

# 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

Certain specific areas of German law provide for class/collective type actions to a limited extent (as opposed to a broader general class action regime such as in the US).

German law lacks the general discovery mechanisms that exist under US law and has a different risk allocation for litigation costs. In Germany, under 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.

Since the Model Declaratory Action (*Musterfeststellungsklage*) has been implemented into the German Code of Civil Procedure (*Zivilprozessordnung*) collective/class actions play a more important role in Germany. The framework for claiming damages caused by anti-competitive misconduct has also been amended (see below).

In addition to the Model Declaratory Action (which cannot be considered to be a general procedural mechanism for class/collective actions), the Code of Civil Procedure allows, to a certain extent, multi-party actions and representative actions. 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. In addition, there are several specific areas of law that provide for collective actions, as set out below.

**Model Declaratory Action.** In 2018, the Model Declaratory Action was introduced into the Code of Civil Procedure. This proceeding serves as a general supplement to the existing limited forms of collective proceeding. It has been implemented to facilitate the pursuit of claims where unlawful behaviour by mass-market businesses has resulted in a large number of similarly injured consumers. From the perspective of the individual consumer, such damages are often small, and the effort required for legal enforcement can appear disproportionate.

The Model Declaratory Action was implemented in section 606 *et seq* of the Code of Civil Procedure. It allows certified consumer associations to pursue claims by consumers through a model proceeding where at least 50 consumers join the model proceeding. The model proceeding ends with either a settlement or a declaratory decision. The declaratory decision is then binding on the questions of fact and law raised by the consumers who joined the model proceeding for the purposes of their individual follow-on litigation against the defendant. However, the consumer must still pursue its individual damages claim against the defendant in a separate proceeding (which is subject to the general rules of civil procedure).

**Multi-party actions (*Streitgenossenschaft*).** Multi-party disputes are subject to relatively strict criteria. German law distinguishes between:

- Voluntary multi-party disputes (*einfache Streitgenossenschaft*).
- Mandatory multi-party disputes (*notwendige Streitgenossenschaft*).

Although 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 legal pleas and arguments independently from the other parties. Voluntary multi-party disputes can be separated if they do not fulfil the relevant requirements 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 voluntary multi-party disputes for mass litigation.

**Representative action (*Gewillkürte Prozessstandschaft*).** A representative action is only possible if the following criteria are met:

- The owner of the claim must allow the third party to litigate the claim in its own name on behalf of the owner.
- The third party must disclose that it acts on behalf of the owner of the claim.
- The third party must have a legitimate interest for 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 usually try to argue against it.

**Assignment of claims.** Another option for bundling individual damage claims into one legal dispute is to assign them in line with the Civil Code to one entity that pursues them on its own behalf in one complaint. Such assignment of claims has become relevant particularly in cartel follow-on litigation and various questions with respect to its requirements are currently disputed controversially in several court proceedings. The admissibility of the assignments of a large number of alleged damage claims was first relevant in the decisions of the Dusseldorf Regional Court (*Landgericht Düsseldorf*) and the Dusseldorf Higher Regional Court (*Oberlandesgericht Düsseldorf*) in the German cement cartel follow-on litigation. Cement producers had allegedly participated in a cartel on which the German Federal Cartel Office (*Bundeskartellamt*) imposed fines in 2003. Several customers 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. Both courts dismissed the SPV's complaint on the ground that the assignment of the alleged claims violated public policy under section 138 of the Civil Code because the SPV was not sufficiently funded to compensate the statutory litigation costs of the defendants in case of defeat (*Landgericht Düsseldorf, decision of 17 December 2013, 37 O 200/09 (Kart)*; *Oberlandesgericht Düsseldorf, decision of 18 February 2015, VI-U (Kart) 3/14*).

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These decisions increased the capital requirements for the funding of SPVs, strengthening the business case for litigation financing companies to enter the German market. Since then, alternative legal service providers formally acting as a registered collection agency started offering to enforce damages claims which have been assigned to a SPV of the service provider. The German Federal Supreme Court (*Bundesgerichtshof, ruling of 27 November 2019, VIII ZR 285/18; wenigermiete.de*), in principle, approved the business model of alternative legal service providers finding that it would be in line with the Legal Services Act (*Rechtsdienstleistungsgesetz*).

