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List of abbreviations

ABGB	Allgemeines Bürgerliches Gesetzesbuch
ACI	Association for Consumer Information
Art	Article
ASC	Austrian Supreme Court
BGH	Bundesgerichtshof
BGstG	Bundes-Behindertengleichstellungsgesetz
B2C	Business to consumers
CREA	Consumer Rights Enforcement Act
ECJ	European Court of Justice
e.g.	exempli gratia
EU	European Union
FRCP	Federal Rules of Civil Procedure
i.e.	id est
KapMuG	Kapitalanleger-Musterverfahrens-Gesetz
KSchG	Konsumentenschutzgesetz
Lit.	Literra
OGH	Oberster Gerichtshof
para.	paragraph
RAD	Representatives Actions Directive

TFEU	Treaty on the Functioning of the European Union
UGB	Unternehmensgesetzesbuch
UklaG	Unterlassungsklagengesetz
UWG	Gesetz gegen den unlauteren Wettbewerb
U.S.	United States of America
VDUG	Verbraucherrechtedurchsetzungsgesetz
VRUG	Verbandsklagenrichtlinieumsetzungsgesetz
ZPO	Zivilprozessordnung

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1 Introduction

1.1 Starting point

The starting point is the conflict of interest between collective and individual consumer protection. Collective consumer protection (´collective redress´) is characterized by deficiencies in individual consumer legal protection. If several individual consumers suffer the same or similar damage, the damage often has a marginal value. The affected individual consumers are often stuck with their losses because they have no interest in seeking a compensation from responsible traders. This behavior of affected consumers is described in the literature as a rational lack of interest (*rationale Apathie*). Therefore, an imbalance of interests between consumers and traders is present.[1]

The rational lack of interest results from the comparison of the scattered damage and from the long and expensive court proceedings. For this reason, the affected individual consumers often do not even try to obtain compensation. The rational lack of interest is advantageous for traders who exploit the inferior position of consumers in their favor.[2] Companies therefore abuse the freedom of contract.[3]

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[1] Simon Jetzinger, 'Die Umsetzung der Vergleichsmöglichkeiten der Verbandsklage-RL in Österreich unter Berücksichtigung der deutschen Musterfeststellungsklage' (2021) 35 Wirtschaftsrechtliche Blätter 197 <https://biblioscout-net.uaccess.univie.ac.at/article/10.33196/wbl202104019701> accessed 6 January 2024.

[2] Ibid 197-198.

[3] Ulrich Lienhard, 'Rezension von Kai-Udo Wiedenmann: Verbraucherleitbilder und Verbraucherbegriff im deutschen und europäischen Privatrecht' (2005) 2(3) European Community private law review 123 <https://www-degruyter-com.uaccess.univie.ac.at/document/doi/10.1515/gpr.2005.2.3.123/pdf?stream=true> accessed 6 January 2024.

The purpose of collective legal protection is not to replace individual legal protection. Collective redress is an alternative[4], i.e., it is applied where individual legal protection comes up against its limits. While collective redress pursues public interests, individual legal protection pursues the compensation of the injured consumer. Collective redress therefore pursues objective and not subjective goals.[5]

However, collective redress cannot be separated from individual legal protection. This is because the enforcement of objective rights (public law enforcement) aims to help individual consumers to enforce their subjective rights (private law enforcement). This results in a contradiction or conflict of interest.[6]

Another area of conflict arises from the fact that the purposes of collective and individual legal protection must cooperate with each other. This is because collective redress must consider the aspects of individual legal protection. This includes, in particular, the principle of individual justice and the right to be heard. On the one hand, mass proceedings should be intended to relieve the burden on the judiciary and reduce process costs; on the other hand, consumers whose rights have been violated should receive fair compensation by considering the aspect of individual legal protection.[7]

1.2 Research goal

The European Union has been trying to help the rationally apathetic consumers for 20 years. Mass litigation as an instrument of collective redress attempts to enforce the rights of many equally affected consumers.[8]

For this reason, the author has chosen "Mass Claims in Europe" as the subject of her master thesis. The author will try to find an answer (i) whether there is a harmonized regime of collective redress

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[4] Elisabeth Krausbeck, 'Kollektive Rechtsdurchsetzung als Alternative' in Martin Schmidt-Kessel and Carmen Langhanke (eds), *Datenschutz als Verbraucherschutz* (JWV 2016) 122.
[5] Christoph A. Kern and Christian Uhlmann, 'Kollektiver Rechtsschutz 2.0? Möglichkeiten und Chancen vor dem Hintergrund der Verbandsklagen-RL' (2022) 4 Zeitschrift für Europäisches Privatrecht 852-855 <https://beck.online.beck.de/dokument?vpath=bibdata/zeits/zeup/2022/cont/zeup.2022.849.1.htm&pos=7&hlwords=on> accessed 6 January 2024.
[6] Ibid 854-855.
[7] Ibid 852.
[8] Ibid 849.

in the European Union (ii) if not what are the problems and shortcomings, and (iii) whether the new Representative Actions Directive will reform the collective redress in the European Union.

To answer these questions, the author first discusses the current legal and economic situation in the European Union. It is pointed out that the number of mass damages has increased in recent years due to mass transactions. Problems and shortcomings of the EU secondary legislation are explained.

The continuing deficiencies in the harmonization of collective redress at the EU level led to independent development in the EU Member States. Therefore, the author provides for an insight into the legal situation in Austria and Germany. It is shown how they have tried to deal with problem of collective redress within the framework of their national legal systems and legal traditions.

The legal systems of Austria and Germany will demonstrate how two similar German-language countries can significantly differ from each other in the field of collective redress. The end of the chapter provides for a legal comparison between Austria and Germany to show the reader what are the differences of their national systems regarding mass claims and collective redress, and what are the advantages and disadvantages of both systems. Furthermore, the author discusses whether they provide sufficient legal regulations and instruments to handle with mass claims.

Following the global outbreak of the Volkswagen diesel scandal, it has become apparent that the existing national regulations for handling mass claims are inadequate in many respects. The public pressure resulting from the Volkswagen diesel scandal led the EU Commission to reconsider its strategy. The EU Commission was aware that collective redress needs an urgent reform. Therefore, New Deal for Consumers[9] was published, in which the proposal for the introduction of a new Representative Actions Directive was included.[10]

The author introduces all the aspects of the Representative Actions Directive and defines improvements in comparison to the previous Injunctive Directive. Subsequently the

[9] European Commission, ‘New Deal for Consumers’ (11 April 2018) <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_18_2821> accessed on 11 June 2023 (´**New Deal for Consumers**´).
[10] Kern and Uhlmann (n 5) 851.

implementation of the Representative Actions Directive into national laws of Austria and Germany is presented. Problems and challenges are discussed.

The EU collective redress has always been compared with US class actions. Both historical and current developments of EU collective redress have been shaped by the controversial situation in the USA.[11] The author therefore analyzes the impact of the Representative Actions Directive regarding the US class action. Subsequently, a comparison is made between the EU and US legal situation. This is intended to illustrate whether the loud criticism of the American regime is justified and whether it poses a real threat to the EU Member States.[12]

At the end, the author answers whether the new Representative Actions Directive will improve collective redress and consumer protection in Europe.

2 Mass claims in the European Union

In general, mass claims are brought as a result of a variety of damages that have a common cause. Damages are caused by law infringements of traders where a large number of consumers is affected. Mass damages that lead to mass claims proceedings can result from unlawful business practices, defective products, or other law infringements.[13] Classic examples of mass damages are airplane crashes, industrial accidents, environmental disasters, and defective or health-damaging products that leave behind a large number of injured parties.[14]

If a not inconsiderable number of consumers is affected, their individual claims are often of a marginal value (in German known as *Bagatellschäden* or *Streuschäden*). Marginal value is often a barrier to bringing an individual claim (*rationale Apathie*[15]). The reason is high litigation costs and a stronger negotiating position of a large trader. Individual consumer protection thus reaches its

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[11] Kern and Uhlmann (n 5) 851.
[12] Peter-Andreas Brand, ´US-Sammelklagen und kollektiver Rechtsschutz in der EU´ (2012) 16 NJW 1116 <https://beck-online.beck.de/dokument?vpath=bibdata/zeits/njw/2012/cont/njw.2012.1116.1.htm&pos=20&hlwords=on> accessed 6 January 2024.
[13] Alexander Klauser and Tobias Kunz, ´Mechanismen zur Durchsetzung kollektiver Verbraucherinteressen in Österreich´ in Philipp Anzenberger, Alexander Klauser and Bettina Nunner-Krautgasser (eds), *Kollektiver Rechtsschutz im Europäischen Rechtsraum* (Verlag Österreich 2022) 6.
[14] Mirja Sauerland, *Die Harmonisierung des kollektiven Rechtsschutzes in der EU* (Band 10, Peter Lang, 2012) 33-35.
[15] Jetzinger (n 1) 197.

limits by mass damages. Therefore, collective redress is seen as a solution to even out the imbalance between consumers and traders in case of mass damages.[16]

2.1 Current situation

The European Union (´EU´) consists of 27 EU Member States[17] which have different approaches toward mass claims. Different approaches lead to inconsistency of collective redress in the EU. The inconsistency starts in the terminology. The Union regime of mass claims is often compared with the US class actions regime. However, the Union law terminology talks about collective redress or mass harms situation rather than mass claims or class actions.[18]

The single Member States are using terms of collective actions, mass claims, class actions, group actions or even their own developed terminology. For the purpose of this master thesis, the author will use the term of mass claims. In general, mass claims stand for a bundling of individual claims that have no marginal value. The affected parties have a great interest in compensation.[19] There are various legal instruments which can be used for filing mass claims.[20] Class action (also known as group action) and representative action are two basic models where similar interests are procedurally bundled.[21] They serve procedural economy and collective justice.[22] Model declaratory actions or model lawsuits (also called test cases) have been developed for dealing with mass damages in the Member States.[23] The latter models are suitable for an exemplary clarification of

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[16] Klauser and Kunz (n 13) 6.
[17] European Union, ´Country profiles´ <https://european-union.europa.eu/principles-countries-history/country-profiles_en> accessed on 1 May 2023 (´**EU Country Profiles**´).
[18] Recital 2 and 5 of the European Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanism in the member States concerning violations of rights granted under Union law [2013] OJ L 201/60 (´**EU Commission Recommendation**´).
[19] Sauerland (n 14) 33-35.
[20] Leo Gräf, ´Zusammenfassung der Podiumsdiskussion im Rahmen der Tagung am 4. März 2004 in Potsdam´ in Dieter C. Umbach and Daniel Dettling (eds), *Vom individuellen zum kollektiven Verbraucherschutz* (Band 20, PRR 2004) 86.
[21] Kern and Uhlmann (n 5) 849.
[22] Hans-W. Micklitz and Astrid Stadler, ´Gruppenklagen in den Mitgliedstaaten der EU und der USA´ in Tamara Gabriel and Beate Pirker-Hörmann, *Massenverfahren Reformbedarf für die ZPO?* (Band 33, Verlag Österreich 2005) 253.
[23] Gräf (n 20) 75-76.

the legal situation based on a selected case. In contrast to class actions or representative actions, they do not lead to a collective action.[24] The test cases offer the most cost-effective solution.[25]

The inconsistency regarding mass claims is being carried over from the terminology to substantive law and procedural principles of the single EU Member States. There are still Member States, such as Luxembourg, that do not have any provisions regarding mass claims at all. Differences can be found not only in the substantive law but also in particular procedural principles. The EU legislator tried to tackle the situation by releasing several directives and recommendations but had not fixed it entirely.[26]

As a result of this inconsistency, on the one hand, there are no sufficient regulatory standards at the Union level regarding mass claims. On the other hand, there is a lack of legal protection for affected parties. Therefore, the EU Member States have developed a wide diversity of complicated national legislations in this regard.[27]

In their opinion, they are trying to overcome these problems in the most effective way. Major differences arise in the legislative process that make the legal systems of EU Member States confusing and complicated. In addition, the access of EU citizens to justice and the effective functioning of the EU internal market are impaired as well.[28]

The recent statistics show that it is necessary to improve the inconsistent standards. The number of filed mass claims in Europe increased over 120% in the period from 2018 to 2021.[29] There were 49 mass claims filed in 2018 and 110 class action claims filed in 2021. The leading jurisdiction in mass claims filings was the United Kingdom before Brexit. The second one was the Netherlands.[30]

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[24] Micklitz and Stadler (n 22) 253.
[25] Georg E. Kodek, ´Möglichkeiten zur gesetzlichen Regelung von Massenverfahren´ in Tamara Gabriel and Beate Pirker-Hörmann, *Massenverfahren Reformbedarf für die ZPO?* (Band 33, Verlag Österreich 2005) 319 (´**Kodek 2005**´).
[26] EU Country profiles (n 7).
[27] Lea Christ, ´A collective effort: European class action (finally) on the way, or is it?´ (*dwf*, 13 March 2023) <https://dwfgroup.com/en/news-and-insights/insights/2023/3/european-class-action-on-the-way> accessed on 1 May 2023.
[28] Sauerland (n 14) 3.
[29] CMS Law-Tax-Future, ´European Class Action Report 2022´ (*CMS Legal Services*, June 2022) 4 et seq. https://cms.law/en/media/international/files/publications/publications/european-class-action-report-2022?v=3 accessed on 1 May 2023 (´**European Class Action Report 2022**´).
[30] Ibid.

France and Germany had an increase of 4% and 5%.[31] Austria showed an increase of 3%.[32] The numbers reflect only the numbers of mass claims filed. Austria and Germany have rather lower increase. However, the increase has brought significant changes.[33]

Furthermore, mass claims have become more attractive for big law firms and third-party litigation funders. Recent data shows that a wide variety of industries is affected - such as financial products; product liability in conjunction with consumer law and personal injury; competition claims, human rights claims; discrimination claims or environmental claims. Overall, class action filings are increasing everywhere in Europe.[34]

The rapid increase of mass claims entails both substantive and procedural issues. In terms of substantive law, the question arises as to who has the right to assert the claim on an individual basis. In principle, only the claimant (i.e., the injured party) can enforce his claim in court. Subsequently, individual enforcement of consumer rights can only work when dealing with small claims with a marginal value. However, in such cases, injured parties refrain from taking legal action in court due to financial costs and time involved. This approach is advantageous for unlawfully acting traders. For them it is more profitable than to behave legally.[35]

Due to the fact that individual enforcement of consumer rights does not work when dealing with mass damages, procedural collective mechanisms have to be developed at the European level. Otherwise, there is a lack of legal protection for harmed consumers. Moreover, the gap that has been created prevents consumers from accessing justice and effective enforcement of their claims.[36]

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[31] European Class Action Report 2022 (n 29).
[32] Ibid.
[33] Ibid.
[34] Teresa A. Griffin, ´Class Action Filing on the Rise in Europe, Especially in Product Liability Cased Ahead of Full Implementation of the EU´s Representative Actions Directive` (*Faegre Drinker*, 1 March 2023) <https://www.faegredrinkeronproducts.com/2023/03/class-action-filings-on-the-rise-in-europe-especially-in-product-liability-cases-ahead-of-full-implementation-of-the-eu-representative-actions-directive/> accessed 1 May 2023.
[35] Sauerland (n 14) 1-3.
[36] Ibid.

2.2 Historical development in Europe

Since 1990s, the EU Commission has been dealing with the topic of mass claims as a form of consumer protection.[37] The Union has put a strong emphasis on harmonization of European consumer legal protection. The Union has also understood that mass damages can only be dealt with through procedural collective mechanisms.[38] Accordingly, the EU Directive 98/27/EC[39] was introduced.

2.2.1 Injunctive Directive

This so-called Injunctive Directive 98/27/EC was the first secondary act of the EU which aimed at injunctions for protection of consumers´ interests. The Directive was amended several times, but without success. Therefore, the new Injunctive Directive 2009/22/EC[40] (´Injunctive Directive´) has been introduced and implemented to national laws of the EU Member States. The Injunctive Directive is short – it comprises 11 articles and one annex. The single articles leave the EU Member States a wide scope for implementation on how they maintain provisions on injunction relief in their national laws.[41]

The EU Commission has deemed it necessary to take effective injunctive measures in order to improve legal environment for consumers. The Injunctive Directive shall prevent companies from using unfair contract terms and unfair commercial practices and misleading advertising not only at national level but also in a cross-border context.[42] Therefore, it is relevant to harmonize national

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[37] Lena Hornkohl, ´Up- and Downsides of the New EU Directive on Representative Actions for the Protection of the Collective Interests of Consumers – Comments on Key Aspects´(2021) 10(5) Journal of European Consumer and Market Law 189 <https://kluwerlawonline.com/journalarticle/Journal+of+European+Consumer+and+Market+Law/10.2/EuCML2021039> accessed 14 May 2023.
[38] Sauerland (n 14) 1-2.
[39] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests [1998] OJ L 116.
[40] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests [2009] OJ L 110 (´**Injunctive Directive**´).
[41] Ibid.
[42] Report from the Commission to the European Parliament and the Council concerning the application of Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest [2012] Com/2012/0635 final (´**Report from the Commission**´).

provisions concerning unlawful business practices of companies beyond the borders of the EU Member States.[43]

According to the EU Commission Report from 2012, it is necessary to implement injunctive measures to national legislations in order to diminish unlawful business practices of companies. Such practices lead to infringement of consumer protection legislation.[44]

The EU legislator points out that there is a lack of harmonization of national regulations for cross-border matters. Accordingly, this situation may be used by companies when they move the place of their unlawful business practices to other jurisdictions that are favorable to them. This in turn leads to a breach of collective interests of consumers which may distort competition within the EU internal market.[45] Recital 3 of the Injunctive Directive determines collective interest as *"interests which do not include the cumulation of interests of individuals who have been harmed by an infringement. This is without prejudice to individual actions brought by individuals who have been harmed by an infringement.*"[46]

The aim of the Injunctive Directive is to improve the consumers´ situation in B2C framework. The improvement shall subsequently ensure the smooth functioning of the EU internal market.[47] Therefore, the Injunctive Directive has introduced qualified entities which shall issue representative actions to prevent collective rights of consumers.[48] Qualified entities are determined as independent public entities or organizations which may bring actions for injunctive relief according to Article 3 of the Injunctive Directive.[49]

Actions for injunctive relief shall be necessary actions for consumer protection. However, the Injunctive Directive stipulates only an injunctive relief as a compensatory redress. Compensatory redress means that the concerned companies are obliged to refrain from unlawful business

[43] Recital 7 Injunctive Directive (n 40).
[44] Report from the Commission (n 42).
[45] Recital 5 Injunctive Directive (n 40).
[46] Recital 3 Injunctive Directive (n 40).
[47] Recital 7 Injunctive Directive (n 40).
[48] Recital 10 Injunctive Directive (n 40).
[49] Article 3 Injunctive Directive (n 40).

practices. Although, the affected consumers are thereby not compensated. There is no mention of compensation for damages or other compensation possibilities in the Injunctive Directive.[50]

2.2.2 EU Commission Recommendation

Since the Injunctive Directive foresaw an injunctive relief only, there was a need to create common principles on collective redress throughout the Union. Therefore, the EU Commission adopted a Recommendation[51] on collective redress mechanisms in 2013 as a horizontal approach.[52] The Recommendation should introduce principles of both injunctive and compensatory nature in case of unlawful commercial practices.[53] EU Commission pointed out that all EU Member States shall have collective redress mechanisms for both national and cross-border mass claims[54] with same basic principle regarding violations of consumer rights.[55]

The Recommendation is a very long and extensive paper on the need for collective redress mechanisms. Compared to its volume, this document only offered a few concrete suggestions on how to improve the legal situation. The most important statement of the recommendation is that "*all Member States should have domestic collective redress procedures for injunctions and damages actions. These legal protection procedures should be fair, equitable, expeditious and not unduly expensive*".[56] However, the rest of the Recommendation does not contain any positive guidance on how collective redress should be structured.[57]

2.3 Conclusion

The Injunctive Directive was the first secondary act of the Union to address interstate litigation. In this sense, the prevailing lack of legal protection was remedied. Member States have been therefore

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[50] Beate Gsell, ´The new European Directive on representative actions for the protection of the collective interest of consumers – A huge, but blurry step forward´ (2021) 58(5) Common Market Law Review 1366 <https://kluwerlawonline-com.uaccess.univie.ac.at/api/Product/CitationPDFURL?file=Journals\COLA\COLA2021086.pdf> accessed 14 May 2023.
[51] EU Commission Recommendation (n 18).
[52] Gsell (n 50) 1366.
[53] Recital 4 EU Commission Recommendation (n 18).
[54] Point 17 EU Commission Recommendation (n 18).
[55] Point 19 EU Commission Recommendation (n 18).
[56] Georg Kodek, ´Kollektiver Rechtsschutz in Europa – Diskussionstand und Perspektiven´ in Walter Blocher (eds), *Festschrift Christian Nowotny: zum 65. Geburtstag* (Manz Verlag Wien 2015) 136.
[57] Ibid 136-137.

obliged to recognize the qualified entities of other Member States, so that foreign qualified entities may also bring actions in others than home Member States. It was the role of the Member States to implement the Injunctive Directive in order to establish the mutual recognition of qualified entities.[58]

The main issue of the Injunctive Directive is that it has not been aimed at harmonizing the national forms of action with regard to collective redress. As it is clear from the name of the Directive, the Injunctive Directive aims only at ceasing the unlawful activity of traders. Thus, traders are obliged to stop their unlawful activity, but they are not liable for their unlawful actions. Based on the Injunctive Directive, traders cannot be sued on redress.[59]

Therefore, claims of injured parties are not taken into account. They are referred to individual legal enforcement, which is practically impossible to realize in case of a large number of injured parties. As already explained, most injured parties will refrain from asserting their claims at the end of the day.[60]

As a result, the Injunctive Directive does not have a sufficient preventive function. It is not a deterrent for lawbreakers. Thus, the Injunctive Directive does not provide sufficient legal protection for EU citizens. Moreover, it does not have enough positive impact on the effective functioning of the internal market because it leads to distortion of competition, when one part of competitors behaves lawfully, and another part does not.[61]

The EU Commission Recommendation was another attempt to create common standards for collective redress within national legislations. Since recommendations are of a non-binding nature, the try was unsuccessful.[62] The EU Commission itself has shared this view by stating in its Report of 25 January 2018 that there was "*rather a limited follow-up to the Recommendation*".[63]

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[58] Sauerland (n 14) 29.
[59] Ibid 29-30.
[60] Klauser and Kunz (n 13) 6.
[61] Christ (n 27).
[62] Hornkohl (n 37) 189.
[63] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU) COM(2018) 40.

