

GERMANY

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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

There is no mechanism for general collective redress under the German Code of Civil Procedure (*Zivilprozessordnung*) and consequently there is no legal definition for class/collective actions.

The Code of Civil Procedure provides for multiparty disputes (including joinders by third-parties) and allows for the consolidation of separately-initiated parallel proceedings that are pending at the same court. However, these rules are not designed and are not fit to handle mass actions for a large number of claimants effectively. In addition, German law presents the following hurdles to the consolidation of parallel cases:

- German consumer and investor protection law allows for actions to be filed at the claimant's place of residence instead of the default jurisdiction at the defendant's seat. In practice, this results in parallel cases pending before a large number of courts all over Germany. One prominent exception providing for exclusive jurisdiction at the issuer's seat is §32b of the German Code of Civil Procedure. Its application is limited to certain actions for allegedly inaccurate capital market information.
- There is a lack of means to stay parallel proceedings under German law. Under §148 of the Code of Civil Procedure, a formal stay of proceedings is generally hard to justify just by parallel proceedings pending, even if another case is already taking place in a higher court elsewhere. We are observing a trend of informal factual stays by way of case handling (hearings are only scheduled after decisions of lead cases at higher instances are expected to be handed down). Also parties can mutually agree to a stay pursuant to §251 of the German Code of Civil Procedure.

The Code of Civil Procedure provides for two concepts of factual consolidation within the existing legal framework. Such actions involve the individual claimants pooling their claims with a single entity that acts as claimant on their behalf. This requires either:

- The individual and the representing entity to have a legitimate interest to justify the representation.
- The individual to have validly assigned the claims to the representing entity.

However, in practice the requirements for the above actions are difficult to fulfil. In consequence, none of these concepts are frequently used in Germany.

As an exception to the above and limited to specific areas of substantive law, German law provides for the following collective redress mechanisms:

- Act on Cease and Desist Actions (*Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen*) (UKlaG).
- Capital Markets Model Case Act (*Kapitalanleger-Musterverfahrensgesetz*) (KapMuG).
- Appraisal Proceedings Act (*Spruchverfahrensgesetz*) (SpruchG).

For details of the specific legal mechanisms, see *Question 2, Different mechanisms*.

However, a draft bill on the introduction of group proceedings is currently being discussed in the relevant parliamentary committees. If enacted, this would create the first mechanism for general collective redress under German civil law (see *Question 24*).

Use of class/collective actions

UKlaG. Filing representative actions under UKlaG is by far the most popular collective redress mechanism in Germany. Certain representatives such as registered consumer organisations or professional (trade) associations can bring actions in the public interest to the benefit of large number of individuals actions.

According to a 2013 report commissioned by the federal government following the Commission's 2008 Green Paper on consumer collective redress (*COM (2008) 794 final*), representatives (particularly consumer organisations) are bringing significant numbers of injunctive actions challenging:

- The transparency of general terms and conditions.
- Information provided in relation to consumers' cancellation rights.
- Misleading advertisements.

The report shows, however, that follow-on actions to surrender ill-gained profits to the federal government budget under §34a GWB and §10 UWG are very rare.

As far as compensatory actions under UKlaG are concerned, the use of collective redress mechanisms is fairly rare. This is not only true for the concentration of claims brought by competitors following a violation of competition or anti-trust laws, but also for consumer organisations, even though the hurdles to bring such representative actions are much lower.

KapMuG. Historically, KapMuG was enacted in 2005 as a reaction to over 17,000 individual actions brought against Deutsche Telekom AG by its investors claiming to have relied on allegedly misleading market information in the context of Deutsche Telekom AG's IPOs. KapMuG was intended to:

- Handle the extraordinary caseload in a more efficient and timely fashion.
- Provide for a fair cost division of expert's fees.

However, since the Federal Court of Justice remanded the model decision in *re Deutsche Telekom AG* to the Frankfurt Court of Appeals only in late 2014, it is difficult to argue that KapMuG has delivered on the desired efficiency. In addition, studies in the context of legislative activities around KapMuG demonstrated that KapMuG has not been very well received in cases other than Deutsche Telekom AG (and only a small number of model decisions have been handed down since its enactment). Several amendments in the course of the extension of KapMuG's "sunset clause" are intended to rectify this and render KapMuG more attractive to investors.