However, further requirements for the assignment of a large number of damages claims are currently discussed controversially. After the European Commission in 2016 fined six truck manufacturers for their alleged participation in a price cartel, several thousand truck customers have assigned their potential damages claims to SPVs of different alternative legal service providers to pursue these claims in their own name and on their own behalf. In this regard, the Munich Regional Court I dismissed a first action stating that the assignments were null and void due to a violation of the Legal Services Act for the following reasons:

- The claimant, despite its formal registration as a collection agency, could not be considered as such, as its services from the outset would exclusively aim to file a complaint at court leaving no room for out-of-court settlement negotiations.
- The claimant may be subject to a conflict of interest in potential settlement negotiations as not all assigned claims may have an identical success chance.
- The financing company backing the claimant might influence the claimant's decisions with extraneous (economic) considerations

(*Landgericht München I, decision of 7 February 2020, 37 O 18934/17*.)

A corresponding view was adopted by the Hannover Regional Court regarding damage claims against members of the sugar cartel fined by the German Federal Cartel Office (*Bundeskartellamt*) in 2014 (*Landgericht Hannover, decision of 4 May 2020, 18 O 50/16*). However, in a proceeding in relation to a prohibited "defeat device" allegedly used by a car manufacturer in some of its diesel cars were a service provider that has bundled potential damages claims of several thousand diesel car customers, the Braunschweig Regional Court took a different view at least with respect to claims assigned by consumers from Germany (*Landgericht Braunschweig, interim order of 23 December 2019, 3 O 5657/18*). In a parallel proceeding regarding potential damages claims of car customers located outside of Germany, however, the Braunschweig Regional Court dismissed the action, because the provision of legal services under foreign law would be outside the scope of permitted activities of debt collecting agencies under the Legal Services Act, thus making the assignment of the potential claims null and void (*Landgericht Braunschweig, decision of 30 April 2020, 11 O 3092/19*).

**Further class/collective actions in specific areas of law.** There are a number of German laws besides the Code of Civil Procedure providing for further special collective actions, including the:

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

### Use of class/collective actions

**Code of Civil Procedure (Model Declaratory Actions).** The Model Declaratory Action allows certified consumer associations to pursue

in a model proceeding claims by consumers who have allegedly suffered damages. It is not limited to a specific sector, as is the case, for example, for the Capital Markets Model Proceedings Act. However, the court can only issue a declaratory decision. The plaintiffs must then pursue their individual claims separately based on the declaratory decision. Since its introduction, a number of cases have been filed and several Higher Regional Courts (*Oberlandesgerichte*) have issued initial decisions.

The first Model Declaratory Action related to the so-called "revocation joker" (*Widerrufs-Joker*), where consumers were able to withdraw from a car loan agreement due to an allegedly flawed cancellation policy. The court dismissed the complaint finding that the applicant did not qualify as a certified consumer association (*Oberlandesgericht Stuttgart, decision of 20 March 2019, 6 MK 1/18 (announced on 20 November 2018), appeal pending (Bundesgerichtshof, XI ZR 171/19)*). A Model Declaratory Action filed against a bank dealing with consumer loan contracts was dismissed for similar reasons (*Oberlandesgericht Braunschweig, decision of 12 December 2018, 4 MK 2/18; 11 MK 1/19*).

A Model Declaratory Action concerning consumer claims against a car manufacturer that allegedly used a prohibited "defeat device" in the engine management software of some of its diesel engines was withdrawn after the parties agreed on an out-of-court settlement (*Oberlandesgericht Braunschweig, order of 4 May 2020, 4 MK 1/18, announced on 26 November 2018*).

A still ongoing Model Declaratory Action is set to clarify whether consumers who have acquired order bonds, profit participation rights and subordinated loans of now insolvent companies in reliance on "top ratings" from an economic data provider are entitled to damage claims (*Oberlandesgericht Frankfurt, 24 MK 1/18, announced on 21 February 2019*). As the parties dispute whether the applicant qualifies as a certified consumer association, the proceeding is suspended until the Federal Supreme Court's decision in case XI ZR 171/19 (see above).

The first Model Declaratory Action in the law of tenancy by a tenants' association was decided in favour of the applicant (*Oberlandesgericht München, decision of 29 October 2019, MK 1/19, announced on 10 May 2019*). However, the defendant has appealed the decision (*Bundesgerichtshof, VIII ZR 305/19*).

