a defendant will usually not know all or at least a sufficient number of affected consumers by name and because collecting the names very often requires significant resources, it is unlikely that this sub-type of a redress action will be used very often.³⁴

2.5.2. Type 2: Multi-stage proceedings with preliminary and final redress judgment as well as implementation proceedings

Given the challenges associated with an action for the benefit of named consumers, it is very likely that qualified claimants will generally make use of another type of action that only requires that the affected consumers are described collectively on the basis of the requirements for their eligibility to claim from the defendant. The main idea of this type of action is that the court first determines in a preliminary judgment the criteria that must be fulfilled by consumers as well as the evidence they must present in order to demonstrate that they are eligible. If the parties are not willing to enter into a settlement on this basis, the court will estimate the funds necessary to fulfil the claims of eligible consumers. This is followed by implementation proceedings in which a trustee appointed and supervised by the court distributes the funds. Here again, it is the qualified claimant that must enforce the judgment if the defendant fails to pay to the trustee.³⁵

This rather complex procedure can be summarised as follows (example provided for an action for payment):

28. See section 45 of the Consumer Rights Enforcement Act.
 29. See section 46(1) first sentence of the Consumer Rights Enforcement Act. During this timeframe registrations can also be withdrawn.
 30. See Caroline Meller-Hannich, 'Kollektiver Rechtsschutz im Privatrecht und die Umsetzung der Verbandsklagenrichtlinie' (2023) VersR 1321, 1325.
 31. See section 16(1) second and third sentence of the Consumer Rights Enforcement Act.
 32. For such implementation proceedings and the appointment of a trustee, see *infra* 2.5.2.4. Although the wording of section 16(1) second sentence of the Consumer Rights Enforcement Act refers only to judgments ordering performance by way of payment, the explanatory notes state more generally that implementation proceedings are not necessary if consumers are identified by name without limiting the statement to cases of payment (see Federal Parliament publication BT-Drs. 20/6520, 79, 81). It is therefore disputed whether the 'type 1' action for redress is available in cases where the defendant is ordered to perform other than by payment. For a literal interpretation and a limitation to cases of payment,

see e.g. *Röthemeyer* (n 6) Sec. 16, para. 3 and Christoph Althammer, 'Sec. 16 VDuG' in *Zöller, Zivilprozessordnung* (35th ed. Otto-Schmidt 11/2023), para. 3; for a broader interpretation, see Henner Schläfke, Tobias B. Lühmann, 'Kollektiver Rechtsschutz nach der Umsetzung der EU-Verbandsklagen-RL' (2023) NJW 3385, 3388; Inge Scherer, 'Sec. 16 VDuG' in Helmut Köhler, Joachim Bornkamm, Jörn Feddersen (eds.), *Gesetz gegen den unlauteren Wettbewerb* (42nd ed., C.H. Beck Verlag 2024) para. 8; Gregor Vollkommer, 'Sec. 13 VDuG' in *Zöller, Zivilprozessordnung* (35th ed. Otto-Schmidt 11/2023), para. 18.
 33. See Federal Parliament publication BT-Drs. 20/6520, 81.
 34. Caroline Meller-Hannich 'Der Refe für ein Verbandsklagenrichtlinienumsetzungsgesetz (VRUG)' (2023) DB 628, 630.
 35. See Federal Parliament publication BT-Drs. 20/6520, 82. In case of another type of performance than payment (e.g. repair, replacement of product), section 29 of the Consumer Rights Enforcement Act allows the trustee to enforce the judgment by way of an application to the court.

Multi-stage redress proceedings for payment (without enforcement procedures)				
Judicial redress proceedings				
Group(s) of consumers described on the basis of similar eligibility requirements				
Objective of action: payment of a collective total				
Single specific amount of claim (if amounts are identical)		Common method for calculating amount of individual claim		
Preliminary redress judgment (PRJ)				
Decision on: (i) Single specific amount of claim, (ii) Criteria for determination of eligibility of individual consumer, (iii) Evidence to demonstrate eligibility		Decision on: (i) Common method for calculating amount of individual claim, (ii) Criteria for determination of eligibility of individual consumer, (iii) Evidence to demonstrate eligibility		
Settlement phase				
Final redress judgment				
(i) Order of implementation proceedings, (ii) preliminary decision on costs of implementation proceedings, (iii) order to pay collective total and preliminary costs to trustee, (iv) decision on cost of judicial proceedings, (v) extension of deadline to challenge trustee's decision (if applicable)				
Implementation proceedings				
Trustee: Review of claims on basis of PRJ	Consumer/defendant: right to challenge trustee's decision	Court: Final decision on challenge	Claimant: action for increase of collective total	Trustee: Payment to eligible consumers
Individual actions by consumers and/or defendant following the end of the redress proceedings				
Individual action by consumer Action in case trustee has fully or partially rejected eligibility of and payment to consumer		Action for reimbursement by defendant Defendant invokes individual defenses not admissible in the collective proceeding as basis for recovery of payment made to consumer		

2.5.2.1. Judicial redress proceedings: phase 1 (preliminary judgment on redress)

The judicial redress proceedings can be divided into three different phases.

In phase 1, a qualified claimant files an action for the benefit of unnamed consumers described on the basis of similar eligibility requirements. In the statement of claim the court is requested to order the defendant to pay a collective total (*kollektiver Gesamtbetrag*) to a trustee. If the qualified claimant alleges identical amounts of claim for all consumers, it is sufficient to state the amount in the statement of claim.³⁶ This applies, e.g., if the compensation sought is determined by statute.³⁷ If the amounts of the alleged claims vary among the consumers, the qualified claimant must provide a common method for calculating the amount of the individual claims.³⁸

Phase 1 ends either with a judgment dismissing the case if the action is inadmissible or without merit or with a preliminary redress judgment if the action is

admissible and the court is satisfied that the defendant is liable in principle. Due to the possibility to opt in until three weeks after the oral hearing,³⁹ neither the court nor the parties know whose claims will be affected by the judgment. Consequently, the assessment of the court is limited to questions which are relevant for all – sufficiently similar⁴⁰ – claims, including defences raised by the defendant ('collective defences').⁴¹ The main purpose of the preliminary redress judgment is to establish the basis on which the trustee will later verify the eligibility of consumers that have registered their claims. To this end, the court must set out specific criteria a consumer is required to fulfil in order for the claim to have merit ('eligibility requirements').⁴² The court also determines the type of evidence the consumer must submit to the trustee in order to demonstrate that the eligibility requirements are fulfilled.⁴³ The concept that the court only describes the criteria and evidence relevant for the subsequent distribution of funds mirrors the approach of Rule 228(b) of the European Rules of Civil Procedure ('ERCP').⁴⁴

36. See section 15(2) second sentence of the Consumer Rights Enforcement Act.

37. As an example, the explanatory notes refer to compensation under Regulation (EC) No. 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding, cancellation or long delay of flights, see Federal Parliament publication BT-Drs. 20/6520, 80.

