

Mechanisms of Collective Redress in Germany

A. Introduction

The German civil procedural law is based on the notion of providing only individual legal protection. This means that in general, German civil procedural law does not allow a claim in the name of a group of unknown claimants to be brought in the form of class action. Although it does provide for multiparty disputes in some ways¹, these mechanisms are not suitable for mass actions with large numbers of claimants as they are not tailored for such proceedings. This is due to the change in light of new European legislation in this regard (see C.).

B. Available Mechanisms

Only a very limited number of collective redress mechanisms are available in Germany. They have been restricted to very particular areas of law and are available only under special circumstances. The most notable forms of collective redress are the Model Case Declaratory Action (see B.I.) and the German Capital Markets Model Case Act² (see B.II.). In certain other areas, forms of collective redress are also available (see B.III.). This text aims to highlight some of the most important aspects of collective redress mechanisms under German law.

I. Model Case Declaratory Action

In light of the diesel-related claims of consumers against Volkswagen, Germany passed a law allowing for a specific form of collective redress. The Model Case Declaratory Act (“*Musterfeststellungsklage*”) was implemented on the 1.11.2018, making significant amendments to the German Code of Civil Procedure (“*Zivilprozessordnung*” - ZPO)³.

The rules for the Model Case Declaratory Action can be found in the 6th Book of the German Code of Civil Procedure in Sections 606 – 613. This is a tool of procedural law that implemented

¹ “*Streitgenossenschaft*” in Sections 59-62 ZPO allows for procedural bundling of claims under certain circumstances; “*Streitverkündung*” in Sections 72 et seq. ZPO allows for third party notice; “*Nebenintervention*” in Sections 66 et seq. ZPO allows for an intervention by a third party to support one of the litigants.

² Capital Markets Model Case Act as promulgated on 19.10.2012 (Federal Law Gazette I, p. 2182), last amended by Art. 24 (1) of the Act of 23.6.2017 (Federal Law Gazette I p. 1693).

³ Code of Civil Procedure as promulgated on 5.12.2005 (Federal Law Gazette I p. 3202; 2006 I p. 431; 2007 I p. 1781), last amended by Art. 3 of the Act dated 5.10.2021 (Federal Law Gazette I p. 4607).

a new form of collective redress under German law. However, the Model Case Declaratory Action does not implement new rights or claims for consumers as it only allows for a procedural “bundling”.

1. Scope

The scope of application is limited to disputes between consumers and businesses.⁴ The objective of the action is the determination of the presence or non-presence of factual and legal prerequisites for the existence or non-existence of a claim between a consumer and a company. Only general factual or legal questions that are relevant to a large number of consumers can be the subject of a model case declaratory action. Questions relating to very specific individual questions cannot be decided upon.

2. Process of Initiation

The Model Case Declaratory Action cannot be initiated by individuals but only by certain so-called “qualified institutions” that are responsible for these actions and that must represent the consumers in the proceedings. Qualified institutions eligible to initiation actions are, in particular, associations within the meaning of Section 3 (1) of the German Act on Actions for Injunctions (“*Unterlassungsklagengesetz*” - UKlaG)⁵ insofar as they pursue or safeguard the interests of consumers on the basis of their articles of association and provided that these interests are not safeguarded for commercial purposes.

In order to raise a Model Case Declaratory Action, the institutions must have at least 350 individual members or 10 member federations and they must be registered for four years in the list held at the Federal Office of Justice.⁶ The proceedings are conducted exclusively between the institution entitled to bring an action and the defendant company, meaning that it is the institution and not the consumers that is in charge of the proceedings.

The Model Case Declaratory Action follows an “opt-in” approach, meaning that consumers can register their claims after the Model Case Declaratory Action has been made public in the

⁴ Section 606 (1) ZPO.

⁵ German Act on Actions for Injunctions as promulgated on 27.8.2002 (Federal Law Gazette I p. 3422, 4346); last amended by Art. 3 of the Act dated 25.6.2021 (Federal Law Gazette I p. 2123).

⁶ Section 606 (1) 2 ZPO.

register.⁷ Registration remains open to consumers until the day before the first hearing. Consumers can withdraw their registration until the day of the first hearing in the first instance.⁸ It is not required that the consumers are represented by lawyers when registering for the Model Case Declaratory Action. As the consumers are not directly involved in the proceedings of the action, there is no cost risk borne with registering.

Furthermore, a total quorum needs to be met for the Model Case Declaratory Action as a whole. At least 50 consumers must accede to the Model Case Declaratory Action within two months after the public announcement of the action by registering.⁹ One Model Case Declaratory Action may encompass more than one declaratory target or aim. In order to be successful, it must be demonstrated¹⁰ that each singular declaratory aim of the Model Case Declaratory Action affects at least ten consumers.¹¹

3. Legal Consequences

The Higher Regional Courts (“*Oberlandesgerichte*”) are the designated courts of first instance. These courts usually only act as courts of high appeal, but an exception has been made in regard to Model Case Declaratory Actions. Decisions of the higher regional courts in Model Case Declaratory Action proceedings can only be challenged in the Federal Court of Justice, which is generally bound by the factual findings of the court of first instance and will review the case only from a legal perspective.

