

Legal Resolution of Mass Disputes

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International Developments in Class Actions and Collective Redress

“The German Perspective”

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In Germany, the period for implementing the EU Commission’s Recommendation 2013/396/EU on instruments of collective redress expired in July 2015 without any legislative reaction. A draft for an Act on Group Proceedings submitted to Parliament by the opposition Green Party has been rejected by the government majority recently. The Federal Ministry of Justice and Consumer Protection announced to publish a draft for a new representative action in consumer law for spring 2016. The new type of action will allow consumer associations to sue for a declaratory judgment on the violation of consumer law, but it will not include actions for the recovery of damages.

Therefore, instruments of collective redress under German law are still very limited in number and their scope of application. Some designated associations, particularly consumer associations may ask courts for injunctive relief in case of a violation of unfair competition law or consumer law. Consumer association may also – based on the assignment of individual consumer claims or on a power of attorney given by individual consumers – conduct a test case litigation. They may also collect individual claims for bringing a joint action against businesses who violated consumer law. This is, however, far from being as effective as a real group or class actions. Consumer associations must organise assignments in advance, which is manageable only in some cases with a limited number of affected consumers and the possibility to identify them easily.

Another instrument under German law which can be described as collective redress are actions for skimming off illegally gained profits. Consumer associations have legal standing to bring such actions in competition law (antitrust law) and consumer law. The instrument which was implemented in 2005 does not provide compensation for consumers, but intended to have a preventive effect on the business sector. However, it turned out to be rather ineffective, because consumer associations are reluctant to bring such actions due to the procedural risk involved in such litigation. There are no financial incentives for consumer associations to file such actions. As a result, only very few actions of this kind have reached German courts since 2005.

In 2005, the German legislature implemented a special procedural instrument for handling complex securities cases, the so-called Capital Market Test Case Act (CMTA). It provides rules for test case proceedings once shareholders have filed individual actions for damages against the same defendant. The proceedings are rather complicated and are not very effective or speedy. A reform of the CMTA in 2012 did not change the instrument to a real group action as suggested by many academics and lawyers. Nevertheless, it improved the chance for a collective settlement of all securities cases pending in court during the test case proceedings.