Recent Model Declaratory Actions include proceedings against three saving banks (*Sparkassen*), all concerning the question whether variable interest rate adjustment provisions can be effectively agreed upon in general terms and conditions (*Oberlandesgericht Dresden, decision of 22 April 2020, 5 MK 1/19, announced on 17 June 2019, currently appealed by applicant and defendant (Bundesgerichtshof, XI ZR 234/20); decision of 17 June 2020, 5 MK 1/20, announced on 2 March 2020; and still pending 5 MK 2/19, announced on 8 November 2019*). A further Model Declaratory Action was announced on 27 January 2020 against an insolvency administrator of an energy supply company concerning the payment of new customer bonuses in case of contract termination before the end of a certain minimum contract period (*Oberlandesgericht München, pending proceeding, MK 2/19*).

**Act on Cease and Desist Actions.** This Act 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. 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 2016, the Act on Cease and Desist Actions was amended to expand 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 claim injunctive relief for competition violations to be brought by specific associations and other qualified institutions. A claimant can

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also claim for illegal profits to be handed over to the federal budget. The Act against the Restraint of Competition provides for similar injunctive relief against illegal profits for violation of EU or German anti-trust laws.

The option of requesting illegal 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.

One major case concerning a German car manufacturer that allegedly failed to inform the public in good time of the detection of a prohibited "defeat device" in the engine management software of some of its diesel engines is still pending. The model proceeding combining about 1470 lawsuits of individual investors was initiated in August 2016, after the Braunschweig Regional Court issued its order for reference to the competent Braunschweig Higher Regional Court (*Landgericht Braunschweig, decision of 5 August 2016, 5 OH 62/16*). A parallel proceeding was initiated before the Stuttgart Regional Court which issued an order for reference (*Landgericht Stuttgart, decision of 28 February 2017, 22 AR 1/17 Kap*) that was rejected by the Stuttgart Higher Regional Court (*Oberlandesgericht Stuttgart, order of 27 March 2019, 20 KAP 2/17*) due to the already pending model proceeding in Braunschweig. After the claimant's appeal, the German Federal Supreme Court overturned the Stuttgart Higher Regional Court's order and referred the proceeding back for decision on the appointment of a model claimant (*Bundesgerichtshof, order of 16 June 2020, II ZB 10/19*).

Capital Markets Model Proceedings Act litigation against a German telecom operator 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 German Federal Supreme Court, the Frankfurt Higher Regional Court issued a revised model decision confirming the Telecom operator's fault regarding an error in the relevant prospectus (*Oberlandesgericht Frankfurt, decision of 30 November 2016, 23 Kap 1/06*). At the same time, the court ruled that the prospectus error's causation of the investment decisions had to be assessed on an individual case-by-case basis. However, the model decision was again subject to appeal to the German Federal Supreme Court where it is still pending (*Bundesgerichtshof, XI ZB 24/16*). 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 individual claimants have suffered.

In the 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 of providing 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.

In May 2020, a further Capital Markets Model Proceeding has been initiated against a German digital payment service provider, several of its board members and the company's audit firm at the Munich Regional Court I on the grounds that serious deficiencies in the digital payment service provider's compliance system have been concealed from the capital market (*Landgericht München I, 3 O 5875/20*).

On 1 November 2020 the Capital Markets Model Proceeding Act is set to expire. In March 2020, political stakeholders from the

opposition have submitted a still pending motion to the German Parliament (*Bundestag*) directed at the parliament to call on the Federal Government to submit a draft bill regarding the extension and revision of the Capital Markets Model Proceeding Act (*BT-Drs. 19/17751*).

**Appraisal Proceedings Act.** This Act enables minority shareholders to claim appropriate compensation where they are affected by corporate reorganisation 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

The legislation allowing for Model Declaratory Actions entered into force on 1 November 2018 (*see above*). Against the background of the now agreed draft directive on representative actions for the protection of the collective interests of consumers, it remains to be seen to what extent the Model Declaratory Action will have to be amended (*see Question 24*).

The ninth amendment to the Act against Restraints of Competition came into force in June 2017, to implement the Anti-trust Damages Directive and introduces substantive and procedural reforms, including certain discovery mechanisms, to allow for more effective recovery of damages resulting from anti-competitive misconduct such as cartels. A draft bill on the tenth amendment to the German Act against Restraints of Competition which currently is subject to parliamentary consultation provides for further clarifying amendments. In particular, the draft bill proposes a rebuttable presumption according to which claimants would be considered as affected from a cartel if they fall within the cartel's material, geographical, and temporal scope. In antitrust damage litigation to date, claimants regularly face challenges to demonstrate that they have been affected by an alleged cartel, which is, however, a prerequisite for claiming damages under the currently applicable provisions.

