

Kluwer Competition Law Blog

New Collective Action System for Competition Law in Germany

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With the (belated) transposition of the [EU Representative Actions Directive](#) (RAD) on 13 October 2023 by means of the [RAD Implementing Act](#) (*Verbandsklagenrichtlinienumsetzungsgesetz* – non-German speakers, I treat you to a beer if you can properly pronounce this *Zungenbrecher*), the German legislator has ventured new legal territory for collective actions. Now, four main models build the collective action landscape in Germany: representative injunctions, disgorgement of benefits, model declarations, and redress.

The new concept has implications for the collective enforcement of competition law in Germany. While competition law was not included in the scope of the RAD, Germany now gold-plated the Directive by including competition law in the scope of the RAD Implementing Act. In addition, collective actions in Germany also encompass breaches of Articles 5 – 7 [DMA](#) by virtue of EU law and due to Germany's status as the initial EU Member State to integrate such infringements into its domestic competition law private enforcement system.

More on the German collective action system applicable to competition law and DMA violations can be found in my newest longer German [paper](#), published by *Neue Zeitschrift für Kartellrecht* (NZKart), with a shorter English version also available [open access](#), published by the *Journal of European Competition Law & Practice* (JECLAP).

The essence of the new German Act applicable to competition law is described in the following. For an in depth-analysis on DMA collective actions see [here](#).

Injunctions

Representative injunctions for competition law violations are still covered by Sections 33(1) and (4) of the [German Competition Act](#) (*Gesetz gegen Wettbewerbsbeschränkungen*). These injunctions can be filed by certain professional associations or qualified domestic consumer associations, including cross-border consumer associations. The RAD Implementing Act updated the criteria for consumer associations in line with Article 5 of the RAD. While for other representative injunctions further innovations on centralisation of jurisdiction and limitation periods were regulated in the [Injunctions Act](#) (*Unterlassungsklagengesetz*), no such innovations were included in the rules applicable to competition proceedings.

Disgorgement of benefits

Following the RAD Implementing Act, the associations who can file an injunction can also file a representative action for disgorgement of benefits under Section 34a of the German Competition Act. The benefits from a competition violation are disgorged from the perpetrator and included in the federal budget. The associations do not benefit from the disgorgement but bear the full cost risks. Litigation funding is excluded by [case law](#). Consequently, no such actions have been filed so far. This will not change since any innovations, e.g., in litigation funding, provided by the RAD Implementing Act for similar disgorgement provisions, e.g., in [unfair competition law](#), did not affect Section 34a of the German Competition Act.

Model declaratory actions and representative redress actions

The new [Consumer Rights Enforcement Act](#) (*Verbraucherrechtetdurchsetzungsgesetz*) was at the heart of the German reform. It includes the model declaratory actions with limited practical applicability in competition proceedings and, most importantly, the novel representative redress action. For the first time, the implementation of the RAD expressly introduces an action for redress into the German legal system.

By gold-plating the RAD, the Consumer Rights Enforcement Act includes competition law in its scope, as it covers all ‘civil disputes concerning claims and legal relationships of a large number of consumers against a trader’. This can include competition law claims as well. Not only consumer claims in the strict sense are covered but also claims by certain form of small and medium enterprises (SMEs) ‘that employ fewer than 10 people and whose annual turnover or annual balance sheet does not exceed EUR 2 million’. Other companies still only have the so-called [assignment model](#) to file competition claims collectively, as they are excluded from the redress action.

The redress action of the Consumer Rights Enforcement Act requires a quorum of at least 50 affected consumers (including SMEs). The underlining claims, e.g. competition damages claims, of these consumers and SMEs must be ‘essentially similar’, which can be difficult when it comes to complex competition law violations. The action can be brought by a qualified domestic or cross-border consumer association, professional associations are excluded. The consumers and SMEs have to opt-into the representative action by registering their claims with the Federal Representative Action Registry at the [Federal Office of Justice](#). The procedure will usually consist of different stages. In the first stage, the representative organisation will aim for a judgment on the merits, which is followed by a settlement stage in the second stage. In case a settlement is not reached, the court issues a final redress judgement the payment of a collective total amount into a fund managed by a trustee, who deals with the payment of individual amounts to the registered consumers and SMEs.

Conclusion

The new German system definitely constitutes a first step in the right direction when it comes to

collective actions for competition law violations. However, important innovations for representative injunctions and representative disgorgement of benefits were not adopted for competition law. The novel Consumer Rights Enforcement Act for the first time expressly introduces an action for redress applicable for competition law enforcement into the German legal system. Yet, the redress action falls short of expectations as it has no application for companies outside a very limited applicability for SMEs. For companies, the assignment model will remain an important additional instrument. For consumers, the opt-in requirement will pertain considerable hurdles in practice.

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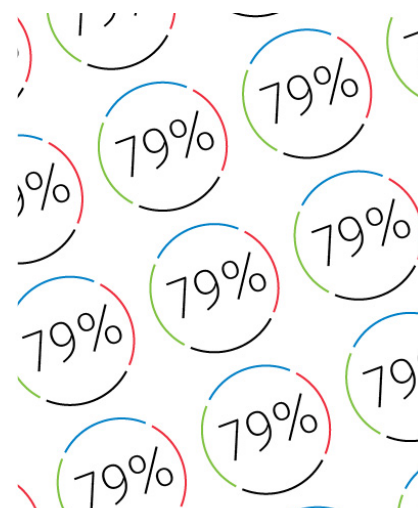
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