3 Individual development in Austria & Germany

As indicated in the 2. Chapter, national laws of the EU Member States are inconsistent and show significant differences in their substantive and procedural laws regarding collective consumer protection.[64]

3.1 Mass claims in Austria

In general, Austria has no legal tradition in the field of collective redress. There is therefore a legal gap in Austrian law regarding collective consumer protection. The legal situation has primarily developed independently from individual legal protection with the adaptions to EU secondary legislation.[65]

Regarding to substantive law, consumer rights are protected in Austria within the framework of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzesbuch – ABGB*)[66] and the Consumer Protection Act (*Konsumentenschutzgesetz – KSchG)*[67]. The most important regulations for consumer protection include the provisions of §§ 864a, 879(3) ABGB and § 6 KSchG. These provisions control consumer contracts. They are applicable in cases where the individual consumers´ rights are violated within the scope of business to consumers deals. In cases where many consumers have had their rights violated, the Austrian Consumer Protection Act provides for provisions in Sections 28 to 30 KSchG.[68]

On the one hand, § 879(3) ABGB is a general provision used to check the content of contractual clauses. Pursuant to that provision grossly disadvantageous agreements in general terms and conditions and contract forms are void and immoral (*contra bonos mores*).[69]

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[64] Recitals 2, 5 EU Commission Recommendation (n 18).
[65] Klauser and Kunz (n 13) 6.
[66] Allgemeines bürgerliches Gesetzbuch für die gesamten deutschen Erbländer der Oesterreichischen Monarchie BGBl. Nr. 38/2023 (´**ABGB**`).
[67] Bundesgesetz vom 8. März 1979, mit den Bestimmungen zum Schutz der Verbraucher getroffen werden (Konsumentenschutzgesetz – KSchG) BGBl. Nr. 140/1979 (´**KSchG**´).
[68] Rudolf Welser and Brigitta Zöchling-Jud*, Bürgerliches Recht Band II* (14th edition, Manz Verlag Wien 2015) par 1318.
[69] Simon Laimer, ´§ 879 ABGB´ in Attila Fenyves, Ferdinand Kerschner and Andreas Vonkilch (eds), *ABGB: Großkommentar zum ABGB- Klang §§ 859-887* (3rd edition, Verlag Österreich 2022), para 253 et seq.

On the other hand, § 6 KSchG concretizes the general provisions of § 879(3) ABGB. This provision also serves to control the content of contractual provisions that may have negative impact on consumers. Moreover, the provision provides for a special catalog of clauses, which if used, render a consumer contract null and void. The catalog contains a demonstrative list of disadvantageous contractual clauses. This allows the case-law of the Austrian Supreme Court (´ASC´) to adapt to the constantly evolving contractual practice.[70]

§ 6 KSchG distinguishes between absolute and relative nullity of contractual provisions. Absolute void are contractual provisions that not only violate consumer protection but also general interests. This legal consequence complies with the absolute nullity consequence of § 879(3) ABGB. In case of relative nullity, the contract can be rescued by means of a reduction that preserves the validity of the contract at issue. However, the requirement is that the concerned consumer must assert the nullity of the contract clause.[71]

§ 864a ABGB stands for validity control of general terms and conditions and contract forms which the other contracting party did not have to count on. Those provisions which are unusual and disadvantageous for one contracting party shall not be part of the contract. Unusualness is considered objectively *ex ante* from the point of view of a reasonable contracting party at the time of the contract conclusion. The external appearance of the contractual provision (e.g., color, bold print or location in contract) is also important. This provision does not require a gross disadvantage as in § 879(3) ABGB. The consequence of an invalid contractual provision leads to a reduction that preserves the validity of the contract. This means that the contract continues to apply without the affected clause.[72]

3.1.1 Individual claims & joinder of proceedings

In general, it is still possible for affected consumers to file individual lawsuits. However, it is associated with many disadvantages. The same factual and legal issues have to be clarified in a

[70] Heinz Krejci, ´§ 6 KSchG´ in Peter Rummel, Meinhard Lukas and Andreas Geroldinger (eds), *ABGB-Kommentar* (3rd edition, Manz Verlag 2002) paras 1-3.
[71] Ibid paras 8-9.
[72] Peter Rummel, ´§ 864a ABGB´ in Peter Rummel and Meinhard Lukas (eds), *ABGB-Kommentar* (4th edition, Manz Verlag 2014) paras 16-28.

large number of individual proceedings. This places a burden on the judiciary and militates against procedural efficiency.[73]

In addition, several similar proceedings can be joined in accordance with Section 187 Austrian Civil Process Code (*Zivilprozessordnung - ZPO*)[74]. However, the proceedings must be pending before the same court. Joining proceedings does not achieve much because the value limits are assessed separately, e.g., in the case of admissibility of an appeal. A uniform decision is not to be expected.[75]

3.1.2 Representative action (*Verbandsklage*)

The legal development of collective redress in Austria is set both at the level of substantive law and procedural law. Austrian legislator has introduced a representative action known in German language as "*Verbandsklage"*. This kind of a representative action is an instrument and should serve to enforce collective consumer protection. [76]

In general, Austrian scholarship is of the opinion that situations – which are particularly worthy – are protected within the scope of application of the representative action regime. Particularly worthy situations are situations which concern many consumers. Moreover, the representative action requires a mass business practice which constitutes a developed system by companies.[77]

Like the Injunctive Directive, representative actions are only provided for an injunction relief according to § 28(1) KSchG. It enables consumers to sue companies for injunction if traders violate a legal prohibition and morality of contracts (*contra bonos mores*) in their business practices. Unlawful clauses are therefore a target of the representative action. The provision aims at contracts concluded with consumers which use *in concreto* (i) general terms and conditions and (ii) the terms

[73] Kodek 2005 (n 25) 318.
[74] Gesetz vom 1. August 1895, über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten (Zivilprozessordnung – ZPO) BGBl. Nr. 61/2022 (´**ZPO**´).
[75] Kodek 2005 (n 25) 318-319.
[76] Welser and Zöchling-Jud (n 68) par 1319.
[77] Beate Gelbmann, ´Verbandsklage´ (*Lexis Briefings Zivilrecht*, October 2023) <https://360.lexisnexis.at/d/lexisbriefings/verbandsklage/h_80001_1422620053115107839_176beaae07?searchid=20240105115335421&page=1&index=1&origin=rl&rlclick=title&originview=STM> accessed 5 January 2024.

and conditions in blank sheets. Moreover, a recommendation of such terms and conditions or even invoking it, stipulates a violation.[78]

3.1.2.1 Out-of-court warning procedure

The requirement for bringing the representative action is the existence of a risk of repetition. Pursuant to § 28(2) KSchG, the defendant trader has the option of submitting a so-called "declaration of discontinuance" within a reasonable period. The request to issue the declaration of discontinuance comes from an association as defined in § 29 KSchG. The declaration of discontinuance is usually accompanied by payment of a contractual penalty pursuant to § 1336 ABGB. If the trader complies with these conditions, the risk of repetition ceases to exist. In this way, the Austrian legislator has created an opportunity to carry out an out-of-court warning procedure. This can save expensive and lengthy court proceedings. It should be emphasized that an out-of-court warning procedure is not mandatory. It creates only an option for the trader.[79]

If the defendant does not react or does not sufficiently react within a set out period or if the risk of repetition is not eliminated, a judicial warning procedure may be started.[80]

3.1.2.2 Injunction action

If the risk of repetition persists, the association may sue for an injunction relief at Austrian Commercial Courts (*Handelsgerichte*), where the traders have their registered office. The injunction action can be asserted in three ways: First, the association may sue the trader to stop using the unlawful clauses in the future. It means that he is not allowed to use in new contracts concluded with consumers. Second, the action can foresee a prohibition of using the unlawful clauses in the valid contracts. The trader is not allowed to appeal to such clauses. Third, the trader is prohibited to recommend unlawful clauses. However, this option is not really used in practice.[81]

The court then proceeds by interpreting the concerned clauses in the most consumer-unfriendly way. Subsequently, the court examines whether the clauses constitute a violation of a legal prohibition and/or a violation of good manners. In individual cases, the ASC accepts the filling of

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[78] Gelbmann (n 77).
[79] Ibid.
[80] Ibid.
[81] Ibid.

gaps by dispositive law as permissible. These are cases in which the contract would not be capable of continuing without the invalid clause and this would have negative effects on the consumer.[82] However, it is settled case-law that in injunction proceedings it is not possible to apply preservation of validity reduction for partial admissibility of the clauses.[83] Hence, supplementary contract interpretation is a highly controversial issue. The European Court of Justice (´ECJ´)[84], for example, rejects the application of supplementary contract interpretation for consumer contracts.[85]

If the court concludes that the contractual clauses are unlawful, it may set a performance deadline for the trader concerned depending on the size and scope of the breach. The court may also provide in the judgment that the plaintiff is authorized to publish the judgment. Normally, the judgment is then published in a daily newspaper. A mere publication of the judgment in mass media, on the website of the plaintiff association or the defendant trader is not sufficient. According to the case-law of the ASC, the reason for the publication is that consumers shall have the right to obtain information about such violations.[86] In cases where the tader wins the proceeding, he is entitled to request the judgment publication. However, it must be a complete win.[87]

3.1.3 Model lawsuit (*Musterprozess*)

In addition to representative actions, it is possible to pursue model lawsuits (*Musterprozesse*) according to Section 502 para. 5 no. 3 ZPO.[88] Model lawsuits enable to litigate lawsuits with a low amount in dispute.[89] They stand for a single lawsuit between a consumer and a trader. Such lawsuits can be taken all the way to the ASC when the claims are assigned to a qualified entity according to

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[82] RIS-Justiz RS0017829.
[83] RIS-Justiz RS0038205.
[84] Case C-260/18 *Kamil Dziubak and Justyna Dziubak v Raiffeisen Bank International AG, prowadzący działalność w Polsce w formie oddziału pod nazwą Raiffeisen Bank International AG Oddział w Polsce, anciennement Raiffeisen Bank Polska SA* [2019] ECLI:EU:C:2019:819.
[85] Wolfgang Kolmasch, ´Inhaltskontrolle von AGB´ (*Lexis Briefings Zivilrecht*, September 2023) <https://360.lexisnexis.at/d/lexisbriefings/inhaltskontrolle_von_agb/h_80001_6844380756212944815_f51e5bd0b1?searchid=20231201131207404&page=1&index=1&origin=rl&rlclick=title&originview=STM> accessed 1 December 2023.
[86] RIS-Justiz RS0079764.
[87] Gelbmann (n 77).
[88] Astrid Deixler-Hübner, ´Exkurs: Verbraucherrechtliche Sonderklagen´ in Astrid Deixler-Hübner and Peter Kolba (eds), *Handbuch Verbraucherrecht* (LexisNexis 2015) 408.
[89] Bundesministerium Soziales, Gesundheit, Pflege und Konsumentenschutz, ´Unterlassungsklagen und Verbandsklagen´ <https://www.konsumentenfragen.at/konsumentenfragen/Rund_um_den_Vertrag/Rechtsdurchsetzung/Unterlassungsklagen_und_Verbandsklagen.html#> accessed on 5 May 2023 (´**Bundesministerium Soziales, Gesundheit, Pflege und Konsumentenschutz**´).

Section 29 KSchG. The lawsuits are supported by the Austrian Ministry of Consumer Protection as well.[90] Individual cases are usually limited to an amount in dispute for appeal proceeding for reason of procedural economy. Therefore, an appeal to the ASC would not be possible.[91]

Furthermore, model lawsuits are also known as test cases. They stand not only for monetary claims but also for claims of a different nature. However, the application of the model lawsuits is limited in two ways: On the one hand, if a contract provides for a contractual prohibition of assignment, then assignment of the claim to a qualified entity is not possible. On another hand, the application of the model lawsuits is limited by cross-border disputes. Article 18 of the Brussel 1 Regulation[92] stipulates that only the consumer itself may file a claim. Such claim cannot be enforced with the help of a qualified entity. Once the claim is assigned to a qualified entity, that qualified entity may not invoke international jurisdiction within the meaning of Article 17 et seq. the Brussel 1 Regulation.[93] The qualified entity lacks consumer status.[94]

3.1.4 Class Action Austrian style (*Sammelklage österreichischer Prägung*)

Representative action (*Verbandsklage*) and model lawsuit (*Musterprozess*) have not become established in Austrian procedural law. These legal mechanisms are not efficient for handling mass claims especially regarding their insufficient legal force effect. Moreover, they do not provide sufficient legal protection for consumers because they do not have the effect of interrupting the limitation period for claims.[95]

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[90] Verein für Konsumenteninformation, ´Klagen: Konsumenten zu ihrem Recht verhelfen´ (27 November 2020) <https://vki.at/klagen-konsumenten-zu-ihrem-recht-verhelfen/5197> accessed on 5 May 2023 (´**Verein für Konsumenteninformation**`).

[91] Beate Pirker-Hörmann and Peter Kolba, ´Österreich: Von der Verbandsklage zur Sammelklage´ in *Internationales Symposium „Verbraucherpolitik: Kollektive Rechtsdurchsetzung – Chancen und Risken" AG 4 – Europäische Perspektiven zur Durchsetzung von Verbraucherrechten* para 1.3 <https://verbraucherrecht.at/system/files/typo3/Kolba_Pirker_Bamberg.pdf> accessed on 5 May 2023.

[92] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351.

[93] Case C-89/91 *Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH* [1993] ECLI:EU:C:1993:15.

[94] Deixler-Hübner (n 88) 408.

[95] Klauser and Kunz (n 13) 6, 28.

For these reasons, class action Austrian style has been developed.[96] Its founders are Dr. Alexander Klauser (the attorney of the Association for Consumer Information) and the FORIS AG (the German litigation fund).[97]

A class action stands for similar claims of consumers, the so-called accumulation of claims (*Klagshäufung*). Its basis lies in § 227 ZPO. The provision states that several claims of the plaintiff against the same defendant may be asserted in the same claim if the same court has jurisdiction and the same type of proceedings is provided for.[98] The admissibility of the class action Austrian style was also confirmed by the ASC.[99]

According to class actions Austrian Style, consumers can assign their claims to a qualified entity for collection. Consumers´ claims are then filed by the qualified entity as a single class action.[100]

The class action is advantageous for reasons of procedural economy because (i) only one lawsuit in front of one judge and subsequently one appeal is pursued, (ii) issued judgments are consistent, (iii) process costs are lower and (iv) a third-party funder may be involved in the proceedings so that the cost risk is covered.[101]

The positive collective feature of the Austrian-style class action is also the summing up of the amounts in dispute. This enables even rationally apathetic consumers with low amounts in dispute to actively participate in the class action.[102] They are able to enforce their rights and obtain compensation.[103]

Class actions Austrian style can be funded by a third-party. However, the principle of *quota litis* is prohibited under Austrian law to protect lawyers and clients. It is only permissible if a qualified entity agrees with a litigation funder on a percentage participation in the case of success. The litigation funder then bears the costs risks of the proceedings.[104]

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[96] Pirker-Hörmann and Kolba (n 91) para 1.2.
[97] Verein für Konsumenteninformation (n 90).
[98] Klauser and Kunz (n 13) 18.
[99] OGH 12.07.2005 4 Ob 116/05w.
[100] Bundesministerium Soziales, Gesundheit, Pflege und Konsumentenschutz (n 89).
[101] Deixler-Hübner (n 88) 409.
[102] Jetzinger (n 1) 199.
[103] Pirker-Hörmann and Kolba (n 91) para 1.3.
[104] Klauser and Kunz (n 13) 23-24.

Class actions Austrian style is an improvement regarding collective redress. In the light of procedural economy, several claims can be brought in one action. Their filing interrupts the limitation periods of claims concerned. However, it has also many disadvantages. Those include the fact that consumers must first assign their claims. As a result of the assignment, they can no longer be parties to the proceedings, but only witnesses. The proceedings nevertheless take a long time and are cost intensive. The courts are overburdened with the filing of class actions. The overload is due to inadequate technical equipment and a lack of staff responsible for the administration of class actions. In addition, the time limits for appeals are not adapted to class actions. They seem to be too short for such large proceedings.[105]

3.1.5 *Excursus:* Qualified entities

In light of the Injunctive Directive[106], consumers are usually represented by a qualified entity provided for by law in mass claims proceedings. § 29 KSchG implements the provision of the Injunctive Directive regarding standing of associations.[107]

The provision stipulates which organizations or associations are entitled to bring an action in case of violation of consumer rights. These are the Austrian Federal Economic Chamber (*die Wirtschaftskammer Österreich*), the Austrian Federal Chamber of Labor (*die Bundesarbeitskammer*), the Austrian Chamber of Agricultural Workers (*der Österreichische Landarbeiterkammertag*), the Presidential Conference of the Austrian Chambers of Agriculture (*die Präsidentenkonferenz der Landwirtschaftskammern Österreichs*), the Austrian Federation of Trade Unions (*der Österreichische Gewerkschaftsbund*), the Association for Consumer Information (*der Verein für Konsumenteninformation*) and the Austrian Senior Citizens' Council (*der Österreichische Seniorenrat*). These associations are entitled to assert the claims of consumers before Austrian courts.[108]

The Association for Consumer Information (´ACI´) and the Federal Chamber of Labour (´Chamber of Labour´) are the best-known Austrian associations protecting consumer rights. Both actively

[105] Klauser and Kunz (n 13) 28-29.
[106] Injunctive Directive (n 40).
[107] OGH 21.03.2018 7 Ob 168/17g = JBl 2018, 722.
[108] Welser and Zöchling-Jud (n 68) para 1319.

file class actions against a wide variety of entrepreneurs. They represent the rights of consumers in various industries on the Austrian market.[109]

The very first class action was issued by the ACI in 2001. Consumers had assigned their price reduction and damage compensation claims against a tour operator. Since then, hundreds of proceedings have been pursued by the ACI throughout Austria.[110] In the past 8 years, the ACI has taken class actions against large companies such as Volkswagen. It represents in total about 10,000 harmed consumers due to Volkswagen diesel scandal. The ACI claims damages of around EUR 60 million. The lawsuits are still pending in courts throughout Austria after years of negotiations.[111]

Foreign associations are also permitted to bring an action for injunction and class action in Austria. The material scope of application includes cross-border cases when Austrian companies are responsible for damages and infringement of consumer rights in other EU Member States.[112] According to § 29(2) KSchG, the EU Commission maintains a list of bodies and organizations from other EU Member States that are empowered to file cross-border class actions. The list can be found in the Official Journal of the EU. The EU Commission is obliged to update the list every six months according to Article 4 para. 3 of the Injunctive Directive[113]. Austrian associations are also allowed to bring the class action in other EU Member States, provided Austrian consumers are affected, and the responsible companies are located abroad.[114]

3.1.6 Class actions in another fields of law

The Austrian Consumer Protection Act is not the only one that provides for the class action. The class action can also be found in Section 14 of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb – UWG*)[115], in Section 13 of the Federal Disability Equality Act

[109] Bundesministerium Soziales, Gesundheit, Pflege und Konsumentenschutz (n 89).
[110] Pirker-Hörmann and Kolba (n 91) para 1.3.
[111] Verein für Konsumenteninformation, ´VKI: Termine VW-Sammelklagen´ (19 May 2022) <https://vki.at/vki-termine-vw-sammelklagen/65065> accessed on 5 May 2023.
[112] Bundesministerium Soziales, Gesundheit, Pflege und Konsumentenschutz (n 89).
[113] Injunctive Directive (n 40).
[114] Bundesministerium Soziales, Gesundheit, Pflege und Konsumentenschutz (n 89).
[115] Bundesgesetz gegen den unlauteren Wettbewerb 1984 – UWG BGBl. Nr. 204/2022 (´**UWG**´).