38. See section 15(2) third sentence of the Consumer Rights Enforcement Act. As an example, the explanatory notes refer to claims for outstanding interest payments which are calculated individually according to the specific duration of the contract and the amount of savings, see Federal Parliament publication BT-Drs. 20/6520, 80.

39. See supra 2.4.

40. See infra 2.6.1.

41. For the possibility to take into account collective defences, see Federal Parliament publication BT-Drs. 20/6520, 79. For a more detailed assessment of the problem, see Stefan F. Thönissen, 'Schadensersatz in der Verbandsabhilfeklage' (2023) r+s 749, 751 et seq.

42. See section 16(2) first sentence of the Consumer Rights Enforcement Act.

43. See section 16(2) first sentence of the Consumer Rights Enforcement Act.

44. For details in Rule 228(b) ERCP in this regard, see Magne Strandberg, Vincent Smith, 'Case management and the role of the judge' in Astrid Stadler, Emmanuel Jeuland, Vincent Smith (eds), *Collective and Mass Litigation in*

The court also decides on either the specific amount of each consumer's claim or the common method for calculating the claims.⁴⁵

The preliminary redress judgment can be appealed to the Federal Court of Justice (*Bundesgerichtshof*) on points of law.⁴⁶

2.5.2.2. Judicial redress proceedings: phase 2 (settlement attempt)

In phase 2 of the judicial proceedings, i.e. when the preliminary redress judgment is final, the court asks the parties to submit a written settlement proposal.⁴⁷ At this point in time, the question whether the defendant is liable has already been decided, which is why the explanatory notes refer to the settlement phase primarily as an opportunity for the defendant to agree with the qualified claimant on a private implementation proceeding in order to avoid the statutory proceedings and their costs.⁴⁸ A valid settlement requires approval by the court. If no settlement is concluded, the judicial redress proceedings continue and enter phase 3.

2.5.2.3. Judicial redress proceedings: phase 3 (final judgment on redress)

The purpose of phase 3 of the judicial redress proceedings is to obtain a final redress judgment in which the court (i) orders the implementation proceedings to take place, (ii) decides on the preliminary costs of the implementation proceedings,⁴⁹ (iii) decides on the cost of the judicial proceedings and (iv) orders the defendant to pay the preliminary costs and the collective total to the trustee.⁵⁰ The final redress judgment can also be appealed to the Federal Court of Justice on points of law.⁵¹

The decision on the collective total is factually and legally different from, e.g., the final estimation of damages payable by the defendant.⁵² The collective total is by its nature only provisional because the qualified claimant can request the court to increase the amount if it is too low to satisfy the claims of eli-

gible consumers. Any funds not distributed to consumers must be refunded to the defendant.⁵³

When determining the collective total, the court may take into account all circumstances and make a decision based on its own free conviction.⁵⁴ The explanatory notes to the Act on the Transposition of the Representative Actions Directive expressly state that, for the purpose of estimating the collective total, the court may assume that all consumers are able to demonstrate their eligibility to the trustee.⁵⁵ Another factor relevant for the court's estimation is the (likely) amount of each individual claim.⁵⁶

2.5.2.4. Implementation proceedings: distribution of compensation by a trustee

The purpose of the implementation proceedings is to determine the eligibility of each consumer based on the requirements set out in the preliminary redress judgment and distribute the collective total to all eligible consumers.⁵⁷

After giving the parties the opportunity to comment, the higher regional court appoints a trustee who is suitable, independent of the parties and supervised by the court.⁵⁸ The explanatory notes consider professionals such as lawyers, accountants, economists, auditors and insolvency administrators as potential trustees.⁵⁹ The trustee must be reimbursed for expenses and paid adequate remuneration for administering the implementation proceedings; he/she can also ask for an advance payment.⁶⁰ The remuneration must be determined by the court, which has no specific guidance as to what is considered 'adequate' remuneration. The explanatory notes require the court to make a case-by-case assessment considering factors such as the occupation of the trustee as well as the complexity of the matter.⁶¹

The court initiates the implementation proceedings by way of a court order.⁶² The trustee establishes an implementation fund into which the defendant

Europe, Model Rules on Effective Dispute Resolution (Edward Elgar Publishing 2020) 153, 178.

45. See section 16(2) second sentence of the Consumer Rights Enforcement Act.

46. See section 16(5) of the Consumer Rights Enforcement Act.

47. See section 17(1) of the Consumer Rights Enforcement Act. However, the parties are free to enter into a settlement agreement at an even earlier point in time, see section 9 of the Consumer Rights Enforcement Act and *infra* 2.7.

48. See Federal Parliament publication BT-Drs. 20/6520, 80.

49. Pursuant to section 20(2) of the Consumer Rights Enforcement Act, the defendant must always bear the costs of the implementation proceedings.

50. See section 18 of the Consumer Rights Enforcement Act. In addition, if there are special circumstances (such as a large number of consumers who have registered their claims), the court can also extend the deadline to challenge the trustee's decision on the eligibility of each consumer (see *infra* 2.5.2.4. for the right to such challenges).

51. See section 18(4) of the Consumer Rights Enforcement Act.

52. See *Thönissen* (n 41) 756.

53. See sections 21 and 37 of the Consumer Rights Enforcement Act.

54. See section 19(1) of the Consumer Rights Enforcement Act.

55. See Federal Parliament publication BT-Drs. 20/6520, 83. For scenarios in which such an approach would not be warranted, see *Schläfke/Lühmann* (n 32) 3389.

56. For a more detailed analysis of the relevant factors see *Schläfke/Lühmann* (n 32) 3389.

57. As mentioned before the focus of this article is on redress actions for the payment of money. However, the implementation proceedings are also designed to deal with any other kind of performance, e.g. repair, see in particular section 27 no. 10 of the Consumer Rights Enforcement Act.

