

Class/collective actions in Germany: overview

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OVERVIEW OF CLASS/COLLECTIVE ACTIONS AND CURRENT TRENDS

1. What is the definition of class/collective actions in your jurisdiction? Are they popular and what are the current trends?

Definition of class/collective actions

German law provides for class/collective actions to a limited extent in certain areas of law (as opposed to a broader general class action regime such as in the United States).

German law lacks the general discovery mechanisms that exist under US law and provides a different risk allocation with regard to the cost of litigation (the "loser pays" principle). The losing party compensates the winning party for its litigation costs under a statutory fee schedule, in addition to bearing the relevant court fees.

In years to come, collective/class actions and discovery mechanisms may become a reality in German courtrooms to some extent. The German Federal Government published on 9 May 2018 a Draft Bill on the introduction of a general model proceeding into the German Code of Civil Procedure (*Entwurf eines Gesetzes zur Einführung einer zivilprozessualen Musterfeststellungsklage*). The Draft Bill would allow certified consumer associations to pursue claims by consumers who have allegedly suffered damages in a model proceeding if at least 50 consumers join this model proceeding. The model proceeding can end by settlement or a declaratory model decision. The model decision is binding on the questions of fact and law that the consumers who had joined the model proceeding have raised in their individual follow-on litigation against the defendant. The consumer must then pursue its individual damages claim against the defendant in a separate proceeding (that is subject to the general rules of civil procedure). The Draft Bill does not provide for any discovery mechanisms. The Draft Bill is planned to enter into effect on 1 November 2018.

The 9th amendment to the German Act against Restraints of Competition (which came into force in June 2017) implements in particular the Directive 2014/104/EU on actions for damages under national law for infringements of competition law provisions of the member states (Anti-trust Damages Directive). As a result, companies and consumers who have suffered damages by antitrust violations can enforce claims for damages more effectively. Although it does not provide for class/collective actions, it provides for the introduction of certain discovery mechanisms in follow-on cartel litigation.

While the German Code of Civil Procedure (*Zivilprozessordnung*) currently lacks a general procedural mechanism for class/collective actions, it allows multi-party complaints and representative actions (*gewillkürte Prozessstandschaft*) to a certain extent. Another possibility for bundling claims into one complaint is by assigning the claims in line with the provisions of the German Civil Code (*Bürgerliches Gesetzbuch*) to a party who pursues them in its own name and on its own behalf. Additionally, there are several specific areas of law that provide for collective actions.

Multi-party actions

Multi-party disputes are subject to relatively strict criteria. German law distinguishes between voluntary multi-party actions (*einfache Streitgenossenschaft*) and mandatory multi-party disputes (*notwendige Streitgenossenschaft*). Even though these multi-party actions result in joint oral and evidentiary hearings, the Code of Civil Procedure still treats the parties separately, for example, every party can retain its own lawyer and can submit its own pleas in law and arguments independently from the other parties. Voluntary multi-party disputes can be separated if they do not fulfil the relevant prerequisites for being handled jointly. It is therefore difficult to effectively bundle a large number of claimants into a single complaint in the same civil court, limiting the practical relevance of multi-party actions for mass litigation.

Representative action (*Gewillkürte Prozessstandschaft*)

Representative actions are possible only if the following relatively strict criteria are met:

- The owner of the claim must allow the third party to litigate it in its own name on behalf of the owner.
- The third party discloses that it acts on behalf of the owner of the claim.
- The third party has a legitimate interest in litigating the claim in its own name.

While this structure allows the owner of the claim to be heard as a witness in court, in practice the standards to be reached for the "legitimate interest" element are high and defendants will usually try to argue against it.

Assignment of claims

Another option for bundling individual damages claims into one legal dispute is to assign them in line with the German Civil Code to one entity that pursues them on its own behalf in one complaint.

The validity of the assignments of a large number of alleged damages claims was relevant in the recent decisions of the Düsseldorf Regional Court (*Landgericht Düsseldorf*) and the Düsseldorf Higher Regional Court (*Oberlandesgericht Düsseldorf*) in the German cement cartel follow-on litigation. Several customers of the cement producers who allegedly participated in the cartel on which the German Federal Cartel Office (*Bundeskartellamt*) imposed fines in 2003, assigned their damages claims resulting from the cartel to a single special purpose vehicle (SPV), solely established by its shareholders for the pursuit of the damages claims. The SPV filed the complaint against six members of the cement cartel in its own name and on its own behalf. The Düsseldorf Regional Court and the Düsseldorf Higher Regional Court dismissed the SPV's complaint on the ground that the assignment of the alleged claims violated public policy under section 138 of the German Civil Code because the SPV was not sufficiently funded to compensate the statutory litigation costs of the defendants in case of defeat (*Düsseldorf Regional Court, decision of 17 December 17, 2013, 37 O 200/09 (Kart)*; *Düsseldorf Higher Regional Court, decision of 18 February 2015, VI-U (Kart) 3/14*).