SpruchG. The SpruchG was enacted in 2003 to consolidate the rules of Appraisal Proceedings that were part of several different actions before. The importance of Appraisal Proceedings is growing, with increasing shareholder activism and the expansion of SpruchG's applicability by recent amendments. In practice, however, actions under SpruchG are handled reluctantly by the courts, causing cases to last for several years in only one instance.

Current trends

There has been a recent trend for large cartel damage claims to be lodged with German courts. A common feature is the use of action vehicles (*Klagevehikel*) (that is, legal entities that are created for the purpose of serving as claimants after a large number of individual damage claims are assigned to the vehicle).

In one of the leading cases, Belgian vehicle Cartel Damage Claims SA (CDC) filed damage claims before the district court of Düsseldorf, alleging an illegal price-fixing agreement among several cement manufacturers (*Landgericht Düsseldorf, judgment of December 17, 2013, 37 O 200/09 (Kart) U, NZKart 2014, 75*). CDC had allegedly previously acquired claims from 36 commercial customers of the cement manufacturers. While the court did not object to the assignment arrangements per se, the action was dismissed because CDC had failed to timely suspend the statute of limitation due to CDC's lack of standing at the time of filing the lawsuit. The court held that CDC lacked standing since the assignments before the filing of the lawsuit were in violation of the German Legal Advice Act. In addition, the assignment was held to violate public policy since CDC was undisputedly not in a position to reimburse defendants for their statutory attorney's fees. The court held that this would result in an unfair and unjustified shift of cost risks to the defendants' disadvantage. Despite heavy criticism, the judgment was confirmed by the Düsseldorf Court of Appeals in February 2015 (*Oberlandesgericht Düsseldorf, judgment of 18 February 2015, VI-U (Kart) 3/14, NZKart 2015, 201*).

The court also dismissed the claimant's motion for determination of a lowered amount in dispute leading to very significant cost reimbursement claims against the claimant. This was especially relevant due to the number of third-party interveners (for contribution claims) who are also eligible for reimbursement claims against the claimant if they supported a successful defendant.

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 is the primary source of law for litigation in Germany, including for actions where larger numbers of claims are pooled with action vehicles by way of assignment or representation. For certain areas of law, specific (supplemental) procedural rules are available. These include procedural rules for:

- Alleged infringements of certain consumer protection rules (§§5ff, *Act on Cease and Desist Actions (UKlaG)*).
- Alleged unfair competition and commercial practices (§§ 87ff, *Anti-trust Act (GWB)* and §§12ff, *Unfair Competition Act (UWG)*).
- Model proceedings in cases regarding allegedly incorrect capital market information (§§1ff, *Capital Markets Model Case Act (KapMuG)*).
- Judicial review of compensation claims for minority shareholders (§§1ff, *Appraisal Proceedings Act (SpruchG)*).

Principal institutions

In the absence of a comprehensive procedural legal framework for mass actions, there are no institutions (courts, tribunals or other bodies) that are commonly used to hear cases or that have a specific oversight. Cases are only consolidated when pending at the same court (consolidation is much more likely when rules for exclusive jurisdiction apply).

Different mechanisms

Class/collective actions are not permitted in Germany. However, for specific areas of substantive law, certain mechanisms of collective redress are available under the following statutes:

- **UKlaG.** Following the adoption of Directive 98/27/EC on injunctions for the protection of consumers' interests, German law provides for specific representative actions under UKlaG. Under these rules, injunctive actions can be raised on behalf of consumers to require defendants to cease and desist from certain behaviour such as using inadmissible general terms and conditions (for further examples, see *Question 1*).

If the actions are successful, the representatives can demand that profits resulting from challenged practices (for example, violations of the German Unfair Competition Act or Antitrust Act) be surrendered to the federal budget (see *Question 1*).

- **KapMuG.** KapMuG is designed for cases based on the allegation of inaccurate capital market information which are pending before the same court due to §32b of the Code of Civil Procedure.

