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- Musterfeststellungsklage -

A German Class Action or Merely a Political Measure to End the Carbon Emission Scandal?

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A) Introduction

The Volkswagen (VW) carbon emission scandal of 2015 led to economic, political and legal consequences which were unseen in the history of German legislation.[1] On the 1st of November 2018 the so called "*Musterfeststellungsklage*" ("***MFK***") was implemented in section 606 et. seqq. of the German civil code of procedure ("***ZPO***"). It is without doubt that the implementation has been a direct consequence of the emission scandal itself[2] and marks a huge step towards a broader system of mass protection of consumers in Germany by means of a special group litigation process.[3]

As to the background of the scandal, both in the US and the EU government authorities determine vehicle emission standards. Based on specific test procedures, new vehicles models must obtain "type approval" from government authorities before they enter the market.[4]

In September 2015, the US Environmental Protection Agency (EPA) issued a notice of violation of the Clean Air Act to the Volkswagen Group and announced that, since 2009, Volkswagen had been using illegal software in several of its diesel models (so called "*defeat device*"), which was able to distinguish between test situations and road conditions to ensure the needed standards were matched in the former. This then led to a public confirmation by Volkswagen having manipulated the engine software of about 11 million diesel cars globally and approximately 584,000 in the US to circumvent emission standards.[5]

As of 2017 Volkswagen paid about 25 billion US-Dollars in connection to the VW scandal in the United States and almost any respective costs of management of rights regarding the scandal were dealt with by the end of 2017.[6] In Germany on the other hand, where Volkswagen had manipulated software of about 2,2 million cars,[7] the management of rights is still ongoing and it cannot yet be foreseen when the legal consequences of the scandal will come to an end.[8]

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[1] *Thönissen, Stefan*, Die juristische Aufarbeitung des VW-Dieselskandals, ZZP 2020, p. 69 et. seqq.
[2] *Adolphsen*, Jens, Zivilprozessrecht, 6. Edition 2019, p. 95 Point 19; Gesa Lutz, in: BeckOK ZPO, 39. Edition 2020, § 606 Point 1.
[3] *Rohwetter* in Die Zeit, No.45/2918, *Ein Urteil für alle*, https://www.zeit.de/2018/45/musterfeststellungsklage-verbraucherschutz-gesetz-klage-konzerne, last retrieved 24th of April 2021.
[4] *Eger, Thomas* and *Schaefer, Hans-Bernd*, Reflections on the Volkswagen Emissions Scandal (25 January 2018). Available at SSRN: https://ssrn.com/abstract=3109538 or http://dx.doi.org/10.2139/ssrn.3109538, last retrieved 24th of April 2021.
[5] See the homepage of the United States Environmental Protection Agency https://www.epa.gov/enforcement/volkswagen-clean-air-act-civil-settlement, last retrieved 24th of April 2024.
[6] Beck-aktuell, announcement. 24 April 2017, becklink 2006434; beck-aktuell, announcement, becklink 2008544.
[7] Beck-aktuell, announcement 30 August 2018, becklink 2010808.
[8] *Thönissen*, Die juristische Aufarbeitung des VW-Dieselskandals, ZZP 2020, p. 69, 72.

Most of the claims against VW in Germany were to become time-barred by the end of 2018, so political pressure rose and brought the German legislator to the implementation of the MFK as a declaratory action suspending the statutory limitation regarding the claims. On the day of the implementation the consumer advice centre (Verbraucherzentrale Bundesverband) filed the first MFK at all before the higher regional court of Braunschweig against VW. It was then withdrawn on the 30th of April 2020 following an out-of-court framework agreement between consumer advice centre and VW. More than 240,000 consumers have received a compensation payment totalling more than 750 million Euros from VW due to the agreement.[9]

The MFK has repeatedly been presented in the media as a German way of class action, or at least as a great step towards a similar system, deviating from an approach of rather suing individually or bringing even no legal action at all because the cost analysis does not allow for a meaningful prosecution of rights. [10] Considering that the MFK is a declaratory action in its nature, it therefore does not constitute an equivalent to an American class action,[11] as the claimants, for example, must claim their damages individually after the court has ruled on the declaratory issues brought forward in the MFK. Furthermore, it does not provide for legal measures such as "*discovery*" or "*punitive damages*" like a class action suit in the US, which marks additional differences.

It although seems to be seen as a great step towards a different approach of dealing with high numbers of claims and consumers as claimants, due to an entirely different scale of numbers in production of goods and of any legal issues arising thereof. The essential question seems to be how the German legislator addresses the fact of ever larger scales of business and all the legal implications these might have, especially in terms of efficient protection of rights inter alia in the field of consumer protection.

Where in the US the VW carbon emission scandal, due to the massive cooperation between public authorities and plaintiffs was rather seen as public law enforcement than as a classic example for mass harm litigation and private law enforcement such as class actions,[12] it should although not be underestimated what effect class actions can have on defendants and their

[9] For an overview of the process regarding the MFK against VW see the consumer advice centre's homepage: https://www.musterfeststellungsklagen.de/vw, last retrieved 24th of April 2021.
[10] Deutsche Welle, German class action lawsuit on carbon emissions begins, 30 September 2019, https://www.dw.com/en/german-class-action-lawsuit-over-vw-emissions-begins/a-50596406, last retrieved 24th of April 2021.
[11] *Adolphse*n, Zivilprozessrecht, 6. edition 2019, p. 95 point 19.
[12] See inter alia Cruden et. al., 36 Va. Envtl. L.J. 118, 181 ss. (2018).

expectations. These ideas – at least to a certain extent – appear to have been influential in the MFK's law making process.

Therefore, the question of comparability to the American idea of class actions arises and shall be scrutinized in greater depth. The core legal ideas of American class actions shall be detected (B)) and compared to the system of the MFK (C)). Accordingly, it shall be examined how the American approach influenced the new German legal action and whether the German civil law system is shifting towards an American approach of collective prosecution of rights (D)).

Would it be fair to say that the MFK was merely implemented to address the political pressure during the high times of the VW scandal and does not create meaningful outcomes at all? Or, to the contrary, are ever growing businesses and therefore ever larger scales in civil litigation demanding for a German class action and the MFK marks a great initial step towards this idea?

Finally, it shall be detected whether an American approach of class actions is stipulated on a European level (E)) looking at the recent Directive (EU) 2020/1828, which is seen as a consequence of the VW scandal as well.[13]

[13] See for example: Schläfke/Lühmann, PHi 2020 p. 164 et. seqq.

B) Class Action – Main Legal Framework

Generally speaking, class action lawsuits create an option for defrauded consumers to file a lawsuit collectively while only having suffered smaller damages individually.[14]

At this, Rule 23 of the Federal Rules of Civil Procedure ("***FRCP***") sets the requirements of bringing a class action in federal courts. As each of the 50 states in the US has its own separate rules on when class actions are permissible, the federal rules shall, for the purpose of this thesis, be used as a general example on the basic legal requirements of class action lawsuits and the way they function.

I) Roots of Modern Class Actions in the US

Before addressing the prerequisites for a class action lawsuit or its functioning in general, it seems advantageous to first have a look at the roots of modern class actions in the US. This should make it understandable why class actions are an integral and successful part of American collective redress.

