

## Germany Introduces Class Actions for Consumer Claims

### IN SHORT

**The Situation:** The German Parliament has approved the Act on Model Declaratory Proceedings ("Act"), which introduces, for the first time, class action-style litigation for consumer claims.

**The Plan:** The Act will give qualified institutions the right to raise claims on behalf of groups of consumers in order to obtain a declaratory judgment. In contrast to the initial [proposal to the German parliament](#), the Act now provides for the jurisdiction of the Higher Regional Courts in the first instance and includes a presumption that model proceedings always have fundamental significance. This allows the parties to file an appeal on points of law to the Federal Supreme Court.

**Looking Ahead:** The Act becomes effective on November 1, 2018.

The German Parliament has whipped through [the legislation proposed by the German coalition government](#) in record speed, in an effort to have the Act take effect at the end of this year. The core elements of the approved Act are:

- A qualified institution may raise an action against a company to obtain a declaratory judgment on a question regarding a claim or a legal relationship between a consumer and a consumer-facing company. The right to sue is limited to only those institutions that have been registered for four years under the German Injunctive Relief Act or (if foreign) with the European Commission under Directive 2009/22/EC. Additionally, the institution must consist of 10 associations or 350 natural persons. Qualified institutions may not receive more than 5 percent of their finances from corporate entities and may not initiate model proceedings claims for profit.
- A qualified institution filing a claim with a Higher Regional Court (*Oberlandesgericht*) initiates the claim, showing that at least 10 persons are affected by the alleged wrongdoing. Raising a claim under the Act does not prevent consumers from filing individual claims; however, no other model proceedings based on the same facts may be raised against the same defendant.
- The claim is admissible if 50 applicants join the claim by registering their claims with the claims register within two months. Other affected consumers may join the proceedings by registering their claim until the day before the oral hearing.
- The model proceedings end when the court issues a declaratory judgment or the parties reach a settlement. If the court issues a declaratory judgment, its findings have binding effect on any consumer who joined the proceedings. The consumer may initiate an individual proceeding for damages based on these findings. Alternatively, the parties may settle the claim. If they do so, settlement is subject to review by the court. The settlement is deemed valid unless 30 percent or more of all registered consumers explicitly opt out of settlement.
- Any judgment under the Act may be (directly) appealed to the Federal Supreme Court (*BGH*).



At the outset, the Act does not provide for an easy way to enforce consumers' rights, as consumers still face the problem of having to raise individual claims once a consumer association has obtained a declaratory judgment under the Act.



#### Assessment

At the outset, the Act does not provide for an easy way to enforce consumers' rights, as consumers still face the problem of having to raise individual claims once a consumer association has obtained a declaratory judgment under the Act. It remains to be seen whether consumer associations will want to file claims under the Act and whether consumers will want to initiate individual follow-on claims. Regardless, the Act will increase the risk of litigation for consumer-facing companies.

The fact that the right to initiate model proceeding claims is limited to qualified institutions does little to eliminate this risk because eligible consumer associations may well team up with law firms and third-party funders to pursue consumer claims. In fact, certain consumer associations have already announced their interest in cooperating with law firms and third-party funders in the pursuit of model proceedings against consumer-facing companies.

Another reason consumer-facing companies have an increased litigation risk is the fact that the Act limits the amount in dispute to a maximum of €250,000. As the court fees to be advanced by the plaintiff are derived from the amount in dispute, this relatively modest amount lowers the initial cost burden for the plaintiff.

One practical deficiency of the Act is that it does not give the defendant any bargaining power in settlement negotiations. If the defendant wants to make a settlement offer, it must offer enough money to pass the settlement review by the court. However, even if the court accepts the settlement, any consumer can still opt out of the settlement to wait for the next model proceedings claim or to raise an individual claim attempting to obtain a better offer. This may well initiate an upward spiral forcing the defendant consumer-facing company to offer an ever-increasing amount of money to the plaintiffs.

Because of this deficiency and the assumption that the questions raised in model proceedings are deemed to be of fundamental significance, there is an increased probability that judgments under the Act will be appealed on points of law to the Federal Supreme Court (*BGH*), which will lead to long and arduous proceedings.

## TWO KEY TAKEAWAYS

1. Under the new German class action-style legislation for consumer claims, we expect that qualified institutions may team up with law firms specialized in class action claims and litigation funding companies to initiate model proceedings against consumer-facing companies.
2. Proceedings initiated under the Act will be of extended duration, while settlements may well be structurally difficult.



Christian B. Fulda  
Munich



Jakob Hübert  
Frankfurt



Rebekah B. Kcehowski  
Pittsburgh



Anna Masser  
Frankfurt

[All Contacts >>>](#)

**YOU MIGHT BE INTERESTED IN:** [Go To All Recommendations >>](#)



[EU Class Actions in the Making](#)



[Australian Federal Court Adopts Novel Approach in Dealing with Competing Class Actions](#)



[Renewed Interest in French Class Actions?](#)



[Be Sued or Be Fined: European Commission Proposes Consumer Protections Expanding Class Actions and Enforcement Powers](#)

SUBSCRIBE

SUBSCRIBE TO RSS



Jones Day is a global law firm with more than 2,500 lawyers on five continents. We are One Firm Worldwide<sup>SM</sup>.

**Disclaimer:** Jones Day's publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at [www.jonesday.com](http://www.jonesday.com). The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.

© 2018 Jones Day. All rights reserved. 51 Louisiana Avenue, N.W., Washington D.C. 20001-2113