



## Implementation of the Representative Actions Directive (RAD) in Germany

### – Does the “VDuG” lack bite?

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The Representative Actions Directive (RAD) was implemented in Germany by way of the “Verbraucherrehtedurchsetzungsgesetz” (or “VDuG” in short) that entered into force on 13 October 2023. This blog post aims at giving a brief overview of some key elements of the first full-fledged collective consumer redress mechanism in Germany and its preliminary assessment.

The German legislator adopted an **opt-in** redress mechanism open to consumers as well as **small businesses**.<sup>2</sup> The model involves three main procedural stages. Qualified Entities (QEs) are permitted to bring representative actions when they can plausibly demonstrate that at least **50 consumer claims** may be affected by it.<sup>3</sup> On the first procedural stage<sup>4</sup> the court is given the opportunity to issue a preliminary judgement on the merits of the case.<sup>5</sup> If the court deems the claim to be justified in principle, it then offers the parties the possibility of discussing a **settlement**.<sup>6</sup> If no settlement is reached in this evaluation phase, the court can issue a final judgment, in which a collective total compensation amount for all claimants is determined.<sup>7</sup> The court may set the amount based on its own conviction, taking into account all circumstances of the case. The court thereby may rely on an estimate, using a conceivable maximum amount as base.<sup>8</sup> The amount set by the court is **provisional** in nature. Therefore, if the amount turns out to be insufficient, it can afterwards be increased upon request.<sup>9</sup> At the same time, if after

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<sup>2</sup> Small businesses are considered consumers for the sake of the redress mechanism, see sec. 1 para. 2 VDuG.

<sup>3</sup> Sec. 1 para 1 VDuG.

<sup>4</sup> Sec. 1 ff. VDuG.

<sup>5</sup> *Abhilfegrundurteil*, sec. 16 VDuG.

<sup>6</sup> Sec. 17 VDuG.

<sup>7</sup> *Abhilfeendurteil*, sec. 18 VDuG.

<sup>8</sup> Sec. 19 VDuG

<sup>9</sup> Sec. 21 VDuG.



satisfying all legitimate claims the amount appears to have been set too high, the remainder will be **returned to the defendant company**.<sup>10</sup> The defendant company must transfer the full compensation into a **compensation fund**.<sup>11</sup> If both plaintiff and defendant request it and settlement efforts appear futile, there will be no preliminary judgment but rather an instantaneous final judgment.<sup>12</sup> The second procedural stage consists of the implementation measures. The implementation, ie the distribution of the total amount to the claimants, is carried out by a **trustee that is appointed by the court**.<sup>13</sup> The trustee will examine the eligibility of each consumer and satisfy their individual claims from the total compensation fund considering the individual damage that they have incurred.<sup>14</sup> At a third stage, there can be **follow-on proceedings**.<sup>15</sup> If the defendant company has individual objections regarding a claim that were not recognized by the trustee, it can assert these objections through a lawsuit, if necessary. The same applies in reverse for the consumers.

Initial evaluations in Germany regard the VDuG primarily as a **regulation lacking bite**.<sup>16</sup> A well-known general concern regarding the RAD is that QEs may be funded too poorly to bring all possible representative actions.<sup>17</sup> They might therefore need to rely on third party funding. To **potential third party funders**, the new VDuG mechanism appears **unattractive**. If a QE relies on third party funding, any agreements made with the financing party must be disclosed to the court.<sup>18</sup> The law does not ensure that the defendant company must bear the funding costs and provides no mechanism on which a funder, after a successful collective redress, can rely on to receive a share of the enforcement proceeds from the implementation fund in a legally watertight manner. Similarly, the VDuG does not mention how proceeds between the QE, the law firms involved and potential third party funders can be shared. The trustee is only

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<sup>10</sup> Sec. 37 VDuG.

<sup>11</sup> Sec. 25 VDuG.

<sup>12</sup> Sec. 16 para. 4 VDuG.

<sup>13</sup> Sec. 23 VDuG.

<sup>14</sup> Sec. 27 VDuG.

