

Europe Germany

Consumer ADR: draft bill to amend current regulation

Introduction

The Federal Government has drafted a bill to amend the German Act on Alternative Dispute Resolution in Consumer Matters (*Gesetz über die alternative Streitbeilegung in Verbrauchersachen – Verbraucherstreitbeilegungsgesetz – “VSBG”*)⁴², in force since 1 April 2016⁴³.

Implementing Directive 2013/11/EU⁴⁴ on alternative dispute resolution for consumer disputes (“**Directive on Consumer ADR**”)⁴⁵, the VSBG created – for the first time in Germany – a framework for consumers to turn to consumer conciliation bodies (*Schlichtungsstellen*) for all disputes with traders.

Introduced to provide an alternative legal tool for out-of-court consumer disputes resolution, the VSBG determines basic conditions as to when consumers can turn to these consumer conciliation bodies and sets out the quality requirements for such bodies. Since coming into force, the number of consumer conciliation bodies and the number of ADR procedures have both slightly increased in Germany.

Background

The draft bill amending the VSBG must be viewed against the background of current developments. In November 2018, a new action in consumer matters (*Musterfeststellungsklage*) was introduced in Germany aimed at facilitating consumer litigation by enabling consumers to rely on a declaratory judgment on legal and factual questions relevant

to their claims. Consequently, lawmakers expect a potential increase of consumer ADR proceedings.

However, participation in the new action is not compulsory for consumers and therefore the action does not replace traditional consumer mass litigation. Only qualified entities, such as registered consumer associations matching strict criteria defined in the Code of Civil Procedure, have standing to sue commercial entities for a declaratory judgment. Consumers can register their claim in a litigation register. A declaratory judgment is binding on the defendant entity and on registered consumers (even where the registered consumers are not parties to the lawsuit in question (*Musterfeststellungsverfahren*)). The action does not however provide awards for the benefit of consumers and individual claims can only be determined in follow-on actions.

This is where the new consumer ADR bill comes into play. The lawmakers expect that, following a *Musterfeststellungsklage*, consumers might choose to bring their claim in ADR proceedings instead of pursuing a slower (and more expensive) follow-on action before the ordinary courts.

Also explaining the draft bill’s introduction, ADR proceedings introduced by the VSBG have encountered a number of issues:

- despite a steady increase in the number of proceedings, a majority of consumers are still unaware that ADR exists;
- determination by a competent consumer conciliation body is complex⁴⁶;

42 English version available at: https://www.gesetze-im-internet.de/englisch_vsbg/index.html

43 For further background information regarding the VSBG see Tobias Ackermann, “Keeping consumer claims out of court: cooperation, conciliation and cost cutting?” *International Product Liability Review* (June 2016), p12

44 Directive 2013/11/EU of the European Parliament and of the European Council of 21 May 2013

45 Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0011>

46 Since the VSBG came into force, the General Consumer Conciliation Body at the Centre for Conciliation (*Zentrum für Schlichtung e. V.*) in Kehl, which is supported by the Federal Government, has ensured that in cases where no special consumer conciliation body is in place, the consumer can still call a consumer conciliation body. However, since support from the Federal Government ends on 31 December 2019, federal states are obliged from 2020 to set up supplementary consumer conciliation bodies (“Universal Conciliation Bodies”) if they do not have a sufficient range of conciliation services. This has the disadvantage that a large number of supplementary consumer conciliation bodies would need to be set up, with the result that it may be hard to determine jurisdiction.

- there is a lack of clarity over whether a dispute settlement procedure before a consumer conciliation body can be conducted in parallel with a *Musterfeststellungsklage*;
- in pure domestic disputes with online retailers, there is uncertainty whether the German Federal Office of Justice (*Bundesamt für Justiz*), as the German contact for the European Platform for Online Dispute Resolution⁴⁷ (OS-contact), is authorised to inform consumers about competent consumer conciliation bodies; and
- the fact that the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*) only has to be informed by financial conciliation bodies recognised by the Federal Office of Justice about the business practices of traders that could significantly impair the interests of consumers that have become known in the course of an arbitration - but the same is not required by recognised insurance conciliation bodies.