Although the German Act against Restraints of Competition does not provide for class/collective actions, the number of cartel follow-on litigations has increased despite the fact that the bundling of claims through representative actions or assignment can be challenging. Several aspects particularly with respect to the assignment of large numbers of potential claims are still being discussed controversially in numerous court proceedings. It is to be expected that these proceedings ultimately will be decided by the German Federal Supreme Court.

## 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

German law does not provide for general class/collective actions for mass litigation. Special class/collective actions are included in the:

- Code of Civil Procedure provides a new form of general collective redress mechanism, the Model Declaratory Action.
- Act on Cease and Desist Actions provides for collective actions resulting from alleged infringements of certain consumer rights.
- Unfair Competition Act and the Act against Restraints of Competition provide for collective actions resulting from alleged unfair competition, and commercial anti-competitive behaviour.

- Capital Markets Model Proceedings Act provides for a collective action model proceeding for alleged incorrect, misleading or missing capital markets information.
- Appraisal Proceedings Act provides for compensation claims for minority shareholders following corporate reorganisation measures.
- See Question 1.

### Principal institutions

German law does not provide for class/collective actions as such 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

General class/collective actions are not available in Germany. However, the following German laws allow for specific collective actions.

**Code of Civil Procedure (Model Declaratory Action).** The Model Declaratory Action is governed by section 606 *et seq* of the Code of Civil Procedure, and allows certified consumer associations to pursue in a model proceeding claims by consumers who have allegedly suffered damages. The model proceeding ends with settlement or a declaratory decision.

The Higher Regional Courts are competent for the handling of the proceeding at first instance. A Federal State (*Bundesland*) where several Higher Regional Courts have been established can, by decree of the State Government (*Landesregierung*), assign a Higher Regional Court to handle the Model Declaratory Actions, where appropriate for the advancement or faster completion of the proceedings (for example, in North-Rhine Westphalia this would be the Higher Regional Court Hamm).

Only qualified institutions, that is, certified consumer associations under section 3(1) of the Act on Cease and Desist Actions that meet the criteria laid out in section 606 of the Code of Civil Procedure have legal standing to file a Model Declaration Action (see Question 5). If serious doubts exist whether a claimant consumer association meets these criteria, the competent court can request it to disclose its accounts.

The action is only admissible if 50 consumers register their claims in the claims register (*Klagereregister*) within two months after the publication of the model complaint. Further consumers can register their claims up until the end of the day before the first court hearing. The registration is free of charge.

The complaint must provide information and evidence that the claimant meets all conditions to be a qualified institution under section 606(1) of the Code of Civil Procedure and that the action pursued affects the claims or legal relationships of at least ten consumers.

The statutory limitation period is suspended for the registered consumers. Any further Model Declaratory Action and any further actions by consumers who have registered their claims in the claims register against the defendant based on the same facts are inadmissible as of the day the first Model Declaratory Action becomes pending.

The settlement can be agreed on between the claimant and the defendant, and is then effective for the registered consumers. The settlement agreement must include the:

- Relevant provisions on the consideration of the registered consumers.

- Evidence requirements for the registered consumer to receive the agreed consideration.
- Maturity of the consideration.
- Cost sharing between the parties.

The settlement must be approved by the court and cannot be appealed. Registered consumers can opt out of the approved settlement within one month by written notice to the court. The approved settlement enters into effect if fewer than 30% of the registered consumers opt out of the agreement. The court then confirms the effectiveness of the settlement and the decision is then published. On publication, the settlement enters into effect for those consumers who have not opted out of the agreement.

The model declaratory decision is binding between the defendant and those registered consumers who have not effectively withdrawn their registration. The proceeding has declaratory effect only and the court cannot award specific damages to the registered consumers. The consumer must then pursue its individual damages claims against the defendant in a separate proceeding (subject to the general rules of civil procedure). The model decision is binding on the factual and legal questions raised by the consumers for the purposes of their individual follow-on litigation against the defendant. If a consumer has filed an individual complaint before joining the model proceeding, the individual litigation is paused until the conclusion of the model proceeding.