(*Bundes-Behindertengleichstellungsgesetz – BGStG*)[116] and in Section 460 of the Austrian Company Law Code (*Unternehmensgesetzbuch – UGB*)[117].[118]

According to § 14 UWG, the following associations are entitled to act alongside competitors: the Federal Chamber of Labour; the Austrian Federal Economic Chamber; the Presidential Conference of the Austrian Chambers of Agriculture; the Austrian Federation of Trade Unions; the Federal Competition Authority, and the ACI. Actions for injunction by the ACI are limited by law only to cases of aggressive or misleading business practices.[119] Moreover, the ASC affirmed the right of action of other associations on a case-by-case basis.[120] These include, for example, the bar association[121], profession private association[122] or even pharmacists´ associations.[123]

According to Section 13 BGStG (*Bundes-Behindertengleichstellungsgesetz* – Federal Disability Equality Act), the Austrian Working Group for Rehabilitation (*Österreichische Arbeitsgemeinschaft für Rehabilitation*) which is based on the recommendation of the Federal Advisory Council for the Disabled and the Litigation Association for the Enforcement of the Rights of Victims of Discrimination are entitled to file an action for injunction. Protected are general interests of people with disabilities who are substantially and permanently impaired. The associations with the right of action can sue for cease-and-desist and elimination of discrimination on the grounds of disability.[124]

According to § 460 UGB, the Austrian Federal Economic Chamber (*Wirtschaftskammer Österreich*), the Presidential Conference of the Austrian Chambers of Agriculture and the Associations for the promotion of economic interests of traders are the associations which are

[116] Bundesgesetz über die Gleichstellung von Menschen mit Behinderungen (Bundes-Behindertengleichstellungsgesetz – BGStG) BGBl. Nr. 32/2018 (´**BGStG**´).
[117] Bundesgesetz über besondere zivilrechtliche Vorschriften für Unternehmen (Unternehmensgesetzbuch – UGB).
[118] Gelbmann (n 77).
[119] Ibid.
[120] Matthias Görg, ´§ 14 UWG´ in Matthias Görg, *Kommentar zum UWG* (1st edition, LexisNexis ARD ORAC 2020) para 367.
[121] OGH 07.05.1929 4 Ob 232/29 = JBl 1929, 354.
[122] OGH 03.05.1932 4 Ob 176/32 = JBl 1932, 523.
[123] OGH 12.04.1988 4 Ob 14/88 = wbl 1988, 394.
[124] Gelbmann (n 77).

entitled to file a cease-and-desist claim. Using of grossly unfair contractual clauses pursuant to § 459 UGB and carrying out such business is unlawful in this legal area.[125]

Therefore, one can conclude that actions of associations are scattered in Austria, depending on the area of law and the interests involved. There are no concrete specifications as to which requirements an association must fulfill. The above-mentioned examples show that there is no taxative list of associations with legal standing. On the one hand, the legislator stipulates which associations are authorized to act, on the other hand, the ASC is also authorized to grant other institutions the right to act.

Moreover, it can be stated that Austrian law does not provide for any collective proceedings which would carry out mass actions in a quick and cost-efficient way.[126]

3.2 Mass claims in Germany

In Germany, the legal situation has been developed independently from other EU Member States. Like in Austria, mass claims in Germany are also scattered among several acts and constitute several variations thereof. Collective redress in Germany can be characterized by so-called mass small claims and mass higher claims where the factual situation is not determined. In general, the German Federal Ministry of Justice and Consumer Protection considers that consumers have good access to individual legal protection. Collective redress is still preferred in some situations.[127]

It should be emphasized that the collective redress in Germany resembles Anglo-American class action, but it is not comparable to that. The reason is that all consumers who seek for relief, must still bring an individual action against a trader, and pursue their own lawsuit.[128] In the following subchapters, the concept of class actions in Germany will be presented in more detail. Especially

[125] Gelbmann (n 77).
[126] Kodek (n 56) 140.
[127] Peter Rott, ´Instrumente der Rechtsdurchsetzung im Verbraucherschutz, Ein vergleichender Blick auf Deutschland, China und Brasilien´ (*Bundesministerium der Justiz*, 30 March 2020) 4-5 <https://www.bmj.de/SharedDocs/Downloads/DE/PDF/Berichte/Rechtsdurchsetzung-Verbraucherschutz.pdf?__blob=publicationFile&v=4> accessed on 1 May 2023.
[128] Hennig Bälz and Hengeler Mueller, ´The Class Actions Law Review: Germany´ (*The Law Review*, 20 April 2023) <https://thelawreviews.co.uk/title/the-class-actions-law-review/germany> accessed on 1 May 2023.

it will be shown whether the German legal system provides for sufficient collective redress for harmed consumers.

3.2.1 German Act on Injunctive relief (*UKlaG*)

Since 2000, a representative action (*Verbandsklage*) has been introduced into German civil law. Nowadays, the representative action can be found in Section 2 of the German Act on Injunctive Relief (*Unterlassungsklagengesetz - UKlaG*)[129]. UKlaG provides for an implementation of Injunctive Directive into German national law. It aims at injunctive relief from violations of provisions on consumer protection, especially against the use of invalid or unlawful general terms and conditions (§ 1 UKlaG).[130] The aim is to ensure a high level of consumer protection. § 3 UKlAG provides for an enumeration of representative organizations that can represent harmed consumers. This includes consumer protection association, chambers of commerce and industry.[131]

This procedure serves only to establish a violation of the law by the trader in the event of a future further use of the clauses concerned. If consumers seek for relief which means that consumers would like to have their damages compensated, they are not entitled to do it within the UKlaG procedure. Consumers may invoke the final judgment where the violation is determined. However, to the great disadvantage of consumers, they must sue for damages in an individual lawsuit. Only then they can obtain compensation for their damages.[132]

3.2.2 Capital Markets Model Case Act (*KapMuG*)

Capital Market Model Case Act (*Kapitalanleger-Musterverfahrens-Gesetz – KapMuG*) aims at claims for damages due to false, misleading, or omitted public capital market information and contractual claims for damages due to advisory errors. The scope of application is only limited for capital market law matters pursuant to § 1 KapMuG.[133]

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[129] Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (Unterlassungsgesetz) BGBl. I S. 1237 (´**UKlaG**´).
[130] Rott (n 127) 5.
[131] Bälz and Mueller (n 128).
[132] Rott (n 127) 5.
[133] Christian Wolf and Christian Denz, ´Mechanismen des kollektiven Rechtsschutzes in Deutschland´ in Philipp Anzenberger, Alexander Klauser and Bettina Nunner-Krautgasser (eds), *Kollektiver Rechtsschutz im Europäischen Rechtsraum* (Verlag Österreich 2022) 37.

The KapMuG represents model lawsuit that can be started from at least 10 procedures, which deals with the same or similar issue. First, at least 10 claims have to be filed individually by harmed investors. Subsequently, harmed investors must register their claims in the register of proceedings.[134] Like the Austrian class actions, the KapMuG-model proceedings protects registered investors from losing their claims due to expiration of the limitation period.[135] However, the registered investors are not parties to the proceedings.[136]

The registered claims will then be decided in the group proceedings. The model proceedings serve as the initial proceedings for the continuation of the individual claims. This procedure is also referred to as a bundling of interests.[137]

These model lawsuits should motivate investors to sue for their scattered claims, which have a low value. The background to this is that in the case of stray claims, the risk of litigation costs is much higher than the investor's own loss. This is why investors are "rationally apathetic" and do not assert their claims.[138]

A higher regional court is competent for a proceeding which can issue a so-called model judgment. According to § 8 KapMuG, the model judgment clarifies all issues nationwide. The individual claims can be pursed as an interim result only based on the model judgment as an interim result (§ 9 KapMuG). [139]

The judge may issue a collective settlement instead of the model judgment. The settlement shall regulate compensation for the affected parties. The advantage of the collective settlement is that the individual proceedings do not have to be continued. The settlement also ends the individual proceedings.[140]

The KapMuG became worldwide known in early 2000s as the Deutsche Telekom AG[141] was sued due to alleged portfolios errors. The public share offers did not include adequate information for

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[134] Wolf and Denz (n 133) 38.
[135] Deixler-Hübner (n 88) 410.
[136] Wolf and Denz (n 133), 39-40.
[137] Ibid 37-38.
[138] Ibid 37.
[139] Rott (n 127) 12-13.
[140] Wolf and Denz (n 133) 40.
[141] BGH, Beschluss vom 15.12.2020 – XI ZB 24/16.

potential investors buying shares. This case illustrates the nature of the German representative action. One consumer pursued and won a model case. The other affected persons referred to that case and claimed for compensation. More than 16,000 persons claimed about 80 million euros for a drop in the share price.[142]

3.2.3 Model Declaratory Action (*Musterfeststellungsklage*)

The so-called Model Declaratory Action (*Musterfeststellungsklage*)[143] is one of the newest variations of the class action in Germany. It was only introduced in 2018 within the framework of model declaratory proceedings. For the first time the Germany legislator introduced a concept which is similar to the class action regime under Common law. The model declaratory action (´MDA´) tries to restore a balance between consumers and traders. On the one hand, harmed persons shall easily enforce their consumer rights. On the other hand, traders shall be punished for their unlawful business conduct.[144]

The MDA is characterized by many advantages for consumers. In contrary to the German Act on Injunction Relief (UKlaG), consumers can assign their claims to a consumer organization which pursue the lawsuit for them. Moreover, the legal costs and the risk of litigation are to be borne by the responsible association. However, due to many assigned claims which lead to massive lawsuits, the lawsuits take longer than an individual proceeding. Therefore, it is questionable to what extent consumers easily obtain a compensation.[145]

The Act on Model Declaratory Proceedings provides for several qualified institutions which can represent harmed consumers. This includes Federation of German Consumer Organizations, Consumer Associations, Bank Customer Protection Association, Association of Insured Persons, and General German Automobile Club (ADAC).[146] These qualified institutions have to be

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[142] Peter Maushagen, Harro ten Wolde and Jason Neely, ´Lawyers urges court to speed up 2001 Deutsche Telekom case´ (*Reuters*, 27 October 2016) <https://www.reuters.com/article/us-deutsche-telekom-court-idUSKCN12R1JW> accessed on 6 May 2023.

[143] Section 606 et seq. German Code of Civil Procedure (*Zivilprozessordnung*).

[144] Dieter Strubenhoff, Ozan Akyurek, Eileen Latagthu, Nicholas Cotter, Gerjane te Winkel and Lamberto Schiona, ´Germany Introduces Class Actions for Consumer Claims´ (*Jones Day*, July 2018) <https://www.jonesday.com/en/insights/2018/07/germany-introduces-class-actions-for-consumer-clai> accessed on 7 May 2023.

[145] DEURAG Rechtsschutz, ´Sammelklage: Definition und Rechtslage in Deutschland´ (18 February 2021) <https://www.deurag.de/blog/sammelklage/> accessed on 6 May 2023 (´**DEURAG Rechtsschutz**´).

[146] Ibid.

registered for four years according to the German Act on Injunctive Relief in the case of national proceedings and with the EU Commission under the Injunctive Directive 2009/22/EC in the case of cross-border proceedings. The aim is that the qualified institutions do not represent consumers to make a profit. Therefore, they may receive maximal 5 percent of their finances from funding companies.[147]

Consumers have to follow an opt-in model which means that they have to register their claims to enter the proceeding. The claims must have the same motion and the same subject matter. There is a presumption that model declaratory proceedings shall always be of *fundamental significance*[148]. Furthermore, there is a time limitation for the registration, i.e., until the date prior to the first hearing in the case. The claim is admissible from at least 10 affected persons and the MDA is admissible from at least 50 consumers registering their claims. If the case is pending in a court (i.e., one of the higher regional courts in Germany), no new consumers can join the case. Limitation period of claims is suspended for the time being the model action is pending. The MDA is pursued by the responsible qualified institution. Therefore, the registered consumers are not permitted to pursue an individual lawsuit until the courts issues a declaratory judgment. The declaratory judgment has a binding effect only on the registered consumers who participate in the MDA.[149]

Once the declaratory judgment is issued, the consumers can file an individual claim and seek for a damage compensation. The court seized is bound by the legal assessment of the higher regional court. The Federal Office of Justice (*der Bundesamt für Justiz*) may send a written extract to the registered consumers. The extract shall serve as a proof and demonstration that he or she has validly registered for the model declaratory proceeding.[150]

There is one option when the MDA can provide a payment obligation on the defendant trader. Subsequently, the registered consumers do not have to pursue individual lawsuits. The option is a so-called class settlement. Otherwise, the MDA also lack on an option for consumers to obtain

[147] Strubenhoff, Akyurek, Latagthu, Cotter, te Winkel and Schiona (n 144).
[148] Ibid.
[149] Bälz and Mueller (n 128).
[150] Bundesministerium für Justiz, ´Die Musterfeststellungsklage´ <https://www.bmj.de/DE/Themen/FokusThemen/MFK/MFK_node.html> accessed on 7 May 2023.

compensation directly in that one proceeding. This is intended to be in line with the purpose of the MDA that it constitutes only a "model".[151]

Considered *ex ante,* the expected use of model declaratory action was rather too optimistic. Since the model introduction, only 16 MDAs have been brought in Germany so far. German legislator had expected 450 MDAs in one year.[152]

There are problems with registration of claims by consumers. It is challenging for consumers to understand legal assessment of the subject matter of their particular cases. Courts are strict when assessing the requirements of qualified entities. The issue is whether the qualified entity follows the interests of harmed consumers or rather their own financial interests. The behavior of consumers is also criticized, accusing them of using the MDA only to gain more time to prepare their individual lawsuits.[153]

3.2.4 "Lex VW"

The model declaratory action was introduced to German Civil Law before the end of 2018. Since 2015 the Volkswagen emissions scandal – the so-called "Dieselgate" – has become public in Germany. The case has been supported by mass media and public campaigns all over Europe.[154]

To note is that the Volkswagen diesel scandal has been spread in a large number of jurisdictions of countries around the world. Besides the EU Member States, for instance countries like the United Kingdom, the United States or Australia are affected as well.[155]

Many of the consumer claims would have been time barred in 2019. Therefore, it was in public interest to put the MDA in force on time. This enabled many affected consumers to register their

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151 Bälz and Mueller (n 128).
152 Thomas Lennarz and Thomas Böhm, ´CMS Expert Guide to European Class Actions´ (*CMS law-tax-future*) <https://cms.law/en/int/expert-guides/cms-expert-guide-to-european-class-actions?compare=germany,austria> accessed on 14 May 2023.
153 Tilmann Hertel and Matthias Wittinghofer, ´One year of model declaratory action in Germany – taking stock and outlook´ (*Herbert Smith Freehills*, 13 November 2019) <https://www.herbertsmithfreehills.com/latest-thinking/one-year-of-model-declaratory-action-in-germany-%E2%80%93-taking-stock-and-outlook> accessed 14 May 2023.
154 CMS Law-Now, ´Germany introduces a consumer mass action: The Model Declaratory Action – A (first)- class mass action?´ (6 November 2018) <https://cms-lawnow.com/en/ealerts/2018/11/germany-introduces-a-consumer-mass-action-the-model-declaratory-action-a-first-class-mass-action> accessed on 8 May 2023 (´**CMC Law-Now**´).
155 European Parliament, ´Lawsuits triggered by the Volkswagen emissions case´ (*Europarl,* May 2016) 3 <https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583793/EPRS_BRI(2016)583793_EN.pdf> accessed 14 May 2023.

claims just in time. The “Dieselgate” has been the first using the model declaratory action. Therefore, this action is also known as “Lex VW”.[156]

The mass claim was filed against the German concern Volkswagen AG (´VW´) by the Federation of German Consumer Organizations together with the ADAC on 1 November 2018. They claimed that VW intentionally harmed owners who had bought cars with diesel powered internal combustion engines produced by VW group. The disputed issue was that a defeat device had been installed into some of its engines. This device was a software which manipulated the benchmarking of nitrogen oxides. The legally permitted values of the nitrogen oxides were only achieved during the tests in the laboratory, but not during normal road traffic.[157] This concrete case ended with a settlement in 2020. VW had to compensate about 240,000 consumers. However, there are still many lawsuits pending before German courts where the MDA is used.[158] Some of the “Dieselgate” cases are already ruled by the German Federal Supreme Court (´BGH´) after 5 years.[159]

It is a controversial issue whether mass claims proceedings can succeed after the VW scandal. On the one hand, it seems to be difficult for other fields of law such as pharmaceuticals or travel, to apply the MDAs. The reason is that it is not easy to find 50 consumers who can register their claims. It is difficult to find cases which can be assessed in the same way. The subject matter differs from case to case.[160]

On the other hand, considering online-purchases, consumer loans or gas and electricity contracts in light of energy crisis - many companies can face an increase of class actions because of using invalid or unlawful terms and conditions. Furthermore, mass accidents can also be target of class actions.[161]

Furthermore, the length of proceedings and the probability when the affected consumers can expect a legally binding judgment is currently not predictable. It can therefore be assessed that the

[156] CMS Law-Now (n 154).
[157] Gsell (n 50) 1367.
[158] DEURAG Rechtsschutz (n 145).
[159] BGH, 26. June 2023 – VIa ZR 335/21, VIa ZR 533/21, VIa ZR 1031/22.
[160] CMS Law-Now (n 154).
[161] Claus Thiery, ´Musterfeststellungsklage: „Wilder Westen“ oder alles halb so wild?´ (*CMS Blog*, 5 March 2018) <https://www.cmshs-bloggt.de/dispute-resolution/musterfeststellungsklage-wilder-westen-oder-alles-halb-so-wild/> accessed on 8 May 2023.

collective redress mechanisms, especially in cases such as “Dieselgate”, have many deficits. [162] The need for reform of the German legal system remains even after the introduction of the MDA.[163]

3.2.5 Mass Claims Challenges

Mass claims resulting in mass litigation provides for many problems and challenges. One of the biggest problems is the management of mass proceedings. Law firms regardless of plaintiff or defendant side, need to develop new tools so that they are able to manage mass litigation.[164]

One of the biggest problems is a good organization. Not only the judiciary, but also law firms, which often support the qualified entities in mass claims proceedings, must be appropriately equipped in terms of materials, technology, and personnel.[165]

In terms of procedural economy, it is important that similar claims are judged in the same way and that decisions of the competent court or administrative authority are the same. The same applies to defendant traders. They also have a great interest in mass claims proceedings being conducted in a manner that is uniform, fast, and ideally cost-effective.[166]

The intensity of mass claims proceedings is still increasing. It may affect all areas of law such as data protection, environmental protection, or product liability. Mass claims proceedings are characterized by data overload. This requires an investment in the digitalization of processes. Therefore, Freshfields Bruckhaus Deringer as a leading law firm, has developed the so-called Mass Claims Unit (´MCU´) as a new legal tech support for dealing with mass claims. The MCU represents a case-management-tool which coordinates the lawsuits and enable to work with a huge amount on data. This should facilitate and improve the way of working.[167]

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[162] Christian B. Fulda and Lamberto Schiona, ´Collective Redress in Europe: Comparing the European and German Framework´ (*Jones Day*, May 2019) <https://www.jonesday.com/en/insights/2019/05/collective-redress-in-europe> accessed 7 May 2023.
[163] Raphael Koch, ´Die Musterfeststellungsklage´ (2018) 23 MDR 1411 <https://www-degruyter-com.uaccess.univie.ac.at/document/doi/10.9785/mdtr-2018-722305/pdf?stream=true> accessed 6 January 2024.
[164] Thomas Kustor, ´Positionspapier´ in Philipp Anzenberger, Alexander Klauser and Bettina Nunner-Krautgasser (eds), *Kollektiver Rechtsschutz im Europäischen Raum* (Verlag Österreich 2022) 233.
[165] Kodek (n 56) 139.
[166] Ibid 138-139.
[167] Patrik Schröder and Christina Valdini, ´Masse und Klasse: Die Mass Claims Unit von Freshfields´ (*Legal Tech Verzeichnis*, 20 February 2023) <https://legal-tech-verzeichnis.de/fachartikel/masse-und-klasse-die-mass-claims-unit-von-freshfields/> accessed on 8 May 2023.

3.3 Conclusion

There are several legal mechanisms for dealing with mass claims in Austria and Germany. Their application is complicated and limited to strict requirements. When looking on the legal situation in these two Member States of the EU, it can be stated that there is a lack of sufficient regulation regarding mass claims at the national and European level.[168]

Austrian and German legal systems have parallels that evoke a similarity insofar as they are oriented towards the minimum standards of the Injunctive Directive. In Austria, the Injunctive Directive has been implemented into Austrian Consumer Protection Act (KSchG) and Unfair Competition Act (UWG). Representative actions under Section 29 KSchG and Section 14 UWG are directed only at injunctive relief. This mechanism does not constitute a sufficient deterrent for infringing companies to stop their conduct in the future. Moreover, representative actions cannot create a legal title for the affected consumers to bring an action for damages.