58. See sections 23 and 30 of the Consumer Rights Enforcement Act.

59. See Federal Parliament publication BT-Drs. 20/6520, 85.

60. See section 32 of the Consumer Rights Enforcement Act.

61. Federal Parliament publication BT-Drs. 20/6520, 91. Based on this assessment the court might decide on an hourly rate, a lump sum or a combination of both.

62. See section 24 of the Consumer Rights Enforcement Act.

must pay the preliminary costs of the implementation proceedings and the collective total.⁶³

The primary task of the trustee is to examine the eligibility of consumers participating in the implementation proceedings based on the criteria and evidence set out in the preliminary redress judgment.⁶⁴ The role of the trustee is therefore very different from the role of a judge, who applies the law to the facts of the case in its capacity as the representative of the judiciary. This is underlined by the fact that the trustee can delegate tasks to employees and use 'legal tech tools' for reviewing the eligibility of consumers.⁶⁵ Consequently, the process of reviewing the eligibility of each consumer is very formal and does not allow the trustee to deviate from the preliminary redress judgment, e.g. in cases where the consumer might not be able to provide the specific evidence required by the judgment (such as a copy of a contract). The trustee can set consumers a deadline to provide evidence and may also request supplementary explanations from the consumers and the defendant.⁶⁶

The trustee's decision can be challenged by the consumer or the defendant within four weeks.⁶⁷ If the decision is challenged, the trustee must review it and decide on the challenge. Pursuant to section 28(4) of the Consumer Rights Enforcement Act, this decision can again be challenged by the consumer or the defendant. Then, it is for the court to make a final decision on whether the trustee has granted or rejected the claim correctly.⁶⁸ The legislator's last-minute decision to allow not only a challenge of the trustee's decision but also a review by the court has the potential to significantly delay the implementation proceedings.

The trustee prepares a payment plan in which the amounts payable to eligible consumers are listed.⁶⁹ If the collective total is not sufficient to fulfil the claims of eligible consumers, the trustee informs

the parties accordingly,⁷⁰ providing the qualified claimant with the information necessary to claim that the amount be increased.⁷¹ Based on the result and an additional payment by the defendant (if any), the trustee finalises the payment plan and distributes the funds to eligible consumers.⁷² If the funds are insufficient for fulfilling all claims, the trustee must distribute the funds on a pro rata basis.⁷³

Remaining funds, i.e. a portion of the collective total after deduction of the distributed funds and the costs of the implementation proceedings (in particular the remuneration and expenses of the trustee), are to be refunded to the defendant.⁷⁴

2.5.2.5. Individual actions by consumers and/or defendant

A consumer may sue the defendant if the trustee rejects the claim as a whole or in part, unless the consumer could already have asserted the claim by way of a challenge of the trustee's decision pursuant to section 28 of the Consumer Rights Enforcement Act.⁷⁵ This means that the consumer cannot base an action on facts which relate solely to the question of whether the trustee's decision was correct.⁷⁶

The defendant may bring an action for repayment of the distributed amount against individual consumers.⁷⁷ However, in such an action, the defendant can only rely on (individual) defences that could not be raised during the judicial redress proceedings.⁷⁸ The defendant's claim expires if the defendant does not notify the consumer of its intention to request repayment by nine months after the payment.⁷⁹ This rather short period is meant to provide legal certainty for consumers.⁸⁰

63. See section 25 of the Consumer Rights Enforcement Act.
 64. See section 27 no. 3 of the Consumer Rights Enforcement Act.
 65. See Federal Parliament publication BT-Drs. 20/6520, 85, 87.
 66. See section 27 nos. 4, 5 of the Consumer Rights Enforcement Act.
 67. See section 28(2) of the Consumer Rights Enforcement Act. As mentioned before, if there are special circumstances (such as a large number of consumers who have registered their claims), the court may extend the deadline in the final redress judgment, see section 18(3) of the Consumer Rights Enforcement Act.
 68. The review of the court is strictly limited to the scope of the trustee's mandate, i.e. the court only decides whether the trustee has correctly denied or granted a claim based on the criteria and evidence set out in the preliminary redress judgment, see Federal Parliament publication BT-Drs. 20/7631, 110.
 69. See section 27 no. 7 of the Consumer Rights Enforcement Act.
 70. See section 27 no. 8 of the Consumer Rights Enforcement Act.
 71. See section 21 of the Consumer Rights Enforcement Act. While the claim for an increase in the collective

total is pending, the implementation proceedings are suspended.
 72. See section 27 no. 9 of the Consumer Rights Enforcement Act and for more details and uncertainties in relation to the exact timeline and order of the procedure *Röthemeyer* (n 6) Sec. 27, para. 25 et seqq.
 73. See section 27 no. 9 of the Consumer Rights Enforcement Act.
 74. See section 37 of the Consumer Rights Enforcement Act.
 75. See supra 2.5.2.4. and section 39 of the Consumer Rights Enforcement Act.
 76. See Federal Parliament publication BT-Drs. 20/7631, 110; Inge Scherer, 'Sec. 39 VDuG' in Helmut Köhler, Joachim Bornkamm, Jörn Feddersen (eds.), *Gesetz gegen den unlauteren Wettbewerb* (42nd ed., C.H. Beck Verlag 2024) para. 12.
 77. See section 39 of the Consumer Rights Enforcement Act. Examples provided in the explanatory notes include the fulfilment of the claim or legal incapacity of the consumer at the time of the conclusion of the contract, see Federal Parliament publication BT-Drs. 20/6520, 97. For the possibility to raise 'collective defences' see supra 2.5.2.1.
 79. See section 40 of the Consumer Rights Enforcement Act.
 80. See Federal Parliament publication BT-Drs. 20/7631, 111.

2.5.3. Type 3: Multi-stage proceedings with preliminary and final redress judgment as well as implementation proceedings

If a settlement is highly unlikely, the parties may request a judgment that combines the preliminary and final redress judgments.⁸¹ This judgment is then the basis for the implementation proceedings.

