

The New German Act on a Collective Redress Mechanism for Consumer Claims

November 5, 2018

On July 12, 2018, the German *Bundespräsident* promulgated the Act on the Introduction of a Collective Redress Mechanism for Consumer Claims (*Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage*), and it became effective on November 1, 2018.¹ The purpose of the Act is to improve 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 illegal 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 both to 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 German legislative project gained particular momentum in connection with the "Diesel Scandal" with thousands of Volkswagen car owners seeking financial compensation or other redress for illegal emissions control systems. The Act allows model declaratory actions henceforward, including for alleged illegal practices that occurred before it became effective.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors:

FRANKFURT

Dr. Thomas Kopp
+49 69 97103 246
tkopp@cgsh.com

Wiebke Holzapfel
+49 69 97103 107
wholzapfel@cgsh.com

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

KÖLN

Rüdiger Harms
+49 211 80040 125
rharms@cgsh.com

Theodor-Heuss-Ring 9
50668 Cologne, Germany
T: +49 211 80040 0
F: +49 211 80040 199



Key Features of the Act

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 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

Procedure

A model declaratory action has to be filed with a Higher Regional Court.⁵ If the defendant business is domiciled in Germany, the court at the seat of the defendant has exclusive local jurisdiction;⁶ for foreign businesses, the general rules on international and local jurisdiction apply.

The action is commenced by filing a statement of claim which, in addition to the standard information required for any statement of claim, has to detail the declaratory objective(s) and 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 and to opt out of the proceeding and of the respective legal consequences, as well as of the legal effects of a settlement and their right to opt out. Similarly, key procedural information (*e.g.*, hearing dates, guidance notes, interim decisions and the close of the proceeding) has to be published in the claims register. The claims register is managed by the Federal Office of Justice (*Bundesamt für Justiz*), which will publish the information on a website.⁷

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.

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 of 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 claims 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 voluntary 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 can be appealed on grounds of law to the Federal Court of Justice. The judgment, 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 the courts called to rule on the claims of consumers who registered their claims with the claims register (and did not opt out).

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.

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 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. There is no legal remedy against a court approval.

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

The court-approved settlement becomes effective only if less than 30% of the participating consumers opt out of the settlement. It is the opt out 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 opt out. 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 opt out.

Outlook

The Act can 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 wished 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.⁸ Indeed the first model declaratory action was filed on November 1, 2018 by *Verbraucherzentrale Bundesverband* against Volkswagen and relates to diesel engines (EA 189) with illegal defeat devices. The action is pending before the Higher Regional Court of Braunschweig.

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.⁹

...

CLEARY GOTTLIB

¹ BGBl. 2018 I Nr. 26, 1151.

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, § 606 (1)3 of the German Code of Civil Procedure.

⁵ § 119 (3) of the German Courts Constitution Act. Jurisdiction can be concentrated in one Higher Regional Court within a Federal State by State Government decree.

⁶ § 32c of the German Code of Civil Procedure.

⁷ § 609 of the German Code of Civil Procedure; German Regulation on the Claims Register for Model Declaratory Actions of October 24, 2018 (BGBl. 2018 I Nr. 36, 1804).

⁸ 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 (§ 48 (1) 2 of the Court Cost Act). This may be too little a financial incentive for the plaintiffs' bar to recommend a model declaratory action.

⁹ Similarly, businesses cannot register claims with the claims register and have to pursue their claims through regular litigation. They can file a request to stay their litigation pending the resolution of the model declaratory action (§ 148 (2) of the German Code of Civil Procedure). If a court grants such request and stays the litigation, it will likely consider the findings of the model declaratory action, but is not formally bound.