In common law class actions have been accepted for centuries and their legal origins have been traced back to Henry III's writings in 1125.[15] Modern class actions in the US although, are based upon the revisions introduced in 1966 to Rule 23 FRCP.[16] In the United States, the social movements of the 1960s, originated from a mistrust of government and its ability to pursue justice, let to a great number of plaintiffs' lawyers keen to bring class action lawsuits and to law schools graduating numerous lawyers that were public-spirited.[17]

In the 1960s, the implementation and adoption of strict product liability reflected this trend and constituted an important element in the dissemination of class actions.[18] This then resulted in a wide acceptance of class action as an effective tool in collective redress in the hands of the people and was seen as a great step in the development of the US legal system.[19]

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[14] Waller, et. al., Consumer Protection in the United States, P. 26.
[15] Yeazell, The Past and Future of Defendant and Settlement Classes in Collective Litigation, 39 Ariz. L. Rev. 687, 690 (1997)
[16] Fiebig, Andre, The Reality of U.S. Class Actions, GRUR Int. 2016, p. 313, 314
[17] Marcus, The History of the Modern Class Action, Part I: Sturm und Drang, 1953-1980, 90 Wash. U. L. Rev. 587 (2013); Available at: https://openscholarship.wustl.edu/law_lawreview/vol90/iss3/2; last retrieved 26th of January 2021.
[18] Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (1963)
[19] Being called „a very forward step": Class Action Jurisdiction Act, Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, United States Senate, 91st Cong., 1st Sess., at 25 (1969).

There still is a common basic mistrust among the American society that public authorities are unable to sufficiently identify und punish illegal behaviour, which leads to a widespread recognition of class actions as a tool against these deficiencies.[20] To put it in the words of the US Supreme Court, the class action therefore was "*an evolutionary response to the existence of injuries unremedied by the regulatory action of government*".[21]

Bruns[22], for example, attributes the reliance on class actions as a means of private enforcement largely to the fact that the founding fathers of the United States could not rely on an efficient parliament, a functioning administration and a professional judiciary. Therefore, they would have had to rely primarily on the citizens' own initiative.

II) Purpose / Goals of a Class Action

One of the salient goals of class action lawsuits in the US, opposite to a common belief in Europe, is not compensation but deterrence,[23] as it is considered to be an effective remedy to punish illegal conduct discouraging people from behaving in this manner, as explained above.

Besides compensation, class actions are considered to fulfil the public interest of efficiency for both the courts and the parties.[24] They comprise numerous individual claims with identical issues of law and fact and may therefore be settled in one court, which avoids multiplicity of actions[25] and facilitates the litigation[26]. Hence, they avoid inconsistent results caused by numerous individual rulings.[27]

Sometimes class actions even make legal action possible in the first place. To give an example of this in the words of Judge Posner: "*The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.*"[28]

In addition to this, the mechanism of class actions even sometimes makes the legal action possible in the first place from a lawyer's perspective as well. Given the general rule in the US

[20] Fiebig, Andre, The Reality of U.S. Class Actions, GRUR Int. 2016, p. 313, 314
[21] Deposit Guar. Nat'l. Bank v. Roper, 445 U.S. 326, 339 (1980)
[22] Bruns, Alexander, Instrumentalisierung des Zivilprozesses durch Gruppenklagen?, NJW 2018, p. 2753 et. seqq.
[23] Fiebig, Andre, The Reality of U.S. Class Actions, GRUR Int. 2016, p. 313, 314.
[24] Califano v. Yamasaki, 442 U.S. 682, 701 (1979); Cummings v. Connell, 402 F.3d 936, 944 (9th Cir. 2005); Atkins v. Morgan Stanley, 307 F.R.D. 119 (S.D.N.Y 2015); U.S. Parole Commission v. Geraghty, 445 U.S. 388, 100 S. Ct. 1202, 63 L. Ed. 2d 479, 29 Fed. R. Serv. 2d 20 (1980);
[25] United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977); Webb v. Carter's Inc., 272 F.R.D. 489 (C.D. Cal. 2011)
[26] Devlin v. Scardelletti, 536 U.S. 1, 10 (2002); Day v. Persels & Associates, 729 F.3d 1309, 1319 (11th Cir. 2013).
[27] .S. Parole Commission v. Geraghty, 445 U.S. 388 (1980); Cameron-Grant v. Maxim Healthcare Services, Inc., 347 F.3d 1240 (11th Cir. 2003).
[28] Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004)

that each party must pay its legal fees, a lawyer most likely – not even on a contingency fee basis – would not accept a case for a relatively small amount in damages, because the investment made by the law firm would fall short of the claim for damages itself.[29] Thus, a class action lawsuit makes it possible for the lawyer to step in.

III)Outcome of Class Actions

Class actions can basically end in two different ways. They either will be settled by the court (verdict) or ended by the parties.

According to Rule 23(e) FRCP class actions may only be settled, voluntarily dismissed, or compromised having the court's approval. Actually, most of the class actions in the US end up in a settlement approved by the court.[30] Regarding this settlement Rule 23(e) FRCP sets out the mechanism of how a settlement can be achieved.

In case of a settlement, first, the court is notified with sufficient information about the parties' proposal. It then decides whether to communicate this proposal to the class. The court then has the discretion to confirm the proposal. In doing so, it takes into account whether the proposal is fair, reasonable and adequate. Rule 23(e) FRCP constitutes further sub-issues which are to be considered by the court. The provisions of Rule 23(e)(2) FRCP already show that the court here has a wide margin of appreciation. From the question of whether the proposal was generally negotiated at arm's length to the question of the terms of any proposed award of attorney's fees, the court will assess the proposal comprehensively.

In addition, a further exclusion of members is then possible and the class-members are free to object to the proposal.

IV)Prerequisites for a Class Action

To achieve the goals of class action mentioned above, there is a distinguished system on how a class action works. First of all, according to Rule 23(a) FRCP there are four prerequisites which need to be fulfilled to proceed as a class action:

(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;

[29] Fiebig, Andre, The Reality of U.S. Class Actions, GRUR Int. 2016, p. 315.
[30] Alexander Bruns, Instrumentalisierung des Zivilprozesses durch Gruppenklagen?, NJW 2018, p. 2754.

(3) the claims or defences of the representative parties are typical of the claims or defences of the class; and (4) the representative parties will fairly and adequately protect the interest of the class.

V) Further Process

In addition to the numerosity, commonality, typicality and adequacy of representation of Rule 23(a) FRCP, according to Rule 23(b) FRCP the district court then must make at least one of the following findings: (1) requiring separate actions by or against the class members would create the risk of inconsistent rulings, or that a ruling with respect to individual class members may be dispositive of other class member claims thereby substantially impair[ing] or imped[ing] their ability to protect their interests; (2) the party against whom the class seeks relief has acted or refused to act on grounds generally applicable to the class so that injunctive or declaratory relief as to the entire class would be appropriate; or (3) common questions of law or fact common predominate over class member specific questions, and that proceeding by way of class action would be superior to other available methods for resolving the dispute.

According to Rule 23(c) FRCP the court will then, at an early practicable time, determine by order whether to certify the action as class action. If so, the order then must define the class and the class claims, issues, or defences, and must appoint a class counsel under Rule 23(g) FRCP.

Upon this the court will direct the appropriate notice to the class pursuant to Rule 23(c)(2) FRCP which may or in some cases must state for example (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defences; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3) FRCP.

VI)Class Counsel

Looking at the general process of a class action, once initiated, an important factor for its success clearly seems to be the appointment of a so called “class counsel”; see Rule 23(g) FRCP. Hence, it again seems – for the purpose of this thesis – advantageous to have a closer look on its position and its work.

The class counsel will be appointed by the court taking into consideration inter alia it's experience in handling class actions, other complex litigation, and the type of claims asserted in the action. Furthermore, the counsel's knowledge of the applicable law and the resources that counsel will commit representing the class will be taking into account. The counsel will prosecute the class action on behalf of the class whilst representing the lead plaintiff.