<sup>15</sup> Sec. 39 f. VDuG.

<sup>16</sup> See Karl Hamacher, 'Diese Abhilfeklage hilft Verbrauchern nicht', LTO 20 October 2023, <<https://www.lto.de/recht/meinung/m/verbandsklage-neu-kommentar/>> accessed 27 November 2023. Loosely translated to English, the article is titled "This redress mechanism is of no help to consumers". In it, the author claims that the new redress mechanism will remain largely insignificant.

<sup>17</sup> See Susanne Augenhof and Adriani Dori, 'The proposed regulation of Third Party Funding – much ado about nothing?' (2023) GPR 198 cf. 5.

<sup>18</sup> Sec. 4 para. 3 VDuG.



allowed to fulfil legitimate consumer claims by making payments from the implementation fund. Additionally, the trustee may withdraw amounts from the fund to settle the implementation costs upon a court order.<sup>19</sup> Third party funding costs however are not considered a part of these costs.<sup>20</sup> QEs are also not allowed to re-direct redress proceeds to funders without consumer consent. Additionally, a third party funder may only be promised a **maximum share of 10 %** of everything that must be borne by the defendant company.<sup>21</sup> If a QE initiates a redress action breaching these provisions this action will be considered **inadmissible**.

Despite all of this, representative actions in Germany might still become a success due to factors that are embedded in and very specific for the German legal services and litigation funding markets. For once, with its consumer associations and their umbrella organisation *Verbraucherzentrale Bundesverband (VZBV)*, Germany features a set of entities that by law have been designated to be “natural” QEs.<sup>22</sup> In parts, **VZBV** is funded publicly, other funds inter alia result from membership fees.<sup>23</sup> It is hard to estimate whether the consumer associations can rely on the financial means necessary for their new task of carrying out VDuG proceedings. But the fact that VZBV has already initiated at least two representative actions under the new legislative regime<sup>24</sup> at least indicates that they might continue to be able to conduct successful collective consumer redress without needing to rely on third party funding. The TPF cap may have created a monopoly for VDuG redress however and prevent the emergence of new QEs.<sup>25</sup> Additionally, the VDuG features a **tight fee cap on legal expenses**, which has major benefits for the consumer associations, since it protects them from adverse costs that they would otherwise incur when a court decides in favour of the defendant company and they have to carry the costs of the company’s legal team. Finally, Germany has adopted a **very late opt-in model**. Consumers may opt into a VDuG proceeding until up to three weeks

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<sup>19</sup> Sec. 25 para. 3 VDuG.

<sup>20</sup> Sec. 20 VDuG. The costs inter alia include a remuneration for the trustee, however.

<sup>21</sup> See sec. 4 VDuG. Third-party financing a VDuG redress is also forbidden if the funder is a competitor of the defendant company, is dependent on the defendant company, or it can be expected that the funder will unduly influence the QE’s handling of the litigation. This includes funders ensuring that a settlement to the detriment of the consumers is reached.

<sup>22</sup> Sec. 2 para. 3 VDuG.

<sup>23</sup> See VZBV <<https://www.vzbv.de/ueber-uns/transparenz/10-punkte-zur-arbeit-des-vzbv>> accessed 27 November 2023.

<sup>24</sup> See VZBV <<https://www.sammelklagen.de/aktuelles/fernwaermepreise-vzbv-verklagt-eon-und-hansewerk-natur>> accessed 27 November 2023.

<sup>25</sup> See S Augenhofer/A Dori (n 17), cf. 23.



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after the end of the oral hearing in court.<sup>26</sup> At the same time, a judgement can only be issued after six weeks have passed since the conclusion of the oral hearing.<sup>27</sup> This allows consumers to join a proceeding at a point in time when they can already foresee with relatively high certainty whether it will be successful, while at the same time making it hard for defendant companies to calculate the accrual for potential future collective redress expenses stemming from it.

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<sup>26</sup> Sec. 46 para. 1 VDuG.

<sup>27</sup> Sec. 13 para. 4 VDuG.