In Germany, the Injunctions Act (UKlaG) implements the Injunctions Directive. As in the Austrian case, qualified entities can bring a representative action under UKlaG only for injunctive relief. Since the Injunctive Directive has been insufficient when enforcing collective rights of harmed consumers, Austria and German has developed other legal mechanisms. The development of new laws regarding collective enforcement has been independent. Therefore, these legal mechanisms differ from each other significantly.[169]

Independent development can be seen in model lawsuits both in Austria and Germany. Model lawsuits enable injured parties to assert their claims either individually or through representatives. Model lawsuits often serve as a model process for many similar cases. However, a model lawsuit has a binding effect only on the parties to that very lawsuit. All other injured consumers who do not participate in a model lawsuit, have to sue on their own. Therefore, a judgment rendered in a model lawsuit has only a de facto precedent effect.[170]

Although a model lawsuit judgment may increase the defendant trader´s willingness to settle. However, the model action may fail if other similar cases show only minor deviations. As a result,

[168] Hertel and Wittinghofer (n 153).
[169] Sauerland (n 14) 182-183.
[170] Ibid 178-180.

this legal tool does not create an effective basis for collective legal enforcement. In addition, there is a risk for injured parties who do not participate in a model lawsuit that they will no longer be able to enforce their claims at all. Their claims are not pending at a court and can become time-barred by the time the model lawsuit is concluded.[171] In Austria, a mass claims action called a class action Austrian type (*Sammelklage österreichischer Prägung*) has been developed. This legal mechanism is characterized by assignment of claims for debt collection. This means that injured consumers assign their claims to a qualified entity. Subsequently, the qualified entity (e.g., the ACI in Austria), represents the consumers and file the claims bundled in one lawsuit.[172]

The class actions Austrian type can also be brought for compensation. Thus, this mechanism fulfills, to a certain extent, the objectives of the collective legal protection because the class action Austrian type is associated with significant disadvantages for claiming consumers.[173] The disadvantages begin with the highly controversial issue of the admissibility of the class action. The admissibility of the class action was formulated by the ASC. The class action must have a similar cause of action and must essentially involve the same issues of fact or law that affect all claims.[174] Although the ASC case-law is *obiter dictum*, the admissibility criteria are disputed in most cases. The main point of contention is the subject-matter jurisdiction of the court convened.[175] The intervening disputes prolong the proceedings and are associated with further costs. This is not compatible with the principle of procedural economy.[176]

In practice, it has proven problematic that consumers are often afraid to assign their claims to a third party. This can be assessed as a psychological inhibition threshold. The fear is justified because the claimants lose their consumer jurisdiction in cross-border matters after the assignment.[177]

In addition, the possible involvement of a litigation financier on the claim side is often attacked by the defendant side and the admissibility of the Austrian-style class action is questioned.[178]

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[171] Sauerland (n 14) 178-180.
[172] Ibid 181-182.
[173] Ibid 278-279.
[174] OGH 12.07.2005 4 Ob 116/05w.
[175] Klauser and Kunz (n 13) 21-20.
[176] Ibid 29.
[177] Ibid 29.
[178] Sauerland (n 14) 278-279.

However, the ASC has ruled that the financing of legal costs does not fall under the prohibition of quota-litis and is therefore permissible.[179]

The class action was created for reasons of procedural economy. However, from the very beginning of the procedure, it involves an enormous amount of work for everyone involved. The plaintiffs' representatives must conclude an assignment agreement with each individual claimant. The legal representatives must have sufficient technical and human resources to deal with mass actions. The high amount in dispute in mass claims also means a high liability risk for legal representatives. It is also a challenge for courts to deal with mass proceedings. The judicial administration must create measures to balance the workload in the relevant court departments.[180]

The procedural economy of the Austrian-style class action and thus its effectiveness is also questionable for another reason. Most proceedings are drawn out over years and usually end in a settlement. A final judgment rarely occurs. While a settlement is procedurally economical, it only points to the fact that the Austrian Code of Civil Procedure does not have effective mechanisms for dealing with mass litigation. Moreover, the time limits for appeal are too short in view of the scope of the mass proceedings.[181]

The German legal situation differs from the Austrian legal situation in that they have already developed two legal mechanisms aimed at mass enforcement of claims (i.e., model lawsuits according to KapMuG and model declaratory action). The Austrian-style class action was developed in Austria for this purpose, but as has been shown, it is associated with many disadvantages and is therefore not sufficient for effective collective enforcement.[182]

The two specific legal mechanisms regarding mass claims have been developed independently and find no equivalent in the Austrian legal system. The model lawsuit according to KapMuG was created for dealing with mass claims of affected investors under capital market law. The KapMuG model procedure is problematic in several respects. The scope of application is limited, in that the procedure is only applicable to facts under capital market law. In addition, the length of the model proceedings is problematic as investors must first file their claims individually and the model

[179] OGH 27.02.2013 6 Ob 224/12b.
[180] Klauser and Kunz (n 13) 25-26.
[181] Ibid 26-29.
[182] Ibid 7-8.

proceedings can only be conducted once 10 individual claims have been filed. In addition, the continuation of individual claims after the end of the model procedure is costly. This in turn leads to rational apathy on the part of investors with regard to stray claims.[183]

The introduction of the German Model Declaratory Action (MDA) in 2018 following the VW diesel scandal has brought much hope. MDA is advantageous for courts because it simplifies the collection of evidence in complex cases.[184] It also has helped consumers dealing with claims against VW. However, its further use in future is still disputed because it does not provide a sufficient legal tool for harmed consumers to get monetary compensation directly.[185]

The German MDA is not compatible with class actions Austrian type or model lawsuits. In Austria, there exists no comparable counterpart. The MDA is advantageous for consumers in that it minimizes the risk of litigation costs for them. However, the length of such proceedings is unforeseeable. In addition, the individual injured parties must pursue their claims on their own after the model declaratory judgment is issued. This legal tool is therefore incompatible with the principle of procedural economy. Collective redress remains deficient.[186]

The road to obtaining compensation is long and problematic both in Austria and Germany. The collective redress mechanisms do not exist or are not sufficient. The model proceedings do not constitute a payment title for the individual plaintiffs. They must enforce their claims themselves. In principle, mass proceedings are long and involve procedural delays. The compensation law systems in Austria and Germany are based on an individual examination of damage, causality, illegality and fault.[187]

[183] Wolf and Denz (n 133) 37-41.
[184] Bettina Rentsch, `Kollektiver Rechtsschutz unter der EU-Verbandsklagenrichtlinie` (2021) 12 European Community Private Law Review 524-525 <https://beck-online.beck.de/dokument?vpath=bibdata/zeits/euzw/2021/cont/euzw.2021.524.1.htm&pos=9&hlwords=on> accessed 6 January 2024.
[185] Hertel and Wittinghofer (n 153).
[186] Wolf and Denz (n 133) 40-41.
[187] Ibid 54.

The legal questions in mass claims proceedings are mostly of the procedural nature. In principle, the defendants only have to prove that they bought a product which could have caused the damage.[188] It is therefore questionable whether the defendant has actually suffered any damage.[189]

Mass claims are also raised across borders. In this field of law, the legal situation is either not regulated at all or not regulated sufficiently. All these facts lead to the conclusion that legislative competence under EU law is therefore desirable for the development of collective redress.

Moreover, the bundling of proceedings hinders individual review, as it is not feasible for the judge for reasons of time and procedural economy to interrogate all claimants. This can lead to an increase in risk as to whether the substantive law is correctly assessed in mass claims proceedings.[190]

The selected Member States, Austria and Germany, serve to illustrate that Member States try to deal with mass claims autonomously. The independent handling has already proven to be problematic in purely domestic cases. First, it is difficult for harmed consumer to make sense of many different legal protection mechanisms and to choose one. Secondly, it is not possible to judge *ex ante* whether they can expect compensation one day. Both Austrian and German legal systems offer insufficient possibilities for affected consumers to enforce their redress claims.

4 From Injunctive Directive to Representative Actions Directive

Turning back to the issue of the lack of harmonization regarding mass claims in Europe. After 30 years of trying, there is no uniform structure of collective redress for consumers in the EU. The EU Commission has demanded though a collective redress approach through adopting two Injunctive Directives in 1998 and 2009 and related Recommendation in 2013, however without success. The Recommendation as a soft low without binding power has only a limited impact on the Member States.[191]

[188] Wolf and Denz (n 133) 55.
[189] Ibid 55.
[190] Ibid 54-55.
[191] Gsell (n 50) 1366.

The situation in the Member States has remained unchanged. The Injunctive Directives have covered only actions for injunctive relief excluding actions for damage or other compensatory measures.[192]

The latest Injunctive Directive has not created a satisfactory framework for the area of collective redress at the European level. It has not introduced efficient substantive and procedural standards regarding class actions. This can be seen as problematic considering the increasing number of mass claims in the EU.[193]

In 2014, the EU Commission adopted the Antitrust Damages Directive 2014/104/EU.[194] One could think that the EU Commission turned away from the collective redress approach because the Antitrust Damages Directive provides for any mechanism for collective redress. The impression was that the EU Commission focuses on resolving consumer disputes not in the way of collective redress, but through alternative dispute resolution.[195]

Another turning point was the release of the Alternative Dispute Resolution Directive 2013/11/EU[196] and the Online Dispute Resolution Regulation EU/524/2013.[197] Alternative dispute resolution was pushed by the EU Commission stating that it represents a cheaper, faster, and easier way of resolving consumer disputes. Alternative dispute resolution means settling consumer disputes out of the court. It covers many types of alternative dispute resolution mechanisms such as mediation, conciliation, ombudsmen, arbitration, or complaints boards. All negotiations shall be assisted by an impartial dispute resolution body. Both Alternative Dispute Resolution Directive and

[192] Gsell (n 50) 1366.
[193] Freshfields Bruckhaus Deringer, ´Class actions and collective claims around the globe´ (2023) <https://www.freshfields.com/en-gb/our-thinking/campaigns/collective-actions/> accessed on 9 May 2023.
[194] Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1.
[195] Gsell (n 50) 1366.
[196] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L 165.
[197] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L 165.

Online Dispute Resolution Regulation shall improve protection of consumer rights and simplify the way of resolving consumer disputes out of court.[198]

It is obvious that the approach of the EU Commission in 2014 changed in contrary to the approach pursued in the Injunctive Directive in 2009. The approach in the Injunctive Directive was the possibility of bringing representative actions by qualified entities.[199]

However, only one year later, the EU Commission turned away from the alternative dispute resolution approach. The crucial point for the EU Commission was the Volkswagen emissions scandal in 2015.[200]

The EU came under public pressure. Especially since it has been known that affected consumers in the US were awarded compensation. The insufficient Injunctive Directive received the spotlight once again because the affected vehicle owners have filed their as "claims for damages in tort"[201]. Based on that Directive it was impossible for affected consumers to get a monetary compensation through mass claims for injunctive relief.[202]

4.1 New Deal for Consumers

The lack of effective legal standards for consumer collective redress became obvious. Therefore, it was necessary for the EU Commission to act in the public interest. The EU Commission made a step forward in April 2018 and released the so-called "New Deal for Consumers"[203].[204]

New Deal for Consumers represents a new era for consumer protection. The aims of the proposed document by the EU Commission are (i) to strengthen consumer rights, (ii) to modernize consumer

[198] European Commission, ´Alternative dispute resolution for consumers´ <https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/resolve-your-consumer-complaint/alternative-dispute-resolution-consumers_en#:~:text=Alternative%20dispute%20resolution%20(ADR)%20means,expensive%20than%20going%20to%20court.> accessed on 11 June 2023.
[199] Gsell (n 50) 1366.
[200] Ibid 1367.
[201] Peter Kolba, ´Positionspapier´ in Phillip Anzenberger, Alexander Klauser and Bettina Nunner-Krautgasser (eds), *Kollektiver Rechtsschutz im Europäischen Rechtsraum* (Verlag Österreich 2022) 228.
[202] Gsell (n 50) 1367.
[203] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, A New Deal for Consumers [2018] COM(2018) 183 final (´**Communication from the Commission 2018**´).
[204] Gsell (n 50) 1367.

protection rights, (iii) to have publicly and effectively enforceable consumer rights, and (iv) to have better redress mechanisms.[205] The latter means that consumers shall be entitled to get a compensation in case of violation of consumer rights.[206]

The background of the proposal is mainly the adaptation of consumer rules in the context of the fast growing and developing digitalization of the market. Another reason is the existing need for modernization of law enforcement through better cooperation of national public authorities. EU Commission evaluated consumer legislation in the EU in 2017. The general outcome was that the EU has a well-established consumer legislation. However, the evaluation stressed out that the legal practice of enforcing consumer rights is vague.[207]

Hence, the "Dieselgate" has clearly shown that consumers in the EU have only insufficient legal enforcement options at their disposal, especially when dealing with cross-border issues. Therefore, not only public, and private enforcement but also whole consumer protection law needs to be strengthened.[208]

All these reasons led the EU Commission to adopt following legislative proposals: The New Deal for Consumers shall update (i) unfair terms in consumer contracts, (ii) consumer protection in the indication of the prices of products offered to consumers, (iii) unfair business-to-consumer commercial practices and (iv) consumer rights.[209]

Furthermore, the EU Commission provided for a big step forward in reforming the collective redress mechanism by proposing a new directive regarding representative actions for the collective interest of consumers. This new legislative proposal shall replace the currently applicable Injunctive Directive. The aim of the proposal is an improvement of unfair commercial practices and of collective redress mechanisms for consumers. The EU Commission states clearly that it points out to mass harm situations when the consumer rights are violated in the same way.[210]

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[205] Communication from the Commission 2018 (n 203) para 8.
[206] New Deal for Consumers (n 9).
[207] Ibid.
[208] Ibid.
[209] Ibid.
[210] Ibid.

New Deal for Consumers aims to empower the existing situation for both European consumers and businesses. Clear, strengthened and coordinated consumer protection rules shall on the one hand protect consumers and on the other hand bring a legal certainty and trust for businesses within the EU internal market.[211]

In order to successfully implement all these proposals and initiatives, the EU Commission emphasizes that it can be achieved only within the framework of a wide-ranging cooperation between the EU Parliament and EU Member States. This means that the future situation of European consumers and businesses is purely dependent on a political will.[212]

5 Representative Actions Directive (RAD)

New Deal for Consumers has induced political discussion. EU Member States do not want a "Dieselgate" type scandal or similar mass harm situation to happen again. However, if it does, the Union law together with national laws should be better prepared. Therefore, in 2020, the EU Parliament and the EU Member States agreed on a new directive to strengthen and modernize consumer protection within the EU. This shall ensure a more effective redress option for consumers against unfair commercial practices.[213]

The new directive is called "Directive on 2020/1828 on representative actions for the protection of the collective interest of consumers and repealing Directive 2009/22/EC".[214] As it follows from the title of the new Representative Actions Directive (´RAD´), the RAD shall repeal the Injunctive Directive 2009/22/EC. The Injunctive Directive had been found to be insufficient to effectively enforce consumer rights. According to the Injunctive Directive qualified entities had been able to bring actions only for injunctive relief but not for collective redress. The RAD shall enable representative actions on injunctive as well as remedial decisions. Since the new directive provides

[211] Communication from the Commission 2018 (n 203) para 8.
[212] Ibid para 8.
[213] Heike Anger, Till Hoppe and Dietmar Neuerer, `Lehre aus VW-Skandal, Neue EU-Regeln erleichtern Sammelklagen gegen Unternehmen´ (*Handelsblatt*, 23 June 2020) <https://www.handelsblatt.com/politik/international/lehre-aus-vw-skandal-neue-eu-regeln-erleichtern-sammelklagen-gegen-unternehmen/25942780.html> accessed on 17 June 2023.
[214] 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 [2020] OJ L 409 (´**RAD**´).

for many innovations and legislative changes, it is appropriate to repeal the existing Injunctive Directive.[215]

The first Recital of the RAD speaks to the main points of why the EU has decided to adopt the Directive. In the foreground is the globalization and digitalization of the European market, which brings an increased danger for European consumers. The danger is that consumers may be harmed by violations of Union law, which may arise from companies engaging in unlawful commercial practices. Therefore, it is of decisive importance to adopt effective measures to protect consumers.[216]

Moreover, unlawful commercial practices of non-law-abiding companies are to the detriment of law-binding companies. The behavior of non-law-abiding companies in turn leads to distortion of competition. It is therefore even more important to adopt effective measures in consumer law to strengthen consumer and business confidence in the EU internal market.[217]

The EU internal market provides for an area without internal borders, in which the free movement of goods and services is guaranteed. The free movement of goods and services is intended to provide a high-level protection for consumer.[218] This approach is based on the European Charter of Fundamental Rights, which stipulates that a high level of consumer protection must be ensured within the framework of the EU.[219]

5.1 Purpose of the RAD

According to Article 1(1) RAD, the purpose of the Directive is to harmonize the laws and regulations of the Member States in order to achieve a high level of consumer protection. In addition, it establishes appropriate safeguards to prevent abuse of the representative action. The harmonization shall ensure consumers an effective and efficient enforcement of their rights in every single EU Member State.[220]

[215] Recitals 5, 6 RAD (n 214).
[216] Recital 1 RAD (n 214).
[217] Recitals 1, 2 RAD (n 214).
[218] Article 169 Treaty on the Function of the European Union (´**TFEU**´).
[219] Article 38 European Charter of Fundamental Rights.
[220] Recitals 7, 8 RAD (n 214).

Furthermore, the harmonization should create a high level of consumer protection and contribute to proper functioning of the EU internal market. Nevertheless, consumers should have better access to justice.[221]

To comply with the RAD, each Member State shall adapt collective procedural mechanisms aimed at injunctive and redress measures. According to Article 1(2) RAD, the representative actions shall be brought by qualified entities. At the same time, the RAD is intended to create sufficient protection for traders against the abuse of representative actions. The RAD therefore foresees precisely envisaged rules for qualified entities (see under 5.3.1.) and provisions on penalties (see under 5.6).[222]

However, the purpose of the RAD is not to replace applicable national provisions on mass claims. In contrary, EU Member States should transpose the provisions of the RAD into their national laws in order to create a uniform legislative standard for representative actions throughout Europe. According to Article 2(2) RAD, it shall ensure that each EU Member State has incorporated at least one procedure on representative actions into its national law.[223]

Furthermore, it is up to the Member States to determine national rules on admissibility, evidence, or remedies. National provisions shall be designed in such a way that there will be no impairment of the effective functioning of the representative actions. According to the principle of non-discrimination, Member States shall put provisions on cross-border representative actions on an equal basis with national representative actions.[224]

It therefore follows from the purpose of the RAD that it intends to create only a minimum harmonization or rather a standardization of national laws. The existing (mostly ineffective) collective redress systems remain in force. The Member States are additionally obliged to introduce a new procedure for redress.[225]

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[221] Article 1(1) RAD (n 214).
[222] Recitals 10-11 RAD (n 214).
[223] Recital 11 RAD (n 214).
[224] Recital 12 RAD (n 214).
[225] Harmut Melzer, ´Entstehungsgeschichte, Zweck und Anwendungsbereich der Verbandsklagen-Richtlinie´ in Philipp Anzenberger, Alexander Klauser and Bettina Nunner-Krautgesser (eds), *Kollektiver Rechtsschutz im Europäischen Rechtsraum* (Verlag Österreich 2022) 74.

5.2 Scope of application

The scope of the Directive already derives from Article 1(1) RAD. According to that article, the Directive ensures provisions on representative actions for the protection of collective interests of consumers within the EU.[226] The RAD shall therefore cover all areas of consumer law to ensure a high level of consumer protection.[227] However, the scope of the RAD encompasses not only general consumer law, but also areas of data protection, financial services, travel and tourism, energy, and telecommunications.[228]

Protected are especially collective interests of consumers which are to be understood as interests of a group of consumers according to Article 3(3) RAD.[229] Consumers shall be protected against violations of Union law as well as against violations of national law by traders. Only consumers as natural persons[230] are covered by the RAD who have suffered harm as a result of an infringement of Union law or who are threatened with such harm.[231]

Annex 1 of the RAD provides for provisions of Union law which falls under the scope of the Directive. Those provisions shall serve exclusively the interests and protection of consumers. The provisions set out in Annex 1 shall apply irrespective of the position in which the consumer is acting. A consumer may act as a traveler, a user, a small investor, an individual investor or as a data subject. The requirement is that he or she is a consumer within the meaning of within the meaning of Article 3(3) RAD.[232]

One of scholars, *Harmut Melzer*, criticizes the limited scope of application provided by the Directive. He points out that regarding "Dieselgate", Annex 1 does not include the regulations on type approval of motor vehicles.[233]

However, according to Recital 17 RAD, the list in Annex 1 is not intended to be exhaustive. In contrary, Annex 1 should be updated regularly to ensure collective protection of consumers in the

[226] Article 1(1) RAD (n 214).
[227] Recital 13 RAD (n 214).
[228] Ibid.
[229] Article 3(3) RAD (n 214).
[230] Article 3(1) RAD (n 214).
[231] Recitals 13-14 RAD (n 214).
[232] Ibid.
[233] Melzer (n 225) 77.

