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COLLECTIVE LEGAL PROTECTION – CLASS ACTIONS AND THE RIGHT OF ASSOCIATIONS TO SUE IN GERMAN CIVIL PROCEEDINGS

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The subject. The article is devoted to problems of institute of collective legal protection in German civil procedure law.
The purpose of the article is to confirm or disprove hypothesis of the need to introduce the institution of general class action in German civil procedural law.
The methodology of the study includes general scientific methods (analysis, synthesis, description) and sociological approach.
The main results and scope of their application. German civil procedure law is based on the principle of "two parties". However, there are many situations that do not fit into the traditional scheme of individual legal protection, because either the conflict is affected by many persons, or the conflict goes beyond the individual interests of the affected persons. For processes in which a significant number of persons are involved, as a means of protection, first of all, claims for abstention from actions (Unterlassungsklagen) submitted by associations of consumers and entrepreneurs are offered. These claims, in spite of the dogmatic difficulties, have been implemented in practice and proven. Special legal regulation on this issue exists in the legislation on consumer protection, competition and Antimonopoly legislation. Added to this are the more recently the claims of the unions about the withdrawal of the profits (Verbandsklagen auf Gewinnabschöpfung). The claim for recovery (Einziehungsklage), which allows associations to join several unidirectional claims of consumers in a single lawsuit, is also regulated in a special way. However, there is still no General class action in German law.
Conclusions. The author concludes that the absence of a General class action is a legal gap in German civil procedure law. This situation is criticized as insufficient to raise the issue of causing mass harm before the court. First of all, there is the absence of a collective action aimed at compensating for harm, which is regarded as alien to German law. The relevant initiatives of the European Commission in this regard contain only non-binding recommendations to States parties on the introduction of collective forms of legal protection. This topic becomes even more relevant in Germany in connection with the "diesel scandal" and the introduction of the bill on a collective model claim for recognition (Musterfeststellungsklage).

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I. Introduction

1. The purpose of the civil procedure

As a rule, in civil law, a dispute arises between a few legal entities, mainly between two opposing each other, the plaintiff and the defendant. These cases correspond to the" traditional idea" of civil substantive and procedural law.
First of all, German civil procedural law serves to protect the individual, private subjective (individual) rights, including interests, and thus, first of all, individual legal protection [1, p. 11]. This thesis is confirmed by the rules on the proceedings of the Civil procedure code (ZPO), since the containing procedure, the plaintiff's claim (§ 253, part 2, subparagraph 2 of the Civil procedure code) related to material legal force of a court decision (§ 322 part 1 of the Civil procedure code) [2, p. 23]. Only in some exceptional cases third parties can participate in the process or their rights are affected by the court decision without such participation.

2. Collective interests in civil proceedings

There are often situations that differ from the traditional structure of individual legal protection, in particular where the interests of many persons are affected or the conflict transcends the individual interests of the participants. This is the issue of collective legal protection, but rather a collective realization of the right [3, p. 590].
Here we are talking about processes that are in the sphere of public interests, that is, those processes in which "supra-individual" interests are protected. Already in 1885 Wach found that the purpose of civil process is also the implementation of the objective of private law [4, p. 3]. In the implementation of objective interest, however, a single individual is not interested, rather, affected the interests of the public [5, p. 4]. This includes, primarily, the public interest in the preservation of the rule of law, universal legal stability and legal certainty [5, p. 8]. Consequently, the civil process serves, including the realization of public interests. As a generic term interests, which native is not only a single individual, the so-called "supraindividual" interests [5, p. 4]. Individual interests are treated as the collective interests of a certain group of persons (for example, interests concerning the protection of the consumer in competition), and General interests or public interests (for example, the public interest in ensuring fair competition) [3, p. 591].
The "collective interests of consumers" in article 3 (K) of Regulation (EC) no 2006/2004 of the European Parliament and of the Council of 27 October 2004 on joint work in the field of consumer protection are defined as "the interests of several consumers who have been or may have been harmed as a result of a violation". The General notion of "collective interest" encompasses, first, public interest and, second, interrelated individual interests of the group (group interest) [1, p. 13].
First of all, supra-individual interests are represented by associations and so-called "qualified organizations". One of the most practically significant examples of realization of public interests are claims of associations on disputes on protection of competition [3, p. 591]. In this case, the interest does not become either an independent or own interest of the Association. The Association, in turn, is authorized to view the group of interest [5, C. 99]. In these cases we speak of "collective legal protection", which primarily has a major importance in the field of consumer protection and in competition/antitrust law [1, p. 13]. In the case of claims associations not protected by the right of the individual and the group interests, thus, as a consequence of the implementation of interrelated subjective rights under the civil process and here is added the objective of protection of rights [1, p. 13].

3. The principle of two parties (Zweiparteienprinzip) and a collective process

As mentioned above, German civil procedure law is based on the traditional idea of a "two-way" process as a dispute between two individual parties. The principle of the two sides is the source of individual legal protection and is reflected in the doctrine on the subject of the dispute, the doctrine of legal force, the principle of inter-partes and in the power management process (Prozessführungsbefugnis) [1, p. 17].

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For processes involving a wide range of people, there were and are in German civil procedural law, in General, only the following tools: procedural complicity, introduction to process third party merge process, the suspension of the proceedings, the claim of the unions to refrain from taking actions (Verbandsunterlassungsklage). Code of civil procedure still does not provide special rules for "process with multiple participants" (Massenverfahren).

