

EXPERT HEARING IN THE LEGAL COMMITTEE OF THE GERMAN PARLIAMENT ON MAY 10, 2023

"Create effective regulations to manage mass litigation."

Statement by Dr. Philipp Plog

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SUMMARY

The statement of the German Judges' Association of May 2022, whose demands the CDU is adopting in large part with the motion, aims to compensate for the described overload of the judiciary by procedural changes. The proposed amendments to the Code of Civil Procedure concern "mass proceedings" in typical consumer law situations (capital investment, consumer protection, insurance and air passenger rights). Almost all of the CDU's demands restrict procedural rights and the autonomy of litigants, and only a few demands are intended to create additional resources.

Streamlining civil procedure, however, does not provide a solution to the structural crisis of the judiciary described by the Association of Judges. The difficulties are not based on the exercise of procedural rights by affected parties. Rather, it is due to the fact that federal policy in recent years has provided the judiciary and its administration with completely inadequate financial resources, personnel, technology and processes. The political omission cannot be compensated by less rule of law. The judiciary must first be enabled to get a grip on procedures organizationally, equipped with a modern

form of procedural management and comprehensively digitized, thus completely overcoming the traditional case management that characterizes it today.

It is astonishing that the Association of Judges does not demand adequate resources, but wants to limit itself to the reduction of procedures. The question also arises as to the overall burden on the judiciary. After all, even if "mass proceedings" lead to overload in individual judicial panels, the overall burden on the judiciary has declined significantly over the past 15 years, and in the case of local courts by as much as 36 percent.

However, the demand to restrict only procedural rights in typical consumer claims is not only questionable in terms of the rule of law. Such an approach would also be a step backwards in terms of legal policy. In recent years, the legislator has only just created legal certainty for legal tech business models in which consumers, but also traders, can use and bundle low-threshold offers to enforce their rights (assignment, debt purchase and representation models, often in combination with litigation financing). It has also deliberately decided against a collective legal protection procedure in which lawsuits are bundled procedurally. As long as Germany essentially opts for individual legal protection, individual procedural rights must be guaranteed.

Against this background - and with this prioritization - we believe it is right to take up individual procedural proposals of the Association of Judges nonetheless (pursuing jump appeals, structuring the parties' submissions and setting up auxiliary adjudicative bodies), while others are questionable from the point of view of the rule of law (limiting extensions of time limits, "transfer" of evidence to other proceedings and the de facto abolition of the principle of publicity). Finally, it is also unclear from a legal dogmatics point of view how the legal institution of "mass proceedings" should be designed without creating the danger of a tension with "individual proceedings".

OPINION OF THE LEGAL TECH ASSOCIATION IN DETAIL

The CDU sees the German judiciary at the limit of its capacity, due to mass proceedings in capital investment, consumer protection, insurance and air passenger law. It has put together eleven demands for amending the Code of Civil Procedure to make it easier for the judiciary to cope with the proceedings. In doing so, the CDU adopts a large part of the demands formulated by a working group of the German Judges' Association in 2021 ("Initiativ-Stellungnahme des Deutschen Richterbundes zur besseren Bewältigung von Massenverfahren in der Justiz" of May 2022, hereinafter: DRB Opinion). In addition, there are two new ideas in the CDU motion: it calls for reducing "additive effects in the law on lawyers' fees" and promoting the use of artificial intelligence in the judiciary.

Our statement takes up the central premises and demands of the CDU motion. Since the motion does not contain any concrete formulations for amended ZPO standards and also does not discuss the amended regulatory concepts it lists, we refer primarily to the argumentation in the demand paper of the German Judges' Association. All in all, in view of the manifold procedural implications of the proposals, but above all because of their still superficial nature, a discussion can only take place at the level of legal policy concepts. In our view, this is also the purpose of the hearing in the Legal Affairs Committee.