Most often these class counsels will be highly recognized law firms bringing in a great amount of manpower which will be devoted to the case. This significantly contributes to the effectiveness of the lawsuit and regularly speeds up its process, even if the proceedings are voluminous. In 1966 already the observation had been made that the major New York law firms had more resources defending businesses than the U.S. Department of Justice going after anti-competitive conduct.[31] The effectiveness of this process is also ensured by the extensive discovery possibilities under Rule 26-37 FRCP. In combination with the resources of the active major law firms, even large proceedings can be conducted quickly.

In connection with this very strongly interest-driven pursuit of rights by the acting law firms, however, problems can be found as well. For example, some class members may receive only small amounts or none at all, because the class counsel's interest in a profitable settlement were higher than those in a profitable result for the entire class.[32] The attorneys may receive a high numeration whilst leaving the class members with so called "coupon settlements", which refers to coupons, class members might get for future services or products with the defendant company.[33] These coupons may appear to be vanishingly small compared to what an individual plaintiff would have received had he pursued his rights individually.

Hence, to ensure the alignment of the counsel's interests with the class members' interest, the Class Action Fairness Act of 2005 addresses these concerns in various ways. If, for example, the settlement provides for coupons the attorney's fee of the class counsel must be put in proportion to the value of the coupons redeemed for the class members, see 28 U.S.C.A. 1712(a).

[31] Consumer rights advocate Ralph Nader in the hearings before the Subcommittee on improvements in judicial machinery of the Committee on the judiciary, United States Senate, 91st Cong., 1st Sess., at 31 (1969).
[32] See as an overview: Do Class Actions Benefit All Class Members? An Empirical Analysis of Class Actions, December 11, 2013, U.S. Chamber Institute for Legal Reform by Mayer Brown LLP.
[33] For further details on these coupon settlements, see: Steven B Hantler, Robert E. Northon (Fall 2005), Coupon Settlements: The Emperor's Clothes of Class Actions, Georgetown Journal of Legal Ethics. CBS Interactive. Last retrieved, April 20, 2021.

But not only the legislator has regulated the acting field of class counsels. Courts have imposed a fiduciary duty on the class counsel which includes interests of absent class members as well as the ones of the named plaintiff.[34] The idea of this fiduciary duty is to ensure the avoidance of conflict of interest between the class counsel and the class itself. According to the Ninth Circuit its importance derives above all from the fact that absent class members are bound by the court's judgments as well. Conflict of interest will often not only result in a denial of certification, but also in the class counsel not being entitled to any fees.

If, for example, the plaintiff's law firm represents one of the defendants in the case in an entirely unrelated matter, most often the ethics rules in the U.S. will make it impossible to grant the law firm any compensation in the class action.[35]

Since the decision as to whether class counsel will receive remuneration and in what amount is usually only made after several years of litigation, plaintiff's counsel will always take conflicts of interest into account and try to avoid them as far as possible.[36] Otherwise years of work and substantial amount of money would be at risk.

Finally, regarding the class counsel, the system of contingency fees is not alien to the system of class actions, so that risks for the plaintiff are greatly reduced.[37] However, this system is often accompanied by the lawyers' demand for incentive bonuses, if, for example, a settlement agreement is reached.[38] This, obviously leads to another conflict of interest endangering a beneficial outcome for the class. However, this is also reflected in the courts' consideration of the fiduciary duty,[39] so that here, too, a balancing of interests takes place once again. The courts may or may not grant an incentive payment depending on the compliance with the fiduciary duty.[40]

[34] Radcliff v. Experian Information Solutions Inc., 715 F.3d 1157, 1167 (9th Cir. 2013); Rodriguez v. Disner, 688 F.3d 645, 655 (9th Cir. 2012); Rodriguez v. W. Pub. Corp., 563 F.3d 948, 968 (9th Cir. 2009); Kayes v. Pac. Lumber Co.,51 F.3d 1449, 1465 (9th Cir. 1995).
[35] For example: Rodriguez v. Disner, 688 F.3d 645, 658 (9th Cir. 2012).
[36] Fiebig, Andre, The Reality of U.S. Class Actions, GRUR Int. 2016, p. 324.
[37] For the purpose of this thesis, see for conflict of interests and contingency fees in this regard: Cashing by the Hour: Why Large Law Firms Prefer Hourly Fees Over Contingency Fees; Nuno Garoupa; Fernando Gomez-Pomar, July 2002, available on SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=394305 (last retrieved 24th of April 2021).
[38] Regarding the idea of how a system of incentive bonuses works, see: Rodriguez v. Disner, 688 F.3d 645 (9th Cir. 2012).
[39] As an example of the court's awareness: In re Carbon Dioxide Antitrust Litig., 1996 WL 523534 (M.D. Fla. 1996).
[40] Fiebig, Andre, The Reality of U.S. Class Actions, GRUR Int. 2016, p. 324.

These points impressively demonstrate the importance of class counsel for the success of a class action and thus for the effectiveness of this system. The possibility of litigation by a law firm as a “business enterprise”, and the resulting agility are a significant factor in the large number of class actions in the U.S.

According to what has been said before, this also reflects the control mechanisms so longed for by the population, which in their view are not sufficiently provided by the state. Keeping this in mind, it seems now is the time to take a look at the MFK and their approach to addressing this.

C) Musterfeststellungsklage

I) The History and the Development of German Collective Redress

Before going into the legal framework of the MFK, it seems appropriate to first take a look at the history of collective redress in Germany. The currently existing system, its advantages and disadvantages as well as its forms can generally only be understood if the historical development is at least outlined.

The discussion about class actions, group actions and representative actions and the need for instruments of collective legal protection in German civil procedure is by no means new.[41] However, the history of collective redress in Germany is a slow-moving one.

The 1950s saw the first legislative efforts in Germany in the sense of collective legal protection. This essentially always concerned disputes under competition law, which were not aimed at collective legal protection of consumers in the first place.[42] A lot of efforts to implement instruments of collective redress were rejected until the turn of the millennium with the argument that collective redress was simply alien to German civil law.[43]

Hence, until the beginning of the 2000s, there were essentially a collective action under unfair competition law and a collective action under general terms and conditions law. Both have been in existence since the 1970s and for a long time they represented the only part of collective legal protection worth mentioning.

In 2007, the regulation on legal services and legal advice was significantly amended.[44] From then on, there were extended possibilities for consumer associations to conduct litigation, which marked a major step in the German system towards a broader collective legal protection. However, these are no possibilities in which the consumer protection associations can act on their own, but rather the assignment of the claim is always necessary.[45]

[41] A comprehensive overview: Meller-Hannich, Report A 72, DJT 2018, p. 60 et. seqq.
[42] See the law on restraints of competition, July 27, 1957, BGBl. I Nr. 41, which entered into force on August 9, 1957.
[43] See for example the discussion on the proposal by V. Bar on an implementation of model proceedings ex officio following the administrative procedural model. Ständige Deputation des Deutschen Juristentages Band I, 1998, S. A 1.
[44] See the amendment on section 79 ZPO in 2007.
[45] See for example Art. 1 section 3 no. 8 RBerG.

The introduction and amendment of the act on model proceedings in disputes under capital market law (KapMuG) and the extension of the injunctive relief under section 2 of the act on injunctive relief mark the most recent steps in the German development of collective redress until the implementation of the MFK in 2018.[46] For the period between 2007 and 2018, it seemed that the legislator was mainly waiting for impulses from the European Union.[47]

Irrespective of the law introduced or amended in each case, it can be stated that the majority of proceedings in collective redress are not aimed at performance, i.e. at already being awarded a sum in damages in this process. The same applies generally to the MFK.

Interestingly, on the 22nd of June 2020 (effective as of the 25th of November 2020) the European Parliament adopted a directive establishing a European representative action (Directive (EU) 2020/1828). The corresponding draft on representative actions to protect the collective interests of consumers and repeal Directive 2009/22/EC had already been presented by the European Commission more than two years before as part of its New Deal for Consumers. At the time, Germany abstained from the vote in the European Council.