For a decision on a collective total, the court and the parties face the practical problem that consumers can register their claims until three weeks after the closing of the oral hearing.⁸² At the time of the oral hearing, it is therefore very difficult, and often impossible, to have a reliable basis for estimating the collective total, which also depends on the number of registered claims.⁸³ This also raises questions of the defendant's right to be heard, as the court is in principle only permitted to base its decision on facts covered by the oral hearing.⁸⁴

2.6. Further admissibility requirements

2.6.1. Required degree of similarity of individual claims

A major point of discussion leading to the first draft of the new law was how to best balance the need for a collective action that deals effectively with a large number of claims while taking into account that applicable substantive law requires an assessment of each individual claim.⁸⁵ The new law adopts in principle a purely procedural approach instead of changing substantive law and introducing, e.g. rules that allow for compensation on a collective level instead of based on the actual damage to the individual consumer.⁸⁶

Under this approach, an action for redress measures is only admissible if the claims concerned by the action are sufficiently⁸⁷ similar (*im Wesentlichen*

gleichartig).⁸⁸ This requirement is fulfilled if (i) the claims are based on the same facts or a series of sufficiently comparable facts and (ii) the claims are based on essentially the same questions of fact and law.⁸⁹ In order to enable the court to assess the similarity of the affected claims, the statement of claim must contain information in this regard.⁹⁰ The legislator's main intent is that the collective action for redress is suitable for cases that allow the court a 'template-like examination of the conditions for entitlement in factual and legal terms without requiring the court to carry out individual case-by-case assessments'.⁹¹ In such cases the court is able to establish common eligibility requirements for consumers and the evidence that must be presented.⁹² The delimitation between cases that are sufficiently similar and cases that are not, due to too many individual factual and/or legal questions, will be one of the greatest challenges for courts. It seems reasonable to predict that cases which involve highly subjective questions such as damage claims based on non-material harm due to violation of data protection law fall in principle outside the scope of an action for redress measures. If the alleged claims have merely different amounts, however, they can still be essentially similar as long as it is possible to calculate each amount based on a common method of calculation.⁹³ As the question of similarity is new to German civil procedure and has been extensively discussed in other jurisdictions, teething problems of the new regime are to be expected.

2.6.2. Minimum number of consumers concerned

An action for redress measures is only admissible if the qualified claimant can show in a comprehensible manner that at least 50 consumers are affected by the subject of the action.⁹⁴ Deviating from the approach of the old law, the new law does not require qualified claimants to provide evidence that at

81. See section 16(4) first sentence of the Consumer Rights Enforcement Act.

82. See supra 2.4.

83. See supra 2.5.2.3. and Inge Scherer, 'Sec. 19 VDuG' in Helmut Köhler, Joachim Bornkamm, Jörn Feddersen (eds.), *Gesetz gegen den unlauteren Wettbewerb* (42nd ed., C.H. Beck Verlag 2024) para. 6.

84. See *Röthemeyer* (n 6) Sec. 19, para. 2, who suggests that the courts set the parties a deadline for commenting on the soon-to-be final list of registrations.

85. See e.g. Beate Gsell, Caroline Meller Hannich, 'Die Umsetzung der Verbandsklagen-Richtlinie als Chance für eine Bewältigung von Streu- und Massenschäden' (2022) JZ 421, 427; Stefan F. Thönissen, 'Verbandsklagenrichtlinie und Haftungsrecht' (2022) JZ 430, 438; Christoph A. Kern, Christian Uhlmann, 'Kollektiver Rechtsschutz 2.0? Möglichkeiten und Chancen vor dem Hintergrund der Verbandsklagen-RL' (2022) ZEuP 849, 874 f.; Christoph Althammer, 'Sec. 19 VDuG' in *Zöller, Zivilprozessordnung* (35th ed. Otto-Schmidt 11/2023), para. 6.

86. This is in line with the Directive, as the Directive does not require Member States to change rules of substantive law, see Tobias B. Lühmann, 'Anforderungen und Herausforderungen der RL (EU) 2020/1828 über Verb-

andsklagen zum Schutz der Kollektivinteressen von Verbrauchern' (2021) ZIP 824, 829.

87. The first draft of the new law required the claims to be 'similar'. This requirement was considered to be too narrow as it would limit the courts' flexibility to handle cases and considerably limit the practical relevance of the action.

88. There is hence no separate certification stage. The parties are (practically) required to argue the merits of the case even if the action is later deemed inadmissible.

89. See section 15(1) of the Consumer Rights Enforcement Act.

90. See section 15(2) first sentence of the Consumer Rights Enforcement Act.

91. See Federal Parliament publication BT-Drs. 20/6520, 77, 78.

92. See Federal Parliament publication BT-Drs. 20/6520, 78.

93. See supra 2.5.2.1.

94. See section 4(1) first sentence of the Consumer Rights Enforcement Act. See also Recital 12 of the Directive, which expressly states that it is for the Member States to decide on the minimum number of consumers concerned by a representative action for redress measures in order for the case to be admitted.

least 50 consumers are indeed affected.⁹⁵ Identifying the relevant consumers by name is not strictly necessary.⁹⁶ The threshold of 50 consumers has been criticized as being too burdensome for qualified claimants.⁹⁷ However, on balance, the number of consumers seems reasonable, as it requires the claimant to properly clarify the facts of the case, which is necessary to be able to assess whether the claims asserted are in fact similar enough.⁹⁸

2.6.3. Funding

Third-party funding is allowed but heavily regulated. Non-compliance results in the inadmissibility of the action. In order to prevent conflicts of interest and ensure focus on the protection of the collective interests of consumers, the requirements of Article 10(2) of the Directive have been transposed almost word for word. An action for redress measures is hence inadmissible if it is financed by a third party (i) that is a competitor of the defendant, (ii) that is dependent on the defendant or (iii) that is expected to influence how the qualified claimant conducts the proceedings, including the decision on settlements, to the detriment of consumers.⁹⁹

Towards the very end of the legislative process and without any prior discussion or further reasoning, the legislator added another basis for the inadmissibility of an action for redress. Pursuant to section 4(2) no. 3 of the Consumer Rights Enforcement Act, an action is inadmissible if the third-party funder is promised an economic share of more than 10% of the performance to be provided by the defendant. Given the uncertainties surrounding third-party funding under the Directive,¹⁰⁰ this can be seen as a conservative approach to avoid legal uncertainty and protect the collective interests of consumers. Yet there is some merit to the criticism that the 10% threshold will marginalise third-party funding and therefore even actions for redress measures

as such,¹⁰¹ although there might be cases where the artificially low costs of the proceedings provide a sufficient economic incentive to fund the action.¹⁰² Given the inherent problem that qualified claimants often do not have sufficient economic resources to bring large-scale actions, the aim of protecting consumers might very well have the unintended consequence of preventing actions for redress.

