

Cos. Must Prepare For Collective Consumer Suits In Germany

By **Julia Schwalm and Jakob Schellmann** (August 1, 2018, 1:38 PM EDT)

German consumers will be able to sue manufacturers and service providers by way of representative action starting on this November — just in time to suspend the statute of limitations for consumer claims based on the exhaust emissions scandal. And this new law won't be the last step Germany will take towards allowing "consumer class actions" — because it is by no means enough to implement the planned European Union directive on representative actions (2018/089 (COD)).

While large claims are already being aggregated by different law firms and claims vehicles, this new representative action structure may lead to more small claims being filed. Consumers will still need to file individually for damages, because the new representative action will only establish liability, not damages. However, claims vehicles will probably also try to bundle individual damages claims, following the recent trend in antitrust damages claims in Europe.

What German Consumers Need in Order to Sue

In reaction to the emissions scandal, and widespread criticism of the lack of effective enforcement measures for German and European consumers, German lawmakers have developed a new type of representative action for consumers who share the same cause of action, the so-called Musterfeststellungsklage (not to be confused with the pre-existing model case proceedings for capital market law claims). It allows consumer protection organizations, under certain circumstances, to file suit against companies, and seek a declaratory judgment with respect to an alleged violation of law. The law will become effective on Nov. 1.

Affected consumers can register their interest in a proceeding. Even if an individual consumer does not become a party to the proceeding, the statute of limitations will be suspended for the duration of litigation. In contrast to class actions in the U.S. and the proposed EU directive, consumers are not awarded damages, but are granted only declaratory relief. While the findings of the judgment will be binding in any follow-on litigation, each consumer will still need to file individually for redress (e.g., damages).



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A consumer protection organization can settle the case on behalf of registered consumers with the approval of the court. However, the registered consumer can opt out within one month after service of the settlement. If consumers opt out, the settlement will not affect them, and they are not barred from filing a suit themselves. If 30 percent or more of the consumers opt out, the settlement is void.

There are only a handful of existing consumer protection organizations that will be allowed to lodge a collective complaint because of the strict legal requirements. More importantly, the organizations must be registered for at least four years as having protected consumers. In order to prevent a company's competitors from filing or funding such representative actions, an organization that files a collective action may not receive more than 5 percent of its funds from corporations. It is unclear, however, if this refers to the specific case or the funding of the entity itself. To prevent a plaintiffs bar from forming, the consumer protection organization must not lodge a representative action for the purpose of making a profit.

If it is eligible to lodge a collective complaint, the respective consumer protection organization must initially represent at least 10 affected consumers to establish legal standing. In addition, the complaint will only be processed if at least 50 consumers register as affected parties for the class action within two months after the public announcement of the class action in the competent registry.

For companies that are the targets of such a representative action, the advantage is that there will be fewer cases to defend against and to coordinate. Depending on the risk assessment of follow-on litigation for damages by individual consumers, it may make sense for the target company to attempt to make a small-scale settlement.

What Multinational Companies Should Keep in Mind

Generally speaking, damages under German law only compensate the actual harm suffered (and proven). There are no punitive damages of any kind, so compared to other jurisdictions, the potential exposure is relatively low. Regardless of that, claims vehicles will probably lead to more claims being filed after Nov. 1, thereby creating new exposure that currently does not exist in Germany.

Most likely, complaints will be filed against German subsidiaries of multinational companies, as service within the country will be easier and faster. The relief requested with the new collective actions will sound relatively harmless to nonlawyers, so subsidiaries without their own legal department may underestimate the risk associated with collective actions and may not line up an adequate level of defense. Multinational companies should make sure that their subsidiaries are aware of this, and are aligned with headquarters.

There is currently no easy way to avoid these new collective actions from German consumers. Choosing a different jurisdiction is not an option, as choice of law clauses are in most cases not permissible in consumer contracts. The same is true for arbitration clauses (generally barring "normal" court proceedings in Germany) which may be agreed to only in very exceptional circumstances.

Context of This New German Law: EU Initiative on Collective Actions

This German initiative is not part of the EU's "New Deal for Consumers," and it falls short of the plans for collective redress therein. The EU's proposal for a directive on representative actions — if adopted in the current version — provides a framework for member states to develop:

- Representative actions to eliminate infringement of consumer rights;
- Representative actions to seek redress on behalf of consumers; and
- The possibility to enter into settlements on behalf of consumers (who shall accept or refuse such settlements individually).

Courts may also order evidence to be presented by the defendant, e.g., the infringing company. This is significant, given that discovery is essentially nonexistent in German litigation. This could potentially bring a noticeable shift in powers to consumer litigation. Since German law does not include this feature, appropriate rules will have to be implemented — in addition to the current law — once they become effective on a European level.

Consumer protection organizations hoping for U.S.-style class actions (and plaintiff law firms) have criticized the EU directive proposal for leaving too many choices to the individual EU member state. There is no obligation for member states to create opt-out actions or settlements, due to a conscious decision made by the EU to avoid U.S.-style class actions and a U.S.-style plaintiffs bar. It remains to be seen which member state will create the most effective system — and whether European consumers will be as combative as U.S. consumers.

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