1. The statement of the German Judges' Association of May 2022 is a document of despair. It becomes clear that judges who are confronted with a multitude of proceedings can no longer cope with them. The authors see "a need for action to ensure the courts' ability to work and "to counteract a loss of confidence in the judiciary's ability to function" (p. 2 of the DRB statement). Attempts are to be made to compensate for the personal and institutional overload through procedural changes,

but only for "mass proceedings." Other, individual civil proceedings are apparently not to be accelerated or changed.

2. almost all of these demands restrict procedural rights and the autonomy of litigants (extension of the jump appeal, continuation of proceedings despite withdrawal of appeals, suspension of proceedings, restriction of extensions of time limits, restriction of the presentation of evidence in proceedings, extension of hearings of evidence to "comparable cases", refusal of oral proceedings without the consent of the parties). There are few proposals that would expand procedural rights from the perspective of litigants or create new resources at the courts (conducting pilot proceedings in the appellate instance to expedite other proceedings; establishing auxiliary adjudicative bodies).

Streamlining civil procedure in a particular field of work may be suitable for selectively reducing the burden on some areas in the judiciary. But it does not provide a solution to the structural crisis of the judiciary in Germany. The enormous difficulties are not based on the exercise of procedural rights by those affected, but on cumbersome processes, an underfinanced apparatus and, above all, a degree of digitization that is also underdeveloped compared to the other players in the legal system. This also follows from an international comparative study published by the Legal Tech Association together with Bucerius Law School and the Boston Consulting Group in June 2022 ("The Future of Digital Justice"). The study found that Germany is five to ten years behind the digitization of the judiciary in the United Kingdom, Singapore, Austria and Canada (incidentally, these pioneers include two countries that - like Germany - have a federal structure). A key finding of the study is that the organization of the judiciary and the procedural codes in Germany are not being thought digitally, but - like the present CDU proposal - are only attempting selective adaptations of the "analog approach", and even this only very hesitantly (cf. also our statement on video hearings in civil proceedings of January 2023, sections 2 and 5, "Statement on the

draft bill of the Federal Ministry of Justice to promote the use of video conferencing technology"). Also lacking - unlike in the digitally leading jurisdictions - is a strategy that considers the level of substantive and procedural law in the context of the technological framework in the administration of justice and the necessary application programs (3-level model of the international comparative study).

The judiciary must now be put in a position to get a grip on procedures organizationally, equipped with a modern form of procedure management and comprehensively digitized, thus completely overcoming the traditional case management that characterizes it today. The overload described by the Association of Judges may also be a problem of resource and procedure management within the judiciary. After all, it is not correct to say that "mass proceedings" lead to a nationwide overload of the judiciary in Germany. The "Final Report on Research into the Causes of the Decline in the Number of Cases Received by the Civil Courts," commissioned by the Federal Ministry of Justice and presented in April 2023, worked out that the overall workload of the judiciary decreased significantly between 2005 and 2019 - by 36% at the district courts and around 20% at the regional courts (Final Report, p. 23 ff.).

3. The desire to restrict procedural rights in typical consumer claims would not only be misguided in terms of the rule of law. It would also be a step backward in terms of legal policy. In the past four years, the German legislature has created legal certainty for legal tech business models in which consumers and businesses use low-threshold services to enforce their rights. These advisory services have improved access to the law, especially in the area of scattered and trivial claims and in the case of small claims by consumers who often avoid conflicts because of the cost risks of a legal dispute and because of their structural inferiority ("rational disinterest"). Offers such as from, [wenigermiete.de](#), [myright](#), [Flightright](#) or [Helpcheck](#), take the litigation cost risk away from holders of small claims and, in the event of success, they receive a share of the proceeds. They often function as assignment models, through claim acquisition or by

proxy, and frequently in combination with litigation financing. Legislators made them legally secure in 2022 by reforming the Legal Services Act (RDG) ("Act to promote consumer-friendly offerings in the legal services market," August 2021), and a few months ago decided in a second round to centralize supervision in the Legal Services Act ("Act to strengthen supervision of legal services," February 2023).