There are further legal and practical obstacles that make third-party funding of at least type 2 and type 3 actions very unlikely.¹⁰³ Usually, neither the qualified claimant nor the third-party funder knows the identity of a sufficiently large number of potentially eligible consumers, which makes it difficult to conceive how a consumer can in practice agree with the funder on the success fee. An agreement between the qualified claimant and the funder would not be sufficient, as a qualified claimant does not have the legal authority to allot a portion of the consumers' claims to the funder. In addition, no provision in the Consumer Rights Enforcement Act suggests that a qualified claimant can limit the right to register claims only to consumers who have agreed to a success fee. On the contrary, section 46 of Consumer Rights Enforcement Act allows any consumer to register a claim.¹⁰⁴ The explanatory notes also expressly clarify that payments on the judgment are to be made to the consumer directly.¹⁰⁵ Since the success fee also cannot be categorised as cost of the proceedings,¹⁰⁶ there is no basis for deducting the success fee prior to the distribution of the funds paid by the defendant to the trustee.¹⁰⁷

The qualified claimant must disclose the sources of the funds used to finance a specific action at the very beginning of the proceedings, in the statement of claim.¹⁰⁸ In the (unlikely) event of third-party funding, whether agreed on prior to the filing of the action or afterwards, the qualified claimant must also disclose the funding agreement.¹⁰⁹

95. See Federal Parliament publication BT-Drs. 20/7631, 107.

96. See Federal Parliament publication BT-Drs. 20/6520, 71.

97. See *Meller-Hannich* (n 30) 1325.

98. See supra 2.6.1.

99. See section 4(2) nos. 1, 2, 4 of the Consumer Rights Enforcement Act.

100. For arguments why the Directive does not allow third-party litigation funding with success fees that go beyond a modest fee, see *Lühmann* (n 86) 833. For an overview on the issue, see Florian Scholz-Berger, 'Finanzierung von Verbandsklagen' in Philipp Anzenberger, Alexander Klausner and Bettina Nunner-Krautgasser (eds), *Kollektiver Rechtsschutz im Europäischen Raum* (Verlag Österreich 2022) 143, 147 et seq.; Antonia Hotter, Florian Scholz-Berger, 'Organisation and Design of Collective Redress in Europe. Workshop Report' (2023) Mass Claims 40, 42; Beate Gsell, 'The New European Directive on Representative Actions for the Protection of the Collective Interests of Consumers – A Huge, but Blurry Step Forward' (2021) CMLR 1365, 1397 et seq.

101. See Beate Gsell, 'Finanzierungshürden für Verbandsklagen' (31/2023) NJW-editorial, 3.

102. See infra 2.8.

103. See Gregor Vollkommer, 'Sec. 4 VDuG' in *Zöller, Zivilprozessordnung* (35th ed. Otto-Schmidt 11/2023), para. 6 who considers at least funding of type 1 actions to be

practically feasible. For the different types of action see supra 2.5.2. and 2.5.3.

104. Peter Röthemeyer, 'Das Verbraucherrecht durchsetzungsgesetz (VDuG) zur Umsetzung der Verbandsklagen-Richtlinie – Die neue Abhilfeklage' (2023) VuR 332, 334 et seq.

105. Federal Parliament publication BT-Drs. 20/6520, 107; Gregor Vollkommer, 'Sec. 4 VDuG' in *Zöller, Zivilprozessordnung* (35th ed. Otto-Schmidt 11/2023), para. 6.

106. See Gregor Vollkommer, 'Sec. 4 VDuG' in *Zöller, Zivilprozessordnung* (35th ed. Otto-Schmidt 11/2023), para. 6. Labelling the success fee as part of the reimbursable costs of the proceedings if third-party funding was necessary to bring the action was proposed by *Gsell/Meller-Hannich* (n 7) 49. Since the proposal meant special rules on costs for actions for redress, it was not in line with Art. 12(1) of the Directive, see *Lühmann* (n 86) 833.

107. See Guido Waßmuth, Alexander von Rummel, 'Das Gesetz zur Umsetzung der EU-Verbandsklagenrichtlinie' (2023) ZIP 1515, 1522.

108. See section 4(3) first sentence of the Consumer Rights Enforcement Act.

109. See section 4(3) second sentence of the Consumer Rights Enforcement Act. It is not entirely clear whether this requires disclosure to the defendant, see *Gsell* (n 101) 3, ar-

2.7. Redress Settlements

The parties may in principle enter into a settlement with binding effect for all consumers registered in the electronic register.¹¹⁰ Because consumers can register their claims until three weeks after the closing of the oral hearing, settlements are allowed only once this deadline has expired.¹¹¹ Consequently, settlement negotiations before an oral hearing and often even before a judgment seem to be rather difficult or at least impractical as the parties do not know the maximum number of consumers potentially covered by the settlement.

The settlement is subject to approval by the court. The court approves the settlement if it considers it to be appropriate in light of the facts of the case, the state of the dispute and the interests of the consumers.¹¹² Within one month after the publication of the settlement approval order, consumers can opt out of the settlement.¹¹³ While under the old law settlement agreements were only valid if fewer than 30% of the consumers opted out, there is no such statutory threshold under the new law. In theory, it is therefore possible for the proceedings to end with a settlement that does not bind a single consumer.¹¹⁴ There is, however, no provision in the new law that prohibits the parties from agreeing on a contractual threshold. A decision that denies approval might only be appealed on points of law if the court allows for such an appeal in its decision.¹¹⁵

There are also no provisions that expressly prohibit the parties from reaching an out-of-court settlement that requires the qualified claimant to withdraw the claim. Whether such a settlement agreement is valid has been subject of strong debate under the old law given the absence of a court review.¹¹⁶ This debate is likely to continue under the new law. However, the majority view seems to be in favour of allowing such an out-of-court settlement.¹¹⁷

2.8. Disclosure of evidence

The rules on disclosure of evidence in Article 18 of the Directive did not necessitate any changes to the general rules regarding the required level of substantiation, the burden of proof and claims for information already in place.¹¹⁸ It was merely necessary to introduce a penalty provision which allows courts to impose a fine of up to EUR 250,000 if a party does not comply with a court order for disclosure.¹¹⁹

2.9. Costs

The general rules of the Code of Civil Procedure on costs apply. The losing party must thus bear the costs.¹²⁰ These costs include both parties' statutory lawyers' fees, court fees and any additional costs (e.g. for experts) if applicable.¹²¹ However, the cost risk is limited by a statutory cap on the value of the dispute which is the reference point for the calculation of lawyers' and court fees. The cap for actions for redress is EUR 300,000.¹²² This is intended to minimise the risk of litigation costs and a 'chilling effect'. Court fees for a collective action for redress thus are capped at EUR 10,852 for the first instance and EUR 13,565 for an appeal; the qualified claimant's adverse cost risk amounts to around EUR 9,200 and approximately EUR 12,500 for an appeal.

