



European collective redress Directive at the finish line

What is the future for the German model declaratory decision when the EU regulates collective redress?

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After a turbulent start for Commission President Ursula von der Leyen, her Commission has now taken over on 1 December 2019. The new Justice Commissioner Didier Reynders, himself a lawyer, was particularly motivated to comment on the legislative proposal for a European representative action. Consumer protection and collective redress are high on his list of priorities. The trialogue negotiations between the European Parliament, the Commission and the Council have started after the Council adopted its General Approach in November 2019. However, Germany abstained from voting in the Council and an abstention in a qualified majority vote is considered as a vote against. If the trialogue negotiations are successful: What would be the impact for the model declaratory decision (Musterfeststellungsklage) under German law?

In principle, the Council supports a high margin of discretion for Member States when it comes to the implementation, including a distinction between domestic and cross-border representative actions. Only the cross-border representative action should be linked to uniform Europe-wide criteria. Nevertheless, these criteria are not as strict as the national provisions for model declaration actions. According to the current state of negotiations, it is possible that Germany could retain the model declaratory action to obtain declaratory decisions. However, it would then be necessary to introduce a new action aiming for injunction and redress which would compete with the action for a declaratory decision. How attractive would the action for a declaratory decision then be? Since it may be difficult to determine the scope of the individual damage and the amount of damage, an action for a declaratory decision appears to be helpful. Settlements, out-of-court settlements or a civil action for the enforcement of claims should be left to each consumer to decide. Lawyers in particular are best placed to assist in this assessment. The EU-Parliament has chosen a different approach, focusing on the "qualified entity". Among other things, it demands transparent financing of qualified institutions and proof thereof, as well as the introduction of the "loser pays principle", which ensures that the defeated party pays the costs of the proceedings of the successful party. The EU-Parliament and the Council agree however on the binding effect of judgments and on the requirement an opt-in requirement for concerned consumers who must actively consent to be joined as part of the representative actions.

Whether the model declaratory action will face competition from a new domestic action for redress and injunction will be decided in the negotiations, which are expected to be concluded under the Croatian Presidency by the summer.