**Act on Cease and Desist Actions.** The Act on Cease and Desist Actions allows for collective actions to facilitate effective enforcement of consumer rights in Germany. It mainly provides for injunctive relief rather than for compensation of damages. 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. The Act on Cease and Desist Actions grants certain representatives, including registered consumer organisations and trade associations, standing to litigate claims. Individuals have no standing to litigate claims under the Act. Actions under the act can be pursued for:

- Violations of the legitimate use of general terms and conditions.
- Violations of consumer protection laws in relation to contracts entered into between a company and a consumer, such as:
  - distance selling contracts (*Fernabsatzverträge*);
  - consumer good purchases (*Verbrauchsgüterkauf*); and
  - consumer loan agreements (*Verbraucherdarlehensverträge*).

Since 2016, certain representatives can also pursue actions for violations of the rules on the collection, processing and use of consumer data by 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.
- 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.

**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.

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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 publishes an application for a model proceeding in the public register ([www.bundesanzeiger.de](http://www.bundesanzeiger.de)) and the underlying individual litigation is suspended.
- If ten applications are published in the public register, the court that published the first application issues 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 starts 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 other than 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 allows the claim to be settled, including all suspended parallel individual litigation (unless the individual claimant opposes the settlement). A model claim settlement is subject to the approval of the Higher Regional Court and 70% of the joined parties.

If the model claimant and the defendants cannot reach a settlement, the Higher Regional Court issues 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 resume.

The Capital Markets Model Proceeding Act is set to expire on 1 November 2020. In March 2020, political stakeholders from the opposition have submitted a still pending motion to the *Bundestag* for Parliament to call on the Federal Government to submit a draft bill regarding the extension and revision of the Capital Markets Model Proceeding Act (*BT-Drs. 19/1775*).

**Appraisal Proceedings Act.** The Appraisal Proceedings Act enables minority shareholders to claim compensation for corporate reorganisational measures. 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 reorganisational 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 can 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 the courts has decreased in recent years, leading to a reduced motivation for settlements on the defendant's side.

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

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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*).

#### General mechanism

The Code of Civil Procedure allows certain qualified institutions to initiate proceedings on behalf of consumers through the Model Declaratory Action (see *Question 1 and Question 2*). This model proceeding has declaratory effect without the court being able to award specific damages. Therefore, consumers who participate in a model proceeding must still pursue their individual damage claims against the defendant in a separate proceeding.

The Model Declaratory Action is a general procedural mechanism not limited to specific customer law regulations.

#### Product liability

Product liability laws do not provide for general class/collective actions. To some extent, the Act on Cease and Desist Actions can 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 injunctive relief and illegal profits claims under the Act against Restraints of Competition and the Unfair Competition Act (see *Question 2*).

#### Pensions disputes

Pension law does not provide for class/collective actions.

#### Financial services: consumer redress

The Capital Markets Model Proceedings Act 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 the conclusion of the model proceeding.

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## LIMITATION

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

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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 must be filed within three months of publication of the corporate

reorganisation measure. Certain claims under the Unfair Competition Act can be time-barred after six months.

As a general rule, the limitation period for most 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.

The commencement of a Model Declaratory Action suspends the limitation period for the claims in dispute (*section 204(1) no. 1a, Civil Code*). Because of the ambiguous wording of the provision, it is disputed whether consumers must enrol in the claims register individually or whether the general submission of the Model Declaratory Action by a certified consumer association is sufficient to suspend the limitation period. In the absence of clarity, consumers are well advised to enrol in the claims register before the expiry of the regular limitation period of their claim.

With regards to competition law, the ninth amendment to the Act against Restraints of Competition (*see Question 1*) has extended the limitation period from three to five years for damages resulting from the violation of EU and German competition law, and provides for specific rules on the start of the limitation period.

## STANDING AND PROCEDURAL FRAMEWORK FOR BRINGING AN ACTION

### Standing

#### 5. What are the rules on standing 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

**Code of Civil Procedure (Model Declaratory Action).** Only certified consumer associations have legal standing to file a Model Declaration Action. Under section 606 of the Code of Civil Procedure, a certified consumer association must:

- Have at least ten associations operating in the same field of activity or have at least 350 natural persons as members.
- Be registered for at least four years in the list under section 4 of the Act on Cease and Desist Actions or the European commission's register under Directive 2009/22/EC on injunctions for the protection of consumers' interests.
- Pursue consumer interests largely through non-commercially driven information or advisory activities as part of its statutory purpose.
- Not file a model declaratory action for the purpose of making profit.
- Not receive more than 5% of its financial funding from private companies.