The result of the principle of the participation of both sides the debate over a new collective forms of redress, such as the introduction of class action in German or European law is facing "structural opposition", as in civil proceedings third party as a General rule, do not participate, and their rights are not affected by action, judicial decisions [6, p. 160].

II . Collective Legal Protection

1. The main groups of cases

a) Serial and mass damage

One of the main typical cases of applying collective legal protection is the situation of “involvement of many people”, which is characterized by the violation of the individual interests of a large number of people in the same or similar way [3, p. 590].

> *Example 1* [3, p. 590]*: When a train crashes, several hundred passengers receive damage of varying severity. Victims declare claims for damages to Deutsche Bahn. The train crash is possibly due to the wear of the material part of the axis of the car. Are the victims the right of claim for damages depends, among other things, on whether the material defect was not detected due to the negligence of unfair employee of Deutsche Bahn AG during regular inspections.*

This type of damage has been extended in particular as a result of major disasters , the limestone 's keyword - "The collapse of the ICE in Eshed" [4] , "The accident on the funicular in the village of Kaprun"[5] and "The Concorde Disaster near Paris" [6] . This also includes serial damage due to defects in the production of goods or medicines. One of the most resonant scandals in the field of pharmaceutical production in Germany was *Contergan*- Scandal [7]. Under the concept of mass injury for some time subject to investor losses (*Kapitalanleger*) , suffered as a result of misinformation or lack of information [7, p. 21].

In the first example, we are talking about many similar cases of harm. All harm comes down to a single source. Each victim would have to initiate a separate process against the Deutsche Bahn joint stock company based on the harm done to him. The courts would be involved in many processes in which the same issues of law and facts were considered, in particular, the circumstances of the accident, issues of responsibility and causal connection [3, p. 590]. This weakly consistent with the principle th of procedural economy. The circumstances of the case would have to be constantly re-examined. All that indicates the advisability and concentrating on the second realization of the right.

b) Insignificant and widespread harm (*Bagatell - und Streuschäden*)

The special problems of “mass involvement” touch upon cases in which a similar amount of harm is inflicted on many people, but only to a small extent.

> *Example 2 [3, p. 590]: A manufacturer sells chocolate bars online. According to data contained in the advertisement and displayed on the package, they contain 65% cocoa, but in fact - only 55%. The reduction in cost of this bar of chocolate is, however, quite a few cents.*

Between this and the first example you can spend a lot of parallels: in both cases, the malicious event affected the interests of a large number of persons. All buyers incur losses because they purchase a product that contains less than promised in advertising and packaging. Unlike the first example, in the second, the losses of each individual are insignificant.

Buyers have the right to make a claim from the contract to the sellers based on the fact that the real properties of the product does not meet the distinct under the contract terms. Since the losses incurred are only a few cents, most consumers will not initiate legal proceedings, but will get angry and, possibly, will buy other chocolate in the future. Customer

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waives the right, because the need for it of costs commensurate c benefits of such a procedure. In this situation, we can talk about "rational disinterest" in the exercise of rights [3, p. 590].

In such cases, we often speak of minor and widespread harm. At the same time, these concepts, although they are visual, are nevertheless blurred, because it is not clear what the size of the damage should be, so that it can be attributed to insignificant. EU law treats this concept as follows: The requirement is considered to be insignificant if the claim is without interest, costs and procedural costs not exceeding 2 000 [8]. German law discusses a significantly smaller amount of harm (from 25 to 1,000 Euros) [1, p. 23].

c) Violation of collective or public interests

In addition, some authors highlight the construction, which deals with the perception and realization of supra-individual interests through Association.

> *Example 3 [3, p. 591]: the consumer protection Association opposes The General terms and conditions of transactions (Allgemeine Geschäftsbedingungen (AGB) of the enterprise. The Association believes the improper position terms of use/AGB, in which personal information can be used by a party applying terms of use/AGB and its partner companies to implement advertising campaigns by SMS or email in case customers are certainly not expressed by the mark in the special field of their disagreement with this newsletter.*

According to the position developed by judicial practice, the condition is invalidated with reference to the proposal 1 of part 1 § 307 BGB, as it deviates from the main idea of the legislative provisions to the detriment of customers . The condition contains a solution "opt-out", while the legal provisions require the explicit consent ("opt-in") of the addressee of advertising.
Example 3 also shows that the invalid condition affects the interests of many customers. The difference is that here the plaintiff is not an individual whose individual interests are infringed, but the Association for the protection of consumer rights in the interests of many actually or potentially endangered customers. It thus protects the supra-individual interest. This is not about the interrelated individual interests of many individuals, as mentioned earlier, but about special interests. They do not belong as subjective or individual rights to individual subjects, but enjoy independent legal protection.
Supraindividual interests are perceived and realized by certain organizations. In addition to the control terms of use/AGB towards practically relevant application areas of protection ov individual interests are, as has been previously noted, claims associations in the field of protection of competition. Even the Imperial Supreme court ruled in the case involving Enterprises in the protection of trademarks, that the authority of unions to sue against unfair acts based on "the idea that claims about refraining from taking actions, which inherently have to protect only competitors, in fact, but as a whole the law on protection of competition, counteract the abuses of competition, including in public interest and directed not to leave the prosecution of the relevant offence at the discretion of each individual victim" .

