



The future of collective actions in Europe

The Declaratory Model Action (DMA) in Germany

7 February 2018 saw the completion of negotiations for a “big coalition” government in Germany. Three German parties – CDU, CSU and SPD – published their coalition agreement on the basis of which they plan to govern in the coming years.

One of the points addressed in the agreement relates to the introduction of a Declaratory Model Action (DMA) – Musterfeststellungsklage – a type of collective redress procedure. The new government plans to introduce the implementing legislation by November 2018 to allow consumers to bring claims within the limitation periods expiring at the end of 2018.

In order to avoid the development of a US-style class action industry, the coalition plans to limit the right to bring a DMA to a fixed number of qualified organisations. It is not yet certain how big the pool of qualified organisations will be or what qualification requirements the future government has in mind. The approach generally resembles the French collective and representative action where the government approves organisations that may bring claims on behalf of consumers based on a set list of requirements.

To initiate DMA proceedings, at least ten claimants will need to form a class and substantiate their common claims. Within two months after the filing of the DMA, at least fifty claimants will need to opt-in and register in the DMA register to allow the claims to proceed. Otherwise the DMA will fail.

The DMA judgment will be binding on the defendant and all group members registered in the DMA register. The only way a group member can avoid this is by withdrawing their opt-in. Registered group members will only be able to withdraw their registration prior to the commencement of the first oral hearing.

Open issues

- The coalition agreement does not elaborate on what would happen to the limitation periods for similar claims of potential claimants that have not opted in to the DMA proceedings. There is, however, some discussion as to whether the limitation period should also be suspended for such potential group members. The agreement also does not specify how long the opt-in phase would be open or when the group would be considered as finally closed. It is therefore unclear whether new claimants could opt in e.g. within the two months period or until the first oral hearing.
- The coalition agreement does not provide any information on which courts will hear DMA claims, i.e. whether such claims will be subject to the general rules of national jurisdiction or automatically start in the higher courts. The latter would be in line

Government envisages the implementing legislation by November 2018

Limitation of the right to bring a DMA to a fixed number of qualified organisations

Ten claimants to form a class, and fifty more to opt in and register in the DMA register

with the limited collective redress already available in Germany for certain financial investments where the courts of appeal act as the court of first instance.

- It is not clear whether any special rules of international jurisdiction would apply to DMA proceedings. In principle, international jurisdiction in the EU is governed by the Brussels I Regulation. This means that claimants can only initiate actions in Germany if German courts have international jurisdiction over the defendant under the Brussels I Regulation and German law may not provide for additional international jurisdiction.
- It would seem that the DMA might be brought against several joined defendants if German courts have international jurisdiction for one of the defendants and the others can be joined under the Brussels I Regulation.
- Another interesting issue will be whether and to what extent claimants not domiciled in Germany will be able to join a DMA. Under the current provisions the only threshold is the international jurisdiction of German courts under the Brussels I Regulation. Therefore, claimants not domiciled in Germany would be able to join the DMA if German courts have international jurisdiction, e.g. if the defendant has its seat in Germany and the parties have not derogated from the general jurisdiction rules through a valid choice of forum clause.
- Finally, a DMA judgment in favour of the claimants would not grant any specific remedies, it would be merely limited to the finding of liability of the defendant, as is the case with other declaratory judgments in Germany. The quantum of individual claims would need to be determined separately, either out of court or in follow-on court proceedings.

Since only limited information is available at this time, it remains to be seen how the DMA structure will evolve during the drafting of the new legislation. Please do not hesitate to contact us, should you have any queries related to the new regime and its significance for your organisation.



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