Union. This means in practice that the EU Commission should review every newly adopted legal act of the Union that serves the protection of consumers and include it in the Annex 1.[234]

This would also mean that it will be a political decision whether Member States limit the scope to Annex 1 or leave the scope without explicit restrictions. Austria, for example, did the latter when implementing the Injunctions Directive.[235]

According to Recital 18 RAD, the EU Member States are entitled to apply provisions of the Directive also to areas other than those mentioned in the Annex 1.[236] However, this recital raises procedural legal issues.[237] When interpreting this provision, one could ask who should be responsible for determining the new possible areas of the RAD and how the determination should look like.[238] Hence, the procedural consequences should also be considered when asserted claims compete. In such cases, do we apply a concurrence for performance or an ideal concurrence? All these legal questions are currently open.[239]

5.3 Qualified Entities

The RAD follows the Injunctive Directive system, in which only qualified entities have the right to bring representative actions.[240] Article 3(4) RAD determines qualified entities as "*any organization or public body representing consumers´ interests which has been designated by a Member State as qualified to bring representative actions* […]".[241] Especially, consumers associations shall act as consumers´ representatives.[242] It is on Member States to ensure that their jurisdiction has at least one designated qualified entity.[243]

The definition of qualified entities in Article 3(4) RAD means that consumers can address their demands to qualified entities on a national as well as on a European level. Qualified entities shall

[234] Recital 17 RAD (n 214).
[235] Melzer (n 225) 78.
[236] Recital 18 RAD (n 214).
[237] Melzer (n 225) 80-81.
[238] Recital 18 RAD (n 214).
[239] Melzer (n 225) 80-81.
[240] Petra Leupold, ´Qualifizierte Einrichtungen zur Erhebung von Verbandsklagen´ in Philipp Anzenberger, Alexander Klauser and Bettina Nunner-Krautgasser (eds), *Kollektiver Rechtsschutz im Europäischen Rechtsraum* (Verlag Österreich 2022) 84-85.
[241] Article 3(4) RAD (n 214).
[242] Article 4(2) RAD (n 214).
[243] Article 4(1) RAD (n 214).

be authorized to initiate representative actions on injunctive and redress measures. A representative action on injunctive measures means the termination of an unlawful business practice. A representative action on redress measures means that a qualified entity may sue traders for compensation, repair, or price reduction.[244]

Furthermore, consumers should not be able to be a requesting party to the proceedings, for example, to be able to independently demand evidence or to file appeals. This is the exclusive competence of the qualified entities. However, consumers are entitled to benefits resulting from representative actions.[245]

According to Recital 10 RAD, the aim of the limited right of action is to protect consumers and traders. On the one hand, consumers should have better access to justice. On the other hand, traders are to be protected from the risk of abuse of representative actions by the directive providing for appropriate protective measures.[246]

5.3.1 Conditions

Abuse prevention starts straight away with the strict requirements for qualified entities.[247] Qualified entities must fulfill following conditions: A qualified entity must be a legal person that has been publicly active in the protection of consumers' interests for at least 12 months since its designation. Its statutory purpose is to protect consumer interests. It may not have a profit-making purpose. It must not be insolvent or declared insolvent. It must comply with transparency regulations, namely it must be able to prove its independence from third party funders (e.g., traders or hedge funds).[248]

Above all, qualified entities must be able to prove that there are no conflicts of interest between the qualified entity, their investor(s) and consumer interests. All relevant information such as financing resources, statutory purpose, list of activities and organizational/management/members

[244] Recital 8 RAD (n 214).
[245] Recitals 36-37 RAD (n 214).
[246] Leupold (n 240) 85.
[247] Ibid.
[248] Recital 25 RAD (n 214).

structure must become publicly available on its website. Special attention must be paid to clear and understandable language of such information.[249]

Moreover, Member States are responsible for a correct designation of qualified entities for the purposes of the RAD. They should ensure that representative actions will function in an effective and efficient manner. A 5-year review of qualified facilities shall be provided. Member States may appoint contact centers that will be responsible for reviewing applications in this regard.[250] In addition to the 5-year review, the court also checks whether the qualified entity meets the requirements. The court thus assumes the monitoring function for the benefit of consumers.[251]

Furthermore, Member States are obligated to maintain a list of designated qualified entities. The list shall be provided to the EU Commission. EU Commission, in turn, shall maintain a list of all qualified entities of Member States. The list shall be publicly available on the website of the EU Commission.[252] The qualified entities designated under the Injunctive Directive do not lose their validity. They can continue to represent consumer interests.[253]

5.4 Representative Actions

The RAD applies not only to violations against Union law but also to violations against national law. National and cross-border representative actions may be brought either on injunctive or redress measures. Member States may determine whether proceedings on injunctive measure may be conducted separately or together with proceedings on redress measures [Article 7(5) RAD].[254]

Representative actions can be brought by qualified entities either in court proceedings or administrative proceedings. The admissibility of the representative action is then reviewed by competent courts or administrative authorities. If the representative action brought is determined to be manifestly unfounded, dismissal must be made at the earliest possible stage of the proceeding.[255]

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[249] Article 4(3)(a)-(f) RAD (n 214).
[250] Article 4(4)-(6) RAD (n 214).
[251] Kern and Uhlmann (n 5) 858.
[252] Article 5(1) RAD (n 214).
[253] Article 4(7) RAD (n 214).
[254] Recital 35 RAD (n 214).
[255] Article 7 RAD (n 214).

When filing a representative action, qualified entities are obliged to provide sufficient information on the individual consumers and on the case itself. Such information is necessary for courts or administrative authorities to verify their competence and admissibility of the representative action. The level of information required differs depending on the type of proceeding (i.e., representative action on injunctive or redress measures).[256]

5.4.1 Cross-Border Representative Actions

The RAD is dedicated to the so far no or vague regulations with regard to the cross-border matters. Cross-border representative actions include cases of consumers adversely affected or threatened with adversely affected from different Member States. In such cases, a representative action may be brought by several qualified entities from different Member States (Article 6 RAD).[257]

Article 4(3) RAD explicitly states that qualified entities must be able to bring cross-border representative actions. The RAD differentiates therefore between domestic and cross-border representative actions. The type of a representative action is determined by the Member State in which it is brought.[258]

According to Article 6(1) RAD, a representative action is considered to be cross-border if a qualified entity brings the representative action in a Member State other than the one in which that qualified entity was designated. *Vice versa*, in the case of a domestic representative action, a qualified entity brings a representative action in the Member State in which that qualified entity was designated. It should be noted that the representative action remains domestic even if the trader's registered office is in another Member State. The same applies to affected consumers who are domiciled in several Member States.[259]

Article 4(3) RAD stipulates strict conditions for cross-border representative actions. The qualified entity must be established in accordance with the national law of the Member State. Additionally, it must have already been operating publicly for at least 12 months (lit a). The purpose of the qualified entity must be to protect consumer interests (lit b). It must have a non-profit-making

[256] Recital 34 RAD (n 214).
[257] Article 6(1) and (2) RAD (n 214).
[258] Recital 23 RAD (n 214).
[259] Ibid.

character (lit c). No insolvency proceedings may be opened against it (lit d). And it must be independent (lit e) and transparent (lit f). These obligatory conditions must be applied uniformly in all Member States.[260]

Furthermore, the conditions for qualified entities to bring cross-border representative actions can (but do not have to) apply to domestic representative actions. If the Member States do not apply the requirements for cross-border actions to domestic ones, they should draw up the criteria in such a way that an effective functioning of representative actions is not impaired.[261]

To ensure a proper functioning of cross-border representative actions, all qualified entities included in the list of the EU Commission are to be mutually recognized by courts and administrative authorities of all Member States.[262]

5.4.2 Forum Shopping

Since it is permissible to bring cross-border representative actions under the RAD, *forum shopping* is applicable as a special tool of international private law. Moreover, the fact that the RAD only creates a standardization of procedural rules instead of harmonization opens the way for the spread of *forum shopping*.[263]

Forum shopping gives qualified entities an opportunity to choose a jurisdiction that is most attractive to the party bringing the action. This is particularly dangerous for companies that have their subsidiaries scattered in several states. In such cases, there are several jurisdictions where the company can be sued.[264]

Thus, the rules of private international law must be considered when filing cross-border representative actions. It should be noted that the existing Union law instruments of private

[260] Recitals 25-28 RAD (n 214).
[261] Ibid.
[262] Article 6(3) RAD (n 214).
[263] Rentsch (n 184) 524, 531.
[264] Lars Eckhoff, Thomas Lennarz and Peter Wende, ´Sanktionen und Sammelklagen – EU verschärft Verbraucherschutzrecht´ (*CMS law-tax-future*, 9 December 2020) <https://cms.law/de/deu/publication/sanktionen-und-sammelklagen-eu-verschaerft-verbraucherschutzrecht> accessed on 17 June 2023.

international law, in particular Regulation No. 864/2007[265], Regulation No. 593/2008[266], and Regulation No. 1215/2012[267], shall remain unaffected by this Directive and shall become applicable to representative actions.[268] The rules on international private law (especially the Brussel 1 Regulation) are relevant regarding international jurisdiction, recognition and enforcement of representative actions.[269]

Forum shopping may lead to a model competition between the EU Member States. Such competition would make filing of representative actions more attractive. It would approximately increase the number of mass claims in Europe.[270] Moreover, it may lead to divergent results, especially with regard to the conflict-of-law issues of which jurisdiction and which national law (*lex fori*) applies.[271]

5.4.3 Injunctive Measures

Like the Injunctive Directive, the RAD provides for a possibility of suing traders for injunctive measures. Injunctive measures are aimed at protecting collective interests of consumers, regardless of actual loss or damage. Representative actions on injunctive measures can be brought regardless of whether the trader´s practice was intentional or negligent.[272]

In order to cease an unlawful commercial practice or to prohibit a commercial practice, either a provisional measure [Article 8(1)(a) RAD] or a definitive measure [Article 8(1)(b) RAD] may be issued by the court.[273] The found infringement of consumer law within a representative action on injunctive measures may for instance facilitate subsequent representative actions on redress

[265] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199.
[266] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177.
[267] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351.
[268] Recital 21 RAD (n 214).
[269] Rentsch (n 184) 533.
[270] Ibid 524, 531.
[271] Leupold (n 240) 101-102.
[272] Recital 33 RAD (n 214).
[273] Article 8 RAD (n 214).

measures. Moreover, courts may order a publication of a decision as a measure against an infringing trader.[274]

To obtain a decision on an injunctive measure, the qualified entity must prove either actual loss or damage to the affected consumers or the existence of willful misconduct or negligence on the part of the business owner. A statement by the consumer to be represented by this qualified entity is not required.[275]

In light of the Injunctive Directive, the Member States have still an option of first consulting with the trader concerned before bringing a representative action on injunctive measures. If the consultation remains unsuccessful for a period of two weeks and the trader concerned persists on infringing consumer law, a representative action on injunctive measures can be brought directly.[276]

It is important for the protection of affected consumers that pending representative actions on injunctive measures have an effect of suspending or interrupting the limitation periods. The aim is to safeguard consumers' ability to bring a representative action for redress at a later stage. The same applies for representative actions on redress measures (see below Section 5.4.4.).[277]

5.4.4 Redress Measures

In contrary to the Injunctive Directive, the RAD provides for a possibility to require remedies from a trader. Article 9 RAD prescribes to the Member States which provisions and measures they must exactly introduce into national law for the effective functioning of redress measures.[278]

Representative actions on redress measures shall apply when the consumers´ substantive rights resulting from (non)-contractual legal relationship are infringed by a trader.[279] According to Article 3(1) RAD, a redress measure may be formulated as compensation for damages, repair, replacement,

[274] Recital 49 RAD (n 214).
[275] Article 8(2), (3) RAD (n 214).
[276] Article 8(4) RAD (n 214); Recital 41 RAD (n 214).
[277] Article 16(1) RAD (n 214).
[278] Article 9(1) RAD (n 214).
[279] Recital 42 RAD (n 214).

price reduction, termination of the contract or reimbursement of the price paid. Redress measures have to be appropriate and available under Union or national law.[280]

However, a representative action on redress measures can only be brought if substantive rights under Union law and national law provide for the redress measures within the meaning of this Directive.[281]

Representative actions on redress measures as well as representative actions on injunctive measures have an effect of suspending or interrupting limitation periods to protect consumers´ claims in the future.[282]

5.4.4.1 Opt-in and Opt-out Mechanism

Special feature of representative actions on redress measures is an opt-in and opt-out mechanism. It is up to the Member States to decide which mechanism, or a combination of both, fits their national law better.[283]

In case of an opt-in mechanism, consumers concerned have to explicitly or tacitly express their wish to be represented by a qualified entity and to be bound by the outcome of the representative action. Most EU legal systems, including Austria (Class Action Austrian Style) and Germany (Model Declaratory Action), are based on the opt-in mechanism.[284]

Opt-in mechanism is more legally certain and more advantageous for the consumers concerned, as the right to be heard is guaranteed. The prospects of success of the opt-in mechanism are questionable. Collective legal protection should also motivate rationally apathetic consumers to take an action. It remains to be seen whether it will be worthwhile for them to actively join.[285]

In case of an opt-out mechanism, consumers have to explicitly or tacitly express their wish to not be represented by a qualified entity and not to be bound by the outcome of the representative action.

[280] Article 9(1) RAD (n 214).
[281] Recital 42 RAD (n 214).
[282] Article 16(2) RAD (n 214).
[283] Recital 43 RAD (n 214).
[284] Rentsch (n 184) 530.
[285] Ibid 530.

Therefore, Member States shall adopt provisions in this regard, especially on how and at what stage individual consumers have to express their wishes.[286]

To note is that an opt-out mechanism is a characteristic of US class actions. It is often discussed in the literature that the opt-out poses a threat to the spread of the litigation industry.[287] It is argued that representative actions can develop into an investment object if consumers can be caught up in a class action without opting out. However, an opt-out mechanism is not new in the EU. In some EU Member States, it has already been established for years. This includes the Dutch-group settlement that applies an opt-out mechanism since 2005.[288]

Furthermore, Article 9(5) RAD points out that individual consumers can be identified within a representative action. However, in case where a representative action does not mention individual consumers, it has to mention at least a group of consumers concerned.[289] This provision shall improve consumer participation in the mass proceedings.[290]

Subsequently, provisions are to be adopted in order to cover cases where an individual consumer domiciled in one Member State explicitly wishes to participate in a representative action brought in another Member State.[291]

Once consumers explicitly or tacitly opts-in or opts-out a representative action on redress measures, they cannot participate in other representative actions involving the same facts.[292] In light of legal certainty, it shall be ensured that affected consumers receive compensation only once from the same cause of action against the same trader.[293]

To ensure the efficiency of representative action proceedings, Member States shall ensure that qualified entities may bring a representative action on redress measures directly. A separate declaratory judgment before courts or administrative authorities to establish an infringement is not

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[286] Article 9(2) RAD (n 214).
[287] Astrid Stadler, ´Kollektiver Rechtsschutz quo vadis?´ (2018) 17 Juristen Zeitung 796 <https://www-mohrsiebeck-com.uaccess.univie.ac.at/artikel/kollektiver-rechtsschutz-quo-vadis-101628jz-2018-0235?no_cache=1> accessed 20 August 2023.
[288] Rentsch (n 184) 525, 529.
[289] Article 9(5) RAD (n 214).
[290] Rentsch (n 184) 525, 529.
[291] Article 9(3) RAD (n 214).
[292] Recital 46 RAD (n 214).
[293] Article 9(4) RAD (n 214).

necessary.[294] In light of efficiency, legal certainty and transparency, Member States must sufficiently coordinate provisions on the protection of individual and collective consumers interests.[295]

5.4.4.2 Settlements (Article 11)

A representative action on redress measures may not only end with a decision on injunctive or redress measures. It may end with a settlement according to Article 11 RAD. There are two options how to reach a settlement agreement: (lit a) It may be a joint proposal of the qualified entity and the trader, or (lit b) a proposal of the court or the administrative authority to conclude a settlement agreement after hearing the parties.[296] The Member States can choose one option.[297]

A redress settlement must comply with obligatory provisions of national law. This should be examined by the competent court or administrative authority. If there is no approval of the redress settlement, the representative action procedure continues and ends with a final decision.[298]

To ensure the aspect of individual legal protection[299], the individual consumer concerned should be given an opportunity to agree or object to the settlement negotiations.[300]

The possibility of ending representative actions with a settlement is not new. Mass claims proceedings in the EU usually end with a settlement. Reaching a settlement is a cost-effective way of resolving a dispute.[301] For example in the Netherlands, the law on collective settlements in mass claims (*Wet collectieve afwikkeling van massaschade - WCAM*)[302] has already been established in 2005. The literature characterizes the WCAM as a practical solution for the handling of mass claims. The aim of the WCAM is only to conclude a settlement. Similar to US class action, the

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[294] Article 9(8) RAD (n 214).
[295] Recital 48 RAD (n 214).
[296] Article 11(1) RAD (n 214).
[297] Jetzinger (n 1) 202.
[298] Article 11(2) RAD (n 214).
[299] Kern and Uhlmann (n 5) 854.
[300] Article 11(4) RAD (n 214).
[301] Georg Kodek and Matthias Dangl, ´Unterlassungs- und Abhilfeentscheidungen und Abhilfevergleiche´ in Phillip Anzenberger, Alexander Klauser and Bettina Nunner-Krautgasser (eds), *Kollektiver Rechtsschutz im Europäischen Rechtsraum* (Verlag Österreich 2022) 117-118.
[302] Tomas Arons and Willem H. Van Boom, 'Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from the Netherlands' (2010) 21(6) European Business Law Review 857 <https://kluwerlawonline-com.uaccess.univie.ac.at/journalarticle/European+Business+Law+Review/21.6/EULR2010040> accessed 20 November 2023.

WCAM is based on the opt-out mechanism. Thus, the Dutch government wants to prevent the spread of a so-called litigation culture. If one looks at the prevailing practices of defendant companies in the EU, almost all of them aim to get pending mass litigation closed with a settlement that is cost-effective for them.[303]

Nonetheless, the possibility of settlement creates a tension between private law enforcement with the aim of obtaining compensation for damages and public law enforcement aimed at preventing future abuse of rights.[304]

5.5 Procedural Rules

The RAD stipulates that the provisions of the Directive should only partially interfere with national procedural law. The primary objective is to introduce a representative action procedure in each Member State. The secondary objective is to harmonize the different national procedural rules regarding collective redress. Therefore, the RAD includes minimum standards to ensure the effective functioning of collective redress procedures.[305]

In order to protect national procedural law, the Member States are left a wide margin of discretion in implementing the provisions of the RAD. The Member States face a major challenge in adapting national rights in line with the directive's requirements. The wide scope for implementation may increase the differences across the EU. It remains open whether the representative action procedures will work effectively. It will depend on how the Member States implement the RAD into their national laws.[306]

Turning back to the procedural rules. Representative actions procedure shall pursue a public interest and protect the collective rights of consumers.[307] Therefore, the Member States shall ensure that (i) representative actions will be conducted expeditiously,[308] (ii) final decisions will serve as

[303] Kodek (n 56) 133-134.
[304] Jetzinger (n 1) 206.
[305] Caroline Meller-Hannich and Pauline Modra, ´Verfahrensrechtliche Aspekte´ in Phillip Anzenberger, Alexander Klauser and Bettina Nunner-Krautgasser (eds), *Kollektiver Rechtsschutz im Europäischen Rechtsraum* (Verlag Österreich 2022) 120-122.
[306] Ibid 120-122.
[307] Recital 70 RAD (n 214).
[308] Article 17 RAD (n 214).

evidence for other actions[309], and that (iii) Member States shall support financing of qualified entities from public funds if necessary.[310]

It is noteworthy that the focus of representative actions is the place of designation of the qualified entities, rather than the consumer's habitual residence or the defendant trader's place of business [Art 3(7) RAD]. The ulterior motive is to protect national courts from unknown associations.[311]

In order to ensure effective representative action procedure in light of public interest and consumer protection, it is important that Member States mutually exchange information on qualified entities and pending or completed representative actions. Therefore, electronic databases, which shall be publicly accessible, need to be established in each Member State.[312] Hence, qualified entities themselves shall provide for all relevant information regarding representative actions on their websites.[313]

Furthermore, the RAD provides for other special procedural provisions which are noteworthy:

5.5.1 Costs allocation (Article 12)

Cost and financing of processes always plays a major role. In case of representative actions, it is even more important because these proceedings can be very time-consuming and expensive. The regulation of litigation costs is therefore decisive for the question of whether and how often representative actions will be used at all.[314]

According to Article 12(1) RAD, procedural costs of the prevailing party - in case of representative action for redress measures - are to be paid by the losing party (the so-called loser-pays-principle). The article also provides for that procedural cost rules are governed by the respective applicable national law of the Member States. All national legal frameworks and exceptions must be observed.[315]

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309 Article 15 RAD (n 214).
310 Article 20 RAD (n 214).
311 Meller-Hannich and Modra (n 305) 121.
312 Article 14 RAD (n 214).
313 Article 13 RAD (n 214).
314 Meller-Hannich and Modra (n 305) 122.
315 Article 12(1) RAD (n 214).

The procedural codes in Germany[316] and Austria[317] already follow loser-pays-principle for injunctive relief. These provisions can therefore also be applied to new representative actions for redress.[318]

Article 12(2) RAD stipulates that consumers concerned should not bear the costs of the proceedings. However, according to Article 12(3) RAD, if an individual is found to have acted intentionally or negligently, he or she may be ordered to bear the costs.[319] Consumers should therefore be liable for their negligent actions. The competent courts or administrative authorities must then make a legal assessment. Already a faulty registration to the register of complaints is associated with additional costs and would therefore be decisive for liability of an individual consumer in the sense of this provision.[320]

5.5.2 Disclosure of evidence (Article 18)

The RAD introduces a new obligation for traders to disclose evidence held by them according to Article 18 RAD. Disclosure of evidence as a new procedural instrument is intended to put affected consumers on an equal footing with traders. This is intended to create an equality of arms. The background to this provision was also "Dieselgate", where the defendant, Volkswagen AG possessed all relevant evidence.[321] The aim of the provision is again to achieve effective collective consumer protection.[322]

Documents that should be disclosed are directly related to pending representative actions proceedings. Disclosure of evidence may be made upon a request of a qualified entity. It must be evident that the requested evidence is at the disposal of the defendant or a third party. The court or the administrative authority may order disclosure of such evidence. However, EU national rules on confidentiality and proportionality must be respected to protect procedural rights of traders or a third party.[323]

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[316] Section 5 UKlaG; Section 91 German Civil Process Code (´dZPO´).
[317] Section 41 Austrian Civil Process Code (´ZPO´).
[318] Meller-Hannich and Modra (n 305) 122-123.
[319] Article 12(2), (3) RAD (n 214).
[320] Meller-Hannich and Modra (n 305) 126-127.
[321] Gsell (n 50) 1367.
[322] Meller-Hannich and Modra (n 305) 130-131.
[323] Recital 68 RAD (n 214).