**Act on Cease and Desist Actions.** Under section 3(1) of the Act on Cease and Desist Actions, claims can be brought by certain qualified institutions, commercial associations, and chambers of industry and commerce and crafts. These institutions can also commence actions under the relevant provisions of the Unfair Competition Act (*section 8(3) no 2 and 3*) and the Act against Restraints of Competition (*section 33(4) no 1 and 2*). Claims under the Unfair Competition Act and the Act against Restraints of Competition can also be brought by a competitor.

**Capital Markets Model Proceedings Act.** Under this Act the competent 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 chooses 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 class/collective 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 normally 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*). The courts typically demand an upfront security deposit for initial and appeal proceedings. 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 such as the introduction of Commercial Courts for international cross-border disputes to introduce English into the German courts. A draft bill on the introduction of chambers at court for international commercial matters (*Gesetz zur Einführung von Kammern für internationale Handelssachen (KfiHG)*) is still pending consultation by the German parliament (*BT-Drs. 19/1717*). The draft bill proposes introducing court chambers at German regional courts where litigation on international commercial matters can be undertaken 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 vehicle (SPV), they should take into account the case law of the Dusseldorf Higher Regional Court (*Oberlandesgericht Düsseldorf, decision of 18 February 2015, VI-U (Kart) 3/14*). The court ruled that at the time of the assignment of the claims such SPVs must be sufficiently funded to compensate the statutory litigation costs of the defendants in case of defeat. Further requirements are currently discussed controversially in several court proceedings (*see Question 1*).

Only qualified institutions are entitled to file Model Declaratory Actions or claims under the Act on Cease and Desist Actions (*see above, Potential claimant*).

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## Qualification, joinder and test cases

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

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#### Certification/qualification

Certain requirements must be met for the certification of a Model Declaratory Action or Capital Markets Model Proceedings (see *Question 2 and Question 5*).

#### Minimum/maximum number of claimants

The filing of a Model Declaratory Action requires at least 50 consumers to enrol in the claims register and the pursued action must affect the claims or legal relationships of at least ten consumers (see *Question 2*).

#### Joining other claimants

For Model Declaratory Actions:

After a Model Declaratory Action has been initiated, potentially affected consumers can join the action by enrolling in the claims register. The claims registration, which is managed by the Federal Office of Justice (*Bundesamt für Justiz*), is free of charge for all consumers.

Consumers can register claims or legal relationships for determination under the Model Declaratory Action in the claims register until the end of the day before the first court hearing. The details of the application are entered into the claims register without substantive assessment.

The registration can be withdrawn until the end of the day on which the first instance hearing has started.

The initial registration as well as the withdrawal must be explained in text form to the Federal Office of Justice.

If the model proceeding ends by settlement, the Code of Civil Procedure provides for an opt-out option. Each consumer can withdraw from the settlement within a period of one month from the notification of the approved settlement. The resignation must be declared to the court in writing or as a record of the office.

For joining other claimants under the Capital Markets Model Proceedings Act, see *Question 2*.

#### Test cases

There are no class/collective action test cases, as German law does not provide for class/collective actions as such. However, a Model Declaratory Action can in principle enable claimants to test the validity of their claims.

#### Timetabling

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

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There are no specific rules on timetables for class/collective actions, as German law does not provide for class/collective actions as such.

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 can again take another one to two years. With respect to Capital Markets Model Proceedings, however, several proceedings are still pending several years after their initiation. As regards the Model Declaratory Action, the court practice to date shows that several first instance proceedings were decided or settled within less than one year after their announcement (see *Question 1*).

## EFFECT OF THE AREA OF LAW ON THE PROCEDURAL SYSTEM

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

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German law does not provide for class/collective actions as such. The Model Declaratory Action under the Code of Civil Procedure as well as 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) have different procedural rules (see *Question 2 and Question 3*).

## FUNDING AND COSTS

### Funding

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

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There are no specific rules governing lawyers' fees in class/collective actions, as German law does not provide for class/collective actions as such.