The Directive (EU) 2020/1828 grants the Member States a degree of freedom in the design of the new representative actions, which makes it possible to take national legal traditions into account.[48] The Directive thus provides the Member States with a binding framework for representative actions and does not prescribe in detail how these are to be structured throughout Europe. (see already Art. 1 of the Directive (subject matter and purpose)). This means that Germany is generally also required to introduce a representative action for performance within the next two years, i.e. by the end of 2022 at the latest. This will have to go further than the MFK, which was only introduced in November 2018. It is likely to deepen the discussion on collective redress in Germany as a whole over the next two years.[49]

It is therefore imperative to shed more light on the foundations of the MFK in order to understand the law on representative action for performance, demanded by Directive (EU) 2020/1828, more precisely, as it will probably build on the MFK as a further building block of collective redress, or at any rate integrate itself into the structure of collective redress. After this new action comes into force, it will have to be reassessed to what extent Germany is moving

[46] Meller-Hannich, Report A 72, DJT 2018, A 12.
[47] Meller-Hannich, Report A 72, DJT 2018, A 12.
[48] See already the recitals of the Directive (EU) 2020/1828.
[49] Schläfke/Lühmann, PHi 2020 p. 164 et. seqq.

closer to the American system of class action, also due to the influences of the European Union. To date, there is still no draft of the legislator.

Before addressing the MFK's main legal framework and its concept although, it should be highlighted that there has been a great German distaste for the American approach of class actions ever since, which in general applies to continental Europe.[50]

II) German Hesitation Regarding the American Model of Class Actions

As described under C)I), Germany was not much of a country being in favour of collective redress throughout its history. This raises the question of what motivations prevented Germany in particular from moving towards a system of collective redress based on the American model. Restraint is found on several levels.[51]

For example, in 2011 the German Bundestag, as the legislative body, was of the opinion that class actions are incompatible with European legal traditions for many reasons. It therefore stated that it rejects a litigation industry ("*Klageindustrie*") and announced to be resolutely opposed to all initiatives and instruments that promote such a litigation culture.[52]

This anti class action approach is shared by the German industry on a broad level as well. The German Chamber of Industry and Commerce (Deutsche Industrie- und Handelskammer), for example, stressed in a press release on the 10th of June 2013 that collective redress bears risks of abuse,[53] and more generally, a predominantly negative attitude towards collective redress is found within the German industry as well.[54]

The overwhelming reason for the rejection is that many see the danger that specialised law firms with possible very high claims for damages could force affected companies to quickly reach an out-of-court solution, without the actual legal situation being clear at all, at least from

[50] See at length: Fiebig, Andre, The Reality of U.S. Class Actions, GRUR Int. 2016, p. 313, 314.
[51] See for example the chief legal adviser's statement of DIHK, in the DIHK's press release of June 10, 2013.
[52] Beschlussempfehlung und Bericht des Rechtsausschusses, BT-Drucks. 17/5956 (25.5.2011) p. 7.
[53] Press release of the DIHK of June 10, 2013.
[54] As another example see: Verband der Chemischen Industrie, Sammelklage: Keine amerikanischen Verhältnisse (2018), see the press release: https://www.vci.de/presse/pressemitteilungen/sammelklage-keine-amerikanischen-verhaeltnisse-eu-plaene-zur-kollektiven-rechtsdurchsetzung-gehen-zu-weit.jsp, last retrieved 24th of April 2021.

a legal perspective. In the eyes of many, this - as indicated above - would lead to a so-called litigation industry, which should be prevented.[55]

The urge of the companies to agree to a settlement that might not be justified on the merits at an early stage is fuelled by expensive discovery requests, which the companies would have to bear in any case in the event of losing.[56]

Another problem that many legal scholars see is the difference in the obligation to bear the costs. While contingency fees are frequently found in the USA, especially in class actions, they are alien to German law and are not even permissible in principle (see section 2 et. seqq. Rechtsanwaltsvergütungsgesetz -RVG). Especially in class actions, however, the lawyer acting on the basis of a contingency fee would often have a great interest in reaching a settlement as early as possible in order to make the highest possible profit, which could lead to great principal-agent problems.[57] This is seen as another argument against an American approach of collective legal redress by means of a class action.

III)Interim Conclusion

If one looks at the dissenting voices and their arguments, one notices above all that they come predominantly from business-related associations or from people close to business. The generally negative attitude seems to be aimed primarily at keeping the large German companies away from the sometimes “painful” lawsuits of injured consumers.

Looking at the historical development in Germany, it is particularly noticeable that the attitude still prevails in Germany today that the state can sufficiently protect its citizens through appropriate laws. If these are not complied with, the understanding seems to be to sanction this through public law rather than to give private citizens their own "sharp sword" to effectively enforce their rights and deter companies.

In general, the idea of deterrence through private lawsuits, as described in the US system (see B)II)), seems alien to German civil law and also to German attitudes. Rather, faith in the German state and its ability to punish violations turns out to be great.

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[55] Möschel, Wernhard, Erweiterter Privatrechtsschutz im Kartellrecht?, WuW 2006, p. 115 et seqq. Also: Heinemann, Die privatrechtliche Durchsetzung des Kartellrechts – Empfehlungen für das schweizer Recht auf rechtsvergleichender Grundlage. Studie im Auftrag des Staatssekretariats für Wirtschaft, 2009, p. 15.
[56] Beschlussempfehlung und Bericht des Rechtsausschusses, BT-Drucks. 17/5956 (25.5.2011) p. 7.
[57] Fiedler, Class Actions zur Durchsetzung des europäischen Kartellrechts, 2010, p. 72-73.

This is a major difference from the American system and a great factor why development has stagnated for so many years and the mindset even today seems far removed from the American view.

Keeping this in mind, it is now time to take a look at the functioning of the MFK and, above all, to shed light on the extent to which it reflects or has even changed the attitude in Germany towards collective redress.

IV)Main Legal Framework in the Light of Class Actions

According to section 606 para. 1 sentence 1 ZPO the Musterfeststellungsklage allows "qualified entities" ("Qualifizierte Einrichtungen") to seek a declaration of the existence or non-existence of factual and legal preconditions for the existence or non-existence of claims or legal relationships ("Feststellungsziele" – "declaratory objectives") between **consumers** and an **entrepreneur**.

The MFK as a declaratory action in nature (section 606 para 1 sentence 1 ZPO) will not assign the plaintiffs or the "class"/"group" any specific amount of compensation but will determine whether inter alia these claims exist on the merits and will suspend the statute of limitations for its duration even if the action is not admissible but the claims have been registered validly.[58]

However, it is possible to reach a concrete claim for performance by way of a settlement within the meaning of section 611 ZPO. The legislator even assumes that in most cases the registered consumer and the defendant will reach an out-of-court settlement, so that legal proceedings are facilitated by the MFK.[59] The legal institution of settlement is familiar to German civil proceedings ever since and every dispute is regularly preceded by a conciliation hearing, which can, for example, bring about a settlement, see section 278 ZPO.
As a rule, however, in this case the court will only declare such a settlement and will have little influence on it itself. It remains to be an agreement reached by the parties, see section 278 para. 6 ZPO

[58] Very controversial regarding the action being generally inadmissible. See: Menges, in: Münchener Kommentar zur ZPO, 6 edition 2020, § 606 notes 50-55; highlighting constitutional conflicts with this. As well as Grzeszick, Bernd, "Die rückwirkende Verjährungshemmung bei der Musterfeststellungsklage aus verfassungsrechtlicher Sicht", NJW 2019, p. 3269-3274.
[59] See BT-Drs 19/2439 p. 17.