These decisions increased the capital requirements for the funding of SPVs, strengthening the business case for litigation financing companies to enter the German market, especially because cartel follow-on litigation is likely to increase following substantive and procedural reforms through the Anti-trust Damages Directive.

Use of class/collective actions

There are a number of German laws with provisions that provide for special collective actions, namely:

- The Act on Cease and Desist Actions (*Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen*)(UKlaG).
- The Unfair Competition Act (*Gesetz gegen den unlauteren Wettbewerb*) (UWG).
- The Capital Markets Model Proceedings Act (*Kapitalanleger-Musterverfahrensgesetz*) (KapMuG).
- The Appraisal Proceedings Act (*Spruchverfahrensgesetz*) (SpruchG).

The Act on Cease and Desist Actions. This provides for collective actions for violations of certain consumer protection laws. Claims can only be brought by specific associations and other qualified institutional bodies such as trade organisations and are limited to injunctive relief. In 2016, the Act on Cease and Desist Actions was amended expanding the scope of possible claims to violations in the context of the commercial collection of data on consumers. The Act on Cease and Desist Actions has proved a useful tool for protecting consumer rights even in the absence of the possibility of claiming damages.

Unfair Competition Act. This provides for a similar collective action to be brought by specific associations and other qualified institutions. Actions allow injunctive relief for violation of the prohibition against unfair competition. In addition, a claimant can claim for ill-gained profits to be handed over to the federal budget. The Act against the Restraint of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) (GWB) provides for similar injunctive relief against ill-gained profits for violation of European or German anti-trust laws.

The option of requesting ill-gained profits to be handed over to the federal budget has so far been of almost no practical relevance.

Capital Markets Model Proceedings Act. This Act facilitates the pursuit of damages claims by investors suffering from incorrect, misleading or missing capital market information (for example, in annual reports or listing prospectuses). If the same factual and legal questions arise in at least ten individual lawsuits, a model proceeding can be initiated in which these factual and legal questions are decided. After the decision in the model proceeding becomes binding, the individual lawsuits resume and the courts hearing these cases must take the decision into account as binding.

The structure of litigation under the Capital Markets Model Proceedings Act carries the risk of litigation taking a long time. Currently, there is a major case concerning a German car manufacturer that allegedly failed to inform the public on time of the detection of a so-called "defeat device" in the engine management software of some of its diesel engines. The Braunschweig Regional Court and the Stuttgart Regional Court recently issued their orders for reference, which will be the basis for a model proceeding before the competent Higher Regional Courts Braunschweig and Stuttgart (*LG Braunschweig, decision of 5 August 2016, 5 OH 62/16, www.bundesanzeiger.de; LG Stuttgart, decision of 28 February 2017, 22 AR 1/17 Kap* confirmed by Higher Regional Court Braunschweig, decision of 27 October 2017, 1 W 32/17).

The Appraisal Proceedings Act. This Act enables minority shareholders to claim appropriate compensation where they are affected by corporate organisation measures (for example, a squeeze-out) without requiring them to appeal against the

measures. The Appraisal Proceedings Act provides for a specific litigation action for the determination of appropriate compensation. It requires the court to appoint a joint representative who represents those shareholders that do not participate in the compensation proceeding under the Appraisal Proceedings Act.

Current trends

See above, *Definition of class/collective actions* for the Draft Bill on the introduction of a general model proceeding into the German Code of Civil Procedure and the 9th amendment to the German Act against Restraints of Competition, came into force in June 2017, implement the Anti-trust Damages Directive. Although the 9th amendment does not provide for class/collective actions, it is expected that the number of cartel follow-on litigation will increase despite the fact that the bundling of claims by representative action or by assignment can be challenging.

REGULATORY FRAMEWORK

2. What are the principal sources of law and regulations relating to class/collective actions? What are the different mechanisms for bringing a class/collective action?

