

German Draft Bill for the Introduction of a Collective Redress Mechanism for Consumer Claims

May 22, 2018

On May 9, 2018, the German federal government proposed a draft bill for the introduction of a collective redress mechanism for consumer claims.¹ This draft bill aims at improving the enforcement of consumer rights by enabling certain qualified consumer protection associations to bring a representative action on behalf of at least ten consumers and obtain declaratory rulings on the existence of certain elements of a claim, or the absence of certain bars to a claim. These declaratory rulings serve as a basis for a settlement of the claims to be concluded between the consumer and the defendant business, or for further litigation between them.

The European Commission has been recommending the introduction of collective redress mechanisms since 2013.² The European Commission noted that the injunction procedure for the protection of consumers' interests (introduced by Directive 2009/22/EC) does not enable harmed consumers to obtain compensation for losses suffered as a result of an illicit practice.³ Moreover, in mass harm situations involving relatively small losses per individual concerned, individuals often refrain from bringing an action ("rational disinterest"), despite certain procedural tools already in place, such as small claims procedures for consumer cases or the joinder of claims. To facilitate access to justice further, the European Commission promulgated a set of principles relating to both judicial and out-of-court collective redress that should be common across the European Union, while at the same time respecting the legal traditions of the EU Member States.

The implementation of these principles into German law is on the government's agenda for this term. The legislative project gained particular momentum in connection with the "Diesel Scandal" with thousands of consumers seeking financial compensation or other redress for potentially illegal emissions control systems. If the bill is adopted as envisaged by the government, it will enter into force in November 2018 and allow model declaratory actions henceforward, including for alleged illicit practices that occurred before that date.

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Key Features of the Draft Bill

Model Declaratory Action for Consumer Claims

The model declaratory action is a new procedural tool for collective redress in consumer matters. Unlike other forms of collective redress (*e.g.*, the procedures under the Act on Model Case Proceedings for Disputes Under Capital Markets Law, the German Act on Injunctions for the Protection of Consumers' Interests or under the Act Against Unfair Competition), its scope is broad and covers any matter involving consumers on the one hand and a business on the other.

The action aims at establishing whether certain “factual or legal requirements for the existence or non-existence of claims or legal relationships (“declaratory objectives”, *Feststellungsziele*) between consumers and a business” are met. The focus on declaratory objectives (mirroring the Model Case Proceedings for Disputes under Capital Markets Law) is designed to resolve certain recurring issues of fact or law that concern all consumers alike. Accordingly, neither causation between an alleged breach of a duty and the damage nor the quantum can be the subject of such declaratory objective.

The action does not result in an award of compensation or damages to the consumer but is a first step towards, ideally, a subsequent settlement between the consumer who participated in the model declaratory action and the business, or a subsequent action for damages in which the rulings of the model declaratory action will be binding.

Standing

Only certain “qualified entities” may bring a model declaratory action. In essence, consumer protection associations qualify if they have at least 10 organizations active in the same field or 350 individuals as members, have been registered in the Commission list pursuant to Directive 2009/22/EC or the list pursuant to § 4 of the German Act on Injunctions for the Protection of Consumers' Interests for at least four years, are non-profit organizations and meet certain other criteria, all designed to exclude special-purpose vehicles as potential claimants and to prevent frivolous actions.⁴

Chambers of industry and commerce who had standing under the previous draft bill, no longer have standing, possibly as a result of the criticism expressed by the German Bar Association.⁵

Procedure

A model declaratory action always has to be filed with a Regional Court, regardless of the amount in dispute.⁶ Since the draft bill contains no specific provisions on international and local jurisdiction, the general rules apply. The action is tried by a full chamber of three judges (not by a single judge).

The action is commenced by filing a statement of claims which, in addition to the standard information required for any statement of claims, has to detail the declaratory objective(s) and to contain substantiated information (“*Angaben und Nachweise*”) on (i) standing and (ii) the fact that the claims or legal relationships of at least ten consumers depend on the declaratory objectives sought.

If the model declaratory action fulfills these requirements, the court will publish in a claims register certain key information (including the name of the parties, the court, the file number, the declaratory objectives and a summary of the facts of the case) within 14 days from the filing. Moreover, consumers must be informed of their right to opt in, to withdraw from the proceeding and the respective legal consequences. Similarly, all subsequent procedural information, such as hearing dates, guidance notes and interim decisions, has to be published in the claims register. The claims register is managed by the Federal Office of Justice (*Bundesamt für Justiz*); initially, the claims register will likely be managed manually, however, an electronic form is envisaged.

Consumers can then file with (or withdraw from) the claims register their claims or legal relationships to the extent that these depend upon the declaratory objectives; such filing is possible until the day before the first court hearing. The filing is free of charge and does not require the involvement of an attorney.

If at least 50 consumers have filed their claims or legal relationships with the claims register within two months following the publication of the model declaratory

action in the claims register, the model declaratory action is admissible and will proceed, irrespective of whether subsequent withdrawals reduce the number of consumers below 50.