In the case of the MFK, however, procedural safeguards are required in order to ensure effective legal protection of the registered consumers.[60] The settlement must therefore be approved by the court according to section 606 ZPO, whereby the determination of the amount of the claim is left to the parties. However, pursuant to section 606 para. 3 ZPO, the court has to examine whether there is an appropriate settlement, taking into account all the facts presented and also the questions of law.

According to the coalition agreement between CDU, CSU and SPD of February 7, 2018 the MFK was to be implemented, to address the pressing issue of claims in connection with the VW carbon emission scandal becoming time-barred. It stated: "*By introducing a model declaratory action, we will improve legal enforcement for consumers. ... We will prevent impending statutes of limitations at the end of 2018 and therefore bring the law into force (at the latest) on November 1, 2018.*"[61] (Translation by the author of the thesis)

This idea then continues to be found in the law-making process of the MFK or rather in its explanatory memoranda.

1) Purpose of the Implementing law

The bill's explanatory memorandum states the improvement of consumer redress as the overriding goal of the MFK's implementation, besides the issues of claims being time-barred.[62]

In the interest of effectiveness, a powerful instrument of civil procedure was sought to be created.[63] Equal to the purpose of facilitating the enforcement of rights for the individual consumer, the preservation of a functioning and secure legal system in the interest of the general public is cited as a legislative objective. It is also intended to reduce competitive advantages from infringements of rights,[64] such as lowering production costs by knowingly not fulfilling the legal requirements of the product but only to an extend at which the single customer would not initiate a lawsuit.

[60] Seiler, in: Thomas/Putzo, 41th edition 2020, § 611, p. 1013.
[61] Coalition agreement between the CDU, CSU and SPD of February 7, 2018, p. 124. https://www.cdu.de/system/tdf/media/dokumente/koalitionsvertrag_2018.pdf?file=1; last retrieved 26 of January 2021.
[62] BT-Drs. 19/2439, p. 1.
[63] BT-Drs. 19/2439, 12, 15.
[64] BT-Drs. 19/2439, 12.

It will be assessed later on whether these goals have been reached successfully and whether the public's perception of the MFK as a class action and therefore as an effective tool "to fight the big guys" is accurate after all (see C)V) and D)).

2) Mechanism

The option for qualified entities to bring an MFK in front of the respective court is, contrary to a first (unpublished) draft of 2016, only opened for claims or legal relationships between a consumer and an entrepreneur[65]. Thus, entrepreneurs affected by the same mass tort event must in principle sue individually. Pursuant to section 148 para. 2 ZPO they although may request that their proceedings be suspended until a pending model case has been settled.

Thus, regarding the parties the MFK has a one-sided, customer-protection-focused mode of operation. In class action lawsuits on the other hand counterclaims are not per se excluded and might be brought up in front of the same court as a way of defence.[66]

The focus of the law on this point seems to be more on strengthening the rights of consumers in a first stage than on the idea of creating an effective tool of collective legal protection which considers effectiveness as its basic maxim.

3) Prerequisites for the MFK

Comparable to Rule 23 FRCP, there are certain prerequisites which need to be fulfilled to obtain admissibility before the respective court. As there are four prerequisites regarding a class action, it is only three prerequisites for the MFK:
(i) it is brought by a qualified entity within the meaning of para. 1 sentence 2;
(ii) it is shown credibly that the claims or legal relationships of at least ten consumers depend on the objectives of the declaratory judgement; and (iii) two months after the MFK's public announcement, at least 50 consumers have validly filed their claims or legal relationships for entry in the register for actions.

[65] Critical on the exclusion of small and medium-sized enterprises in particular against the background of the VW emissions scandal see Vollkommer, Gregor, Musterprozess statt "Musterfeststellungsklage", MDR 2018 p 497 (498) as well as Halfmeier, Axel, Musterfeststellungsklage: Nicht gut, aber besser als nichts, ZRP 2017, p. 201 (202).
[66] Fiebig, Andre, The Reality of U.S. Class Actions, GRUR Int. 2016, p. 316.

a) Class Counsel vs. Entities

The first prerequisite of the MFK already limits the access to the lawsuit to the qualified entities referring to Art. 3 para. 1 sentence 1 no. 1 of the German act on injunctive relief (Unterlassungsklagengesetz) whilst adding five numbers of further cumulative and obligatory requirements to allow for the respective entity to bring an MFK.

The entities are inter alia prevented from bringing the MFK for the purpose of making a profit (section 606 para. 1 sentence 2 no. 4 ZPO) and are not allowed to obtain more than 5 percent of their financial resources through contributions from companies (section 606 para. 1 sentence 2 no. 5 ZPO). Furthermore, the institutions, in the performance of their statutory task, need to protect consumer interests largely through non-commercial educational or advisory activities (section 606 para. 1 sentence 2 no. 3 ZPO).

The consumer on the other hand who signed up for the MFK and validly waived his right to opt-out of the declaratory action, will become a mere observer in the proceedings before court and will not have any influence on how the case will be pleaded in court.[67] He will not be able to for example extend any motions, offer evidence or present facts on his own behalf. This is unique for the MFK because it marks a great difference to the model proceedings under the capital investor model proceedings act (Kapitalanleger-Musterverfahrensgesetz),[68] which is one of the few ways of collective redress in Germany. Hence, it shows a certain connection to the functioning of a class action at this point.

Looking at Rule 23(c) (3) FRCP the members of a class action who opted for the class action lawsuit will also become “mere observers” in the lawsuit but they are by far not as limited as their German fellows regarding the question of who might represent the class.

According to Rule 23(g) FRCP appointing the class counsel the court, unless a statute provides otherwise, must consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel’s experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel’s knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.

Thus, class counsel in the class action must also have a high level of expertise in the relevant field of law and be able to provide the appropriate resources for the litigation. The field,

[67] Menges, in: Münchener Kommentar zur ZPO, 6 edition 2020, § 606 Rn. 21.
[68] Menges, in: Münchener Kommentar zur ZPO, 6 edition 2020, § 606 Rn. 21.

however, is far less limited. There is a discretion and thus a possibility of selection by the court, whereas in the context of the MFK an admission of the action is mandatory if the requirements are met.[69]

To reiterate, qualified entities are not allowed to bring the MFK for profit under section 606 para.1 and must, in the fulfilment of their statutory tasks, protect consumer interests largely through non-commercial educational or advisory activities.

Furthermore, according to section 606 para. 1 sentence 4 ZPO, it is irrefutably presumed that consumer centres and other consumer associations that are predominantly funded with public funds fulfil the requirements under section 606 para. 1 sentence 2 ZPO.

b) Interim Conclusion

Looking at the qualified entities, it becomes clear that the German history of collective legal protection continues in the MFK. A closer look at the requirements of the qualified entities, especially at section 606 (1) sentence 2 no. 3 ZPO, shows that once again a "public law" approach has been chosen. According to this section and although the institutions are not part of the public sector per se, they must, in the fulfilment of their statutory tasks, protect consumer interests largely through non-commercial informative or advisory activities.

In contrast to the American model, a law firm with a lot of resources cannot be commissioned to conduct the lawsuit. Furthermore, according to section 606, paragraph 1, sentence 2, no. 4 ZPO, the qualified institution may not bring the MFK for the purpose of making a profit and, according to no. 5, may not obtain more than 5 per cent of its financial resources through donations from companies.

In the opinion of the author of this thesis, the focus is clearly on facilitating civil proceedings for consumers, but not on creating an "equality of arms" between the parties and enabling consumers to use highly-resourced and thus usually expensive law firms for their legal action.