Principal sources of law

The Code of Civil Procedure (*Zivilprozessordnung*) does not provide for general class/collective actions suitable for mass litigation. Special class/collective actions are included in the following statutes:

- The Act on Cease and Desist Actions (UKlaG) provides for collective actions resulting from alleged infringements of certain consumer rights.
- The Unfair Competition Act (UWG) and the Act against Restraints of Competition (GWB) provide for collective actions resulting from alleged unfair competition, and commercial anti-competitive behaviour.
- The Capital Markets Model Proceedings Act (KapMuG) provides for a collective action (model proceeding) for allegedly incorrect, misleading or missing capital markets information.
- The Appraisal Proceedings Act (SpruchG) provides for compensation claims for minority shareholders following corporate organisation measures.

Principal institutions

German law does not provide for general class/collective actions and therefore has no special institutions for handling them.

The Code of Civil Procedure typically provides a claimant with different options for asserting its claims. The principle is that claims can be pursued in the court with jurisdiction over the place of residence/headquarters of the defendant. Tort claims can be pursued in the district where the alleged tort occurred. Provisions on exclusive jurisdiction exist in the Code of Civil Procedure and in other statutes.

Different mechanisms

Class/collective actions are not available in Germany. However, the following German laws allow specific collective actions:

- **The Act on Cease and Desist Actions.** The Act on Cease and Desist Actions allows collective actions to ensure effective implementation of consumer rights in Germany. It mainly provides for injunctive relief rather than for compensation of damages. The Act on Cease and Desist Actions grants certain representatives standing to litigate the claims including registered consumer organisations or trade associations. Individuals have no standing to litigate claims under the Act on Cease and Desist Actions. Substantively, the Act on Cease and

Desist Actions allows certain representatives to pursue actions for violations of the legitimate use of general terms and conditions, as well as for violations of consumer protection laws including distance selling contracts (*Fernabsatzverträge*) consumer good purchases (*Verbrauchsgüterkauf*), and consumer loan agreements (*Verbraucherdarlehensverträge*) entered into between a company and a consumer. Since 2016, certain representatives can also pursue actions for violations of rules on collection, processing and use of consumer data through a company for the purposes of advertisement, market research, operating credit agencies, creation of personality and user profiles, trading of contact details or other use of data trading or for other comparable commercial purposes. Representatives can also bring actions against companies for unfair or misleading commercial practices including misleading advertisements under the German Unfair Competition Act (*Gesetz gegen den unlauteren Wettbewerb*).

- **The Capital Markets Model Proceedings Act.** This was introduced in 2005 to provide effective legal protection to a German telecom provider's shareholders who, in over 17,000 individual actions, claimed to have relied on allegedly misleading capital market information in the context of the telecom provider's IPOs. In addition to more timely and efficient case handling, the Capital Markets Model Proceedings Act aims to limit the costs of individual litigation. Litigation under the Capital Markets Model Proceedings Act has the following structure:
 - claimants file an individual complaint about an alleged infringement of relevant capital market information. The complaint can be accompanied by an application to initiate a model proceeding. A defendant can also apply for a model proceeding;
 - the relevant court will publish an application for a model proceeding in a public register (www.bundesanzeiger.de) and the underlying individual litigation will be suspended;
 - if ten applications are published in the public register, the court that published the first application will issue an order for reference (*Vorlagebeschluss*) to the competent Higher Regional Court. The order for reference cannot be appealed by any of the parties and is typically binding on the Higher Regional Court;
 - the Higher Regional Court will start the model proceeding by choosing a model claimant on the basis of its competence to pursue the model proceeding considering the legitimate interests of the joined parties, any agreement between the claimants and the financial interests of the respective claimants. Claimants that are not the model claimant are joined parties by operation of law;
 - the model claimant pursues the model proceeding by preparing and presenting the arguments. The model claimant cannot declare the matter settled or waive the asserted claims. The factual and legal questions to be decided by the Higher Regional Court are determined by the questions submitted in the order for reference by the referring court. The joined parties have far-reaching procedural rights and can freely make submissions to the court as long as they do not contradict any submissions made by the model claimant;
 - the Capital Markets Model Proceedings Act contains the option to settle the model proceeding including all suspended parallel individual litigation unless an individual claimant opposes the settlement. A settlement is subject to the approval of the Higher Regional Court and 70% of the joined parties; and
 - if the model claimant and the defendants cannot reach a settlement, the Higher Regional Court will issue a model decision that is binding on all suspended parallel individual

litigation. The model decision is subject to appeal to the German Federal Supreme Court. After the model decision becomes binding, the individual litigation claims will resume.