2. Collective legal instruments in civil proceedings

Civil substantive and procedural law provides for various mechanisms that can contribute to solving these problems. There are various, and largely point-based approaches that offer a particular solution. Due to gaps, the introduction of additional tools is discussed.

In the course of discussions in recent years, different types of class actions have emerged in European Union member States.

Widespread the following classification of collective remedies: claims associations (Verbandsklagen), joint or class action (Sammel- bzw. Gruppenklagen) and the model manufacturing (Musterverfahren) [6, p. 162; 8, p. 7; 9, pp. 149-168]. On the basis of European legislation, the actions of associations to refrain from committing acts are particularly widespread in EU Member States.

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3. **New trends at the EU level**

Recently, the European Union has shown increased interest in legal instruments of collective protection. First of all, this is reflected in the implementation of the Institute of collective action for damages in the field of competition law and antitrust law, as well as legislation on consumer protection.

(a) development in EU competition and antitrust law

On the topic "claims for damages for violation of EU competition law", the European Commission in 2005 prepared a "Green book" (Grünbuch), and in 2008 – a "White book" (Weißbuch). The green paper recommended easier access to claims for damages for violations of EU competition law in order to improve the effectiveness of the right to compensation in this area. In the White paper, the Commission proposed to introduce two types of claims: claims associations opt-out with a choice of models automatic inclusion in the group, unless explicitly expressed refusal to participate in it (opt-out-Verbandsklage) and class actions opt-in, involving the expression of consent to participation in the group (opt-in-Gruppenklage). First of all, the proposal to introduce opt-out claims was strongly criticized, as this concept contradicts the right to be heard in court proceedings (Grundsatz des rechtlichen Gehörs) and the principle of dispositivity enshrined in the paragraph. 1 tbsp. 103 of the Basic law of Germany, article 6 of the ECHR and part 3 of article 47 of the Charter of European Union fundamental rights, and therefore cannot be implemented in member States of the EU [1, p. 126].

b) Development of EU legislation on consumer protection

At the end of 2008, the European Commission published a Green book on collective consumer protection procedures. The green book was developed in accordance with the EU consumer policy Strategy (2007-2013): the aim of the Strategy was to create a comprehensive and effective domestic market, which also includes effective consumer protection. The green paper contained a number of considerations on how to improve the application of the law to minor and massive harm. In this regard, the issue of introducing claims of associations, group or model claims was discussed.

(c) Joint initiative to establish collective legal protection mechanisms

In February 2011, the European Commission, as part of its strategy to introduce the institution of class action in competition and consumer law, published an Advisory brochure entitled "Collective legal protection: towards a harmonized European approach". In February 2012, a resolution of the European Parliament with the same title "on collective legal protection: towards a coherent European approach" followed. The EU Parliament stressed the benefits of class action. A "horizontal" framework Directive defining minimum conditions for class actions should facilitate the introduction of class actions for damages into competition and consumer protection legislation.
On 11 June 2013, the European Commission issued a recommendation "on the General principles of collective proceedings in cases of refraining from action and compensation for harm in EU member States in cases of violation of the rights guaranteed by EU law" . The recommendation contains General non-binding principles of collective legal protection, which aim to provide a unified, harmonized approach in the EU. Collective legal protection should include not only claims by associations, but also, among other things, class actions. The Commission gave the EU member States two years to implement the Recommendation. And four years later she planned considering the need to adopt legally binding regulations at EU level [10, p. 497]. These Recommendations were reiterated by the European Commission in its Report of 25 January 2018 on the implementation of these Recommendations.

III. Claims of associations in civil and civil procedural law

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In Germany, the claims of associations developed as an important instrument of collective legal protection. As in example 3, it is the filing of a claim by an Association that is legally empowered to bring an action to stop conduct that is abstractly harmful to the consumer. Violation of the subjective rights of the Association is not required. As a rule, the claims of the associations serve to protect their own interests not the interests of the Association or its members, and the protection objective (collective) interest to ensure the effective implementation of objective law [1, p. 29]. An interested person who is not an independent participant in the process, thanks to the "legal reflex", receives indirect benefits from the outcome of the case in the form of an extended action of the court decision or its pre-judicial force. At the same time, since the plaintiff is involved in the Association, the process takes place as a normal process in which two parties participate.

The introduction into German law of the right of Association to file a claim was carried out in three stages. In the first place in 1965 in the Law on unfair competition (Gesetz gegen unlauteren Wettbewerb – UWG) was introduced the claim of the unions to refrain from taking actions (Verbandsunterlassungsklage). Then in 1976, this claim was included in the Law on the regulation of General terms and conditions (Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen – AGB). During the reform of the law of obligations in 2002 the procedural provisions of the AGB were summarized in the new procedural law – Law on the claims for abstinence from actions (Unterlassungsklagegesetz – UKlaG).

1. Review of special legal grounds

Claims of associations are of great practical importance in the field of consumer protection and competition protection (in competition law and antitrust law). With some exceptions, the claims of associations are not intended to obtain funds and are claims containing demands to refrain from certain actions. The relevant provisions on claims of associations in the field of consumer protection are enshrined in §§ 1, 2 in conjunction with § 3 UKlaG/ZIVD, in the field of competition law in the PP. 2-4 part 1 and 3 of § 8 UWG/ZNK and h 1, 2 § 33 of The law against restrictions of competition (Gesetz gegen Wettbewerbsbeschränkungen – GWB).