The model declaratory action is governed by the general rules of civil procedure, except that

- it requires a hearing and cannot be tried in a written proceeding;
- a conciliation hearing is not mandatory;
- the claimant (a consumer association) cannot waive claims; and
- the rules on third-party intervention generally do not apply.

As the consumers are not themselves parties to the proceeding, they can testify as witnesses.

Effects of a Pending Model Declaratory Action

To incentivize consumers to participate in the model declaratory action and to reduce the number of parallel litigations, the filing a model declaratory action tolls the statute of limitations with respect to consumer claims that have been validly registered with the claims register, provided that the underlying fact pattern is identical.

A pending (*rechtshängig*) model declaratory action also bars any further model declaratory action against the same defendant and involving declaratory objectives based on the same underlying fact pattern. Similarly, a consumer who registered claims with the claim register cannot bring an action against the same defendant based on the same fact pattern. In the reverse situation in which a consumer commenced an individual action *before* the model declaratory action was published in the claims register, and subsequently filed claims based on the same fact pattern with the claims register, the model declaratory action takes precedence and the individual action is stayed until the final resolution of the model declaratory action.

Consumers who have not registered claims with the claims register are free to commence litigation against the business. While the opt-in approach better fits into the basic concepts of German civil procedure, it

somewhat thwarts the intended bundling effect of the model declaratory action.

A Judgment Rendered in a Model Declaratory Action

A judgment rendered in a model declaratory action, as well as the filing of an appeal against the judgment, and the entry of the *res iudicata* effect (*Rechtskraft*) have to be published in the claims register.

When the judgment has become final, it is binding on a court that is called to rule on the claims of consumers who registered (and did not withdraw) their claims with the claims register.

Settlement

The model declaratory action procedure is open for settlement with effect “for and against the participating consumers”. In terms of timing, at least one hearing must have been held, a requirement which is intended to increase transparency of the proceeding.

According to the draft bill, a settlement shall address (i) the consideration to be given to the participating consumers, (ii) the further evidence that the consumers have to adduce in order to be entitled to the consideration, (iii) the due date of the consideration and (iv) the allocation of costs among the parties.

A settlement is subject to court approval, and the court will approve of the settlement if it considers, based on the status of the litigation, the settlement to be a “reasonable” (*angemessen*) amicable resolution of the dispute. While it is clear that this provision is intended to reduce the risk of settlements to the detriment of the consumers by prohibiting a court from rubber-stamping a settlement negotiated out of court between the consumer association and the defendant, it is unclear how and with what degree of scrutiny a court should and could review a draft settlement for reasonableness.

The court-approved settlement has to be served on the participating consumers, along with a notice that they can withdraw from the settlement within one month.

The court-approved settlement becomes effective only if less than 30% of the participating consumers withdraw from the settlement. It is the withdrawal quota that

will ultimately tell whether the settlement is reasonable (or perceived as such), provided that all participating consumers take an informed decision on the potential withdrawal. If the settlement becomes effective, this is again subject to publication in the claims register, and is binding on the participating consumers who did not withdraw.

Outlook

The draft bill might be viewed as the government's response to litigation vehicles such as *myRight* which in the car emissions cases assert claims of concerned car purchasers for a contingency fee: The government wishes to offer an alternative to such U.S.-style litigation structures by legislating a collective redress mechanism free of charge for the consumers who can entrust the pursuit of their interests to non-profit consumer associations.⁷

If the draft bill is adopted as proposed, the new model declaratory action is a first step but not the resolution of mass claims, as the proceeding is limited to rulings on the declaratory objectives which recur in all individual consumer claims, but does not create a one-stop shop to resolve such consumer claims in full.

Non-participating consumers who would like to avail themselves of a judgment or settlement reached in a model declaratory action cannot subsequently tag along and thus need to hope that their claims will be satisfied on the same terms as a practical matter, or have to litigate the matter anew, in which case the rulings of the model declaratory action will likely have significance.

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¹ Gesetzesentwurf der Bundesregierung: Entwurf eines Gesetzes zur Einführung einer zivilprozessualen Musterfeststellungsklage ("RegE"), available at http://www.bmfv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Musterfeststellungsklage.pdf?__blob=publicationFile&v=2.

² Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU); Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU), COM(2018) 40 final.

³ Consideration (11) of Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU).

⁴ If certain requirements are doubtful, the court can request financial disclosure, Article 2, § 606 (1), 3rd sentence RegE.

⁵ See Stellungnahme des Deutschen Anwaltvereins durch die Ausschüsse Zivilverfahrensrecht und RVG und Gerichtskosten, Nr. 14/2017 of February 2017.

⁶ Article 1 RegE. Jurisdiction can be concentrated on one or more Regional Courts within a Federal State by State Government decree.

⁷ The parties' cost exposure (court and statutory attorney's fees that are to borne by the losing party) is quite low due to a cap of the value of the dispute at €250,000 (Article 4 RegE). This may be too little a financial incentive for the plaintiffs' bar to recommend a model declaratory action.