Decisions that are made within a Model Case Declaratory Action are - as the name suggests - of declaratory nature only. Within its judgement, the court decides if the relevant prerequisites for the claim have generally been met. Unlike regular proceedings that only have an *inter partes* effect, the judgement is binding for all subsequent proceedings between the consumers that have been registered and the company as far as the subject matter of the model case claim is concerned.¹² The declaratory decision is binding for a registered consumer unless the consumer has withdrawn his registration.¹³ The registration must be withdrawn before the end of the first

⁷ Section 608 (1) ZPO.

⁸ Section 608 (3) ZPO.

⁹ Section 606 (3) ZPO.

¹⁰ Section 294 ZPO.

¹¹ Section 606 (3) ZPO.

¹² Section 613 (1) ZPO.

¹³ Section 613 (1) ZPO.

day of the hearing.¹⁴ If the consumer fails to withdraw his registration in time, the binding effect applies in the following individual proceedings. Generally, consumers can only avert the binding effect through an enforcement defence suit (“*Vollstreckungsabwehrklage*”)¹⁵ when the judgement of the individual proceeding is being enforced against the consumer.

The decision of the court that was made in the course of a Model Case Declaratory Action does not provide for an enforceable title against the company. The courts do not issue injunctions or award damages within the proceedings of a Model Case Declaratory Action. Instead, each individual consumer must assert their claim against the company in separate subsequent individual proceedings based on the binding determinations that were made in the declaratory decision.

During the Model Case Declaratory Action the limitation period of the consumer’s claim is suspended only for consumers that have previously been registered.¹⁶ Furthermore, registrants can no longer initiate a lawsuit as long as the Model Case Declaratory Action procedure is pending.¹⁷ Proceedings of individual consumers are suspended for the duration of this procedure.¹⁸

The proceedings can also be concluded by a settlement. The settlement must contain provisions on the compensation payable to the registered consumers, when these payments are due and also how the individual claimants need to verify their claims.¹⁹ The court must give its approval of the settlement and can only do so if it deems it appropriate according to the current state of proceedings.²⁰ Consumers may leave the settlement within one month.²¹ The settlement becomes void if more than 30 percent of the consumers leave the settlement.²²

II. German Capital Markets Model Case

¹⁴ Section 608 (3) ZPO.

¹⁵ Section 767 ZPO.

¹⁶ Section 204 (1) Nr. 1a German Civil Code (BGB).

¹⁷ Section 610 (3) ZPO.

¹⁸ Section 613 (3) ZPO.

¹⁹ Section 611 (2) ZPO.

²⁰ Section 611 (3) ZPO.

²¹ Section 611 (4) ZPO.

²² Section 611 (5) ZPO.

Another important collective redress mechanism is the Capital Markets Model Case (“*Kapitalanleger-Musterverfahren*”) which is regulated in the Capital Markets Model Case Act (“*Kapitalanleger-Musterverfahrensgesetz*” - KapMuG). The KapMuG was implemented on 1.11.2012. It permits a model case to be brought in the context of certain capital markets disputes to determine factual or legal issues with binding effect for other cases.

1. Scope

The proceedings under the KapMuG apply in particular to investor claims for damages due to inaccurate, misleading or omitting public capital market information or to claims for compensation of damages for the use of false or misleading public capital markets information or for failure to offer clarification about the false or misleading nature of public capital markets information. Public capital market information is information which is directed at a large number of investors and concerns facts, circumstances and company data which relate to an issuer of securities or an offerer of other investments.²³

2. Process of initiation

Both the plaintiff and the defendant of a first instance court proceeding may file an application for the establishment of a model case proceeding under the KapMuG. Such an application is valid if the aim of the model case is the establishment of the existence or non-existence of conditions justifying or ruling out entitlement or the clarification of legal questions.²⁴ Furthermore, it is required that at least nine other related applications for the establishment of a model case have been announced within six months after the first announcement of the application for the establishment of a model case. Only if a sufficient number of applications have been filed does the court of first instance order the referral of the decision to the Higher Regional Court.²⁵

3. Legal consequences

After the publication of the order for referral in the register of actions, the trial court stays those proceedings of its own motion that are already pending or which become pending before the final decision in the model case and whose final decision depends on the determination of the

²³ Section 1 KapMuG.

²⁴ Section 2 KapMuG.

²⁵ Section 6 (1) KapMuG.

factual or legal issues in the model case. The stay of those proceedings is ordered irrespective of whether a model case application has been filed in the proceedings.²⁶ The Higher Regional Court chooses the model case plaintiff from among the plaintiffs of the stayed proceedings.²⁷ The plaintiffs that were not chosen as model case plaintiffs are instead summoned to the model case proceedings²⁸ and enjoy certain entitlements.