Other claims associations refraining from taking actions, for example, claims about compulsion to observance of the restrictions provided by copyright, enshrined in §§ 2a, 3A UKlaG in conjunction with § 95b of copyright Act; claims for violation of the rules of telecommunication relationships – in part 2 of § 44 of the Law on telecommunications connections in conjunction with § 3 UKlaG. A full description of the various types of claims associations in German private law, see [11, p. 51; 12; 13; 14].

The reform of the legislation on unfair competition of 2004 in part 1 of § 10 UWG/ZNK there was a claim of the unions about the withdrawal of the profits (Gewinnabschöpfungsklage). After making seventh amendments to the Law against limiting competition in 2005 in part 1, § 34a (GWB) were included also the claim of the unions on elimination of benefits (Vorteilsabschöpfungsklage). Special provisions of the Law on legal services (Rechtsdienstleistungsgesetz) is governed by the so-called action for recovery (Einziehungsklage).

Claims of associations are also enshrined in EU law. Comprehensive regulation contains a Directive of the European Parliament and of the Council of 19 may 1998 No. 98/27/EC on actions refraining from taking actions to protect the interests of consumers (UKlaRL; codified version of April 23, 2009).

In addition, some acts of EU secondary law contain separate rules, for example, article 5 of Directive No. 2006/114/EG of 12 December 2006 on false advertising and advertising containing incorrect comparisons of goods (works, services) (codified version) or article 11 of Directive No. 2005/29/EG of 11 may 2005 on unfair business practices.

2. Scientific classification of claims of associations

The question of classification of claims of associations in the structure of civil law and civil procedure has long been debatable [15, p. 3-10; 16, p. 90]. Especially sharply there was a question about the correct understanding of the authority of unions to sue and on the special legislative requirements for such associations [3, p. 593].

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In the practice of the Supreme Court of Germany, the right of Association to a claim is assessed as having "dual legal nature [...], on the one hand, as the right to conduct proceedings in court, on the other hand, as the material basis of the claim." In the literature, it is also quite common to find an opinion about the dual legal nature of claims of associations: both procedural and substantive [17].

This approach has many procedural implications. The compliance of the Association with special legislative requirements should be checked by the court at any stage of the trial, including the review of the case in cassation [3, p. 593]. The facts, in the presence of which the subject has the right to bring an action, must be submitted to the court at least not later than the last oral hearing of the case in the instance in which new facts can still be presented as evidence . Here rules free evidence (Freibeweis) . If the special legal requirements for associations are not met, the claim is considered inadmissible, not unfounded.

Example 4 [3, p. 593]: the Association files a claim to impose on the company the obligation to refrain from unfair commercial activity. The enterprise-defendant objected to the presence of the Association the powers to submit such a claim in connection with the conformity of enterprises to the requirements laid down in paragraph 2. h. 3 § 8 UWG/ZNK, since in connection with the provision of an anonymous list of participants by the Association, it is impossible to verify the presence in the Association of the required number of participating enterprises that sell goods or provide services of the same or similar type in the same market.

According to the position of the Supreme Court of Germany in this case, the claim is inadmissible due to the lack of the Association's authority to conduct the process. This conclusion is based on the fact that the defendant cannot be required to rely on the absolute reliability of the data provided by the plaintiff on the composition of the members of the Association, since the defendant cannot verify them if the plaintiff Association does not disclose the names of its members .

The "theory of the dual nature" of the right of action has been extensively criticized. Many scientists deny the dual legal nature in favor of an exclusively substantive approach [3, p. 393], according to which an Association claiming its own claim is its bearer, if it meets the special requirements of the legislation. Therefore, all issues related to the verification of the right of claim of the Association shall be considered in the study of the validity of the claim. In support of the substantive approach, the argument is given that this method avoids the "substitution" of verification of the substance (validity) of the claim by checking its admissibility. For example, paragraph 2 part 3 § 8 of the CNA/UWG requires that the wrongful act claimed by the Association affect the interests of its members. According to the theory of" dual nature", the violation of the rights of members of the Association should be established already at the stage of checking whether the Association has the right to conduct the process.

In addition, the following approaches to the definition of the legal nature of claims can be found in the literature:

- statutory right to go to court on his behalf, but on behalf of another person/other persons (gesetzliche Prozessstandschaft);
- the right to defend the collective rights of others in court proceedings;
- the right to go to court on his behalf with the requirement about compulsion to refrain from certain actions to protect the interests of the state [18, p. 402].

The reason for scientific debate has become old edition part 2 § 13 AGB: "be required to refrain from certain actions and termination of illegal actions can only [...]". Meanwhile, the legislator formulated this rule differently. So, in part 1 § 3 UKlaG and part 3 § 8 of the new edition of the UWG is the old wording, a new "Right to claim to have [...]". According to most scholars, the new edition has led to the fact that the dispute about the scientific classification of claims is no longer relevant [16, p. 98].