This once again demonstrates the German belief in effective law enforcement through effective sanctioning by the public authorities.

In the opinion of the author of this thesis, however, this regulation is to a certain extent contradictory to its stated objective. If the strengthening of consumer rights is the declared goal

[69] For the MFK see section 606 para.1 ZPO.

and the introduction of the MFK also confirms the need for strengthening, it does not seem plausible why, on the one hand, it should already be clear from the outset who will conduct the proceedings on the plaintiff's side. On the other hand, the American idea of choosing the person with the best qualifications, experience and resources seems to be excluded per se. However, this does not guarantee the most effective conduct of the case.

Furthermore, it is in the very nature of things that if the qualified entity is prohibited from bringing the MFK for the purpose of making a profit, the motivation of the entity will usually fall short of an entity's motivation which is allowed to do just that. Also, a permitted profit-making would lead to the fact that the resources thus generated could then, for example, be used for the benefit of a next process.

In my view, it is already clear from the restrictions on litigants that the MFK approach is clearly a protectionist approach for larger companies. This is always in the belief that sanctions for misconduct can also be sufficiently imposed by public law.

Thus, the declared goal of the coalition agreement between the CDU, CSU and SPD, to improve legal enforcement for consumers, seems to be only partially achieved looking at the standing of the qualified entities in comparison to the American class counsels.
In my opinion, it could also be postulated that it has basically not contributed to a significant improvement of consumer rights if the elected "tiger remains predominantly toothless".

The preservation of a functioning and secure legal system in the interest of the general public which was cited as a legislative objective as well, seems to have prevailed in the law-making process. This in the sense of keeping the functions of public law enforcement clearly distinguished from private law enforcement. Looking at section 606 para. 1 sentence 4 ZPO and its irrebuttable presumption for the fulfilment of the requirements to be a qualified entity, this is reaffirmed. Here, the legislator formulates this presumption precisely for institutions that are in themselves private-law institutions, but which are funded with public money. Thus, a control function under public law flows into a procedure that is in itself under private law. Once again, the German understanding of the deterrent and sanction character is shown, which should be assigned to public law or at least indirectly controlled by the public authorities.[70]

[70] See the list of the qualified entities:
https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Verbraucherschutz/Liste_qualifizierter_Einrichtungen.html , last retrieved April 21, 2021.

In addition, it must be noted, that the mere fact of the inadmissibility of counterclaims against the consumers involved is by no means a direct consequence of the intention of consumer protection. It is simply the case that counterclaims in such cases are hardly conceivable and that the recording of this fact is simply a reflection of reality and does not reflect the intention of the legislator. Finally, counterclaims are a rarity in the American class action system as well.[71]

After what has now been said, one gets the impression that the MFK has little, perhaps even nothing to do with a class action, except that it deals with mass proceedings. However, this impression is deceptive. If one takes a closer look at the second variant of the outcome of the MFK, namely a settlement, a different picture emerges.

4) Outcomes of an MFK - Ending an MFK by Settlement

As outlined above under C)IV) it is possible to reach a concrete claim for performance by way of a settlement within the meaning of section 611 ZPO.

This in itself is not new, since the possibility of a settlement directed at performance has always been provided for in German law (see section 278 ZPO). What is new and clearly influenced by the American idea of class action,[72] is the now strong role of the court in such a settlement in an MFK. As the legislator even assumed that in most cases the registered consumer and the defendant will reach an out-of-court settlement,[73] it is construed an entirely new way of collective settlements involving an important role of the court regarding the MFK.

According to section 611 para. 3 sentence 1 ZPO, the settlement requires the court's approval. This means first of all that approval is now a prerequisite for effectiveness of the negotiated settlement, unlike the settlement previously known to German civil procedure law, which can be effectively concluded between the parties alone.[74]

Pursuant to section 611 para. 3 sentence 2 ZPO, the court shall approve the settlement if it considers it to be an appropriate amicable settlement about the claims or legal relationships filed, taking into account the state of facts and the dispute to date.

The registered consumers then have the option, again very similar to the mechanism for settlements in a class action, to withdraw from the settlement within one month after

[71] Fiebig, Andre, The Reality of U.S. Class Actions, GRUR Int. 2016, p. 316.
[72] Alexander Bruns, Instrumentalisierung des Zivilprozesses durch Gruppenklagen?, NJW 2018, p. 2757.
[73] See BT-Drs 19/2439 p. 17.
[74] Seiler, in: Thomas/Putzo, ZPO, 41. Edition, 2020, § 611, p. 1012-1013.

notification of the settlement and to enforce their rights individually in each case (see section 611 para. 4 ZPO). According to section 611 para. 5 ZPO, the approved settlement becomes effective if less than 30% of the registered consumers have declared their withdrawal from the settlement.

The substantive judicial review of the settlement is thus very similar to the Rule 23(e) FRCP review by the relevant US court. There, the primary concern is to determine that the settlement is fair, reasonable and adequate.

What is particularly exciting is that under Rule 23(e) FRCP, the claims, issues, or defences of a certified class can only be "settled, voluntarily dismissed or compromised with the court's approval". After reading section 611 ZPO, it seems that this is exactly the same for the MFK - after all, it requires court approval to protect consumers.[75]

However, in the MFK against VW mentioned in the introduction (A)), before the higher regional court of Braunschweig, things turned out differently. Here, the consumer association (Verbraucherzentrale) and VW reached an out-of-court (!) settlement, so that a precedent was already set for the provision of section 611 ZPO. Whether this settlement was permissible at all is highly disputed in German legal literature and many see this as a circumvention of the legislative intention of consumer protection through the compulsory involvement of the court.[76] Some nevertheless see the settlement as proof that the MFK did exert the necessary pressure on the defendant (VW).[77]

What is particularly striking here is that the settlement reached between VW and Verbaucherzentrale did not include 100,000 of the previously registered consumers. Klaus Müller, the board of the Verbraucherzentrale, justified this at the time by saying that the excluded cases would also not have been suitable for a continuation of the MFK.[78] This in turn already met with criticism because it had then not become clear why these cases were included in the MFK in the first place.[79] The withdrawal of the MFK by the Verbraucherzentrale thus certainly raises the question of the extent to which an association - like the consumer advice centre - has allowed itself to be pushed into a corner by the powerful Volkswagen group and

[75] Which ones again was the main intention: See BT-Drs 19/2439 p. 17.
[76] For example: Augenhofer, in BeckOK ZPO, 40th Edition, 01.03.2021, § 611 no. 21; as well as Stadler, VuR 2020, p. 163 et. seqq.
[77] Metz, Rainer, Volkswagenvergleich, VuR 2020, p. 161 et. seqq.
[78] https://www.vzbv.de/pressemitteilung/vzbv-und-vw-erzielen-vergleich-fuer-betrogene-kaeufer: „Wir finden zwar, dass auch diese Menschen Ansprüche haben. Die Grundlagen dafür sind aber so individuell, dass sie im Rahmen einer Musterklage nicht hätten geklärt werden können".
[79] Stadler, Astrid, Pyrrhussieg für den Verbraucherschutz, VuR 2020, p. 163 et. seqq.

the international law firm Freshfields commissioned by it. This although might be up to the parties themselves to assess the outcome of the first MFK in German history.

In any case, it should be noted that the German legislator has obviously not managed to construct the regulations in such a way that it would be impossible to circumvent the protective mechanisms, especially the approval of the court regarding a settlement. On the contrary, the fact that Volkswagen managed to bring Verbraucherzentrale to an out-of-court settlement shows that the legal situation was not designed to be as consumer-protective as the legislator had announced.[80]

It is precisely the control and the mandatory approval by the court that corresponds to international standards and is provided for within the framework of class action, above all to prevent conflicts of interest.[81] These conflicts of interest are unavoidable and arise when negotiating mass settlements in the triangle between the class counsel, the defendant and the consumers who are not directly involved.[82] This is precisely why Rule 23(e)(C)(iii) FRCP requires the court to include attorney's fees in its review.

