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# Implementation of Collective Redress Mechanisms Under German and EU law—Are We Facing US-Style Class Actions in Europe?

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On November 1, 2018, a new German act implementing a “class action”-type procedure for consumers-related matters, the so-called model declaratory judgment action (Musterfeststellungsklage), came into force.

So far, the German Code of Civil Procedure (Zivilprozessordnung – ZPO) does not provide for a general collective redress mechanism. Although the ZPO allows multiparty disputes (including joinders by third parties), the German procedural framework is generally not equipped to handle “class action”-type litigation. Collective redress mechanisms have so far only been admitted in very limited areas such as, for instance, under the Capital Markets Model Case Act (Kapitalanleger-Musterverfahrensgesetz – KapMuG), which exclusively extends to investor claims based on false, misleading or omitted public capital markets information.

However, following the “Dieselgate” scandal, politicians and consumer associations have recently pushed hard to introduce an effective collective redress mechanism in Germany to make law enforcement for consumers easier and more effective, avoiding numerous parallel court proceedings and mitigating the cost risk for the individual consumer. The new procedural instrument is also intended to increase the attractiveness of the German court system and to provide for appropriate means of out-of-court settlement in mass litigation cases.

Essentially, the German act for the introduction of a declaratory judgment action is based on the following principles:

- Only certain “qualified” consumer associations which have been registered for at least four years are entitled to bring claims under the new act. The individual consumer has no standing to sue and will therefore not participate in the model case procedure as a party.
- The model case procedure is restricted to factual and legal questions which are decisive in determining whether the defending company violated applicable legal standards of consumer regulations. These factual and legal questions will be dealt with in an abstract manner and not ruled upon for each individual case. Once the model case procedure has been terminated, consumers will have to bring their individual action to enforce their respective claim.

- The model case procedure is only permissible if the consumer association can demonstrate that the factual and legal questions concern at least 10 consumers, and at least 50 consumers have registered their claims within two months upon publication of the model case procedure in the official claims register.
- The registration of the claims will lead to a suspension of the limitation period of the registered claims. With the registration of their claims, consumers will recap the benefits of the decision in the model case procedure.
- The Higher Regional Court is the first instance court to decide in the model case procedure. Its decision has a binding effect for all registered consumers and the defending company. The decision can be appealed to the Federal Supreme Court.
- Equally, a settlement between the consumer association and the defending company has a binding effect for all registered consumers unless a consumer withdraws from the settlement within one month after service of the settlement.

During the legislative procedure, the draft bill has been controversially discussed in the legal community. On the one hand, it has been criticized that, due to the lack of financial incentives, the bill prevents highly specialized law firms from representing consumers in the model case procedure and it remains unclear how consumer associations will (pre-)finance and organize these highly sophisticated mass proceedings. On the other hand, it has been argued that the bill does not provide for any mechanism to accelerate the model case procedure; defending companies can play for time and, therefore, block individual actions.

In parallel to the German initiative, the EU Commission published a “New Deal for Consumers” on April 11, 2018, which also includes measures for consumers to enforce their rights. Should the proposed Directive be adopted, it will not be directly applicable in the Member States but will have to be implemented into national law first. The new German act may then have to be modified to abide by the European collective redress standards.

The proposed EU Directive is based on the following principles:

- As under the German regime, only so-called “qualified entities” shall be entitled to bring representative actions. These entities need to be properly constituted, prove their non-profit-making character, declare the source of their funds and be registered in a publicly available list.
- The proposed Directive not only entitles the qualified entities to bring representative actions for injunctive relief but also actions for redress.
- Contrary to the German approach, the proposed Directive does not require consumers to register their respective claims in a claims register but enables the Member States to set up further requirements which need to be complied with before filing a claim for a declaratory decision or a redress order.
- Other than the German act, the proposed Directive allows that several qualified entities from different Member States initiate cross-border collective actions if the (alleged) infringement will likely affect consumers from different Member States.
- In case a court finds an infringement, the final and binding decision is generally deemed

as irrefutably establishing the existence of that infringement for the purposes of any other actions seeking redress before the national courts in any other Member State. The proposed Directive also entitles the Member States to introduce disclosure rules and rules for effective, proportionate and dissuasive penalties in case the defending company does not comply with the final decision in the collective redress action.

In conclusion, implementing a collective redress mechanism will cause a substantial increase of consumer-related mass litigation in Germany. Even though the new procedural rules are still far away from a US-type class action, it appears likely that the instrument will soon become a powerful weapon for consumer associations. While the associations already announced that they will first enforce claims against the car industry, other consumer-related areas such as for instance data privacy law and warranty claims will probably soon become active fields for consumer-related mass litigation.

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