- The Capital Markets Model Proceedings Act litigation against the German telecom operator mentioned above is still pending more than ten years after the introduction of the Act and the start of the proceedings. After an appeal from the claimants, granted in part by the Federal Supreme Court, the Frankfurt Higher Regional Court issued a revised model decision on 30 November 2016 confirming the Telecom operator's fault regarding an error in the relevant prospectus. At the same time, the court ruled that the causation of the prospectus error for the investment decision needed to be assessed on an individual case-by-case basis. The model decision is again subject to appeal to the German Federal Supreme Court. As soon as this model decision has a binding effect for the common factual and legal questions, the individual litigations against the German telecom operator will resume to determine the amount of damage the respective individual claimants have suffered.
- In light of this and other Capital Markets Model Proceedings Act litigation, the question arises whether the Capital Markets Model Proceedings Act has achieved its objective to provide effective and timely legal protection. Overall, only a couple of model decisions have been rendered by courts since the introduction of Capital Markets Model Proceedings Act.
- **The Appraisal Proceedings Act.** The Appraisal Proceedings Act enables minority shareholders to claim compensation for corporate organisational measures and the court at the seat of the corporation has exclusive jurisdiction over the compensation claims. In practice, this regularly leads to a consolidation of the proceedings. The application for compensation is subject to a relatively short deadline of three months from the publication of the relevant corporate organisational measure. The competent court must appoint a joint representative who represents those shareholders who do not participate in the compensation proceeding themselves. The court can encourage the parties to settle the case and a settlement must be approved by all parties. The court's compensation decision is binding on all minority shareholders concerned, including those who have not applied for a proceeding under the Appraisal Proceedings Act. The Appraisal Proceedings Act may therefore qualify as a collective action. The majority of appraisal proceedings concern compensation claims following a squeeze-out. The average duration of the proceeding is four years (significantly shorter than the duration of proceedings under the previously applicable provisions). The average compensation awarded by courts has decreased in recent years, leading to a reduced motivation for settlements on the defendant's side.

3. Are class/collective actions permitted/used in all areas of law, or only in specific areas?

German law does not provide for general class/collective actions. Class/collective actions are only available in specific areas of law, such as consumer protection law, investor protection law and corporate law (see *Question 2*).

Product liability

Product liability laws do not provide for general class/collective actions. To some extent, the Act on Cease and Desist Actions may be suitable for redressing violations of product labelling rules.

Environmental law

Environmental laws do not provide for general class/collective actions. The Environmental Appeals Act (*Umweltrechtsbehelfsgesetz*), which is similar to the Act on Cease and Desist Actions, allows for certain qualified institutions to initiate

proceedings in German administrative courts to protect environmental rights.

Competition law

Competition law does not provide for general class/collective actions beyond the claims for injunctive relief and ill-gained profits under the German Act against Restraints of Competition (GWB) and Unfair Competition Act (UWG) (see *Question 2*).

Pensions disputes

Pension law does not provide for class/collective actions.

Financial services: consumer redress

German law does not provide for general class/collective actions beyond the provisions of the Capital Markets Model Proceedings Act (KapMuG), which offers model proceedings to shareholders in case of wrong, misleading or missing capital market information (see *Question 2*). As soon as a model proceeding is initiated, the individual litigation is suspended until its conclusion.

LIMITATION

4. What are the key limitation periods for class/collective actions?

The relevant limitation periods for any claims pursued using class/collective actions under any of the specific laws allowing for these types of claim (see *Question 3*) are governed by the relevant law. Compensation claims under the Appraisal Proceedings Act (SpruchG) must be filed within three months of publication of the corporate organisation measure. Certain claims under the Unfair Competition Act (UWG) may be time-barred after six months.

As a general rule, the limitation period for many claims is three years. The limitation period starts at the end of the year in which the claimant becomes aware of the underlying facts of the claim, or when it could have become aware of them in the absence of gross negligence. In the absence of any awareness, claims are generally time-barred after ten years.

There are various exceptions to these rules depending on the area of law. For competition law, the 9th amendment to the German Act against Restraints of Competition (see *Question 1*) extends the limitation period from three to five years for damages resulting from the violation of European competition law and provides for specific rules on the start of the limitation period. The 9th amendment to the German Act against Restraints of Competition also implements this extension against violations of German competition law.

STANDING AND PROCEDURAL FRAMEWORK FOR BRINGING AN ACTION

Standing

5. What are the rules for bringing a claim in a class/collective action?

Definition of class

There is no definition of "class" in the context of class/collective actions in Germany.