The new wording of the article allows the perception of the requirements for associations only from the substantive point of view. Thus, the theory of dual nature formulated by the Supreme Court of Germany is outdated [19, p. 2462; 20, p. 28]. The phrase "have the right to demand" ("stehen zu") according to grammatical interpretation is directly related to substantive law. Thus, the question of the

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validity of the complaint is directly related to the presence of a person's right of claim. The situation is different with the version of the rules "can produce" ("geltend gemacht werden können"). This construction is based on the formal concept of a party to the process and is related to the procedural question of who needs legal protection or against whom legal protection is exercised.

Consequently, the problem of claims by associations should be considered as part of the verification of the validity of the claim. The Association, accordingly, has the right requirements to refrain from committing a certain action [16, p. 99]. Theoretical classification of claims with the substantive point of view led to the premise that the right to treatment claim is not examined by the court, but rather due to the action of the adversarial principle [1, p. 41]. If the plaintiff cannot prove that he has such authority, the claim should be denied.

3. Certain types of claims of associations

(a) Action to refrain from taking action in the event of unfair practices and practices that violate competition law

AA) the right to the claim

The right to claim abstinence from committing actions in accordance with part 1 § 8 UWG does not belong to individuals (competitors) that were directly affected by violations of competition laws (section 1, part 3 § 8 UWG/ZNK), but "legal associations created to support the development of a commercial or independent professional interests" (economic enterprises (Wirtschaftsverbände)), "qualified organizations" (Association of consumers (Verbraucherverbände)) and trade and handicraft chambers (p. 2-4 para. 3 § 8 UWG).

The right to sue under § 33 GWB belongs to economic associations. In accordance with the Eighth amendment to the GWB, 2013 the right to file a complaint about refraining from certain actions also have associations of consumers (section 1, 2 CH 2 § 33 GWB).

The conditions under which economic and consumer associations are entitled to act as plaintiffs are set out in the UWG/ZNK and GWB/ZOC are identical.

In accordance with paragraph 2 part 3 § 8 UWG/ZNK economic Association must unite a significant number of entrepreneurs who sell goods or services of the same or similar type in the same market. In addition, the Association, in accordance with its personal, material and financial resources, must be able to actually carry out its statutory duties to ensure commercial or independent professional interests. Finally, the unlawful act or violation must affect the interests of the members of the Association. As examples of such economic associations can be called industry associations (Fachverbände) and enterprises in the field of protection of competition (Wettbewerbsvereine).

According to the explanatory note to the draft law prepared by the Federal Government of Germany, the criterion of "a significant number of entrepreneurs" should not be taken literally and, accordingly, the establishment of a minimum border is not mandatory. For the most part, much depends on whether the participants of the Association are such enterprises that occupy a certain market share of a certain industry. The point is to avoid abuse by associations . Given the size of the national market it is proposed to install a representative number of members as one-tenth of the total number of market participants or occupied corresponding to this number market share of the participants of the enterprises [1, p. 43].

The criterion of "sale of goods or services of identical or similar type in the same market" requires the definition of the market in the actual ("identical or similar type") and territorial ("in the same market") aspect. The concept of the actual market is widely interpreted and assumes at least the existence of abstract competitive relations between entrepreneurs . The market in territorial value is defined by the sphere of activity of the Respondent [1, p. 43].

The next criterion of efficiency requires that enterprises were able effectively to exercise its statutory tasks by commercial interests. Illegal action affects the interests of the participants of the Association, if they as competitors comply with the requirements of paragraph 1 part 3 § 8 UWG.

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In accordance with paragraph 3, part 3 § 8 UWG/ZNK Association representing the interests of consumers, must be included in the List of qualified organizations in order § 4 UKlaG/zivd of or Reference to the European Commission in accordance with part 3 of article 4 UKlaG. The concept of "qualified organization" is rooted in European community law and was first mentioned in the Directive of 19 may 1998 No. 98/27/EC about the claims about refraining from certain actions in order to protect the interests of consumers (UKlaG). "Qualified organization" is any Agency or organization, who or which was established in accordance with the requirements of the legislation of one of the member States of the EU and are interested in complying with the provisions on the protection of collective consumer interests, as established by Annex I to UKlaG (see article 3 in conjunction with article 1 and Annex I UKlaRG). The list of qualified organizations is maintained by the Federal justice service (Bundesamt für Justiz) and published in the Federal Gazette. The list of relevant information is publicly available in the social network "Internet" (see part 1 § 4 UKlaG). Under part 3 of article 4 UKlaRL of the European Commission maintained Directive of qualified organizations, which is published in the official journal of the EU.

Inclusion in the List of qualified organizations is of a legal nature. It assumes that the organization is a legal Association that, in accordance with its statutory objectives, protects the interests of consumers and provides non-commercial consulting services. In addition, a qualified organization must have as members at least three associations operating in the same area, or at least 75 individuals and must exist for at least one year. The organization's past activities guarantee that it will also carry out its statutory tasks in an effective and appropriate manner in the future. For consumer centers and consumer associations financed by public funds, compliance with the above conditions is presumed without the possibility of challenge (see Prel. 1, 2 CH 2 § 4 UKlaG).

BB) Legal implications

Claims of associations for abstention from actions are aimed at eliminating violations of the law, but not at compensation for harm or satisfaction of claims arising from unjustified enrichment. They act only for the future time and do not eliminate the harm that has occurred. Such claims are aimed only at preventive protection [1, p. 45].

b) the Claim is refraining from an action (Unterlassungsklage) with invalid General terms and conditions and practices that are contrary to the legislation on protection of consumer rights

The claim of the unions to refrain from committing actions (Verbandsunterlassungsklage) in accordance with §§ 1, 2 UKlaG is additional to the individual legal protection protection against invalid General terms and conditions and practices that are contrary to the legislation on protection of consumer rights.