Model cases under the KapMuG either end when a ruling is issued or a settlement is agreed upon. The ruling of the Higher Regional Court in the model case is binding on the courts that are trying those proceedings that have been suspended and has effect for and against all parties of the model case,²⁹ that is the model case plaintiff and defendant as well as all interested parties summoned³⁰. However, the ruling in the model case resolves all factual and legal questions of general relevance for the suspended proceedings but does not issue a final decision in each individual case. This is to be done by the courts trying the suspended proceedings which recommence upon submission of the binding and final model case ruling.³¹

Model cases can also be terminated if a settlement is agreed upon between the model case plaintiff and the model case defendant. In that case, a settlement proposal has to be submitted to the court or a settlement proposal from the court has to be accepted³² and the settlement has to be approved by the court³³. However, the settlement only enters into effect if at least 70% of the interested parties summoned do not withdraw from it³⁴ and does only have effect for and against those parties that did not withdraw from it³⁵.

III. Other Mechanisms under German Law

Apart from the Model Case Declaratory Action and the proceedings under the KapMuG, the German law provides for some other forms of collective redress with regard to the protection of consumers. To name the most prominent, representative actions under the UKlaG, representative

²⁶ Section 8 (1) KapMuG.

²⁷ Section 9 (2) KapMuG.

²⁸ Section 9 (3) KapMuG.

²⁹ Section 22 (1) KapMuG.

³⁰ Section 9 (1) KapMuG.

³¹ Section 22 (4) KapMuG.

³² Section 17 (1) KapMuG.

³³ Section 18 (1) KapMuG.

³⁴ Section 17 (1) KapMuG.

³⁵ Section 23 (1) KapMuG.

actions under the Unfair Competition Act (“*Gesetz gegen den unlauteren Wettbewerb*” - UWG)³⁶ as well as actions under the Act against Restraints of Competition (“*Gesetz gegen Wettbewerbsbeschränkungen*” - GWB)³⁷ can be brought if the specific requirements are fulfilled. Additionally, the German Federal Court of Justice (“*Bundesgerichtshof*”) recently ruled that debt collectors are allowed to have similar claims of their customers assigned to them and to assert them in court in a single lawsuit (“*Sammelklage-Inkasso*”), thus allowing for another form of collective redress in Germany.³⁸

1. Representative actions under the UKlaG

Under the UKlaG, only certain qualified representative organisations and not consumers themselves can bring proceedings for injunctions that prevent breaches of consumer law or statutory restrictions on the use of standard business terms. Qualified representative organizations are only those entities and associations that fulfill the requirements laid down in Section 3 (1) Nr. 1, 2 UKlaG or chambers of industry and commerce. Defendants are businesses that use unfair commercial terms³⁹ or other practices that violate consumer law⁴⁰. The action has to be brought before the Regional Court (“*Landgericht*”) in whose district the defendant has his commercial establishment or, in the absence of such establishment, his domicile.⁴¹ If the Court finds that the defendant used unfair commercial terms, the relevant term is deemed ineffective insofar as the contractual party invokes the effect of the injunction.⁴²

2. Representative actions under the UWG

The UWG, too, allows for representative actions that can be brought before a Regional Court by certain associations and qualified entities as well as chambers of industry or commerce.⁴³ Claims concern the elimination of an illegal commercial practice (Section 3 - 7 UWG) or, if there is a risk of repetition, an injunctive relief. Furthermore, the defendants can be sued by the authorized

³⁶ Act against Unfair Competition as promulgated on 3.3.2010 (Federal Law Gazette I p. 254), last amended by Art. 1 of the Act of 10.8.2021 (Federal Law Gazette I p. 3504).

³⁷ Act against Restraints of Competition as promulgated on 26.6.2013 (Federal Law Gazette I p. 1750, 3245), last amended by Art. 10 (2) of the Act of 27.7.2021 (Federal Law Gazette I p. 3274).

³⁸ German Federal Court of Justice Judgement of 13.7.2021 - II ZR 84/20.

³⁹ Section 1 UKlaG.

⁴⁰ Section 2 UKlaG.

⁴¹ Section 6 UKlaG.

⁴² Section 11 UKlaG.

⁴³ Section 8 (3) UWG.

applicants for surrender of profits to the Federal budget that were gained by using illegal commercial practices to the detriment of numerous purchasers.⁴⁴ Similar possibilities exist as well under the GWB.⁴⁵

C. Outlook

The mechanisms for collective redress to date remain very limited under German law. The EU plans to improve consumers' procedural positions by granting a more effective collective redress. In light of this, the minimum standard that national systems need to fulfil when implementing mechanisms for collective redress have been stipulated in Directive (EU) 2020/1828⁴⁶. As a result, the German civil procedural law must break with its legal traditions and provide for more collective legal protection mechanisms in the future.

⁴⁴ Section 10 (1) UWG.

⁴⁵ See Section 33 (4) GWB.

⁴⁶ Directive (EU) 2020/1828 of the European Parliament and of the European Council of 25.11.2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.