The Federal Court of Justice has also created legal certainty for the bundling of claims with decisions in recent years (decisions on [wenigermiete.de](#) 2019, [Smartlaw](#) 2021, [Airdeal](#) 2021, [Financialright](#) 2022). Now that consumers are increasingly making use of these advisory models, it cannot be right to unilaterally withdraw their procedural rights again. After all, the individual claims that are asserted here - in larger numbers of cases - are no less justified than other legal concerns that are not bundled or scaled. This is also supported by the fact that the legislature in Germany has deliberately decided against a genuine mass procedure in the U.S. sense. There, lawsuits are bundled procedurally and are subject to their own procedural dynamics (extension to all affected parties, extension of legal force, direct enforcement of claims, build-up of bargaining power, special settlement dynamics). The German decision in favor of the *Musterfeststellungsklage*, which does not provide for direct enforcement of claims, has proven to be wrong, and the German government is now in the process of correcting this with the remedial action. However, this too is half-hearted in its design and, in view of the high procedural and financing hurdles, will not lead to the bundling of individual claims in a wide variety of legal areas.

4. If the - quite radical - modernization of the judiciary is guaranteed, we believe it is right to take up individual procedural proposals of the Judges' Association as a supplement, while others are not feasible from the point of view of the rule of law.

We consider it conceivable to pursue the expansion of preliminary rulings and leapfrog appeals, to think about structuring the party's appeal and to introduce auxiliary

adjudicative bodies (Nos. 1, 2, 6 and 7 of the motion). In addition, we also consider it useful to abolish outdated formal requirements, where court proceedings are often delayed and sabotaged without this result being intended by the procedural code (cf. the Startup Association's June 2019 position paper on RDG reform). Therefore, we advocate, for example, the comprehensive digital processing of legal representation (with the "simple" digital signature), especially for the judicial proof of assignment and assignments (§§ 410, 174 BGB).

In contrast, we consider the restriction in principle of extensions of time limits, the "transfer" of evidence hearings to other proceedings and the de facto abolition of the principle of publicity to be open to legal challenge (paragraphs 5, 8, 9 of the motion). It also makes no sense to change the statutory attorney's fee for "mass proceedings," since even with the remedial action there will be no comprehensive collective legal protection in Germany that reduces a multitude of proceedings to a single one (paragraph 10 of the motion). As long as this is the case, lawyers must be remunerated on a case-by-case basis, and this is precisely what the German Lawyers' Fees Act (RVG) does with its balanced fee logic. Incidentally, the CDU motion amounts to an encroachment on "equality of arms," because the proposed reduction of attorneys' fees on the plaintiff's side has a particularly strong effect when one considers that defendant companies spend two- and three-digit million sums on their legal defense. If this were left untouched and the attorney's fees on the plaintiff's side were restricted, this would be a possible violation of Article 3 of the Basic Law and a restriction of the requirement of effective legal protection.

Finally, it is unclear from a legal dogmatics point of view how the legal institution of "mass proceedings" should be structured. If the classification of a claim as part of mass proceedings implies a considerable restriction of procedural rights, overburdened judges will have a tendency to accept this fact at an early stage. This can lead to the situation that, for example, repayment claims of diesel victims or commercial cartel

victims can be conducted as mass proceedings or even as individual proceedings, depending on the context. This creates the risk of a legal protection gap, and argues for procedural changes to be carried out for all civil law claims in case of doubt.

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About the Legal Tech Association

Founded in May 2020, the association already brings together more than 120 market players in Germany who are united by the desire to open up the legal market in a fair and competitive way. Members include players from across the legal market, including law firms, legal protection insurers, debt collection service providers, mediation platforms, contract generator providers, and software and media companies (including Flightright, ARAG, C.H. Beck Verlag, Wolters Kluwer, Gansel, Lawlift, Myright, Rightmart, Advocard, RA Mikro, STP, Bryter). It is the only association in Germany that brings together players in the legal market, regardless of their profession, to leverage the enormous potential of technology to advance legal services. In just a few years, the members of the Legal Tech Association in particular have used new business models to create access to law in some areas of the law where it could not be guaranteed in the decades before.