(AA) History and scope

The claims act refraining from taking actions (UKlaG) is adopted to implement the European Directive on claims for abstention from taking actions to protect the interests of consumers (UKlaG), aimed at facilitating cross-border consumer protection and establishing as the goal of "collective consumer protection". The purpose of the Directive is primarily the objective implementation of the law, to a lesser extent procedural economy [1, p. 46].

According to § 1 UKlaG may be denied the use and recommendation the provisions of the General terms and conditions, which, according to §§ 307-309 GSU recognized void by results of the carried out abstract control of their content. Part 1 § 2 UKlaG of the subsidiary to § 1 UKlaG provides for the right to claim abstinence from actions and elimination of illegal actions of the law on protection of consumer rights. An open list of consumer protection laws is contained in part 2 § 2 UKlaG. In particular, these include requirements GGU in respect of treaties concluded between entrepreneur and consumer contracts outside the office premises, agreements on distance selling (Fernabsatzverträge), purchase consumption goods (Verbrauchsgüterkäufe), agreements on consumer loans (Verbraucherdarlehensverträge), etc. Requirement may be made only in the interest of "consumer protection". Therefore, the subject of the claim

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about refraining from taking actions in accordance with § 2 UKlaG can be any continuous violation of the laws on the protection of the rights of consumers, entailing negative consequences for consumers as a group [20, p.27].

BB) a right in relation to the handling of a claim and the legal consequences

The right to sue under the paras. 1-3 part 1 § 3 UKlaG have "qualified organizations "(consumer associations)," legal associations established to support the development of commercial or independent professional interests" (economic associations), as well as chambers of Commerce, industry and crafts. The requirements for consumer associations and economic associations are identical to those provided for in the PP. 2, 3 part 3, § 8 UWG/ZNK. However, in contrast to the Law of unfair competition provided in this case monopoly unions to claim [2, p. 34]. Competing individual requirement of individuals whose rights are affected, in contrast to section 1, part 3 § 8 UWG, is not provided.

The legal consequence of a claim for refraining from acting in accordance with § 1 UKlaG is the termination of the application or cancellation of the recommended General terms of transactions. § 2 UKlaG provides for the possibility of requiring abstinence and cessation of practices that violate consumer protection laws. There is no obligation to compensate for harm. The action for abstention under §§ 1, 2 UKlaG, as well as under the unfair competition Act and the law against restrictions on competition (GWB/ZOC), is valid only for the future. The resulting damage cannot be compensated within the framework of this claim.

BB) Binding effect (Bindungswirkung)

Despite the right to bring an action Association, on the claim of abstention from a certain act is subject to the principle of the two sides (Zweiparteienprinzip). The presence of the case in the proceedings and the legal force of the judgment shall apply only to the parties.

The consequences of the court's decision are defined in § 11 UKlaG. According to him the situation of the General terms and conditions in case of illegal actions of the person using the GTCs in respect of which the already issued decision on termination of application of the GTCs, in the process between him and the client shall be deemed invalid as long as the affected party to the contract refers to the effect of the court decision at the suit of the Association. As an exception to the generally binding inter-partes action, the decision on the claim of the Association also applies to the person's contractual counterparty affected in the same way. This is a special case of distribution legal force of a court decision on third parties [17; 12, p. 188]. Action on third parties cannot, however, worsen their situation. For this reason, the solution does not interfere with other entrepreneurs and they use their own identical or similar GTCs as long as they won't be challenged and invalidated in court [1, p. 48].

C) the Claims of withdrawal of profits and the elimination of benefits (Gewinn - und Vorteilsabschöpfungsklagen) in accordance with the Law on unfair competition (UWG) and the Law against competition restrictions (GWB)

In the reform of the 2004 Law on unfair competition (UWG) and the seventh novel in 2005 of the Law against restraints of competition (GWB) introduces new types of claims for exemption: requirement for exemption of profits (§ 10 UWG) and very similar to it the requirement about elimination of benefits (§ 34a GWB). The introduction of the claim associations, aimed at payments, at that time represented a novelty in German law [21, p. 560; 14, p. 263]. The legal regulation of this claim from the very beginning was subjected to partial serious criticism [1, p. 48; 22].

The profit-taking requirement was to fill two legal gaps in cases of minor and widespread harm. Due to the small amount of damage caused, there is no interest in making claims. Since there was no possibility of profit withdrawal, and only the requirement of abstention from actions was allowed, intentional illegal behavior was attractive [21, p. 559].

The purpose of the requirement to eliminate benefits according to the explanatory note to the draft law was "the removal of economic benefits in mass and widespread harm.

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(AA) Legal nature and purpose of the rule

The requirement to withdraw profits and eliminate benefits is sui generis, although it is consistent in its premises with the traditional claim for damages. However, since it is aimed at withdrawing profits (eliminating benefits) and transferring them not to the victim, but to the Federal budget, the claim is not aimed at compensation for harm, but at prevention . The requirement is to prevent the storage of illegal profits and advantages obtained as a result of unfair competition, as well as to prevent aspiration of anti-competitive behaviour [21, p. 128]. Thus, the requirement aimed at correcting market failure. Examples include small charges in the absence of legal grounds, contracts resulting from misleading advertising, counterfeiting of goods or – as in example 2 above – so-called deceptive packaging of a consumer product that contains inaccurate data on the quality and quantity of the product (Mogelpackungen).