Given the rather low statutory remuneration for lawyers for a lengthy and complex procedure, there is no incentive for lawyers to push for an action for redress instead of mass litigation, where the compensation is calculated based on the individual action. If the qualified claimant is able to engage lawyers based on statutory fees, the quality of representation might become an issue. If the lawyers are paid an hourly rate, neither the qualified entity nor the defendant will be able to recover the full costs of the litigation, which might also have a 'chilling effect'. Hence, it could well be that the rules on cost, which are intended to incentivise and promote actions for redress, will actually have the opposite effect.

guing for disclosure to the court only, citing concerns of disclosing the litigation strategy; for a different view see *Schläpke/Lühmann* (n 32) 3386. [25] See section 6a of the Injunctive Relief Act.

110. See section 9(1) first sentence of the Consumer Rights Enforcement Act.

111. See section 9(1) second sentence of the Consumer Rights Enforcement Act.

112. See section 9(2) of the Consumer Rights Enforcement Act.

113. See section 10(1) of the Consumer Rights Enforcement Act.

114. See *Waßmuth/von Rummel* (n 107) 1526.

115. See section 13(1) of the Consumer Rights Enforcement Act which refers to section 574(1) of the Code of Civil Procedure; *Röthemeyer* (n 6) section 9, para. 49; Gregor Vollkommer, 'Sec. 9 VDuG' in *Zöller, Zivilprozessordnung* (35th ed. Otto-Schmidt 11/2023), para. 3.

116. For criticism, see Astrid Stadler, 'Pyrrhussieg für den Verbraucherschutz – vzbv umgeht durch Vereinbarung mit VW gesetzliche Sicherungsmechanismen' (2023) *VuR* 163 et seqq.

117. See *Röthemeyer* (n 6) Sec. 9, para. 57; Gregor Vollkommer, 'Sec. 13 VDuG' in *Zöller, Zivilprozessordnung* (35th ed. Otto-Schmidt 11/2023), para. 20.

118. See *Waßmuth/von Rummel* (n 107) 1524. Under the general rules, the court may, for instance, order a party or a third party to present documents or other records in accordance with the general rules (section 142-144 of the Code of Civil Procedure). Pursuant to section 142 of the Code of Civil Procedure, the court may, at its own discretion, order a party or a third party to disclose documents that are in its possession.

119. See section 6 of the Consumer Rights Enforcement Act.

120. See section 13(1) second sentence of the Consumer Rights Enforcement Act in conjunction with section 91 et seqq. of the Civil Code of Procedure.

121. As mentioned supra 2.5.2.3. the costs of the implementation proceedings are separate from the costs of the judicial redress proceedings and always borne by the defendant, see section 18(1) no. 3 of the Consumer Rights Enforcement Act.

122. See section 48(1) third sentence of the Act on Court Costs (*Gerichtskostengesetz – GKG*).

2.10. Effects of filing an action and suspension of statute of limitations

For the duration of the redress proceedings, a registered consumer may not bring an action against the defendant if the cause of action (*Streitgegenstand*) concerns the same facts and the same claims.¹²³ Parallel actions by registered consumers which were filed before the action for redress must be suspended if those actions concern the same claims and facts.¹²⁴ There are no rules for coordinating a collective action for redress measures with parallel individual proceedings of consumers who have not registered their claims.¹²⁵ Those consumers can therefore still bring their own claims or, e.g., assign their claims to claim vehicles (legal tech providers) which will bundle the claims in either one or very few proceedings or start mass litigation with hundreds or thousands of proceedings.¹²⁶ There is some optimism that, due to the late opt in, the action for redress measures will reduce the number of proceedings and alleviate the burden on the justice system to some extent.¹²⁷ Considering legal tech providers' response time, financial resources and the 'carefree package' they offer, it is, however, rather unlikely that the new action will slow down the mass claim industry and save significant judicial resources.¹²⁸

Given the ambiguity of the Directive as to the effect of the action for redress measures on limitation periods,¹²⁹ a major point of discussion was whether the effect should be limited to claims of consumers who have opted in.¹³⁰ The legislator considered consumers to be 'concerned' within the meaning of Article 16(2) of the Directive only if they have opted in.¹³¹ The filing of the action therefore suspends the limitation period only for claims of such consumers.¹³²

Given that the filing of the action and not the opt-in is relevant for the suspension of the limitation period, consumers can opt in even if their claim (without the opt in) has become time-barred at the time of the opt in.¹³³

2.11. Transitional law

As of 13 October 2023, actions for redress measures can also be brought with regard to infringements prior to this date. However, there are specific transitional rules regarding the suspension of the statute of limitations. The filing of the action only suspends the statute of limitations for claims arising from infringements that occurred after 12 October 2023.¹³⁴ As a consequence, an action for redress measures can be dismissed solely on the grounds that the claims registered by consumers become time-barred while the action is still pending if those claims arose from an infringement that took place before 13 October 2023. Whether such a result can be avoided by combining the action for redress measures with a declaratory model action¹³⁵ is unclear.¹³⁶

3. Model declaratory action

Germany introduced the model declaratory action (*Mustertfeststellungsklage*) in November 2018 as a reaction to the extremely large number of cases involving cars with defeat devices on diesel engines.¹³⁷ The purpose of the action was and is not to provide an enforceable judgment but to clarify factual or legal questions common to claims or the legal re-

123. See section 11(2) of the Consumer Rights Enforcement Act.

124. See section 11(1) of the Consumer Rights Enforcement Act.

125. For arguments in favour of such an approach, see *Gsell/Meller-Hannich* (n 85) 426.

126. For details on this practice, see Carsten Krüger, Andreas Weitbrecht, 'Bundling of Claims by way of Assignment in Germany' (2021) *Mass Claims* 107 et seqq.; David Markworth, 'Coding a Collective Consumer Redress Vehicle in Germany' (2023) *EuCML* 89 et seqq. For a comparative overview see Tanja Domej, Patrick Honegger-Müntener, 'Enforcing consumer law in Europe and beyond: Similarities and differences' in Beate Gsell and Thomas M.J. Möllers (ed.), *Enforcing Consumer and Capital Markets Law* (Intersentia 2020) 365, 397 et seq.