Potential claimant

Claims under the Act on Cease and Desist Actions can be brought by certain:

- Qualified institutions (*section 3(1) No. 1, Act on Cease and Desist Actions*).
- Commercial associations (*section 3(1) No. 2, Act on Cease and Desist Actions*).

- Chambers of industry and commerce and crafts (*section 3(1) No. 3, Act on Cease and Desist Actions*).

These institutions can also commence actions under the relevant provisions of the Unfair Competition Act (*section 8(3) No. 2 and 3*) and the German Act against Restraints of Competition (*section 33(1) No. 1 and 2*). Claims under the Unfair Competition Act can also be brought by a competitor (*section 8(3) No. 1*).

Injunctive relief can be granted where the underlying substantive law has been infringed by the defendant even if the infringement has not caused any damage.

In Capital Markets Model Proceedings Act litigation the Higher Regional Court chooses a model claimant from the group of individual claimants whose individual litigation has been stayed at that point in time. The Higher Regional Court will choose a model claimant by considering:

- Its competence to pursue the model proceeding considering the legitimate interests of the joined parties (*Beigeladene*).
- Any agreement between all the claimants on appointing a model claimant.
- The financial interests of the respective claimants. Any claimants not chosen to be the model claimant are joined as parties to the action (*section 9(3)), Capital Markets Model Proceedings Act*).

Claimants outside the jurisdiction

As German law does not provide for general class actions, there are no rules regarding claimants from outside Germany.

Generally, claims can be brought by any claimant irrespective of the claimant's location, including outside Germany, if the claimant can establish jurisdiction in a competent court. This is regularly the case if the defendant has its seat in Germany (*section 17, Code of Civil Procedure*) or the claimant claims that the defendant has committed a tort (*section 32, Code of Civil Procedure*).

Non-EU and non-European Economic Area (EEA) claimants can be required to provide a security deposit for the costs of litigation on request from the defendant (*section 110, Code of Civil Procedure*). Courts typically demand an upfront security deposit for the initial and the appeal proceeding. The specific amount to be deposited is based on the amount in dispute.

German litigation is conducted in German. This includes any written submissions by the parties, the oral hearings and the decisions. To raise the attractiveness of litigating in Germany for foreign claimants, there have been multiple initiatives to introduce English into German court rooms. The current draft bill on the introduction of chambers at court for international commercial matters (*Gesetz zur Einführung von Kammern für internationale Handelssachen (KfiHG)*) is waiting to be consulted on by the German parliament (*Bundestag*). The draft bill proposes introducing court chambers at German regional courts where any litigation on international commercial matters can be held in English.

Professional claimants

Professional claimants (such as collection agencies) are free to file claims in Germany provided they have been granted permission under the German Legal Services Act (*Rechtsdienstleistungsgesetz*). Permission is typically granted if the applicant is reliable and has the relevant know-how to provide collection services.

If professional claimants decide to bundle third party claims by assigning them to a special purpose entity, they should take into account a recent decision by the Düsseldorf Higher Regional Court (see *Question 1*). The court ruled that the special litigation vehicle was insufficiently funded at the time of the assignment of the claims to be able to compensate any litigation costs incurred by the defendants if they lost the claim.

QUALIFICATION, JOINDER AND TEST CASES

6. What are the key procedural elements for maintaining a case as a class action?

As German law does not provide for general class actions, there are no rules governing the certification of, or qualification for, a class action.

TIMETABLING

7. What is the usual procedural timetable for a case?

As German law does not provide for general class actions, there are no rules on timetables.

Generally, individual litigation at the court of first instance can take one to two years depending on the complexity of the case. An appeal from the court of first instance can take another one to two years. A further appeal on points of law (*Revision*) to the German Federal Supreme Court (*Bundesgerichtshof*) can again take another one to two years.

EFFECT OF THE AREA OF LAW ON THE PROCEDURAL SYSTEM

8. Does the applicable procedural system vary depending on the relevant area of law in which the class/collective action is brought?

German law does not provide for general class actions. The collective actions governed by specific areas of laws (for example, the Act on Cease and Desist Actions, the Capital Markets Model Proceedings Act and the Appraisal Proceedings Act) to some extent have different procedural rules (see *Question 2* and *Question 3*).

FUNDING AND COSTS

Funding

9. What are the rules governing lawyers' fees in class/collective actions?

As German law does not provide for general class/collective actions, there are no specific rules governing lawyers' fees in class/collective actions.