BB) eligibility, conditions and legal consequences

The same entities that have the right to demand abstention from actions may make a claim for withdrawal (see part 1 § 10 in relation to the PP. 2-4 part 3, § 8 UWG/ZNK, part 1, § 34a in conjunction with part 2 of § 33 GWB/ZOK). The basis for the claim is the presence of intentional actions on the part of the entrepreneur, as a result of which a lot of customers are harmed, as well as their profit or economic benefits.

The legal consequence of the satisfaction of requirements is the collection of profit (economic benefits) in the Federal budget, not the income of the person injured, or an Association having the right requirements (of the rationale of the introduction of collective action of associations of consumers for damages, see [23]). The Association which has brought the claim has the right to demand from Federal service of justice (§ 10 UWG) or from the Federal Antimonopoly service (Bundeskartellamt) (para. 2 p. 4 § 34a GWB) only reimbursement of costs incurred in connection with the application to the court and consideration of the case in court, if the costs were not reimbursed by the debtor. This, however, is the reason why there is less interest in practice and the practical application of the provisions is rather insignificant. The recovery of profits in the Federal budget was then a compromise solution. In the case of sued associations, these are publicly funded associations. Thus, part of the costs should again be returned to the state.

d) a claim for recovery under the law on legal services

Connection requirements in order to implement the rights through consumer associations subject to certain conditions, be recognized as valid by court practice yet on the basis of the legal aid Act (Rechtsberatungsgesetz), which until 2008 regulated the professional conduct of legal Affairs for third parties . Thus, in accordance with the previous legal regulation, along with the claim of associations in defense of "exclusively" supra-individual interests, the possibility of combining claims in defense of individual interests was allowed. The legal basis for this procedure was to transfer the individual rights requirements of the die (the question of the former regulation clause 8 of § 3 of article 1 of the Law on legal aid, see [3, p. 591; 12, p. 206]).

With the entry into force of the law on legal services (Rechtsdienstleistungsgesetz (RDG), the original situation has changed. Consumer centres and other supported by public (budget) funds consumer Association received the right, within its tasks and competence to provide legal services (paragraph 4 of part 1 § 8 RDG). According to paragraph 3 part 2 § 79 of the Civil procedure code (ZPO), such associations within the framework of the task provided for by their statutes, when collecting consumer claims have the right to conduct legal proceedings.

An action to recover grants consumer associations the possibility to connect multiple unidirectional demands of consumers in a single trial. This provides for collective protection in cases of minor or widespread harm. But also with respect to the claim for recovery, the General rule is that the resulting legal costs are borne by the losing party. Accordingly, entering into the process, the consumer Association bears procedural risks. The filing of a claim for recovery has no effect on those claims that have not been properly registered and therefore have not

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been the subject of the claim. Although the Federal Supreme Court and calls such claims "group", they-according to the literature – are not in the proper sense of class actions [1, p. 55]. Unlike the latter in actions to recover, there is no "Union suits" (Klagebündelung), and the connection in one lawsuit several requirements that were previously registered in a proper manner.

Claims for recovery are brought primarily in cases of medium-sized claims, such as claims arising from violations committed in the air transport, tourism packages or in the energy sector. For the recovery of mass harm with a large number of claims or claims with a significant amount, such a claim is not suitable. The claim for recovery is not able to replace the missing up to the present time in the German law of class action (Gruppenklage) [1, p. 55].

IV. Conclusions

Collective protection of rights in Germany is most pronounced in such a tool as the claim of associations (Verbandsklage). Contrary to the original dogmatic undeveloped construction of the claim of associations, such claims have acquired great practical importance. However, they are provided only in some areas. Special legal grounds are enshrined in the legislation on General terms of transactions, consumer protection, competition and Antimonopoly legislation, as well as in copyright. Requirements associations refraining from taking actions under the UWG, GWB and UKlaG often do not provide sufficient consumer protection and fair competition. They allow protection only for the future without the possibility of compensation for harm or recovery of ill-gotten profits or other economic benefits.

Similarly, a claim for recovery under the RDG does not allow this Association in order to implement a variety of individual claims for damages. The claim of associations in the existing form is not a sufficient tool for the implementation of claims arising from the infliction of mass and widespread harm. However, the mere extension of the scope of the claim associations by providing the opportunity to file claims for damages is not possible because it is in conflict with the concept of the claim Association [1, p. 75]. As has been shown above, in making a claim, the Association makes its own material claims. They serve the public interest, not a multitude of individual private interests. The claim of associations aimed at compensation of harm is at the moment alien to German law.

Requirements for exemption or elimination in accordance with § 10 UWG and § 34a GWB is focused not on injury compensation and to benefits resulting from the misuse, in violation of competition law action, was not retained in his possession. These requirements are suitable for cases of minor and widespread harm. However, these requirements are not suitable for cases of compensation for individual harm, especially for cases of actual mass harm. The most significant obstacle to the practical application of the claim for withdrawal is the recovery of profits and other economic benefits to the Federal budget, which makes the presentation of such claims for associations is not attractive.