Draft bill in focus

To address the issues with the current regulations, the German Federal Government drafted a bill amending the VSGB (*Entwurf eines Gesetzes zur Änderung von Vorschriften über die außergerichtliche Streitbeilegung in Verbrauchersachen und zur Änderung weiterer Gesetze – “Draft Bill”*)⁴⁸. Key provisions of the Draft Bill include:

- establishing a nationwide universal conciliation body (*bundesweite Unviversalschlichtungsstelle*);
- clarifying how an ADR procedure relates to a *Musterfeststellungsklage*;
- increasing the powers of the German Federal Office of Justice; and
- setting out the information obligations of insurance conciliation bodies recognised by the Federal Office of Justice.

⁴⁷ Available at: <https://ec.europa.eu/consumers/odr/main/?event=main.trader.register>

⁴⁸ Published under BT-Drucks. 19/10348; available at: <http://dip21.bundestag.de/dip21/btd/19/103/1910348.pdf>



Provisions in depth

To deal with potential difficulties in determining the competent conciliation body, the Draft Bill provides for the establishment of a nationwide “**universal conciliation body**”. The Draft Bill stipulates that responsibility for supplementary consumer ADR (universal ADR), currently assigned to the federal states, is to be transferred to the Federal Government on 1 January 2020.

The Federal Government should be given the opportunity either to fulfil this task itself (through an official universal conciliation body) or to lend or commission a recognised private consumer conciliation body. This role will fall to the Federal Office of Justice, which would also be responsible for legal and professional supervision.

By operating a nationwide universal conciliation body, the Federal Government would also be fulfilling its obligation under the Directive on Consumer ADR to provide a nationwide infrastructure of consumer conciliation bodies for consumer disputes throughout Germany. Whilst critics have constitutional concerns regarding the competence of the Federal Government to establish a nationwide Universal Conciliation Body, it does seem to be the best way to preserve clarity and legal unity. The alternative would be a division of competence among different bodies in each of the 16 federal states, which would be unnecessarily complex and place a real burden on resources.

The Draft Bill also provides increased powers to the German Federal Office of Justice. Along with supervisory power to withdraw recognition of a consumer conciliation body, the Draft Bill empowers the Federal Office of Justice to also advise consumers and traders in purely domestic disputes if a complaint has been submitted via the European Platform for Online Dispute Resolution.

As the German contact point for the European Platform for Online Dispute Settlement (OS-contact), the Federal Office of Justice can assist consumers and entrepreneurs in resolving disputes relating to complaints submitted via

the OS Platform. This includes assisting with the submission of complaints and, where appropriate, the relevant documents, advising on how the OS Platform operates, explaining the procedures used by dispute settlement authorities, and/or informing complainants about alternative routes to legal protection if dispute settlement via the OS Platform is not possible.

However, there is currently no legal basis for the OS Contact Point to provide advice in purely domestic cases. The Draft Bill therefore envisages extending the role of the Federal Office of Justice under the Consumer Dispute Resolution Act to make it the German contact point for the OS Platform.

In regards to the **relationship** between ADR and the *Musterfeststellungsklage*, the Draft Bill prevents consumers from conducting ADR proceedings if they have registered their claim in connection with a *Musterfeststellungsklage*.

The Draft Bill’s justification for this is that a registered consumer cannot bring a lawsuit against a defendant while the *Musterfeststellungsklage* is pending if the subject matter of the dispute concerns the same facts and has the same declaratory objectives. By extension therefore, the conduct of ADR proceedings before a consumer conciliation body should also be excluded.

Under these circumstances a consumer conciliation body can refuse to conduct ADR proceedings. The registered consumer will not suffer any disadvantages from this as they can try to reach an agreement with the defendant using ADR before registering their claim in connection with *Musterfeststellungsklage*. If they’re unable to reach an agreement, the consumer can still register a claim.

The Draft Bill also obliges private conciliation bodies recognised by the German Federal Office of Justice in the insurance sector to inform the German Federal Financial Supervisory Authority of any business practices of a trader which have become known to them in the course of their arbitration activities that could significantly damage the interests of a large number of consumers.

Comment

Although the Draft Bill contains some improvements, it has been criticised for not providing explicit provisions to promote consumer ADR. For example, proposals such as fee-based incentives to promote the use of out-of-court conciliation bodies have not been implemented. The Draft Bill also means that defendants to a Musterfeststellungsklage will not be forced to face claims from registered consumers via ADR while court proceedings are pending.

It remains to be seen whether further amendments will be made to the Draft Bill. At this point, the German Bundesrat has submitted supplementary proposals and the German Bundestag has carried out an expert opinion. We'll be monitoring developments closely from now on.



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