Generally, lawyers' fees for litigation in Germany are governed by the Act on Lawyers' Fees (*Rechtsanwaltsvergütungsgesetz*) that provides a statutory fee schedule, taking into the account the amount in dispute. The amount in dispute is determined by the courts (*Streitwertbeschluss*) and is capped at EUR30 million. Lawyers are free to agree higher fees and different fee arrangements with their clients. However, the lawyers' fees to be paid by the losing party to the winning party under the "loser pays" principle are capped at the level stipulated in the Act on Lawyers' Fees.

The following additional cost provisions and exceptions must be observed depending on the litigation:

- The Capital Markets Model Proceedings Act provides that the costs of the model claimant, the defendant and the joined parties that arise during the model proceeding must be considered in the cost decision of the respective individual underlying lawsuits. If the competent court orders the claimant to bear the costs, the claimant must pay for the costs of the model proceeding pro rata according to the amount of the respective claims.

- The Appraisal Proceedings Act is an exception to the "loser pays" principle and provides that it is the defendant who normally pays the statutory court fees. The out-of-court expenses (including the statutory lawyers' fees) must be borne by each party separately, unless the deciding court finds separate cost liability to be unreasonable.

10. Is third party funding of class/collective actions permitted?

As German law does not provide for general class/collective actions, there are no provisions on third-party funding.

As a general rule, claimants are free to obtain litigation financing and there are a number of companies offering these services.

11. Is financial support available from any government or other public body for class/collective action litigation?

German law does not provide for general class/collective actions so there are no provisions on government or other public funding.

As a general rule, claimants can obtain financial support to pursue their claim from the government if they can show that they do not have the required financial means and stand a reasonable chance of success. In this case, the government will not pay more than provided under the Act on Lawyers' Fees.

12. Are other funding options available to claimants in class/collective actions?

As German law does not provide for class/collective actions, there are no other funding options available for them.

COSTS

13. What are the key rules for costs/fees in class/collective action litigation?

As German law does not provide for any class/collective actions, there are no key rules on costs/fees in these proceedings.

For the costs of proceedings under the Capital Markets Model Proceedings Act and the Appraisal Proceedings Act, see *Question 9*.

KEY EFFECTS OF THE COSTS/FUNDING REGIME

14. What are the key effects of the current costs/funding regime?

As German law does not provide for any class/collective actions, the current cost/funding regime has no key effects. However, it is clear that the current funding regime, as well as the lack of an effective class action mechanism, does not make it attractive for claimants who have suffered relatively small damages to pursue litigation.

DISCLOSURE AND PRIVILEGE

15. What is the procedure for disclosure of documents in a class/collective action?

Before litigation

As German law currently does not provide for class/collective actions, there are no mechanisms that govern the disclosure of documents in them. Generally, pre-litigation disclosure is not known in Germany.

In general litigation, the disclosure of documents or other evidence is subject to the claims under the relevant substantive law. The courts help claimants that lack access to relevant evidence with an elaborate system of pleadings. The burden of proof shifts back and forth depending on the extent to which a party is able to substantiate its position.

Procedurally, a claimant can bring forward a substantive disclosure claim using an "action by stages" (*section 254, Code of Civil Procedure*). This action by stages allows the claimant to ask for the disclosure of accounts or schedules of assets belonging to the defendants at the first stage, to substantiate its claim at the second stage. Without the disclosure, the claimant will be unable to pursue its major claim in court as it cannot supply the relevant facts. Combining the disclosure claim and the major claim in one action by stages also has the benefit for the claimant that the major claim's limitation period is already suspended while the court still has to rule on the disclosure claim.

During litigation

German law currently does not provide for class/collective actions so there are no mechanisms that govern the disclosure of any documents during them.

In general litigation, the disclosure of documents or other evidence is subject to claims under the relevant substantive law (for example, section 809 of the Civil Code or section 140c of the Patent Act). The court has the discretion to order the disclosure of relevant documents (*section 142, Code of Civil Procedure*).

The Appraisal Proceedings Act contains a special provision for appraisal proceedings (*see Question 2*), where the defendant must disclose documents to the court or a court-appointed expert on request from the applicant or the court where the documents are relevant to the dispute. The court can order that these documents must not be disclosed to the applicant where non-disclosure is required to protect the applicant's business secrets.

The 9th amendment to the German Act against Restraints of Competition provide for the introduction of separate disclosure obligations in follow-on cartel damages actions.

16. Are there special considerations for privilege in relation to class/collective actions?

German law currently does not provide for class/collective actions.

Generally, disclosure can only be successfully pursued if the applicant has a substantive claim for it (*see Question 15*). Historically, therefore, privilege issues have not arisen in German litigation.

