

Axel Halfmeier
Leuphana University Lüneburg, Germany
halfmeier@leuphana.de

30 August 2017

Collective redress discussed in German electoral campaign

With Germany's federal elections scheduled for September 24, 2017, it is noteworthy that collective redress mechanisms have become an issue of political debate. The large parties – Social Democrats and Christian Democrats – discuss who is responsible for the lack of progress made in this area over the last years. Even chancellor Angela Merkel (Christian Democrats) mentioned in an interview recently that she is basically in favor of a collective action procedure based on the experiences with the model actions in capital markets cases (KapMuG), but that she is not satisfied with the current draft circulated by Heiko Maas (Social Democrats), the Minister of Justice.

Looking back, however, it was the Green Party that first initiated the discussion by introducing a bill for an opt-in group action in 2014. This draft was rejected by the majority in parliament (Christian Democrats and Social Democrats) in November, 2015. The Volkswagen scandal was already underway at that time, and many German consumers were rather dissatisfied with the fact that they need to file thousands of individual actions against Volkswagen while at the same time Volkswagen settled a consumer class action in the U.S., providing for thousands of dollars of compensation for affected car buyers. In view of this situation, the ruling parties announced that although they rejected the Green Party's draft – for fear of "too much" and "abusive" litigation – they would come up with a different proposal on collective litigation.

Such a proposal was then circulated by the Ministry of Justice early in 2016. It would introduce a "model declaratory action" (*Musterfeststellungsklage*) that could only be brought by certain consumer and other organizations, and the results of which could be binding for those consumers who register their claim in a special register. This proposal never reached the parliamentary debate, as it was hotly debated within the federal government. According to press coverage, it was in particular the Minister of Transport (Alexander Dobrindt, of the Bavarian sister party of the Christian Democrats) who criticized the draft by writing a handwritten note in the margin that said: "We reject this!! Delete completely!"

In July 2017, the Minister of Justice (Heiko Maas, Social Democrats) publicly presented a new version of the draft for the *Musterfeststellungsklage*. It differs from the earlier draft mainly in its restriction to consumer law, while the earlier version also mentioned "small and medium-sized businesses" that should be able to rely on the model action. The proposed restriction to consumer law raises the question of whether ordinary tort claims under general private law – that are for example at issue in many of the individual Volkswagen actions – are covered or not.

According to the draft, individual consumers – even a large group – are not able to bring the model declaratory action, but only those institutions that are already registered under the laws on injunction suits for associations. These are in particular the *Verbraucherzentralen*, which are institutions modestly funded mainly by public money. However, the draft does not indicate how these institutions should fund such actions or carry the associated cost risks. The cost risks – under the German "loser pays" system – are reduced under the draft, e. g. by putting up a ceiling of € 250,000 for the value in controversy, even if the economic value of the action may be much higher. At the same time, this reduces the statutory fee for the plaintiff's attorney to a rather modest amount. This has been criticized by the German Association of Attorneys (*Deutscher Anwaltsverein*) as it tends to continue an imbalance between well-paid defense attorneys and underpaid plaintiff attorneys.

The draft is a mixture between the existing laws on associations' suits and the existing special rules for capital market actions (*KapMuG*). From the associations' suits laws, it takes the restriction on standing only for associations. The Christian Democrats have criticized that the draft also gives standing to associations from other EU countries, referring to EU directive 2009/22/EC. While the requirements for creating such an association are rather strict in Germany and thus make it impractical to create one for *ad hoc* purposes, this may be different in other EU member states. The Christian Democrats say that they see the risk that such associations from other EU member states could be used as vehicles by creative plaintiff law firms to start such actions. This critique shows again that the discussion centers very much around avoiding so-called "abuse" of the system.

In procedural terms, the draft provides both for a settlement option and a declaratory judgment. In both cases, consumers need to register their claims in a special court register in order to benefit from the settlement or judgment, so this action can be classified as an opt-in system. The registration also stops the limitation period from running, but again, this requires an active effort by the affected persons.

However, a judgment in the model declaratory action may contain only declarations regarding questions of law or fact, so that there is no enforcement of such a judgment. Instead, the registered consumers who want to rely on the judgment must bring their own individual actions afterwards. The draft leaves it open for the parliamentary discussion whether the model declaratory judgment should be binding on the individual actions only if the consumer wishes or whether it should be binding in any event, that is, for and against the individual consumers. The latter alternative seems much more efficient, but would raise constitutional questions regarding the right to be heard and the access to information and court files for the affected consumers, which at the moment is not provided for in the draft.

Regarding the Volkswagen scandal, the draft makes sure that affected Volkswagen customers will not profit from the new procedure. The draft provides that the new law shall enter into force two years after its publication, which means that even if it should pass through parliament after the elections, it would not become law before 2020. Until then, all of the VW claims will certainly be time-barred.

In sum, the draft is a very modest proposal that is characterized by a paternalist attitude and distrust against the consumers, as it does not allow even a large group of consumers to come forward and bring such an action, but only certain organizations that are deemed to be trustworthy enough. On the other hand, it is a notable step in German legal history, as the discussion on collective redress has now gone beyond academic and judicial circles and has been taken up by high-ranking politicians. It will be interesting to see the fate of this draft in the new German parliament that is to be elected on September 24th.

Documents:

Federal Ministry of Justice, 2017 draft on *Musterfeststellungsklage*:

http://www.bmju.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/073117_DiskE_Musterfeststellungsklage.pdf

Green Party, 2014 draft on *Gruppenverfahren*:

<http://www.bundestag.de/blob/356150/b47bab89b198448e132e983b96400d0c/gesetzentwurf-data.pdf>