Generally, lawyers' fees for litigation in Germany are governed by the Act on Lawyers' Fees (*Rechtsanwaltsvergütungsgesetz*), which provides a statutory fee schedule that takes into account the amount in dispute. The amount in dispute is determined by the courts (*Streitwertbeschluss*) and capped by law 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 (see *Question 1*) 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 specific litigation:

- **Code of Civil Procedure:** The amount in dispute is capped at EUR250,000 for a Model Declaratory Action.
- The registration of possible claims into the claims register for consumers joining a Model Declaratory Action is free of charge. The fees of the Model Declaratory Action are subject to the general litigation "loser pays" cost principle between the claimant and the defendant.
- **Capital Markets Model Proceedings Act:** 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.
- **Appraisal Proceedings Act:** This is an exception to the "loser pays" principal and provides that the defendant normally pays 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?

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There are no specific provisions on third-party funding for class/collective actions, as German law does not provide for class/collective actions as such.

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

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

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There are no specific provisions on government or other public funding for class/collective actions, as German law does not provide for class/collective actions as such.

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. If so, the government will not pay more than provided under the Act on Lawyers' Fees.

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

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There are no other relevant funding options for class/collective actions, as German law does not provide for class/collective actions as such.

## COSTS

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

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There are no specific rules governing litigation costs in class/collective actions, as German law does not provide for class/collective actions as such.

Generally, court costs in Germany are governed by the Act on Court Costs (*Gerichtskostengesetz*), which provides a statutory cost schedule according to the amount in dispute. The amount in dispute is determined by the courts (*Streitwertbeschluss*) and capped by law at EUR30 million. Court costs are paid by the losing party under the "loser pays" principle (see *Question 7*). Additional costs can arise from the taking of evidence (*Beweisaufnahme*), such as experts' and lawyers' fees (see *Question 9*).

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

- **Code of Civil Procedure:** For a Model Declaratory Action, the amount in dispute is capped at EUR250,000.
- **Appraisal Proceedings Act:** This is an exception to the "loser pays" principle and provides that the defendant normally pays the statutory court fees.

#### Key effects of the costs/funding regime

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

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The current funding regime and the lack of an effective class action mechanism does not make litigation attractive for claimants who have suffered relatively small damages.

However, the newly implemented Model Declaratory Action allows individual consumers to pursue a claim by enrolling in the claims register without any initial financial risk and, in case of a successful Model Declaratory Action, to mitigate the financial risk of individual follow-on litigation. For the fees and costs of the Model Declaratory Action, see *Question 9* and *Question 13*.

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## DISCLOSURE AND PRIVILEGE

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

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#### Before litigation

There are no specific mechanisms that govern the disclosure of documents for class/collective actions, as German law does not provide for class/collective actions as such.

Generally, pre-litigation disclosure is not known in Germany. In civil litigation, the disclosure of documents or other evidence is governed by 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" (*Stufenklage*). This allows the claimant to ask for the disclosure of defendants' accounts or assets at the first stage, to substantiate its claim at the second stage. Without the disclosure, the claimant is 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 suspended while the court rules on the disclosure claim.

#### During litigation

In general litigation, the disclosure of documents or other evidence is subject to the relevant substantive law, such as section 809 of the Civil Code or section 140c of the Patent Act (*Patentgesetz*). The court can generally 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 this is required to protect the applicant's business secrets.

The Act against Restraints of Competition provides for a distinct disclosure obligation in follow-on cartel damages actions.

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

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There are no special considerations for privilege in relation to class/collective actions, as German law does not provide for class/collective actions as such.

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 is likely to increase since the ninth Amendment of the Act against Restraints of Competition implemented certain disclosure mechanisms for 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*) has extended legal privilege to in-house lawyers in civil proceedings. EU law has historically not recognised the legal privilege of communications with in-house lawyers.



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## EVIDENCE

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

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There are no specific provisions on filing factual and expert witness evidence in class/collective actions, as German law does not provide for general class/collective actions as such.

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

## DEFENCE

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

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#### Joining other defendants

There are no specific provisions on joining other defendants in class/collective actions, as German law does not provide for class/collective actions. Under the general rules of civil procedure, either party can join third parties in support of their position. In a Model Declaratory Action, defendants can be joined by third parties under the general rules of civil procedure, while the joining of claimants by consumers who have registered their claims or allege to have a claim or legal relationship with the defendant is not possible.

