

# SHAPING THE BOUNDARIES OF COLLECTIVE REDRESS IN GERMANY

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Legal Briefings

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## A glimpse of the future under an EU representative action regime?

In a recent decision made on 17 November 2020, Germany's highest civil court shaped the boundaries of collective redress available under German law. The court dismissed a claim brought against a financial institution as inadmissible because the plaintiff did not have the standing to bring the claim.

The claim was brought as a Model Declaratory Action, an instrument that was introduced in November 2018 in the aftermath of the diesel NOx revelations in Germany. The procedure allows an action to be brought against a business by a so-called "qualified entity" on behalf of a group of at least 50 consumers. In the present case, the court held that the plaintiff could not act as a qualified entity because it was not predominantly active in the field of advising and informing consumers. Instead, its predominant activity was to bring mass claims against financial institutions, which disqualified it under the legislative requirements.

### **FACTS AND BACKGROUND**

The Model Declaratory action applies exclusively to B2C relationships. It aims at addressing overarching issues of law and/or fact that are relevant for a group of a minimum of 50 consumers who have to register their claims. The result will be a declaratory judgment. Actual damages still need to be sought in individual litigations in which the declaratory judgment will either be legally binding, if the individual consumer registered its claims, or may serve as a precedent.

The consumer, however, is not entitled to sue. Only registered so-called qualified entities, most prominently consumer protection organisations, may bring claims. These qualified entities have to fulfil a number of prerequisites. Amongst others: they have to serve consumer interests through providing non-profit advice and information to consumers; they must have a minimum of 350 individuals amongst their members; they must not receive more than 5% of their funding through corporations; and they must not file a Model Declaratory Action to generate a profit (s 606 German Code of Civil Procedure). For a more detailed description of the mechanisms of the Model Declaratory Action and status report reflecting the situation as of November 2019, follow this [link](#).

In the case before the German Federal Court of Justice (docket: XI ZR 171/19), the plaintiff in the Model Declaratory Action sought a declaratory judgment against financial institutions that handed out consumer credits for the financing of the purchase of automobiles. The desired declaration was that certain terms in the financing documentation used by defendants were not in line with consumer protection regulations, and the financing agreement could thus be rescinded infinitely so that ultimately also the purchase contracts could be rescinded.

The plaintiff is registered as a qualified entity. According to its articles of association, the plaintiff pursues the protection of consumers' rights against unfair terms in financial service providers' offerings. To that end, the plaintiff reviews standard terms and conditions of financial service providers, identifies unfair business terms and enforces the consumers' rights, if need be through court proceedings.

## **DECISION**

The court of first instance, the Stuttgart Higher Regional Court (docket 6 MK 1/18), dismissed the claim as inadmissible. The Stuttgart court ruled that the plaintiff failed to demonstrate that it had the required number of 350 individuals amongst its members. Furthermore, the Stuttgart court ruled that it was questionable whether the plaintiff in fact aimed to generate profit by way of pursuing the consumers' interests. This was particularly the case since a number of members of the qualified entity were at the same time lawyers in the law firm that was instructed by the qualified entity. Another major aspect was that the qualified entity predominantly pursued legal actions against financial institutions whilst the advisory work facing actual consumers played a marginal role. For those reasons, the Stuttgart court ruled that the plaintiff did not fulfil the prerequisites for a qualified entity as established under German law.

With its decision dated 17 November 2020, the German Federal Court of Justice (the "Court") confirmed the first instance decision. The Court not only confirmed that the plaintiff failed to demonstrate that it has the required number of 350 members, but it put a particular emphasis on the lack of a non-profit operation in the consumer's interest. The Court ruled that providing advice and information to consumers on a non-profit basis has to account for the major part of the plaintiff's activities. The enforcement of consumers' rights, on the other hand, has to play a minor role. The Court held that this was not the case.

The Court highlighted that according to press reports, the plaintiff brought over 3,400 cases in which it claimed costs and thereby generated almost its entire income through the enforcement of claims, be it out of court or in court. The member fees only accounted for a marginal share of the plaintiff's income. Thus, the plaintiff did not fulfil the strict requirements set by the legislators so that the claim was inadmissible. The judgment is final.

## COMMENT

This decision comes at a time where the tectonics of collective redress are moving not only in Germany, but also on an EU-level as well as in the UK and outside of Europe. Several jurisdictions have seen an influx of specialist litigation firms as well as third-party funders which try and monetise purported mass-damage claims through different models such as the bundling of claims. At the same time, law makers on a national as well as on the EU-level have enacted and continue to draft legislation in the field of consumer protection that aims at fostering measures of collective redress. Furthermore, law makers try to strike the balance between the collective enforcement of consumer rights and the avoidance of a profit-driven claims industry. This is one of the main reasons why the German legislator confined the group of claimants under the Model Declaratory Action to qualified entities that fulfil a number of requirements.

The recent decision by the German court may foreshadow the type of disputes that businesses might face not only in Germany but across EU Member States once the EU's Representative Action Directive has been enacted and transposed into national laws. This may well lead to an increase in the number of associations which bring claims in consumer related areas and the question will arise whether these associations have standing before the civil court. The current draft of the EU's Representative Action Directive requires Member States to designate so-called qualified entities that have standing to bring claims under the Representative Action Directive. One of the criteria that these qualified entities have to fulfil is the following: its statutory purpose demonstrates that it has a legitimate interest in protecting consumer interest. It remains to be seen how the final text of the directive will look. It will then be up to the Member States, their courts and ultimately the Court of Justice of the European Union to define the future boundaries of collective redress.

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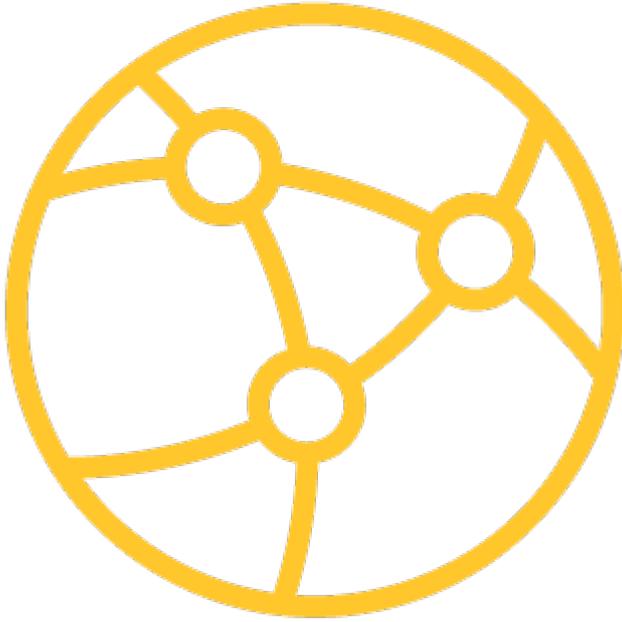
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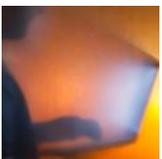


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