127. See e.g. *Meller-Hannich* (n 30) 1325.

128. For the advantages of legal tech providers in comparison to qualified claimants, see Engler, 'Kollektives Legal Tech in Zeiten der Abhilfe-Verbandsklage' (2023) *LTZ* 2023, 15, 20 et seqq.

129. Pursuant to Article 16(2) of the Directive, a pending action for redress measures must have an effect on the limitation periods 'in respect of the consumers concerned'. For the ambiguity in this regard, see e.g. *Gsell* (n 100) 1383 et seqq. For a different view, see *Domej/Honegger-Müntener* (n 126) 386 et seq.

130. For an overview of the discussion, see *Lühmann* (n 86) 835; *Gsell/Meller-Hannich* (n 85) 425; *Röthemeyer* (n 6) section 204a BGB, para. 3 et seqq.

131. See Federal Parliament publication BT-Drs. 20/6520, 107.

132. See section 204a(1) first sentence no. 4 of the Civil Code.

133. This was already the case in the context of the model declaratory action, see Bundesgerichtshof of 29 July 2021, NJW 2021, 3250, 3251 et seqq. and is also the case under the new rules, see Federal Parliament publication BT-Drs. 20/6520, 107.

134. See Article 229 section 65 sentence 4 of the Introductory Act to the Civil Code, where the old rules on the suspension of the statute of limitations are declared applicable. However, due to the lack of a collective action for redress measures before 13 October 2023, the old law did not contain rules on the effects of filing such an action. According to the explanatory notes (Federal Parliament publication BT-Drs. 20/6520, 108), such a transitional rule was required by Article 22(3) first sentence of the Directive. While the Directive refers to infringements that occurred on or after 25 June 2023, i.e. the date for the applicability of the new rules pursuant to Article 24, the delays in the transposition of the Directive led to the date of 13 October 2023.

135. Because model declaratory actions already existed as part of the old law, there were rules that filing such an action would suspend the limitation period. The application of the old rules is expressly allowed by Article 22(3) second sentence of the Directive.

136. See Gregor Vollkommer, 'Sec. 1 VDuG' in *Zöller, Zivilprozessordnung* (35th ed. Otto-Schmidt 11/2023), para. 18.

137. See Alexander Stöhr, 'The Implementation of Collective Redress – A Comparative Approach' *German Law Journal* (2020) 1606, 1611 et seqq.; *Halfmeier* (n 14) 240 et seqq.; Peter Rott, 'The Balance in Consumer Protection Between Substantive Law and Enforcement' *ERPL* (2023) 871, 880 et seqq.

relationships between consumers who have opted in and the defendant trader. The model declaratory action is likewise a representative action. Legal standing is thus granted only to claimants who fulfil certain requirements. Before the transposition of the Directive, the provisions on the model declaratory action were part of the Code of Civil Procedure. The relevant provisions are now part of the Consumer Rights Enforcement Act and largely aligned with the general rules applicable to actions for redress measures (scope, jurisdiction, legal standing, pre-judgment opt in, funding, minimum number of consumers concerned, settlements and disclosure). The cost for such actions is slightly lower than the cost of actions for redress measures because the statutory cap on the value of the dispute is EUR 250,000.¹³⁸

The future relevance of model declaratory actions will depend on how strictly or loosely courts will interpret the requirement of similarity of claims.¹³⁹ At least in cases where the similarity of claims is questionable or obviously not existent, this type of action will still be relevant.

4. Representative actions for injunctive measures

The transposition of the Directive required a number of changes to the existing regime for representative actions for injunctive relief (hereinafter 'actions for injunctive relief'). The legislator decided against incorporating the relevant provision in the Consumer Rights Enforcement Act and merely amended other laws, in particular the Injunctive Relief Act.¹⁴⁰

4.1. Scope of actions for injunctive measures

The scope of actions under the Injunctive Relief Act is not as broad as the scope of actions for redress and concerns in particular actions regarding invalid terms and conditions of business and actions regarding violations of provisions protecting consumers.¹⁴¹

4.2. Jurisdiction of higher regional courts

The courts of first instance are now higher regional courts (*Oberlandesgericht*) and not district courts (*Landgericht*).¹⁴² The reasoning behind this change is that actions for injunctive relief usually deal predominantly with legal and not factual questions, so that it is sufficient to have one court decide on factual questions.¹⁴³

4.3. Suspension of statutes of limitations

According to some scholars, the jurisdiction of higher regional courts will allow qualified claimants to bring actions for injunctive relief jointly with an action for redress measures.¹⁴⁴ Such an approach would enable qualified claimants to suspend the statute of limitations not only for consumers who have opted into the action for redress measures but for all consumers who might have claims due to the infringement concerned by the injunctive measure.¹⁴⁵ This change, which was required by Article 16(1) of the Directive, has been rightly described as a paradigm shift in German law.¹⁴⁶ It might also have the practical effect that qualified claimants conscious of their limited financial resources confine their efforts to measures of injunctive relief in order to suspend the limitation period and leave the performance stage to the private sector, namely legal service providers and claim vehicles with the support of litigation funders.¹⁴⁷

4.4. Information on motions and actions for injunctive measures

Such a development is supported by the newly introduced rules regarding information on motions and actions for injunctive measures. If the court receives such a motion or action, it now must submit the relevant information to the Federal Office of Justice, which will publish the information in the same electronic register in which information on actions for redress and declaratory actions is provided.¹⁴⁸ This enables the relevant stakeholders to monitor the litigation landscape and easily identify new topics suitable for mass litigation.

138. See section 48(1) second sentence of the Act on Court Costs. For the costs of actions for redress measures see supra 2.9.

139. For the requirement of similarity of claims see supra 2.6.1.

140. In addition, the rules on injunctive relief in case of a violation of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb – UWG*) were amended.

141. See section 1 and section 2 of the Injunctive Relief Act. Section 2 of the Injunctive Relief Act covers all provisions referred to in Annex I of the Directive, including such provisions as transposed into national law.

142. See section 6(1) of the Injunctive Relief Act.

143. See Federal Parliament publication BT-Drs. 20/6520, 118. Under the old law, factual questions could be determined at a district court or higher regional court, but only the Federal Court of Justice (*Bundesgerichtshof*) could on points of law.

144. Gregor Vollkommer, 'Verbandsklagenrichtlinienumsetzungsgesetz' (2022) MDR R325, R326.

145. See section 204a(1) first sentence nos. 1, 2 of the Civil Code. This does not apply to claims of small enterprises which fall within the scope of the action for redress (see supra 2.1.).