#### Rights of multiple defendants

There are no specific provisions on the rights of multiple defendants in class/collective actions, as German law does not provide for class/collective actions as such. There can be multiple defendants under the general rules of civil procedure, and they are free to pursue their own defence strategies.

## DAMAGES AND RELIEF

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

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#### Damages

There are no specific rules on the measure of damages in class/collective actions, as German law does not provide for class/collective actions as such.

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.

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. Joint and several debtors have equal obligations, unless otherwise agreed between them (*Gesamtschuldnerausgleich*).

German competition law now provides special rules on claims for contributions among cartel members under the ninth Amendment of the Act against Restraints of Competition (*section 33d, Act against Restraint of Competition*).

#### Recovering damages

See above, *Damages*.

#### Interest on damages

See above, *Damages*.

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

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#### Declaratory relief

There are no general provisions on declaratory relief in class/collective actions, as German law does not provide for class/collective actions as such. 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. In addition, the Model Declaratory Action is designed to be a declaratory action. The subject of the action is the determination of the factual and legal premises for the claim or the determination of the legal relation between the claimant consumer (as represented by the qualified institution) and the defendant business. To obtain financial relief, individual consumers must assert their claim against the defendant in separate follow-on litigation based on the binding findings of the model declaratory decision.

#### Interim awards

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

## SETTLEMENT

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

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#### Settlement rules

As a general rule of German civil procedure, parties can settle at any time. Section 33f of the Act against Restraints of Competition makes settlements of anti-trust damages claims more attractive from a procedural perspective.

For settlements under the Code of Civil Procedure concerning the Model Declaratory Action, see *Question 1 and Question 2*.

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

#### Separate settlements

See above, *Settlement rules*.

## APPEALS

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### 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?

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There are no special provisions on appeals in class/collective actions, as German law does not provide for general class/collective actions as such.

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

Decisions on Model Declaratory Actions can be subject to appeal on points of law (*Revision*), which is always admissible, as Model Declaratory Actions are deemed to be of fundamental significance (*section 614, Code of Civil Procedure*).

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

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## ALTERNATIVE DISPUTE RESOLUTION

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

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There are no special rules on alternative dispute resolution in class/collective actions, as German law does not provide for class/collective actions as such. In general, alternative dispute resolution is commonly used in Germany.

In November 2019, a bill amending the provisions on dispute resolution in consumer matters (*Gesetz zur Änderung von Vorschriften über die außergerichtliche Streitbeilegung in Verbrauchersachen und zur Änderung weiterer Gesetze*) was adopted by the German Parliament. The bill introduced the Consumer Dispute Settlement Act (*Verbraucherstreitbeilegungsgesetz*) which provides for the introduction of a nationwide universal arbitration body (*Universalschlichtungsstelle*) to settle disputes between consumers and undertakings. It implements Germany's obligation under Directive 2013/11/EU on alternative dispute resolution for consumer disputes (ADR Directive) to ensure a nationwide infrastructure of consumer arbitration bodies for consumer disputes.

### PROPOSALS FOR REFORM

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

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Based on a 2013 report, collective redress mechanisms are not harmonised or consistent across the EU. Against this background, the European Commission, the Council of the EU and the European

Parliament on 22 June 2020 agreed on a draft directive on representative actions for the protection of the collective interests of consumers repealing Directive 2009/22/EC. The draft directive which is based on an initial proposal of the European Commission from 2018 requires member states to put in place class/collective redress mechanisms that go well beyond the Model Declaratory Action set out in the German Code of Civil Procedure. While the latter only has a declaratory effect and consumers must still pursue their individual damages claims against the defendant in a separate proceeding, the draft directive provides for collective redress mechanisms that directly aim at damage compensation. Also the prerequisites for entities qualified to launch actions for injunction and redress on behalf of groups of consumers are lower than currently provided for in the German Civil Code with respect to the Model Declaratory Action (for example, there is no minimum number of members above which such an institution is entitled to bring an action). In addition, the draft directive expressly permits commercial third-party financing as long as the independence of the qualified entity (particularly regarding its litigation strategy) is maintained. It is expected that the Council of the EU and the European Parliament finally adopt the draft directive in 2020. EU member states will then have 24 months to transpose the directive into their national laws, and an additional six months to apply it. In this process, it is likely that the currently effective Model Declaratory Action procedure may need to be amended accordingly.

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