The status quo in German law regarding collective protection of rights is often criticized as insufficient. Also not considered in the present article the modeling process on the claims of investors (Kapitalanleger-Musterverfahren) in accordance with the same law (Kapitalanleger-Musterverfahrensgesetz) [14, p. 94; 24] does not change these insights, because the application of the act is limited to the banking sector. Joint or class action (Sammel- oder Gruppenklage), in which individual members can achieve the binding force of court decisions for other people, at the moment is missing in the German law [25, p. 334]. Also, the recent efforts of the European Commission have not yet led to a change in the situation. Almost all the proposals of the European Commission aimed at improving collective legal protection in Europe, with the exception of some points, are non-binding. This situation, especially in terms of procedural economy, is unsatisfactory.

V. Prospects

Nevertheless, the collective realization of rights and interests in the civil process will become increasingly important. This is also shown by the recent discussion of the diesel scandal.

Many Americans are suing German automakers in New Jersey. The process is conducted on a model

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consideration of a group claim. Thousands of buyers can join the process. And in Germany, consumers are also suing car makers for a diesel scam. These processes became possible only thanks to the following “legal circumvention”. Plaintiffs transfer their rights to a person providing commercial legal services (*Rechtsdienstleister, for example, “myright”*), who conducts a kind of pilot process. In case of a positive court decision, the court decision may be used by other plaintiffs.

H Parts Required s this reform, meanwhile, has been recognized by politicians. The draft law on the introduction of a model claim for recognition [26], prepared by the Federal Ministry of Justice and Consumer Protection (Bundesministerium der Justiz und für Verbraucherschutz (BMJV), the so-called version of the German group action, failed at the end of 2016. It is applied only to a minor and the wide spread damage. It began to spread on on so-called massive damage later and was published in connection with the VW - scandal.

It is very likely that one of the reasons for the failure was the fact that the case of VW in Germany could give rise to a poorly predicted wave of claims. With the introduction of the model of the claim for recognition of each buyer will not have to prove that he was indeed injured, for example, the fact that after the removal of manipulative software increased diesel consumption, or decreased value of the car, which led to difficulties in the sale of the vehicle it on secondary market.

31 July 2017 the Federal Ministry of Justice and Consumer Protection has distributed a new discussion draft of the administration and the general model of the recognition of the claim [40]. Before that, ministers of justice of the federal lands in the Justice Ministerial Conference on 21-22 June 2017 city of and the Länder Ministers on the protection of consumer rights of 28 April 2017 decided on the timely strengthening of collective legal protection of consumers.

The agreement on the creation of a government coalition between the CDU, CSU and LNG (hereinafter referred to as the coalition agreement) provides for the introduction of a model for a claim for recognition as a new institution in German civil procedural law. On May 9, 2018, the Federal Ministry of Justice published a draft on the introduction of a civil procedural model of a lawsuit for recognition by November 1, 2018, which was accepted by the Government of the Federal Republic on the same day. On June 4, 2018, the project was handed over from the Government to the Bundestag, which takes it on June 14, 2018 in a revised version despite opposition voices. On July 6, 2018, the Bundesrat also approved the introduction of the model [41]. The reason for such a quick legislative process was the need to prevent the expiration of the “threatening” statute of limitations according to the requirements of victims of the VW scandal until the end of 2018. The project is based on the discussion draft of July 2017 as well as on the recommendations of the European Commission by June 2013. In contrast to the legislative decision of some EU countries, such as France, the United Kingdom and the Netherlands, which stipulate or enact a law on the introduction of a class action lawsuit by an association for damages, the project is limited to procedural support for collective protection of rights by submitting claims for damages only in the form recognition association claim (*Verbandsfeststellungsklage*). The application of this claim should not , as before, be limited only to a specific civil law sphere, but should be applied to all cases of harm to consumers, and should be included in the sixth book of the Code of Civil Procedure as an independent type of claim.

With the help of a model Foot claim for recognition of consumers should be able to through the consumer associations to apply for dispute resolution on the legal relationship or the claims , are important for a variety of processes. This type of claim accordingly serves to uniformly resolve key issues of contention. Political and legal purpose of the bill according to its justification is to improve the capacity of consumers to exercise their rights in the event of a dispute with a large group E. At the same time, according to the explanations contained in the contract, should prevent emergence of a "boundless limitation Industry" ("ausufernde Klageindustrie"), and "trustworthiness economic structures" should not suffer from the introduction of this type of claim.

Qualified organizations are entitled to file a claim as listed in clause 1 para. 1 § 3 UKlaG. They also include

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consumer associations and similar entities in other EU countries.

What specific requirements should be presented to qualified organizations have been discussed for a long time. It was decided that the number of their members should be drawn up not less than ten associations working in the same field of activity, or at least 350 individuals, and the period of the existence of such organizations should be at least four years. In addition, qualified organizations cannot file model claims for recognition of rights for profit and cannot receive more than five percent of their financial resources through donations from companies. These measures are designed to avoid abuse of the model s m a claim for recognition of the right on the part of the large law firms or large business firms.

Not only in Germany, but also at the EU level, new trends have recently been observed. Almost simultaneously with the introduction of the bill in Germany, the European Commission put forward a proposal to amend the EU Directive on the Protection of the consumer rights on mass claims [43]. The draft Directive is quite close in content to the German law that has already been adopted and entered into force.

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