This raises the question of how it came about that the Verbraucherzentrale got involved in an out-of-court settlement in the first place. At first, there were ostensibly quite pragmatic reasons inherent in the conception of the MFK, such as: the electronic register of complaints is inadequate and the federal office of justice (Bundesamt für Justiz) was not staffed for such large-scale proceedings.[83] However, if one takes a closer look at the regulations of the MFK, it seems that one of the conflicts of interest, which, as described above (C)II)), is actually driving the German aversion to class actions, was also a causal factor. A principal-agent problem.

At the time of the first settlement attempt, the plaintiffs' lawyers (i.e. the Verbraucherzentrale) were due 50 million euros, which was reduced to 500,000 euros in the settlement that was then reached, as the lawyers would no longer have anything to do with the further processing of the individual settlements that were still to be reached.[84]

[80] See the long description on how the MFK should improve a mandatory consumer protection in the MFK's proceedings: BT-Drs 19/2439 p. 17 et. seqq.
[81] This mandatory approval can be found in a recommendation by the European Union on collective redress for consumers, KOM 2018 184, 11th of April 2018, Art 8 (2) and in certain national rules inter alia in Belgium, Denmark, Norway or Sweden. For further details see: Stadler, VuR 2020, 163 et. seqq.
[82] Eggers, Alexander, Die gerichtliche Kontrolle von Vergleichen im kollektiven Rechtsschutz, 2020, § 5.
[83] Stadler, VuR 2020, 163 et. seqq.
[84] https://www.lto.de/recht/hintergruende/h/abgasskandalmusterfeststellungsklage-olgbraunschweig-vw-vzbv-vergleichvereinbarungen-anwaltskosten/ ; last retrieved 23rd of April 2021.

However, both sums are far above what the plaintiffs' lawyers would have been able to achieve as fees in the event of a court decision, namely approx. 7,000 euros.

If one looks at the German cost law, which regulates the fees for lawyers, they are based on the amount in dispute according to sections 2; 22 RVG (Rechtsanwaltsvergütungsgesetz) and generally increase gradually. The amount in dispute for the calculation of the lawyer's fee is then capped at a value of 100 million euros. In the MFK proceedings, a mass proceeding, which - as mentioned - is linked to the provisions of the injunctions act (Unterlassungsklagengesetz - another mass proceeding), the amount in dispute is, however, limited to 250,000 euros, so that the lawyer's fee would amount to a maximum of approx. 7,000 euros, see section 48 para. 1 sentence 2 GVG (Gerichtsverfassungsgesetz).

This point certainly speaks for itself. On the one hand, this makes it virtually impossible for the plaintiff organisations to pursue this action in an economically sensible way. On the other hand, this also clearly expresses the attitude of the legislator towards collective legal protection for consumers. In the author's opinion, this clearly shows how effectively the lobbyists of the car industry and the economy in general have brought their interests into the legislative process.[85]

In any case, this fact casts a new light on the principal-agent problems described under C)II) so frequently raised by legal scholars and representatives of the German economy.

V) Conclusion Regarding the Main Differences

First of all, already the underlying idea of the MFK is greatly different from that of class action. As the claim in an MFK-process must be further pursued individually after the end of the MFK-proceedings by a final judgement, the MFK in this sense is not a comparable legal remedy to a class action lawsuit being chosen by consumers wanting to file a lawsuit collectively while only having suffered smaller damages individually.

Therefore, the MFK rather only makes sense for damages from a uniform or similarly directed cause of liability in a medium or large amount.[86] Thus, regarding the damages claimed the MFK concerns a section of the class action, but is much narrower in its actual scope of application.

[85] Finding clear words on this issue, Prof. Astrid Stadler, Interview in the 22nd of January 2019; https://www.ardmediathek.de/video/report-mainz/report-mainz-fragt-prof-astrid-stadler/das-erste/Y3JpZDovL3N3ci5kZS9hZXgvbzEwODg5NDA/ , last retrieved 24th of August 2021.
[86] Meller-Hannich, Report A 72, DJT 2018, p. 60 et. seqq.

Moreover, it was shown by the analysis that recognition of public law enforcement, especially in the shape of public agencies being able to address and prevent illegal conduct on a larger scale, is fundamentally different in both countries.[87] This led to a huge appreciation of class actions in the US whereas private law enforcement is still at an early stage in Germany, because governmental authorities are highly trusted and they are considered to be effective.

Furthermore, as the German civil procedural system is coming from a two-party basis, litigations having an inter-omnes effect are generally unfamiliar to this system and therefore uncommon.

On the other hand, a clear influence on the MFK by the American class action with regard to settlements to be made in the sense of section 611 ZPO was shown. Here it becomes clear that the legislator has seen the need for effective mass settlements and has tried to create a binding regulation.

In the eyes of the author, however, it did not succeed and it remains doubtful whether it wanted to succeed at all. First of all, the out-of-court settlement reached in the VW case[88] completely contravenes the provisions of section 611 ZPO and the compulsory involvement of the court provided for therein. In the interest of legal peace, it certainly makes sense to settle proceedings as quickly and comprehensively as possible, but especially in mass proceedings, there is an increased interest in protecting those who are not themselves involved in the negotiations. It seems to be a double standard if, on the one hand, more consumer protection is demanded, which is rejected by means of a class action, but on the other hand, with the MFK, an instrument is created in which the actually compulsory involvement of the court can be circumvented.

Furthermore, the requirements for the qualified institutions that are allowed to conduct an MFK in court clearly show the legislator's attitude towards collective legal protection for consumers.

On the one hand, the individual consumer is assisted in the fight against large companies by institutions which, according to their statutes, should not have the resources of a large international law firm. On the other hand, their expected fee in the case of a court decision is capped at a seemingly ridiculous 7,000 euros.
It becomes clear that the MFK's proceedings are more of a "David versus Goliath" battle than a trial of equals.

[87] See at length: Fiebig, Andre, The Reality of U.S. Class Actions, GRUR Int. 2016, p. 313, 314.
[88] See: C)IV)4).

Calling for more consumer protection, drafting a new complaint and finally introducing it is equivalent to symbolic politics when the mechanisms concerning them are made so complicated and ineffective.

To use the words of Prof. Stadler: "*Congratulations to the lobbying associations in the legislative process.*"[89] (Translated by the author).

The argument always used by opponents of class action in the German legal system, that violations of the law could be sufficiently punished by public law and its institutions, also seems increasingly weakened if not downright obsolete when one takes a look at the VW scandal on this issue. After all, it was the American authorities who uncovered the scandal, who put massive pressure on Volkswagen as well as the brought class actions carried out in America, the process of coming to terms with it was already completed in 2017. In Germany, it is still ongoing and there appears to have been only limited acceleration by the MFK.

The argument of effective sanctioning by public authorities thus seems to have degenerated into a protective claim in order to be able to leave minor violations of the law unpunished in individual cases, even if they may have caused great damage overall.

The argument of the MFK being considered superior to a class action aimed at performance insofar as only those points of dispute are procedurally collectivised which are amenable to bundling without loss of individual case justice,[90] seems weak as well.

As Rule 23 FRCP shows, there is some standardisation in the context of a class action, but subclasses of the class action still have the possibility to opt out, so the argument does not justify neglecting the whole concept of class actions.

In summary, it can be said that the MFK presents itself quite predominantly as a political response to one of Germany's biggest economic scandals. It has certainly contributed to ending it, also addressing the claims being time-barred, but it falls far short of the expectations that arose primarily through media communication.