146. *Röthemeyer* (n 104) 334. Conceptually, it could be argued that such an effect is not warranted because the qualified claimant asserts a claim of its own and because consumers do not show an interest in pursuing any claims.

147. See for this type of 'job sharing' as a response to the strict rules on funding of actions for redress measures *Gsell* (n 101) 3.

148. See section 6a of the Injunctive Relief Act and section 8(5) second sentence of the Act against Unfair Competition. This information includes the name of the claimant and defendant and the claimant's description of the infringement.

5. Reform of actions for skimming off profits

In 2004, Germany introduced a representative action which allows qualified entities to bring a mandate-free action for skimming off profits that were made through practices in violation of the Act against Unfair Competition.¹⁴⁹ This type of action has not been initiated very often.¹⁵⁰ Arguably, this is because the skimmed profits do not benefit the claimant but go directly to the federal budget because third-party litigation funding was deemed inadmissible by the courts and because the requirement of an intentional infringement was difficult to demonstrate.¹⁵¹

In order to incentivise actions for skimming off profits in particular in cases of scattered damage (larger number of customers with relatively small claims),¹⁵² the Act on the Transposition of the Representative Actions Directive introduced several changes. Notably, qualified entities no longer need to establish intentional conduct but merely gross negligence on the part of the defendant.¹⁵³ In addition, third-party funding is expressly allowed and subject to the approval of the Federal Office of Justice prior to the filing of the action. Approval must be granted if the litigation is not abusive and the success fee is typical and reasonable.¹⁵⁴ Contrary to the rules on funding of actions for redress measures, there is therefore no explicit cap on the funder's success fee.¹⁵⁵ In order to limit the cost risk, the value of dispute which is the reference point for the lawyers' and court fees is capped at EUR 410,000.¹⁵⁶ Depending on the circumstances of the individual case, this will likely be viewed by funders as a major incentive to invest in actions for skimming off profits.

6. Capital Investors Model Proceedings Act

In 2005, the Capital Investors Model Proceedings Act¹⁵⁷ was introduced in order to establish a test case proceeding in which common factual and legal ques-

tions can be decided in a decision that is binding on individual proceedings against the same defendant.¹⁵⁸ The Act contains a 'sunset clause' with a deadline for new proceedings which has been extended from 31 December 2023 to 31 August 2024.¹⁵⁹

7. Concluding remarks

The transposition of the Representative Actions Directive has spurred further development of the German system of collective redress significantly. For the first time, qualified entities can bring representative actions for redress measures. Whether this alone will change the relevance of collective redress is doubtful. But the first few cases show that consumer pricing in energy, telecommunication and online shopping are already entering the spotlight. Even comparatively small amounts are being scrutinized. As the scope of the new action is wider than required by the Directive, covering all civil law disputes not only between consumers and traders but also between small businesses and traders, the scope of potential members of a class has been significantly broadened. In the past, business associations have struggled to bundle small businesses' cartel damages claims without a dedicated service provider. The new action for redress could give them the tool they need. In addition, the criteria for legal standing have been significantly lowered, allowing new players to emerge and fill the gap left by the Federation of German Consumer Organisations and its members due to limited resources.

But despite this consumer-friendly approach, third-party funding of redress actions is strictly regulated and usually not a viable option for funding redress actions. In the absence of significant additional funding and the lack of other financial incentives, it seems unlikely that qualified claimants will be able to bring a significant number of actions per year.¹⁶⁰ The new type of collective action will thus not replace existing instruments but complement them. Whether qualified entities will be able to com-

149. See section 10 of the Act against Unfair Competition. For details on such actions see Caroline Meller-Hannich, 'Enforcing Consumer and Capital Markets Law in Germany' in Beate Gsell and Thomas M.J. Möllers (eds), *Enforcing Consumer and Capital Markets Law* (Intersentia 2020) 93, 95 et seqq.; *Halfmeier* (n 14) 236, 237.

150. According to the explanatory notes only 43 actions have been reported to the Federal Office of Justice since 2004, see Federal Parliament publication BT-Drs. 20/6520, 125.

151. See Federal Parliament publication BT-Drs. 20/6520, 125; *Halfmeier* (n 14) 236.

152. See Federal Parliament publication BT-Drs. 20/6520, 125, 130. In such cases it is unlikely that qualified claimants will manage to convince a considerable number of consumers to become active twice, for the first time when registering their claims and for the second time when providing the trustee with the necessary evidence.

153. See section 10(1) of the Act against Unfair Competition.

154. See section 10(6) of the Act against Unfair Competition, which allows the qualified entity to claim the third-party funders' success fee as part of the expenses which are de-

ducted from the skimmed profits payable to the federal budget.

155. A rationale behind this could be that the success fee is deducted from the amount payable to the federal budget while third-party litigation funding of actions for redress measures means that the success fee must be borne by consumers. See for the cap on success fees in case of actions for redress measures supra 2.6.3.

156. See section 51(2) second sentence of the Act on Court Costs.

157. *Kapitalanleger-Musterverfahrensgesetz* (KapMuG).

158. For more details see *Halfmeier* (n 14) 238 et seqq.

159. See section 28 of the Capital Investors Model Proceedings Act. According to several press reports on 18 December 2023, the Federal Ministry of Justice has presented a draft bill which provides inter alia that the sunset clause will be repealed making the Act a permanent instrument of collective redress, see e.g. Heiker Anger, 'Reform der Sammelklage für Kapitalanleger kommt' *Handelsblatt*, 18 December 2023.

160. The legislator expects (only) 15 actions for redress measures per year, see Federal Parliament publication BT-Drs. 20/6520, 66.

pete with established business models run by professional claimant law firms and legal service providers who are supported by third-party litigation funders might depend on the courts' ability to speedily resolve the first few disputes and consumers' willingness to opt in.

In any case, the new rules on collective redress have the potential to bring change to the litigation landscape in Germany. This is particularly true for changes in relation to motions and actions for injunctive relief as well as actions for skimming off

profits. The automatic suspension of the limitation period for claims of consumers and the public availability of information regarding motions and actions for injunctive relief is likely to push litigation by third-party-funded stakeholders, either alone or in cooperation with qualified entities. If funding at market-standard conditions is allowed by the Federal Office of Justice, an action for skimming off profits could be considered an attractive investment opportunity and become a real commercial burden for companies doing business in Germany.