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LEGAL UPDATE LITIGATION

Cologne, 28. April 2023

The current state of collective remedies in German legislature and case law

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The concept of legal actions brought in a model case proceeding by a model claimant acting on behalf of many individuals with similar claims has been avoided in German legislature and legal culture for many years in spite of being popular and well established in other legal cultures. Especially in the United States, class actions represent an important legal remedy which is expressly provided for in Rule 23 of the United States' Federal Rules of Civil Procedure.

Only in the past decades has the German legislature decided to introduce certain collective redresses into civil procedure (1.-2.). As they have certain limitations in comparison with class actions as they are known in other cultures, simulating the concept of class actions has developed into a business model for certain entities in Germany which has been subject of significant controversy and case law in past years (3.).

The field of collective remedies in German law in general expects to see further drastic changes since the European Union issued their Directive (EU) 2020/1828 in 2020 regarding the need for representative actions to be implemented in all Member States (4.).

1. Introduction to the first collective remedies in Germany

The German Code of Civil Procedure provides parties with claims based on similar facts and legal issues with the option to bundle these claims, thus seeking relief in a joined action. However, this procedural option still requires all parties to actively participate in the proceedings and is generally unsuited to the situation of many people throughout a nation who are not connected by anything other than the similarity of their claims, which is typically addressed by collective remedies provided for by law.

German law functioned without such collective remedies throughout the 20th century, until in 2002, the Act on Injunctive Relief (UKlaG) was introduced. It provided a collective redress mechanism which was however limited to certain entities representing collective consumers' interests in consumer law.

In 2005, after investors brought around 16.000 single actions against the Deutsche Telekom due to incorrect capital market information, the Capital Markets Model Case Act (KapMuG) established a collective remedy for investors seeking relief in proceedings against the same entity based on the same events giving rise to their damages.

2. Developments following the VW emissions scandal

The last significant innovation in the field of German collective remedies was kindled by the VW emissions scandal in 2015. The amount of claimants potentially eligible to relief based on the emission manipulations cleared the legislature's view on the need for a collective remedy applicable to such a broad case.

In 2018, the Model Case Proceedings Act added a collective remedy to Sections 606-614 of the German Code of Civil Procedure. It provides certain consumer organisations with the right to obtain a declaratory judgment determining certain elements of fact and law, which is then applied to every single action brought by individual claimants who had joined the Model Case Proceedings beforehand.

Consequently, this collective remedy facilitates the determination of most facts and law relevant to all cases joined in the Model Case Proceedings. However, following the declaratory judgment, every individual claimant still needs to bring an individual action to seek specific relief. The same applies to the other collective remedy aimed at damage claims mentioned above (KapMuG). These procedural means, as well as the most recently introduced Model Case Proceeding are therefore still not comparable to the class actions that can be brought in the United States. Consequently, only few Model Case Proceedings were initiated in Germany since the remedy was introduced.

3. The "assignment model" in recent German case law

By simulating class actions and avoiding the limitations of the procedural options to collectively seek relief introduced into German law until now, claimants often decide to assign their claims to an entity specialised in mass litigation, which then proceeds to bundle all claims assigned to them by different parties in a single action ("assignment model"). This is typically done by legal tech firms or debt collection agencies on a large scale and financed by litigation funding entities. By applying these methods systematically, a business of simulating class actions has been established.

This mass litigation practice has continually been subject of controversy and developing case law in past years as the commercial pursuit of claims on behalf of others must comply with the Legal Services Act. It requires any entity providing out-of-court services by non-lawyers to acquire a debt collection licence and to adhere to high standards regarding registration of proof of personal reliability and suitability.

Considering these standards, certain assignment models have not passed the scrutiny of regional courts which found them to be unlawful under the Legal Services Act. In some courts' opinions, the assignment model judged by them exceeded the limits of typical debt collection under the Legal Services Act, while others saw a conflict of interest arising due to the assignment model. In their opinion, entities funding the bundled claims were in a position to unduly influence the proceedings in a way that might infringe upon the represented parties' best interests.