In order to comply with the principle of equality of arms, traders shall also have a right to request evidence held by the qualified entity.[324] Furthermore, the competent court or administrative authority is obliged to perform a balancing of interests to determine whether the requested disclosure of evidence is proportionate to the extent of confidentiality of the information. In doing so, national and European law provisions must be taken into account.[325]

Disclosure of evidence in Germany and Austria is restrictive and requires legislative intervention (Section 142 German ZPO; Section 303(1) Austrian ZPO). The two legal systems must adapt their provisions to the Directive accordingly. The required balancing of interests serves as a safeguard against extensive discovery of the other party. However, a facilitation about the means of evidence is necessary in case of information asymmetry between the parties.[326]

5.6 Penalties (Article 19)

The RAD aims to strengthen the position of consumers and protect their rights. Accordingly, Article 9 RAD provides for penalties if the defendant trader does not comply with a decision of the court or the administrative authority. Moreover, any failure to comply with the court or administrative authority, as well as failure to comply with obligations provided for in this Directive shall be sanctioned. The provided penalties should be effective, dissuasive, and proportionate.[327]

Penalties are to be imposed in the form of conditional fines, periodic payments, or periodic penalty payments. Member States are free to choose one of these forms.[328]

5.7 Funding of representative actions

In general, the funding of mass claims on the plaintiff side is controversial. Many politicians see a danger of abuse in the light of the class action industry in the USA.[329] The bilateral relationship of the plaintiff and the defendant is joined by lawyers, legal protection insurers and litigation funders as third-party actors. The fear can be considered justified regarding private interests of

[324] Recital 68 RAD (n 214).
[325] Meller-Hannich and Modra (n 305) 132.
[326] Ibid 132-137.
[327] Recital 69 RAD (n 214).
[328] Ibid.
[329] Florian Scholz-Berger, ´Finanzierung von Verbandsklagen´ in Phillip Anzenberger, Alexander Klauser and Bettina Nunner-Krautgasser (eds), *Kollektiver Rechtsschutz im Europäischen Rechtsraum* (Verlag Österreich 2022) 144-145.

litigation funders who are thrilled to find potential mass claims cases. The law firms representing the qualified entities are also profit oriented. Each actor can pursue his/her own interests and the affected consumers might remain neglected. This is to be prevented with sufficient regulations.[330]

In general, the RAD provides for provisions on funding of representative actions on redress. According to Article 10 RAD, representative actions on redress can be funded by third parties. Member States have (again) a wide implementation scope in this regard, especially to what extent the commercial financing, including success rate agreements, should be permissible.[331]

Third-party funding must meet strict requirements (Article 10 paras. 1 and 2 RAD). It shall be permissible under respective national law in the first place. All decisions regarding the financing of representative actions shall in particular serve the protection of collective consumer interests. Undue influence of the litigation funder on decisions of the qualified entities shall be avoided.[332]

Moreover, competent courts and administrative authorities have to review whether the third-party funding of representative actions complies with the Directive requirements (Article 10 paras. 3 and 4 RAD). In case of reasonable doubts, the court may order the applicant to disclose the documents related to the third-party funding.[333]

There is no third-party funding option for representative actions on injunctive measures. The strict rules regarding cross-border representative actions (Article 4 par. 3 lit. c-f RAD) shall be applicable for them.[334]

Even if strict conditions are set for third-party funding, it remains questionable which option would be better. The fears can be contradicted since qualified entities are designed non-profitably. It means that the representative actions shall not spread into a litigation industry. The financing of qualified entities can be still problematic. It is unlikely that they can be financed purely from state

[330] Susanne Kalss and Paul Oberhammer, Zivilrecht Anlegeransprüche – kapitalmarktrechtliche und prozessuale Fragen - Gutachten. in ÖJT (eds), (Band II/1, Manz Verlag Wien 2015) 76.
[331] Scholz-Berger (n 329) 147, 152.
[332] Ibid 148-155.
[333] Ibid 156.
[334] Ibid 147.

resources. In case of third-party financing, the discussion would open as to whether there is a conflict of interest between public law enforcement und private law enforcement.[335]

The independence from state (political) influence speaks in favor of external third-party funding. The risk that representative actions will no longer be conducted in the interests of consumers, speaks against external third-party funding. The promotion of consumer interests speaks in favor of purely state funding. On the other hand, there is a negative expectation that the representative actions will not be attractive for the market and their benefits will be minimal. Since the mass proceedings are always associated with high costs, i.e., some kind of funding will be definitely required.[336]

5.8 Conclusion

With the introduction of the RAD, the European legislator intends to create a sharp weapon for consumers in mass proceedings. The RAD focuses exclusively on the Europe-wide introduction of minimum standards in procedural law provisions. This goal is to be realized, although a wide scope of implementation is left to the EU Member States.[337]

The wide scope of implementation starts with the scope of the RAD. Even though the scope of the Directive is limited by Annex 1 according to Article 2(1) RAD, the national legislator does not have to adhere to it and can extend the scope.[338]

The RAD distinguishes between representative actions on injunctive measures and on redress measures. There is not much new in representative actions for injunctive relief. The rule mirrors the Injunctions Directive.[339]

[335] Kern and Uhlmann (n 5) 858-862.
[336] Ibid 863-865.
[337] Bettina Knötzl, ´Positionspapier´ in Phillip Anzenberger, Alexander Klauser and Bettina Nunner-Krautgasser (eds), *Kollektiver Rechtsschutz im europäischen Rechtsraum* (Verlag Österreich 2022) 205-207.
[338] Ibid 211.
[339] Ibid 218.

Representative actions on redress measures means a fundamental improvement in collective consumer protection. Representative actions can be directed at redressing a damage. It is left to respective national law which substantive claims are covered.[340]

Representative actions can still be brought only by qualified entities. Regarding the cross-border representative actions, strict conditions are provided on qualified entities (Article 6 RAD). A representative action can only be brought if the size of the group is significant. The determination of the group size is left to the national legislators. Moreover, the rules on international private law must be considered.[341]

No mandate from a consumer is required to bring a representative action for injunctive relief. The situation is different for a representative action for redress. Here, consumers must make their claims valid, either in an opt-in form, an opt-out form, or a mixture of both. The Member States can choose one of the three variants.[342] The introduction of the opt-out mechanism is a move away from the previously cautious position of the EU Commission, which focused on combating abuse in light of US class action.[343]

Furthermore, experience with mass claims proceedings against Volkswagen in Germany and Austria, which have been conducted for years, has shown that it is necessary to accelerate mass claims proceedings. In the case of representative actions for injunctive measures, the acceleration of proceedings is expressly standardized in Article 7 RAD.[344] However, in the case of representative actions for redress measures, acceleration is questionable. Indeed, the competent court must verify whether the individual claims filed are of the same nature. In the case of major loss events, the issue is the overall compensation of the damages incurred. If the affected consumers would be described as a group according to Article 7 par. 5 RAD, a faster trial would theoretically be possible.[345]

Another improvement of collective consumer protection, which is related to the filing of collective actions, is the suspension of the limitation period as of the pendency of the representative action

[340] Knötzl (n 337) 219-220.
[341] Ibid 211.
[342] Ibid 213-214.
[343] Rentsch (n 184) 533.
[344] Meller-Hannich and Modra (n 305) 129-130.
[345] Ibid 129-130.

on injunctive measures in court. This is to enable consumers to register for a representative action for redress at the same time.[346]

The new information and transparency obligations on association proceedings provided for in Article 13 RAD are intended to give affected consumers the opportunity to gain insight into ongoing proceedings. The aspects of individual legal protection should therefore be given greater consideration.[347]

Funding of representative actions is also left to the regulation of Member States. However, the regulation should take into account that representative actions proceedings are to be conducted in the interest of consumer protection. Monitoring function is therefore desirable.[348] The monitoring function of the court is intended to avoid conflicts of interest. However, the extent of the monitoring function depends on the individual Member States.[349]

The RAD provides overall an opportunity to improve, strengthen, standardize collective consumer protection in Member States. At the same time, the RAD represents a major challenge for the Member States. Member States need to find tailor-made solutions in order to introduce effective representative action procedures in accordance with the objectives of the Directive. However, effectiveness is questioned even in the provisions of the RAD. Each Member State will implement the provisions of the RAD differently according to its legal traditions.[350]

Therefore, the next chapter will discuss the implementation challenges based on the selected Member States, Austria and Germany.

6 Implementation of the RAD

Article 24 RAD foresees that the RAD should have been implemented into national laws of EU Member States until 25 December 2022. The implementation laws should have been applicable from 25 June 2023.[351]

[346] Knötzl (n 337) 222.
[347] Ibid 214.
[348] Ibid 216-217.
[349] Kern and Uhlmann (n 5) 862.
[350] Klauser and Kunz (n 13) 28-29; Knötzl (n 337) 225.
[351] Article 24 RAD (n 214).

For the first time, the EU Member States have been forced to introduce a genuine collective (representative) action into their national laws. Most Member States, including Austria or Germany, are not familiar with such legal instrument. Therefore, it might be challenging for Member States to adopt provisions of the RAD into their national laws in a way which corresponds with the requirements of Union law.[352]

However, after two years of an implementation period set out in Article 24 RAD, only three out of 27 Member States have implemented the RAD. Those Member States are Hungary, Lithuania, and the Netherlands.[353] A failure to implement a secondary act of Union law in a timely manner constitutes a failure to fulfill obligations according to Article 258 TFEU[354].[355]

Moreover, this behavior indicates an infringement of the Treaty. Therefore, EU Commission has already initiated infringement proceedings against those Member States who have not fulfilled their obligations under Union law.[356]

Subsequently, the EU Commission sends formal notices to all Member States concerned. Those Member States shall remedy the violation of EU law (i.e., to implement a directive) within a specific time-period.[357]

One of the reasons why most of the Member States have not implemented the RAD so far may be the fact that the RAD leaves a wide discretion of implementation to the Member States. This may hinder a progress of the implementation.[358]

The RAD does not intend to replace national provisions regarding mass claims. National provisions remain applicable. However, national law of Member States must be adapted to the conditions

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[352] Florian Scholz-Berger, ´Umsetzung der Verbandsklage-RL: Status quo in den Mitgliedstaaten´ (2023) 20(1) Ecolex 40 <https://rdb.manz.at/document/rdb.tso.LIecolex20230120> accessed on 6 July 2023.
[353] Dan Cooper, Kristof Van Quathem and Anna Oberschelp de Meneses, ´National Transposition of the EU Representative Actions Directive: What is the Current Status? (*Covington*, 27 February 2023) <https://www.insideprivacy.com/eu-data-protection/national-transposition-of-the-eu-representative-actions-directive-what-is-the-current-status/> accessed 6 July 2023.
[354] Treaty on the Functioning of the European Union [2012] OJ C 326.
[355] Paul Craig and Gráinne De Búrca, *EU Law Text, Cases and Material* (7th Edition, Oxford 2020) 471-472.
[356] Ibid 471-472.
[357] Ibid 471-472.
[358] Scholz-Berger (n 352) 40.

imposed by the RAD.[359] Therefore, the provisions of the RAD can be assessed as neutral. The Member States can transpose the RAD in two ways. They can transpose only provisional rules without changing the substantive law or they can also adjust the substantive law.[360]

When implementing the RAD, the Member States must also decide between the conflicts of interest. Do they want to prioritize the aspects of public law enforcement (i.e., efficiency, common good) or the aspects of private law enforcement (i.e., individual justice, combating abuse)? Or do they try to find an optimal solution of both aspects? [361]

6.1 Austria

Austria belongs to those Member States which have not implemented the RAD so far. According to publicly available information Austria has initiated a written procedure.[362] A work on a draft is currently at the political level. Therefore, the available information is limited, and it is not clear when a final draft can be expected.[363]

For Austria, the implementation of the RAD constitutes a far-reaching reform of the collective enforcement regarding consumer protection. A reform of the Austrian Civil Process Code is urgently needed.[364]

The current possibility of a national collective action according to Austrian Consumer Protection Act and an Austrian-style class action must be adapted to the new requirements of the Directive in

[359] Matthias Dangl, ´Die neue europäische Verbandsklage-Richtlinie´ (2020) 568(11) RdW 818 <https://360.lexisnexis.at/d/artikel/die_neue_europaische_verbandsklagen_richtlinie/z_rdw_2020_11_RdW_2020_11_568_58fee09b58?searchid=20231201131416313&page=1&index=3&origin=rl&rlclick=title&originview=STM> accessed 1 December 2023; Recital 11 RAD (n 212).
[360] Kern and Uhlmann (n 5) 874.
[361] Ibid 874-876.
[362] Parlament Österreich, ´Entwurf einer Richtlinie des Europäischen Parlaments und des Rates über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher und zur Aufhebung der Richtlinie 2009/22/EG (2018/0089 (COD)) – Annahme des Standpunkts des Rates in erster Lesung und der Begründung des Rates – Einleitung des schriftlichen Verfahrens´ 3725/EU XXVII.GP <https://www.parlament.gv.at/gegenstand/XXVII/EU/37235> accessed 6 July 2023.
[363] Scholz-Berger (n 352).
[364] Knötzl (n 337) 213.

such a way that a representative action procedure is created. Hence, it is also necessary to introduce new substantive and procedural legislation in accordance with the RAD.[365]

Austrian consumers as well as traders will be confronted with a new legal situation. An impact of the RAD and its legal consequences for both consumers and traders can only be assessed after a successful implementation of the Directive.[366]

It is already known that new legislative proposals and initiatives are often opposed by business associations representing the trader side and politicians. For example, the Austrian federal government of 2008-2013 rejected the proposal of a working group at the Federal Ministry of Justice for the introduction of a class action (*Gruppenverfahren*). The subsequent federal government of 2013-2018 almost did not include the topic of class and collective actions in its work program. Although it is widely known that class and collective actions lead to a relief of the courts. Holding similar claims in one proceeding is simpler, shorter and makes more sense for procedural-economic reasons.[367]

It therefore remains to be seen how the RAD provisions will be implemented into Austrian national law.[368] Especially procedural provisions are countersigned with flexibility. Therefore, it will be interesting to see (i) whether an opt-in or opt-out mechanism or a mixture of both will be chosen; (ii) which qualified entities will be designated to represent consumers; (iii) what will be the threshold for a filing a representative actions; (iv) what safeguards regarding third-party funding will be adopted; as well as (v) to which extent the provisions on disclosure of evidence will be implemented into national law.[369]

[365] Stefan Adametz, ´Umsetzung der EU-Richtlinie über „Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher"´ (*Fellner Wratzfeld Partner*, 17 January 2023) <https://www.fwp.at/news/blog/umsetzung-der-eu-richtlinie-ueber-verbandsklagen-zum-schutz-der-kollektivinteressen-der-verbraucher> accessed on 6 July 2023.
[366] Ibid.
[367] Kodek (n 56) 130.
[368] Scholz-Berger (n 352).
[369] Emilie Jones and Johanna Weißbach, ´The Impact of the new EU mass actions directive across Europe´ (*Pinsent Masons, Out-Law Guide*, 28 June 2023) <https://www.pinsentmasons.com/out-law/guides/the-impact-of-new-eu-mass-actions-directive-across-europe> accessed 6 July 2023.

6.2 Germany

The implementation of the RAD transforms the current legal framework of mass claims in Germany. German government introduced a draft Bill (*Verbandsklagenrichtlinienumsetzungsgesetz – VRUG*)[370] which shall implement the RAD into national law on 29 March 2023. The draft Bill was published four months after the implementation deadline set out in the RAD expired. Therefore, Germany also received a formal notice send by the EU Commission – as a part of the infringement proceeding - to implement the RAD until the end of March.[371]

On 7 July 2023, the German Parliament passed the law implementing the RAD (VRUG) into German national law. [372] The law only came into force on 8 October 2023.[373] The RAD was still not implemented within the deadline of 25 July 2023. Therefore, it remains to be seen whether the EU Commission will continue with the initiated infringement proceeding against Germany [374]

6.2.1 Consumer Rights Enforcement Act (CREA)

The draft Bill (VRUG) represents a new Consumer Rights Enforcement Act - CREA (*Verbraucherrechtedurchsetzungsgesetz - VDuG*)[375] which introduces a new legal tool of the so-

[370] Gesetzesentwurf der Bundesregierung - Entwurf 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 (Verbandsklagenrichtlinienumsetzungsgesetz – VRUG) <https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_VRUG.pdf?__blob=publicationFile&v=2> accessed on 11 July 2023.

[371] Jones and Weißbach (n 369).

[372] Der Paritätische Gesamtverband, ´Das Verbandsklagenrichtlinienumsetzungsgesetz – VRUG wurde am 7. Juli 2023 im Bundestag beschlossen´ (11 July 2023) <https://www.der-paritaetische.de/alle-meldungen/verbandsklagenrichtlinienumsetzungsgesetz-vrug-wurde-am-7-juli-2023-im-bundestag-beschlossen/> accessed on 20 July 2023 (**´Der Paritätische Gesamtverband 2023´**).

[373] Gesetz zur Umsetzung der Richtlinie (EU) 2020/1828 über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher und zur Aufhebung der Richtlinie 2009/22/EG sowie zur Änderung des Kapitalanleger-Musterverfahrensgesetzes (Verbandsklagenrichtlinienumserzungsgesetz – VRUG) BGBl. 2023 I Nr. 272.

[374] Der Paritätische Gesamtverband (n 372).

[375] Gesetz zur gebündelten Durchsetzung von Verbraucherrechten (Verbraucherrechtedurchsetzungsgesetz – VDuG) BGBl. 2023 I Nr. 272.

called redress action (*Abhilfeklage*).[376] The already existing provisions on Declaratory Model Action will be integrated into the new CREA.[377]

German government provides for two options for consumers: They can choose to purse a declaratory decision via Declaratory Model Action or to file a redress action according to the RAD.[378]

However, the new possibility of filing redress actions will remove the hurdle for consumers to sue individually for their claims as it is possible according to the Declaratory Model Action.[379] Other existing legal frameworks such as KapMuG or bundling mass claims remain applicable.[380]

6.2.1.1 Scope of the application

Germany is taking an advantage of the broad scope for implementation offered by the RAD. So, the CREA will go beyond the provisions of the RAD. Since the RAD is applicable only on violations of EU law, the CREA will apply to all civil disputes arising from a violation of EU law or national consumer regulations or legislations. Therefore, traders could be also sued for unlawful practices resulting in damages, contract termination or purchase price reimbursement.[381]

Moreover, the CREA will apply not only to consumers as natural persons, but also to small companies with less than 10 employees and an annual turnover of up to 2 million Euros. Small companies would be therefore treated equally as consumers.[382]

The CREA is similar to the Model Declaratory Action (MDA) to an extent that only qualified entities may represent claims of affected consumers and thus bring a redress action. The filing of a redress action requires a minimum of 50 affected consumers.[383] The qualified entity bringing the

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[376] Sandra Gröschel and Johanna Weißbach, ´Implementation of EU´s Representative Actions Directive takes shapes in Germany´ (*Pinsent Masons*, 2 March 2023) <https://www.pinsentmasons.com/out-law/news/umsetzung-der-verbandsklagerichtlinie-nimmt-formen-an> accessed on 11 July 2023.
[377] Der Paritätische Gesamtverband 2023 (n 372).
[378] Jones and Weißbach (n 369).
[379] Gröschel and Weißbach (n 376).
[380] Jones and Weißbach (n 369).
[381] Gröschel and Weißbach (n 376).
[382] Der Paritätische Gesamtverband 2023 (n 372).
[383] Jones and Weißbach (n 369).

redress action must demonstrate that 50 consumers are affected.[384] Redress actions can be brought at Higher Regional Courts at the seat of the defendant.[385]

Redress actions differs from MDA. Redress action offers an advantage over the MDA. A follow-on action after the remedial decision is not necessary. Moreover, remedial decision will foresee concrete or abstract calculation of the redress action.[386]

As it is provided in the RAD, the draft Bill sets out rather restrictive conditions for the designation of (consumer) associations to act as a qualified entity. Thus, only (consumer) associations can act as qualified entities if they meet the following two requirements: First, a qualified entity shall be registered in the list according to Section 4 UKlaG. Second, companies' contribution shall be limited to not more than 5% of financial resources of a qualified entity. Germany has currently 64 registered qualified entities. Furthermore, foreign qualified entities registered in other Member States will be able to bring a redress action in Germany as well.[387]

German government has chosen an opt-in mechanism regarding claim registration. It means that affected consumers must expressly agree to be represented by a qualified entity.[388] Consumers shall register their claims within three weeks after the first oral hearing.[389] The registration should be free of charge. There was a public discussion that consumers would only opt-in to the representative action if they expected a favorable outcome. To alleviate this fear, the CREA provides that a settlement or judgment cannot be issued until the opt-in period of two months has expired.[390]

The registration of claims will influence the limitation periods of consumer claims. The limitation periods are suspended upon registration of the redress actions in the register of actions. This provision is not new. The statute of limitations is also suspended in MDAs.[391]

Transparency for funding of qualified entities is also incorporated in the CREA. Therefore, the CREA foresees an obligation of qualified entities to disclose a third-party funder. A third-party

384 Der Paritätische Gesamtverband 2023 (n 372).
385 Jones, and Weißbach (n 369).
386 Kern and Uhlmann (n 5) 868.
387 Der Paritätische Gesamtverband 2023 (n 372).
388 Jones and Weißbach (n 369).
389 Der Paritätische Gesamtverband 2023 (n 372).
390 Jones and Weißbach (n 369).
391 Ibid.

funding by a competitor of the trader is inadmissible. Moreover, competitors who are dependent on the defendant or competitors who could influence the proceedings are also excluded.[392] Moreover, the agreements with the third-party financiers must also be submitted to the court.[393]

6.2.1.2 Civil procedure according to the CREA

Course of proceedings is divided into several phases. At the very beginning, the competent Higher Regional Court would test the filed redress action whether the bundled claims are similar.[394] Similarity means that the claims are based on same or comparable set of facts and dealing with the same legal questions. This allows the court to make a uniform evaluation of the claims. However, the definition of similarity can be interpreted broadly, therefore there is a room for argument on what meets the threshold.[395]

Once similarity is positively tested, the court would assess the admissibility of the redress action. If the redress action is admissible and the defendant is in breach of consumer law, the court would render a basic redress judgment (*Abhilfeurteil*). Then the court would ask the parties to make a settlement proposal. If there is no settlement reached, the court shall render a final redress judgment (*Abhilfeendurteil*). The final redress judgment can provide for the collective total amount which the defendant shall pay to the affected consumers.[396] The collective total amount is then distributed by a custodian through an implementation process to consumers who have registered their claims for redress.[397]

In general, the final redress judgment will not specify the affected consumers. Therefore, there is a possibility for qualified entities to ask a court for a payment to specifically named consumers. In this case the asked court would render a regular judgment.[398]

The new proceedings on redress actions will adopt provisions on disclosure of evidence according to the RAD. So far, disclosure of evidence within the meaning of the RAD is not known in

[392] Jones and Weißbach (n 369).
[393] Der Paritätische Gesamtverband 2023 (n 372).
[394] Jones and Weißbach (n 369).
[395] Gröschel and Weißbach (n 376).
[396] Jones and Weißbach (n 369).
[397] Der Paritätische Gesamtverband 2023 (n 372).
[398] Jones and Weißbach (n 369).