[89] Prof. Astrid Stadler, Interview in the 22nd of January 2019; https://www.ardmediathek.de/video/report-mainz/report-mainz-fragt-prof-astrid-stadler/das-erste/Y3JpZDovL3N3ci5kZS9hZXgvbzEwODg5NDA/
[90] Alexander Bruns, Instrumentalisierung des Zivilprozesses durch Gruppenklagen?, NJW 2018, p. 2757.

D) German Mass Litigation - Shifting Towards an American Approach of Class Actions?

As there is no fully developed collective redress in Germany yet,[91] one needs to take a look at the development of collective redress in Germany, to see whether the German mass litigation is shifting towards an American approach of class action or whether this remains to be a dream of many.

As shown in this thesis, the MFK marks a step towards a broader system of collective redress for consumers, surely influenced by the American idea of a class action. It although was seen that the impact overall was small, and that even regarding the American approach of a settlement, the rules could be circumvented and thereby the idea of consumer protection contradicted.

It is almost certain that Germany will not implement an equivalent of American class actions in its legal system in the coming years, if not decades. This can be seen very clearly in a statement by the Legal Committee of the German Bundestag[92]:

„*The German Bundestag is of the opinion that class actions on the US model are incompatible with European legal traditions for many reasons... The German Bundestag rejects a 'lawsuit industry' and therefore resolutely opposes all initiatives and instruments that promote such a litigation culture.*" (Translation by the author of this thesis).

This statement may be almost ten years old, but it is as valid as it was then.[93] It even is backed by legal scholars,[94] as well as major parts of the industry as shown above.

The whole conceptual design of the MFK shows how far we still have to go to achieve collective redress as effective as provided by American class action. It becomes clear that the

[91] Meller-Hannich, Report A 72, DJT 2018, p. A9.
[92] Beschlussempfehlung und Bericht des Rechtsausschusses, BT-Drucks. 17/5956 (25.5.2011) p. 7: „*Der Deutsche Bundestag ist der Auffassung, dass Sammelklagen nach US-amerikanischem Vorbild (‚class actions') aus vielen Gründen mit europäischen Rechtstraditionen unvereinbar sind… Der Deutsche Bundestag lehnt eine ‚Klageindustrie' ab und wendet sich daher entschieden gegen alle Initiativen und Instrumente, die einer solchen Streitkultur Vorschub leisten.*"
[93] See as more recent examples: Fiebig, Andre, The Reality of U.S. Class Actions, GRUR Int. 2016, p. 313, 315.
[94] Mäsch, Gerald, Abwehrstrategien gegen unerwünschte Rezeptionen im Internationalen Prozessrecht: Die class action, in: Ebke/Elsing/Großfeld/Kühne (Hrsg.) Das deutsche Wirtschaftsrecht unter dem Einfluss des US-amerikanischen Rechts, 2011, p. 151-158; Möschel, WuW 2006, p. 115; Ebbing, Frank, Class Action – Die Gruppenklage: Ein Vorbild fur das deutsche Recht?, Zeitschrift für die vergleichende Wissenschaft 1994, p. 31 et. seqq.;

corresponding lobby associations will do everything to make the road as long and rocky as possible.

Finally, it seems interesting to take a look at the European Union and the Directive (EU) 2020/1828 adopted by it. If the impulses probably will not come from Germany, maybe they will come from the European Union?

E) Class Actions – Impulses by the European Union

As already mentioned under C)I), the EU adopted Directive (EU) 2020/1828 on the 22nd of June 2020 (effective as of the 25th of November 2020). The German legislator now is obliged to implement the requirements set out in the directive. Thus, until midsummer 2023 an according representative action is to be implemented into the German civil law system. Looking at its introduction alone, the Directive aims for an improvement of redress for consumers, because globalisation and digitalisation have increased the risk of a large number of consumers being harmed by the same unlawful practice. In connection therewith, the Directive is seen – similar to the MFK – as a consequence of the diesel gate in connection with Volkswagen.[95]

The Directive does not regulate "the one" European representative action, but establishes a framework within which the Member States can adopt the rules that best correspond to their legal traditions.[96] As a result, a multitude of different national representative actions will develop, each of which will fulfil the requirements of the planned directive, but may well differ in their concrete form.[97]

This means that there is only limited real pressure from the European Union to move towards a uniform collective system at the European level, which in turn could be modelled on the American class action system for example. From the point of view of the author of this thesis, this is a clear argument against Germany turning further towards the American system influenced by the impulses of Brussels.

Although the Directive leaves the national legislators a great deal of leeway in its implementation, it is to be expected that the implementation will go beyond the regulations of the MFK.[98] The most relevant provision here is clearly Art. 9 of the Directive on redress

[95] Schläfke/Lühmann, PHi 2020 p. 164 et. seqq.
[96] See already the recitals of the Directive.
[97] Schläfke/Lühmann, PHi 2020 p. 164 et. seqq.
[98] Schläfke/Lühmann, PHi 2020 p. 164 et. seqq.

measures. Pursuant to this Article para 1, "*a redress measure shall require a trader to provide consumers concerned with remedies such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate and as available under Union or national law.*"

The decisive factor will be how the German legislator works out this objective, which is in itself directed towards performance, in the formulation of the new action to be created. In the opinion of the author of this thesis, the wording of the Directive leaves room for an interpretation that is not performance-oriented. After all, it says: "…*as appropriate and as available under national law.*" (Art. 9 para. 1 Directive (EU) 2020/1828).

This critical point will show whether the legislator uses the opportunity to create collective legal protection aimed at concrete performance. It remains doubtful at present, especially bearing in mind what has been pointed out under C)II). It can also be demonstrated by a simple example.

Looking at recital 26 of the Directive for example, Member States should be able to establish the criteria for designation of qualified entities for the purpose of domestic representative actions freely in accordance with national law. Article 4 Directive (EU) 2020/1828 then sets out further requirements for the qualified entities regarding the representative action.

These requirements clearly show that the European understanding of collective redress for consumers corresponds to the German understanding of it, which has been outlined herein. For example, according to Art. 4 (3.) (c) Directive (EU) 2020/1828, the qualified entity must have a non-profit-making character. Furthermore, pursuant to lit. (d) the legal entity shall be independent and "*not influenced by persons other than consumers, in particular by traders, who have an economic interest in the bringing of any representative action, including in the event of funding by third parties, and, to that end, has established procedures to prevent such influence as well as to prevent conflicts of interest between itself, its funding providers and the interests of consumers*".

Thus, the German legislator is free to again impose similar restrictive regulations with regard to the qualified entities as in the case of the MFK (see: C)IV)3)a)). This clearly speaks against a shift towards the American system and gives rise to the fear that the inefficiencies of the qualified legal entities elaborated in this thesis will be exactly the same and that, furthermore, conflicts of interest will not necessarily be avoided by the regulations.

From this point of view, a less restrictive regulation of the qualified ones, taking into account the German attitudes towards class actions presented in this paper, see: C)II), seems very questionable. Time will show to what extent lobbying associations will again exert their influence and the described narrow conditions for the qualified institutions will again arise.

F) Final Remarks

In conclusion, it can be stated once again that the introduction of the MFK was predominantly a political measure to overcome the VW scandal. Moreover, the European approach also seems to be a "toothless tiger" rather than a feared instrument of collective redress by way of private enforcement.

Time will tell whether a further convergence with the American system will take place on the German or even on the European level. In any case, for the author of this thesis it is clear that such a will does not really exist at the moment and that voices close to business in particular will do a lot to prevent it.

This seems particularly questionable since the European Union as well as the German legislator have recognised that ever larger companies and increasing internationalisation also require adequate answers.

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