The practical relevance of privilege issues will increase with the implementation of the 9th Amendment of the German Act against Restraints of Competition implementing the Anti-trust Damages Directive. This introduced certain disclosure mechanisms in cartel follow-on litigation cases.

The 2016 Act on the Reform of the Law of In-House Counsel (*Gesetz zur Neuordnung des Rechts der Syndikusanwälte, BGBl. I 2015*,

page 2517) extended legal privilege to in-house lawyers in civil proceedings. As is widely known, EU law has historically not recognised the legal privilege of communications with in-house lawyers.

EVIDENCE

17. What is the procedure for filing factual and expert witness evidence in class/collective actions?

As German law does not provide for any general class/collective actions, there are no provisions on filing factual and expert witness evidence.

General German civil procedure provides a number of rules on the testimony of factual and expert witnesses in regular proceedings.

DEFENCE

18. Can one defendant apply to join other possible defendants in a class/collective action?

Joining other defendants

As German law does not provide for any general class/collective actions, there are no provisions on joining other defendants. Under the general rules of civil procedure, either party can join third parties in support of their position.

Rights of multiple defendants

As German law does not provide for any general class/collective actions, there are no provisions on the rights of multiple defendants. Under the general rules of civil procedure, there can be multiple defendants and they are free to pursue their own defence strategies.

DAMAGES AND RELIEF

19. What is the measure of damages under national law in the field of class/collective actions?

Damages

As German law does not provide for any class/collective actions, there are no rules on the measure of damages.

As a general rule in individual litigation, German law provides for single damages only. Punitive damages do not exist and are considered to be a violation of public policy. Damages claims are subject to interest. It is currently disputed whether interest on damages resulting from tort violations should be granted from the time of the injuring event/emergence of the claim, or from the time when a complaint first comes to court. German law prohibits compound interest (*Zinseszinsverbot*).

If one debtor is held severally and jointly liable for damages, that debtor can request contributions from the other debtors who were not part of the litigation. In relation to one another, joint and several debtors are equally obliged unless otherwise agreed between them (*section 426, German Civil Code*).

The 9th Amendment of the German Act against Restraints of Competition provides special rules on claims for contributions among cartel members.

Recovering damages

See above, *Damages*.

Interest on damages

See above, *Damages*.

20. What rules apply to declaratory relief and interim awards in class/collective actions?

Declaratory relief

As German law does not provide for any class/collective actions, there are no provisions on declaratory relief. Under the general rules of German civil procedure, a claimant can ask for a declaratory judgment if unable to determine the precise amount of damages.

Interim awards

As German law does not provide for any class/collective actions, there are no provisions on interim awards. Under the general rules of German civil procedure, courts can issue an interim judgment on certain aspects of the case (*Zwischenurteil*).

SETTLEMENT

21. What rules apply to settlement of class/collective actions?

Settlement rules

Since German law does not provide for any class/collective actions, there are no specific provisions on the governance of settlements.

As a general rule of German civil procedure, parties can settle at any time. Article 19 of the Anti-trust Damages Directive makes settlements of anti-trust damages claims more attractive from a procedural perspective.

For settlements under the Capital Markets Model Proceedings Act and the Appraisal Proceedings Act, see *Question 2*.

Separate settlements

See above, *Settlement rules*.

APPEALS

22. Do parties have a right to appeal decisions relating to class actions, such as a decision granting or denying certification of a class action?

Since German law does not provide for general class/collective actions, there are no provisions on appeals.

As general rule, German law grants a right to appeal decisions.

For the appeal of model proceedings under the Capital Markets Model Proceedings Act, see *Question 2*.

ALTERNATIVE DISPUTE RESOLUTION

23. Is alternative dispute resolution (ADR) available in class/collective actions?

As German law does not provide for general class/collective actions, alternative dispute resolution is not available. In general litigation, alternative dispute resolution is commonly used in Germany.

PROPOSALS FOR REFORM

24. Are there any proposals for reform concerning class/collective actions?

See *Question 1, Definition of class/collective actions* for the Draft Bill on the introduction of a general model proceeding into the German Code of Civil Procedure. The Draft Bill would allow certified

consumer associations to pursue claims by consumers who have allegedly suffered damages in a model proceeding if at least 50 consumers join this model proceeding. The model proceeding will serve as a general tool in consumer law related matters and will supplement the already existing collective proceedings.