The German Federal Court of Justice made its disagreement with these lines of argument clear in the past years. In two landmark decisions it overruled judgments which had rejected the assignment models applied in their cases. In the first decision from 2021 (II ZR 84/20), the Court held that an assignment model was lawful under the Legal Services Act in spite of its commerciality and design to pursue claims in court instead of focusing on out-of-court collection. Furthermore, the Court did not see any conflict of

interest arising from assignment models in general.

In the second decision from 2022 (VIa ZR 418/21), the Federal Court of Justice disagreed with the Higher Regional Court of Braunschweig which had found the bundling of several claims against Volkswagen to be unlawful under the Legal Services Act as the claims were governed by Swiss law. Claims governed by foreign law were – according to the Regional Court – not covered by the service provider's debt collection license. In the Federal Court's opinion, which was based on its broad application of the Legal Services Act, the relevant debt collection license did cover the foreign claims. The Court emphasised in its ruling the admissibility of the assignment model, regardless especially of the number of claims bundled by the claimant.

Regarding the issue of the conflict of interest which the Regional Court saw for the reasons lined out above, the Federal Court held that the involvement of a funding entity by itself and its consent being required to initiate appeal proceedings or to reach a settlement does not constitute any issues relating to a conflict of interest. Neither does, in the Federal Court's opinion, the bundling of claims with different prospects of success.

After these landmark rulings, application of the principles set out by the Federal Court of Justice by the lower courts met some difficulties. The Higher Regional Court of Munich did follow the Federal Court's line of argument in a decision in July 2022 (21 U 1200/22). However, controversy regarding the assignment models remains among commentators as well as the lower courts, especially regarding the field of antitrust law.

This becomes apparent in a ruling by the Regional Court of Mainz in October 2022 (9 O 125/20) regarding cartel damages claims which were bundled and jointly pursued by a debt collection agency. The Court found the assignment model in this case to be unlawful under the Legal Services Act as the claimant was not able to provide the expertise necessary in the complex matter, resulting in the assertion of the claims exceeding the scope of the debt collection license.

The Court also held that the calculation of the contingency fee in this specific case (which was to be calculated based on the amount recovered in court or in a settlement and, beyond that, based on the legal costs, while the entire fee was not to exceed 50 per cent of the recovered sum) created incentives for the claimant to pursue cost-intensive and unnecessary procedural measures, disregarding the represented parties' interests, thus resulting in a conflict of interest.

Some critical voices arose following this decision. They took issue with the line of argument which, according to these voices, contradicts the Federal Court of Justice's rulings regarding assignment models. They argue that the complexity of a claim cannot result in an exceedance of the debt collection license's limits if it is not equally exceeded in the case of claims governed by foreign law.

4. Implications of the Representative Actions Directive (EU) 2020/1

In 2020, the European Union introduced the Directive (EU) 2020/1828 stipulating the requirement for all Member States to provide for a representative remedy protecting the collective interests of consumers. The Directive requires that certain entities be able to bring representative actions on behalf of all consumers affected by the infringement that gave rise to the proceedings and willing to be represented. It also requires the consumers to be entitled to benefit

from the proceedings directly, which implies the possibility to immediately seek specific remedies within the representative action.

Germany was required to implement the Directive's principles into German law until December 25th, 2022 but failed to do so. Due to this violation of the Treaties of the European Union, the European Commission initiated proceedings against Germany in January 2023.

At present, only the broad direction of a law finally incorporating the Directive's requirements into German law has manifested. There is no final draft of legislature known to have been agreed upon within the federal government. However, the Federal Ministry of Justice has allegedly prepared a preliminary draft.

Most likely, the current concept of collective remedies in German law will be replaced by the new legislation introducing a new representative action. The new remedy's most distinguishing feature in comparison with the current ones will be the option to directly pursue specific relief within the representative action.

Outlook

It remains to be seen in what manner the federal government and parliament will eventually implement the provisions required by the Representative Actions Directive into German law. Until then, further decisions regarding the controversial issue of assignment models will have been passed by lower courts, shedding light on the depth of the remaining reservations against these models, especially in antitrust law, or the willingness to apply the Federal Court of Justice's line of argument in future proceedings. The upcoming legislature will heavily impact the field of collective redress and the practice of assignment models in Germany in any case.

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