Germany. Thus, if one party does not comply with a court order to disclose evidence, the court may impose a fine up to 250,000 Euro. The high amount of fine shall have a dissuasive effect. However, the penalty shall be proportionate to violation. This kind of penalty provision represents a novelty in the German Code of Civil Procedure.[399]

6.2.2 Representative Actions on injunctive measures

The core of the Bill represents the CREA. The Bill foresees that the provisions for representative actions on injunctive measures according to the RAD will be implemented into the German Act on Injunctive Relief (UKlaG) and the German Act against Unfair Competition (dUWG).[400]

Furthermore, the filing of representative actions on injunctive measures will suspend the limitation period for consumer claims. Therefore, the German Civil Code will be adjusted accordingly.[401]

6.3 Conclusion

The implementation of the RAD in Austria and Germany is associated with new legal developments. The existing legal situation must be adapted to the Directive requirements. The delay in implementation in Austria could be seen as a lack of political will.[402]

Adapting the provisions of the Directive to national legislation may be difficult with regard to the independent development of collective redress in these Member States. The independent development of collective redress in Austria and Germany has shown how national legislations differ from one other. With the transposition of the RAD into national law, it is unlikely that national laws will become more similar if the existing differences in legislation continue to apply.[403]

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[399] Gröschel and Weißbach (n 376).

[400] Bundesministerium der Justiz, ´Schnellere und einfachere Klagemöglichkeit für Verbraucherinnen und Verbraucher` (*BMJ-Pressemitteilungen*, 16 February 2023) <https://www.bmj.de/SharedDocs/Pressemitteilungen/DE/2023/0216_Verbandsklage.html> accessed on 11 July 2023 (´**Bundesministerium der Justiz**´).

[401] Ibid.

[402] Florian Scholz-Berger and Silke Schusser, ´Kollektiver Rechtsschutz nur für Verbraucherinnen und Verbraucher? (2023) 85(5) Österreichische Notariatszeitung 239 <https://rdb.manz.at/document/rdb.tso.LInz20230503#doc-C> accessed 6 January 2024.

[403] Rentsch (n 184) 526.

On the Austrian side, implementation of the RAD is not foreseeable. The present situation shows that the RAD entails a major change for Austrian procedural law, and its implementation is associated with many legal issues. In particular, Austria must address the principles of procedural economy, cost savings and time efficiency. After all, representative action proceedings should be structured according to these principles as far as possible.[404]

Another implementation problems have arisen with different opinions and approaches of the consumer side and the business side. According to *Dr. Schuschnigg*, unlike Germany, Austria resists extending the personal scope to small and medium-sized enterprises. This and many other issues are so significant that an agreement or rather a compromise of both sides is doubtful.[405]

Furthermore, Austria faces further questions as to whether substantive law should also be changed or only procedural law.[406] After all, the goal is to compensate every individual. However, Austria does not want to establish an overall lump sum for compensation claims in national law. Austria has not reached an agreement in which direction the implementation of the directive should move. Something should be done. How and what exactly is still open.[407]

In addition, the most effective mechanism under Austrian law is the use of "class actions Austrian style" which allows qualified entities to litigate several similar factual issues in one process.[408] Therefore, it is questionable whether Austrian government wants to change the established practice.

Unlike in Austria, the German Federal Parliament has already enacted a new implementation act, the so-called Consumer Rights Enforcement Act (*Verbraucherrechtedurchsetzungsgesetz*) as early as 7 July 2023. The new implementation act has already entered into force. It provides for the

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[404] Gabriele Zgubic-Engleder, ´Rechtspolitisches Panel – geringfügig redigierte Wiedergabe der Diskussionsbeiträge´ in Phillip Anzenberger, Alexander Klauser and Bettina Nunner-Krautgasser (eds), *Kollektiver Rechtsschutz im Europäischen Rechtsraum* (Verlag Österreich 2022) 171-172.
[405] Artur Schuschnigg, ´Rechtspolitisches Panel – geringfügig redigierte Wiedergabe der Diskussionsbeiträge´ in Phillip Anzenberger, Alexander Klauser and Bettina Nunner-Krautgasser (eds), *Kollektiver Rechtsschutz im Europäischen Rechtsraum* (Verlag Österreich 2022) 173.
[406] Ibid 173.
[407] Thomas Kustor, ´Rechtspolitisches Panel – geringfügig redigierte Wiedergabe der Diskussionsbeiträge´ in Phillip Anzenberger, Alexander Klauser and Bettina Nunner-Krautgasser (eds), *Kollektiver Rechtsschutz im Europäischen Rechtsraum* (Verlag Österreich 2022) 174-175.
[408] Hertel and Wittinghofer (n 153).

representative action for redress. This is a milestone for Germany as German procedural law allows – for the first time – to bring representative actions for redress.[409]

The implementation of the RAD in Germany has not been easy as it has attracted a wave of criticism. Following the enactment of the draft Bill, the fundamental question arises as to whether the new redress action will at all facilitate consumers' access to legal action. The question arises from the fact that the provisions of the draft Bill are narrowly formulated. This in turn leads to a narrow interpretation of these provisions. It is also questionable whether remedial actions will have a statute of limitations-blocking effect on future individual consumer proceedings. These questions pose uncertainty above all for the defendant companies. The newly prevailing uncertainty would be contrary to the purpose of the RAD.[410]

The opt-in mechanism provided for in the CREA, which allows for a later filing of a lawsuit, is considered particularly critical by the German Central Business Association. Particularly regarding the defendant business enterprises, it is fraught with unforeseeable legal consequences. The defendant business enterprises would then not be able to assess the outcome of the litigation *ex ante* if it is not known from the outset how many affected consumers are on the side of the plaintiff.[411]

Furthermore, Germany has extended the scope of representative actions for redress to small and medium-sized enterprises. The lists of qualified entities, which are outlined in the Injunctions Act (UKlaG), remain applicable. The affected parties can opt into the proceedings. In addition, the representative actions must be of the same nature.[412]

German regime of collective redress has expanded through the adoption of the RAD. However, the previous legal instruments, such as the model declaratory action, remain applicable. It therefore

[409] Gleiss Lutz, ´German Federal Parliament Passes Act Implementing the European Representative Actions Directive´ (*Gleiss Lutz*, 10 July 2023) <https://www.gleisslutz.com/en/German_Federal_Parliament_Passes_Act_Implementing_the_European_Representative_Actions_Directive.html#:~:text=The%20German%20Federal%20Parliament%20(Bundestag,Verbandsklagenrichtlinienumsetzungsgesetz)%20on%207%20July%202023> accessed on 6 October 2023.
[410] Caroline Meller-Hannich, ´Der RefE für ein Verbandsklagenrichtlinienumsetzungsgesetz (VRUG)´ [2023] DB 628.
[411] ZAW, ´Vebraucher` (April 2023) <https://zaw.de/positionen/verbraucher/> accessed 24 July 2023.
[412] Lutz (n 409).

remains to be seen whether the number of mass actions will increase under the new regime of representative actions on redress measures.[413]

7 Impact of the RAD

The RAD focuses on improving collective redress and strengthening the inferior position of consumers vis-à-vis powerful traders. However, the strengthening does not have to disadvantage the traders. On the contrary, the aim is to create an equality of arms between the parties in the process.[414]

7.1 Positive impact of the RAD

The positive aspects of the RAD are reflected especially in the introduction of a new system of representative actions on redress measures. Since mass claims proceedings are originally not familiar in European jurisdictions, this is a new corner stone of consumer protection within the EU.[415]

The mandatory creation of representative actions for redress can be seen definitely as a positive change. For the first time, it obliges all Member States to create a procedure that enables claims for damages by affected consumers.[416] The scope of representative actions on redress measures shall cover all kinds of civil disputes regarding violations of consumer´s rights. This should make it possible to sue for further claims by injured consumers.[417] Moreover, consumers who have registered for a redress representative action do not have to go through a separate procedure to obtain redress.[418]

The RAD follows the Injunctive Directive, as only qualified entities are entitled to file representative actions. They must fulfill strict requirements to act as a qualified entity. The main

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[413] Lutz (n 409).
[414] Recitals 9, 68 RAD (n 214).
[415] Britta Grauke and Gero Pogrzeba, ´Germany´s Long Way to Class Actions – The Implementation of the EU Directive on Representative Actions for the Protection of Collective Interests of Consumers´ (*European Disputes Blog*, 23 May 2023) <https://european-disputes-blog.weil.com/germany/germanys-long-way-to-class-actions-the-implementation-of-the-eu-directive-on-representative-actions-for-the-protection-of-the-collective-interests-of-consumers/> accessed 9 July 2023.
[416] Meller-Hannich and Modra (n 305) 141.
[417] Grauke and Pogrzeba (n 415).
[418] Recital 50 RAD (n 214).

character of qualified entities is their non-profit making character. Therefore, qualified entities must fulfill number of strict transparency obligations especially regarding their financing and structure to ensure their non-profit making character. National authorities and courts should be entitled to monitor and assess a possibility of conflict of interests arising from the fact that behind every qualified entity will act a third-party funder. Therefore, it must be examined which interests are followed by qualified entities and their third-party funders.[419]

The RAD protects traders against abusive litigation (i) by excluding punitive damages as well as the qualified entities' obligation to reimburse costs in the event of an unjustified action by the qualified entity; (ii) the competent courts have the option of dismissing manifestly unfounded representative actions at the beginning of the proceedings and (iii) by legal standing of qualified entities.[420]

The simplification of the burden of proof in the context of discovery, the suspension or interruption of the limitation period and the right of foreign qualified entities to bring an action are to be regarded as positive from a procedural point of view.[421]

The consumers´ right to be heard will be strengthened because affected consumers can become certain procedural rights. Although they cannot be party to the dispute.[422] They also should receive ongoing information from the qualified entities about the status of the representative action. Furthermore, they have the right to express whether they wish to continue to participate in the representative action.[423]

The promoted digitalization and the creation of electronic databases is desirable. This should lead to better communication between qualified entities and traders vis-à-vis consumers.[424]

[419] New Deal for Consumers (n 9).
[420] Knötzl (n 337) 209-210.
[421] Ibid 209-210.
[422] Recital 36 RAD (n 214).
[423] Recital 59 RAD (n 214).
[424] Meller-Hannich and Modra (n 305) 141.

7.2 Negative impact of the RAD

The RAD contradicts itself. On the one hand, it aims to strengthen collective redress in the European judicial area. On the other hand, it foresees only a standardization of procedural rules and leaves the Member States so much room to maneuver regarding implementation. In the end, only a minimum harmonization will be achieved. This will inevitably lead to many difficulties for an effective enforcement of collective consumer rights in the Union.[425]

Moreover, in the general provisions of the RAD, one can only see the first steps towards uniform binding requirements of collective redress.[426] This supports a rather skeptical opinion of stakeholders and politicians who oppose strengthening collective redress.[427] Another consequence is that politicians take their time and do not rush the transposition of the RAD. The actual effectiveness of the Directive's goals in practice is thus called into question, because it depends on its implementation in each Member State.[428]

This is also illustrated by the very broad scope of application of representative actions proceedings. As the previous chapter has shown, Austria and Germany are struggling to implement the RAD. Austria has not implemented the Directive yet. Germany has already introduced the transposition act which has already entered into force.[429]

Thus, qualified entities have a great power in representing consumers. Therefore, associations must fulfill strict requirements to act as a qualified entity. The RAD expressly prescribes requirements for cross-border representative actions. Regarding national representative actions they can apply the requirements for cross-border representative actions according to the RAD. But they can still apply their already existing national requirements.[430] At this point, Europe-wide harmonization can only take place in a limited way.

Another negative aspect of the RAD is the fact that the procedural rules provided for in the Directive are not fully regulated. Member States may implement and develop the procedural rules

[425] Kodek and Dangl (n 301) 118.
[426] Meller-Hannich and Modra (n 305) 141.
[427] Kodek and Dangl (n 301) 118.
[428] Meller-Hannich and Modra (n 305) 141.
[429] Grauke and Pogrzeba (n 415).
[430] Article 4(4) RAD (n 214).

differently depending on their legal traditions. One can therefore hardly speak of a uniform development of collective redress. As *Meller-Hannich* and *Modra* interestingly describe it, the Directive leads rather to the "strengthening of the procedural autonomy of the Member States."[431]

Third-party funding can also have a negative impact. If the interests of consumers are superseded by the interests of a litigation funder, this conflict of interests might turn into abusive litigation. Competitiveness between companies can escalate in a way where one company would intentionally act against its competitor by launching frivolous lawsuits.[432]

National provisions on funding of representative actions, bearing of legal costs and state funding support for qualified entities will also play a crucial role in the overall assessment of the Directive. It is up to the Member States to prepare a level playing field which should by fair and transparent for both qualified entities and traders.[433]

7.3 US class actions v RAD

Many politicians, business associations, and members of the EU Parliament criticize a possible impact of the RAD. They fear that the RAD would introduce a situation similar to the USA because of US class actions.[434] There are ongoing discussions to what extent traders might be threatened with a litigation industry due to possible increase of filing representative actions. Traders are afraid that they will be blackmailed and that representative actions proceedings will be misused to the detriment of traders.[435]

The experience with class actions in the USA shows that litigation industry can lead to situation where consumer´s interests stay in the background and the chance to make profit in the foreground. The present worries may be partially justified since litigation funders and insurance companies

[431] Meller-Hannich and Modra (n 305) 141.
[432] New Deal for Consumers (n 9).
[433] Meller-Hannich and Modra (n 305) 141-142.
[434] Anger, Hoppe and Neuerer (n 213).
[434] Sauerland (n 14) 1-7, 19.
[435] Heike Anger, ´Justizminister Buschmann bringt Sammelklage auf den Weg´ (*Handelsblatt*, 24 September 2022) <https://www.handelsblatt.com/politik/deutschland/gesetzentwurf-justizminister-buschmann-bringt-sammelklage-auf-den-weg/28703142.html> accessed 5 July 2023.

may have increased interests to fund representative actions. Fear may be therefore one of the reasons why EU Member States are not rushing to implement the RAD.[436]

7.3.1 Description of the US-Model

The concept of mass claims has its origin in the Anglo-American procedural laws since 1930s. Collective handling of proceedings with identical fact and legal issues relieves the burden on courts. Therefore, US class actions are the key to US procedural law.[437]

US class actions serve to control behavior of traders through procedural means. This makes a difference to punitive damages, which achieve the control of behavior through substantive law. US class actions also serve to protect consumers´ rights and at the same time they serve public interest. Moreover, they provide more legal certainty than individual lawsuits.[438]

In general, the US model differs between collective claims on redress and class actions. Collective claims on redress are based on a collective loss which is claimed as an entity. One individual can file a collective claim for the whole group. There is no need for a standing of an association.[439] In the EU it is not possible to sue a collective loss.[440]

According to the Rule 23 Federal Rules of Civil Procedure (FRCP) in the 28th title of the Unites States Code, class actions stand for individual claims of affected consumer as a "class" and follow "class interests". The class is defined according to objective criteria: (i) The class exists when it is sufficiently large and bringing individual claims is inefficient. (ii) The majority of individual claims asserted (not all of them) must be of the same nature. (iii) Class actions must be superior to any other cause of action such as consolidation, joinder, or test cases. Furthermore, affected consumers are not party to the dispute of class actions (so-called nonparties). The class may be led by one individual or plaintiffs (so-called named plaintiffs).[441]

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[436] Anger, Hoppe and Neuerer (n 213).
[437] Stephanie Eichholtz, *Die US-Amerikanische Class Action und ihre deutschen Funktionsäquivalente* (Mohr Siebeck 2002) 1-7.
[438] Ibid 12, 19.
[439] Chrisoula Michailidou, *Prozessuale Frage des Kollektivrechtsschutzes im europäischen Justizraum [eine rechtsvergleichende Studie]* (Nomos 2007) 165.
[440] Schuschnigg (n 405) 172-173.
[441] Michailidou (n 439) 165-169.

7.3.2 Differences to the US-model

US class actions are a specific feature of the US law.[442] Therefore, the legal situation in the USA differs from the EU regime in many respects:

7.3.2.1 Scope of claims

The scope of US class actions is more extensive in contrast to EU representative actions. US class actions can be used for all types of claims including antitrust claims. On the other hand, EU representative actions are considered to be narrower and can be used only for certain consumer claims which are foreseen in the Annex 1 of the RAD.[443]

7.3.2.2 Legal standing

Another significant difference of the EU regime to the US class actions is the possibility for individual consumers to file a class action. A standing of a qualified entity is not needed.[444] This is not possible in Europe. According to the RAD and current legal situation in Germany and Austria, affected consumers must always assign their claims to a qualified entity such as a consumer association.[445]

According to the RAD only qualified entities are empowered to bring representative actions. Moreover, the strict requirements for qualified entities regarding financing and transparency must be monitored both by the Member States and the EU Commission.[446] Moreover, awarding of punitive damages is not possible under the RAD. The basis of representative actions is only the claims of consumers seeking damages.[447] In addition, registered consumers should be informed by qualified entities of all circumstances surrounding the representative actions process. This is to ensure the strengthening of their position.[448]

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442 Stephanie Eichholtz (n 437) 218.
443 Linda Martin and Henry Hutten, ´Comparing the EU´s Representative Actions Directive to US class action procedures´(*Freshfields Bruckhaus Deringer*, 2021) <https://riskandcompliance.freshfields.com/post/102gvmh/comparing-the-eus-representative-actions-directive-to-us-class-action-procedures> accessed 12 December 2023.
444 Sauerland (n 14) 14.
445 Anger (n 435).
446 New Deal for Consumers (n 9).
447 Ibid.
448 Ibid.

7.3.2.3 Jurisdiction

There is a peculiarity of court jurisdiction in US class actions. If a class action is brought by several consumers who reside in different states, federal jurisdiction is provided. This is not regulated under the previous regime in the EU and under the new regime of the RAD.[449] For example, in Austria, personal jurisdiction is currently used as a basis, depending on which court the concerned affected consumers belong to. However, when a qualified entity files a representative action, the "consumer jurisdiction" is no longer applicable. The RAD does not rule this issue.[450]

7.3.2.4 Opt-in and opt-out model

US class actions follow both opt-in and opt-out mechanism. However, opt-out model is mostly used.[451] Both mechanisms are based on the principle same as the RAD provides.[452] The advantage of the opt-out model is that it can have a far-reaching effect as many more consumers can be embraced compared to the opt-in model.[453] The opt-out model binds the class to the class action decision or class action settlement. There is no obligation to notify class members. The class members are part of the class action even if they did not become aware of it ("on time"). This concept is dangerous for defendants because they cannot know how many class members may actually be in class action at the end of the day.[454]

It should be noted that if the lawsuit is unsuccessful, the affected consumers are prevented from conducting their own lawsuits. If they win the lawsuit, they can share the success proportionately to the amount of their claims.[455]

The RAD also follows both systems, but in a different way. Member States can choose on which basis representative actions will be proceed.[456]

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[449] Knötzl (n 337) 215.
[450] Kolba (n 201) 228.
[451] Martin and Hutten (n 443).
[452] Recital 43 RAD (n 214).
[453] Martin and Hutten (n 443).
[454] Michailidou (n 439) 178-179, 194.
[455] Ibid 165-166.
[456] Recital 43 RAD (n 214).