Only certified consumer associations have legal standing to submit a model complaint. The certified consumer associations must have as members at least ten other associations or 350 individuals. The claimant association must be registered for at least four years as a qualified institution (under *section 4, Act of Cease and Desist Actions*, as published by the German Department of Justice or in the list of the European Commission under Directive 2009/22/EC on injunctions for the protection of consumers' interests). The association must protect consumer interests that do not relate to commercial and advising activities by pursuing model proceedings (without profit intentions). Also, the association cannot receive more than 5% of its financial funding by private companies. If serious doubts exist whether the claimant association meets these criteria, the court may request it to disclose its financials.

The model complaint must confirm that the pursued claims affect at least ten consumers. It is only admissible if 50 consumers register their claims in the public claims register within two months after the publication of the model complaint. A consumer may register their claims until the end of the day before the first court hearing. The registration is free of charge.

As of the day the first model complaint becomes pending, any further model complaint against the defendant which is based on the same facts is inadmissible. The statute of limitations period is suspended for the registered consumers.

The model proceeding ends by settlement or model decision:

- The settlement may be agreed on between the claimant and the defendant, and then be effective for the registered consumers. The settlement agreement must include:
 - the relevant provisions on the consideration of the registered consumers;
 - the evidence requirements for the registered consumer to receive the agreed consideration;
 - the maturity of the consideration; and
 - the cost sharing between the parties.
- The settlement needs the court's approval which cannot be appealed. Every registered consumer may opt out of the approved settlement within one month by written notice to the court. The approved settlement enters into effect if less than 30% of the registered consumers opted out of the agreement. The court confirms the effectiveness of the settlement (such decision is then published). Upon publication, the settlement enters into effect for those consumers who have not opted out of the agreement.
- The model decision is binding between the defendant and those registered consumers who have not effectively withdrawn their registration. The model proceeding has declaratory effect without the possibility for the court to award specific damages to the registered consumers. Once a model decision becomes final, a registered consumer needs to pursue its individual claims on its own. The model decision is binding on the raised factual and legal questions for the consumers who joined the model proceeding in their individual follow-on litigation against the defendant. A consumer must then pursue its individual damages claims against the defendant in a separate proceeding (subject to the general rules of civil procedure). If a consumer has filed an individual complaint before joining the model proceeding, such individual litigation will be paused until the conclusion of the model proceeding.

The Draft Bill is planned to enter into effect on 1 November 2018. Before it becomes effective, the Draft Bill must go through the

German legislative process stages (which may lead to amendments to the Draft Bill).

On the European level, the European Commission published on 11 April 2018 a proposal for a directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC on injunctions for the protection of consumers' interests. It remains to be seen whether and to what extent the German Draft Bill will need to be adjusted in the upcoming

legislative hearings in light of the Draft Directive. The Draft Directive states that it will not prevent member states from adopting provisions designed to grant qualified entities to bring actions aimed at the protection of the collective interests of consumers at the national level. However, the scope of the Draft Directive appears to be wider than the Draft Bill in several points (for example, it is missing a clear opt-in or opt-out mechanisms for consumers in relation to actions brought by qualified entities, the provision of a redress order in addition to a declaratory decision and the disclosure of evidence).

ONLINE RESOURCES

Legislation Portal of the Federal Ministry of Justice (*Gesetze im Internet*)

W www.gesetze-im-internet.de

Description. The website is operated by the Federal Ministry of Justice and Consumer Protection (*Bundesministerium für Justiz und Verbraucherschutz*). This website provides the text of German legislation. The website is regularly updated. The website provides for a limited number of legally non-binding English translations.

German Federal Gazette (*Bundesanzeiger*)

W www.bundesanzeiger.de

Description. The website is operated by the Federal Ministry of Justice and Consumer Protection (*Bundesministerium für Justiz und Verbraucherschutz*). The provided documents are available in German.

German Federal Gazette Publisher (*Bundesanzeiger Verlag*)

W www.bgbl.de

Description. The website is operated by *Bundesanzeiger Verlag GmbH* and provides documents published in the Federal Law Gazette (*Bundesgesetzblatt- BGBI*). A public login is available. The documents are available in German.

German Parliament Documents (*Bundestag Drucksachen – BT-Drs.*)

W www.bundestag.de/drs

Description. The website is operated by the German Parliament (*Deutscher Bundestag*) and provides documents with regard to legislative procedures. German Parliament documents are available in German.

Case law database of the Ministry of Justice of North Rhine-Westphalia

W www.justiz.nrw/BS/nrwe2/index.php

Description. The website is operated by the Ministry of Justice of North Rhine-Westphalia. All references to decisions of the Regional and Higher Regional Court of Düsseldorf in the above contribution are available in German.

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