7.3.2.5 Contingency fee and strike suits

A named plaintiff is in general an attorney who has a standing to file a class action. Attorneys themselves seek cases in which there is a public interest that may lead to class action. They are primarily interested in the contingency fee of the overall dispute.[457] Since there is an American no-fee rule which means that each party has to bear its own costs, an agreement on contingency fee is an unwritten requirement for filing a class action. This encourages the lawyers to achieve the best possible outcome.[458]

It should be noted that a contingency fee agreement is not subject to judicial review. The existing legal situation encourages law firms to compete.[459] Therefore, there is a danger that lawyers are only interested in a high contingency fee and do not act in the interest of their clients.[460] On the one hand, the applicable law foresees that lawyers who represent the class members shall act fair and appropriate. On the other hand, US is known for strike suits (*missbräuchliche Klagen*) which result from the high competitiveness of attorneys. Strike suits stands for class actions where a law infringement is unsure. A success would not be expected. However, an attorney can blackmail the defendant company in terms of process costs and the defendant's reputation so that a settlement is reached.[461]

The EU legal situation, unlike in the USA, sanctions lawyers who actively solicit clients for their services.[462] The RAD leaves the regulation of contingency fee to individual Member States. Therefore, it remains to be seen whether some Member States will consider contingency fees permissible the association bears the risk of litigation costs.[463]

A possibility of strike suits in the EU is low since qualified entities – who have legal standing - must be non-profit oriented and they are subject to the court review.[464]

[457] Eichholtz (n 437) 260.
[458] Michailidou (n 439) 175-176.
[459] Ibid 175-176.
[460] Sauerland (n 14) 9, 20.
[461] Eichholtz (n 437) 13.
[462] Michailidou (n 439) 194.
[463] Kalss and Oberhammer (n 330) 79.
[464] Article 4 RAD (n 214).

7.3.2.6 Pre-trial discovery

In general, US class actions are more consumer-friendly than EU representative actions. The claimant-friendly industry results *inter alia* from the extensive pre-trial discovery. This instrument is still unknown in the EU. The new disclosure of evidence introduced by the RAD is not comparable to the US pre-trial discovery. Pre-trial discovery allows the investigation of the facts by requiring the defendant to disclose all documents held to the plaintiff's side and to the court. This makes it easier for the plaintiff to present the relevant documents to the court.[465] However, disclosure of evidence under the RAD can only be made upon request and must consider the principle of confidentiality of information to protect the defendant.[466]

Because pre-trial discovery is applicable in the USA, (only) a short pleading is sufficient for the lawyer. The pre-trial discovery in the USA means that the defendant must provide all information to the other side at his own expense. Therefore, the plaintiff only needs to file a short pleading. All relevant information for the class action is covered in the discovery. [467] Such an extensive pre-trial discovery would be risky for defendants and has a so-called nuisance value. It is therefore more cost-effective for them to reach a settlement. Pre-trial discovery is hence a reason why US class actions usually end with a class action settlement which can satisfy both parties to the dispute.[468]

7.3.2.7 Legal costs and third-party funding

The US system differs from the EU system in that it allows class actions to be brought without the risk of cost litigation. Each party to the dispute bears its own litigation costs.[469] In some cases, it is possible for prevailing claimant to get attorney fees from the losing defendant. However, it is not possible if defendant prevails.[470] In contrary, national systems of EU Member States follow the loser pays principle regarding the legal costs. Moreover, qualified entities bear the risk of litigation costs.[471]

[465] Kalss and Oberhammer (n 330) 79.
[466] Article 18 RAD (n 214).
[467] Eichholtz (n 437) 24-27.
[468] Michailidou (n 439) 180-181.
[469] Kalss and Oberhammer (n 330) 79.
[470] Martin and Hutten (n 443).
[471] Kalss and Oberhammer (n 330) 79.

The US regime allows a third-party funding. The funding is not subject to the court review. In general, there are no fixed limits on funding. However, the litigators are still obliged to pursue class action proceedings in a fair and reasonable manner without a third-party interference.[472]

In contrary, the RAD follows legal policies aimed at avoiding abuses of representative actions. Hence representative actions can only be brought by non-profit oriented qualified entities. Therefore, qualified entities must fulfill extensive transparency obligation regarding their funding. Moreover, qualified entities should also be supported primarily by state resources if necessary.[473] However, it is on Member States to rule to which extent a third-party funding will be allowed. If third-party funding will be allowed, consumers´ interests must be protected.[474] This latter approach have both US and EU regimes in common.[475]

7.3.2.8 Punitive damages

Another significant difference is represented by punitive damages (*Strafschadenersatz*). Punitive damages stand for the punishment of the damaging trader. They are awarded by a jury in addition to the actual damage. With respect to the maintenance of legal peace, they should have a general and special preventive effect. Therefore, the amount should be high enough to act as a deterrent for the defendant trader.[476]

However, the amount of punitive damages may be excessive and therefore existential for traders. They are regularly awarded by a jury. The jury is usually made up of individuals who are themselves consumers. It is particularly unfavorable for large companies (so-called *deep pockets*). The decision taken by the jury is often subjective and influenced by emotions which is reflected in excessive payments for punitive damages. According to the Supreme Court decisions in *BMV v. Core*[477] and *State Farm Mutual and Automobile Insurance Company v. Campbell*[478] the award of

[472] Martin and Hutten (n 443).
[473] Kalss and Oberhammer (n 330) 128.
[474] Article 10 RAD (n 214).
[475] Martin and Hutten (n 443).
[476] Michailidou (n 439) 170.
[477] Sup. Court 116 S.Ct. 1589 (1996).
[478] Sup. Court 123 S. Ct. 1513 (2003).

punitive damages should be proportionate to the extent of the infringement and the penalties provided for by law.[479]

Punitive damages are awarded next to compensatory damages. In general, EU regime of collective redress does not foresee awarding of punitive damages. Therefore, the RAD grants only a possibility of awarding of compensatory damages.[480] German law does not know per se punitive damages. However, the Federal Court of Justice (BGH) has developed punitive damages for German law regarding infringement of personal rights in light of the US legal situation.[481] Austrian law does not know punitive damages neither. There have been reform attempts to integrate punitive damages into Austrian private law, but without success.[482]

7.3.3 Conclusion

EU representative actions and US class actions have one thing in common – to provide a collective redress for affected consumers. However, the situation in the USA already differs from the EU due to the different legal culture and legal policy regarding procedural laws.[483]

The most important features of US procedural law are class action, pre-trial discovery, jury, trial, American rule of costs, contingency fees, and punitive damages. An extensive pre-trial discovery of documents, punitive damages and contingency fees are from the EU perspective the most critical issues for traders.[484]

From the perspective of economic theory, class actions pose a problem, since the class action asserts individual damages, but the class action is oriented towards the assertion of the total damage. The number of individual damages and the total damages can diverge. The calculation of damages may be inaccurate if the true value of the defective product, for example, is unclear. US class actions can therefore lead to misdirection.[485]

479 Michailidou (n 439) 184-185.
480 Ibid 192-193.
481 Volker Behr, ´Strafschadenersatz im deutschen Recht – Wiederauferstehung eines verdrängten Phänomens´ (2010) 3 ZJS 292-296 <https://www.zjs-online.com/dat/artikel/2010_3_320.pdf> accessed on 15 October 2023.
482 Andreas Kletecka, ´Punitive damages - Der vergessene Reformpunkt? (FN)´ (2008) 83(20) ÖJZ 785 <https://rdb.manz.at/document/rdb.tso.LIoejz20082002> accessed 6 January 2024.
483 Michailidou (n 439) 275.
484 Brand (n 12) 1116.
485 Eichholtz (n 437) 12-13.

For all intents and purposes, US class actions are not dangerous per se. The differences between US class actions and EU representative actions are specific features of US procedural laws and not class actions per se.[486] What is dangerous is the large number of lawsuits, which cannot be handled with an appropriate care. Therefore, fatal process errors may already happen at the beginning of proceedings, which may lead to undesired results.[487] In the USA, lobbying by lawyers´ organizations has established itself as one of the most important ways to promote class actions.[488]

The RAD provides for further-reaching safeguards to avoid abuses of collective redress like in the USA.[489] The safeguards reflect *inter alia* the need to protect traders and prevent pursuing of abusive lawsuits.[490]

- The EU representative actions are already designed to prevent cases of abuse, in that only qualified entities that are not profit-oriented are allowed to bring representative actions. Qualified entities have to fulfill transparency obligations regarding their funding.[491]
- Consumers are generally excluded from participating in the procedure but the right to be heard is guaranteed by the qualified entities' duty to provide information. The focus lies on the common interest and not on making a profit.[492]
- In contrast to US class actions, the affected consumers have to be registered in order to be part of a representative action. They are specifically named.[493] Therefore, the probability that a consumer will unintentionally participate in the representative action is approaching zero.
- Pursuing of frivolous lawsuits will be not possible under the EU-regime because a national competent court or authority needs to rule that a trader is in breach of law. Only then a representative action on redress can be successful.[494]

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486 Kalss and Oberhammer (n 330) 80.
487 Sauerland (n 14) 21.
488 Brand (n 12) 1116.
489 New Deal for Consumers (n 9).
490 Martin and Hutten (n 443).
491 New Deal for Consumers (n 9).
492 Kern and Uhlmann (n 5) 853, 856.
493 Recital 49 RAD (n 214).
494 New Deal for Consumers (n 9).

- It will be not possible for consumers to get punitive damages. The competent court or authority can award only the actual damage.[495]
- Discovery of documents is not comprehensive but restricted. The approach is to support a representative action. National rules of confidentiality and proportionality in favor of traders shall be maintained.[496]

As the Recital 76 of the RAD stipulates - it is important to have a Europe-wide uniform framework for an effective and efficient functioning of representative actions in order to protect the collective interests of consumers.[497] Thanks to the various safeguards stipulated in the RAD, the EU model of representative actions should be more secure than the US class actions.[498]

Furthermore, EU representative actions will be reviewed by competent national courts or authorities that will be able to issue a final decision. Filing frivolous lawsuits shall not be possible under the European regime.[499]

The legal situation in the USA should therefore not give rise to fears of litigation industry in the EU. The US class actions should serve as a model from which the EU should learn. Years of experience with US class actions have shown the potential for abuse that class actions entail and what should therefore be avoided. However, this does not mean that class actions should be understood in a negative sense. On the contrary, the EU should use the opportunity to develop and modernize collective redress.[500]

8 Outlook & perspectives

Mass claims have no harmonized regime in the EU. They are characterized by significant differences in national regulations. Moreover, there is no uniform terminology when talking about

[495] New Deal for Consumers (n 9).
[496] Article 18 RAD (n 214).
[497] Recital 76 RAD (n 214).
[498] New Deal for Consumers (n 9).
[499] Ibid.
[500] Kern and Uhlmann (n 5) 851-852.

class actions, group actions, mass claims, class mass actions, representative actions, or even collective claims.[501]

The differences are fundamental not only in terms of terminology.[502] It is challenging to provide a legal certainty for both consumers and traders when different jurisdictions may use same terms with different meanings. Or *vice versa* they may use different terms with the same meaning. Legal uncertainty regarding cross-border cases with similar subject matter and similar motion effect all involved parties, i.e., courts (which must deal with laws of other jurisdictions), attorneys, qualified entities, defendants, and harmed consumers.[503]

National governments of EU Member States are searching for "appropriate solutions" in the area of collective redress. However, decisions taken by them are contradictory and/or new gaps in legal protection are created. This does not improve legal certainty. Thus, the existing collective redress has legal gaps that still need to be fixed.[504]

The activity of the EU Commission until the adoption of the New Deals for Consumers and subsequently of the RAD can be judged as very reluctant.[505] The insufficient development of the collective redress system became apparent with the outbreak of the VW diesel scandal.[506] There was no uniform way of claiming damages throughout Europe.

The new introduction of RAD into EU secondary legislation clearly draws improvements. For the first time, qualified entities can sue infringing traders for redress. Evidence gathering procedure, so-called discovery, is newly introduced. Member States can choose between opt-in or opt-out model or a mixture of both. Strict penalties as an art of deterrence are provided for in the event of violation of the provisions of the RAD. The RAD also captures the possibility that the public sector may financially support the representative action procedure. This corresponds to the non-binding recommendation of the EU Commission from 2013, which rather points to institutional

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501 CMS Law-Now (n 154).
502 Ibid.
503 Freshfields Bruckhaus Deringer, ´Class actions and collective claims around the globe´ (July 2023) <https://www.freshfields.com/en-gb/our-thinking/campaigns/collective-actions/> accessed on 9 May 2023.
504 Kodek (n 56) 131.
505 Ibid 136-137.
506 New Deal for Consumers (n 9).

representative action plaintiffs (*ideological plaintiff*). This can be seen as problematic to the extent that the conduct of such proceedings does not become attractive for private financiers.[507]

Other improvements can be seen in strengthening of consumer protection rights and in the protective measures against abuse claims.[508] However, the RAD does not create an EU-wide harmonization of collective legal redress. Thus, harmonization is more than urgent within the EU single market.

The harmonization of laws would strengthen collective interests over individual interests.[509] However, harmonization means undermining the national protective measures of the Member States. Some Member States, such as Germany and Austria, are in favor of stricter protective measures than others. This is why the national legal situation in the EU Member States is so divergent. To improve collective consumer protection overall, it is necessary to harmonize not only procedural but also substantive provisions. This is because mass claims, regardless of whether in the EU or worldwide, always deal with the damage and the cause of the damage. The cause of the damage lies primarily in substantive law. Procedural law is only concerned with whether the individual claims are asserted as collective proceedings or bundled. [510]

To note is that full harmonization is problematic because consumer protection legislation does not fall within the exclusive competence of the EU.[511] The Member States are responsible for consumer policies. The EU only has subsidiary competence according to Article 153 par. 3 lit. a TFEU.[512] This is the reason why the RAD only introduces minimum procedural standards that Member States must meet. The existing national legal situation remains in force.[513]

The RAD cannot achieve full harmonization at the EU level. This is in line with the principle of minimum harmonization, which leaves the Member States a wide margin of discretion. They can therefore provide for stricter rules than a directive. However, the principle of minimum

[507] Kodek (n 56) 137.
[508] New Deal for Consumers (n 9).
[509] Michailidou (n 439) 298-299.
[510] Ibid 293, 6.
[511] Article 153 TFEU.
[512] Michailidou (n 439) 295.
[513] Ibid 295-296.

harmonization can lead to minimum harmonization, which is exactly what happens with the RAD.[514]

To ensure Europe-wide collective redress mechanisms, horizontal harmonization by issuing a regulation would be more efficient than a directive.[515] However, the EU legislator has a restricted legislative power because of subsidiary principle (Article 153 TFEU). To make this possible, the EU political will and attitude of the Member States would have to change – this, however, is still lacking.[516] Furthermore, improvements concern only procedural aspect of national provisions. Substantive law of Member States remains unchanged.[517]

Such situation can be inconvenient not only for consumers, but also for European and foreign traders who are doing or want to establish business in the EU. They have to face the scattered national laws of EU Member States which mostly have not implement the RAD - providing only minimum standards and no harmonization.[518] This means that effective collective consumer protection cannot be guaranteed in the EU.[519]

The RAD was created with the potential to reform collective consumer protection within one EU legal act. The tension between public law enforcement and private law enforcement persists. The position of consumers (thus an aspect of individual legal protection) should be strengthened. However, the focus of the RAD is mostly to collective consumer protection.[520]

The question therefore arises whether the adoption of the RAD can be considered a "mission accomplished" in collective redress.[521] The answer is clear: No. The legal situation in the EU remains uncertain and unsatisfactory.[522]

The RAD is a step forward in the reform of collective redress by standardizing procedural rules, strengthening collective consumer protection, and improving the balance of interests between

[514] Michailidou (n 439) 295-296.
[515] Ibid 299.
[516] Kodek (n 56) 137.
[517] Meller-Hannich and Modra (n 305) 140-141.
[518] Martin and Hutten (n 443).
[519] Michailidou (n 439) 298.
[520] Kern and Uhlmann (n 5) 858.
[521] Ibid.
[522] Michailidou (n 439) 304.

consumers and businesses in the EU. However, standardization does not harmonize the national rights of the Member States. Therefore, the inconsistency of the legal situation will persist.

Furthermore, the development of collective redress is clearly limited by the fact that the EU is trying to take measures against the spread of a litigation industry in Europe. The EU and its Member States should rid themselves of their fears of US class actions. As the analysis in Chapter 7.3 has shown, US class actions are not dangerous per se. They follow the specific features of US procedural law.

Last but not least: As the EU development only focuses on the procedural side of collective redress. The substantive law remains unchanged. According to the current situation, change is also not intended. Harmonization of the substantive national laws of the EU Member States would be desirable to achieve a sufficient collective consumer protection within the EU.

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Annex

A German Abstract

Der kollektive Rechtsschutz fängt grundsätzlich dort an, wo der individuelle Rechtsschutz an seine Grenzen stoßt. Aufgrund der schnellen Modernisierung und Digitalisierung des Marktes kommt es öfter zu Situationen, wenn eine Vielzahl von Verbrauchern einen ähnlichen oder gleichartigen Schaden erleidet. Eine Masse an Einzelklagen mit einem ähnlichen oder gleichartigen Inhalt belastet die Justiz, die Verhandlungen sind prozessökonomisch nicht effizient und die betroffenen Verbraucher kommen selten zu einem Schadenausgleich. Das bisherige sekundäre Recht der EU hat ermöglicht nur auf Unterlassung zu klagen. Die betroffenen Verbraucher konnten nicht auf Schadenersatz klagen. Die Entwicklung des kollektiven Rechtsschutzes in der EU ist daher als unzureichend zu beurteilen.

Im Hinblick auf die unzureichende Entwicklung des kollektiven Rechtsschutzes haben die EU-Mitgliedstaaten eigene Rechtsinstrumente entwickelt, welche es versuchen, sich mit Massenklagen auseinanderzusetzen. Die Mechanismen der kollektiven Rechtsdurchsetzung in Österreich und Deutschland haben sich aus den Defiziten der individuellen Rechtsdurchsetzung auf nationaler Ebene eigenständig entwickelt und weisen signifikante Unterschiede auf. Der Volkswagen-Dieselskandal hat gezeigt, dass die kollektive Rechtsdurchsetzung in der EU dringend eine Harmonisierung braucht.

Die neue EU-Verbandsklagenrichtlinie stellt einen Fortschritt dar, indem qualifizierten Einrichtungen jetzt auch auf Schadenersatz klagen können. Allerdings schafft die Richtlinie nur einen Standardisierungsrahmen für prozessrechtliche Rechtsvorschriften und keine Harmonisierung. Die bisherigen nationalen Rechtsvorschriften bleiben nach wie vor anwendbar. Es ist daher fraglich, inwiefern sich der kollektive Rechtsschutz in der EU verbessert.

Die Entwicklung des kollektiven Rechtsschutzes in der EU ist von US-Class Actions beeinflusst. Die US-Class Actions sind oft als gefährlich eingestuft, weil in den USA Klageindustrie herrscht. Allerdings liegt der Unterschied in dem US-Prozessrecht und nicht in den Class Actions per se. Die US-Class Actions könnten in der EU als ein erfahrenes Vorbild anstatt als ein Abwehrmechanismus genutzt werden.

B English Abstract

Collective redress generally starts where individual legal protection reaches its limits. Due to the rapidly modernizing and digitalizing market, situations arise more often when many consumers suffer similar or identical damage. Many individual claims with similar or identical content burdens the judiciary, the negotiations are not efficient in terms of procedural economy and the affected consumers rarely reach a compensation. The EU's prior secondary legislation only allowed consumers to sue for injunctive relief. The affected consumers could not sue for damages. The development of collective redress in the EU must be assessed as insufficient.

In terms of the insufficient development of collective redress, the EU Member States have developed their own legal instruments that attempt to deal with mass claims. The mechanisms of collective redress in Austria and Germany have developed independently from the deficits of individual redress at national level and show significant differences. The Volkswagen diesel scandal has shown that collective redress in the EU is in urgent need of harmonization.

The new EU Directive on representative actions represents some progress in that qualified entities can now also sue for damages. However, the Directive only creates a standardization framework for procedural legislation and not harmonization. The existing national legislation remains applicable. It is therefore questionable to what extent collective redress in the EU will improve.

The development of collective redress in the EU is influenced by US class actions. US class actions are often considered dangerous because of the litigation industry in the United States of America. However, the difference lies in US procedural law and not in class actions per se. US class actions could be used in the EU as an experienced role model rather than as a defense mechanism.