KapMuG provides for an optional application to conduct model proceedings at the appellate court. These proceedings will only decide certain general questions of law and/or fact that are identical and therefore relevant to other cases involving the same issuer (for example, the inaccuracy of ad hoc information or a prospectus). Either party can apply to the court of first instance for the publication of such questions of law or fact in a special registry in the Federal Gazette (§2). If at least nine similar applications (on essentially the same question(s)) are published within a six-month period (during which the original proceedings are stayed), the competent appellate court will take over and start the model proceedings (§ 6).

Procedurally, the trial court will issue an order for reference, which is binding for the court of appeals and cannot be challenged. The court of appeals will select a model claimant, start the model proceedings and ultimately decide the submitted questions. As long as model proceedings are pending, the individual lawsuits are suspended by the competent trial court (§8). The model decision (*Musterentscheid*) is binding for all parallel matters that were suspended (§22). After the closure of the model proceedings, the suspension is lifted and the matters will be decided individually.

- **SpruchG.** While limited to a specific area of corporate law, SpruchG can be seen as a means of quasi-collective redress. SpruchG provides for judicial review of compensations payable to minority shareholders (for example, pursuant to a squeeze-out) (§1). Since the court at the seat of the corporation has exclusive jurisdiction, several individual actions are usually consolidated. In case the court determines that the offered compensation was too low, such decision is binding with respect to all minority shareholders, including those that have not challenged the compensation (§13).

3. ARE CLASS/COLLECTIVE ACTIONS PERMITTED/USED IN ALL AREAS OF LAW, OR ONLY IN SPECIFIC AREAS?

The Act on Cease and Desist Actions (UKlaG) provides for injunctive actions regarding the use of improper general terms and conditions, as well as the type of conduct that infringes on consumer protection laws. This mechanism comes closest to the concept of class/collective actions in Germany (see Question 2, *Different mechanisms*).

Product liability

There is no specific collective redress mechanism for product liability in Germany. However, UKlaG applies to infringements of certain consumer protection rules such as product labelling rules.

Environmental law

There is no specific collective redress mechanism for environmental law claims in Germany. However, the Environmental Appeals Act (*Umweltrechtsbehelfsgesetz*) is comparable to UKlaG, as it allows for certain international and domestic associations to conduct proceedings before the administrative courts to enforce environmental rights.

Competition law

There is no specific collective redress mechanism for competition law other than the specific rules relating to the German Anti-Trust Act (*GWB*) and Unfair Competition Act (*UWG*) (see Question 2, *Principal sources of law*).

Pensions disputes

There is no specific collective redress mechanism for pensions disputes in Germany.

Financial services: consumer redress

Although there is no general collective redress mechanism for claims relating to financial services, the German Capital Markets Model Case Act provides for model law proceedings (see Question 2, *Different mechanisms*). The application of this process is limited to certain lawsuits concerning the allegation of inaccurate capital market information.

LIMITATION

4. WHAT ARE THE KEY LIMITATION PERIODS FOR CLASS/COLLECTIVE ACTIONS?

Since claims are dealt with on an individual basis, no specific limitation rules apply to class/collective actions in Germany. Therefore, the limitation periods for bringing individual claims apply. The basic limitation period is three years starting at the end of the third calendar year after the claim has become due and the claimant has actual knowledge of the underlying facts or his ignorance is due to gross negligence. There are, however, many exceptions to this general rule.

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 a “class” in the context of class/collective actions in Germany.

Potential claimant

Actions under the Act on Cease and Desist Actions (UKlaG) can be brought by:

- Certain qualified institutions (§ 3(1) no. 1).
- Certain commercial associations (§ 3(1) no. 2).
- Certain chambers of industry and commerce and chambers of crafts (3)§ 3(1) no. 3).

To commence an injunctive action, it is not necessary for damages to have occurred, and it is merely sufficient that the law is infringed by the conduct and should be ceased.

In relation to actions brought under the Capital Markets Model Case Act (KapMuG), the “model decision” is binding on all parties whose individual lawsuits were suspended due to the pending model proceedings (§22) (see *Question 2, Different mechanisms*). The Court of Appeals has equitable discretion to determine the “model claimant” from the claimants whose individual lawsuits were stayed pursuant to §8.

Claimants outside the jurisdiction

In general, claims can be brought by claimants from several jurisdictions outside of Germany if the court has jurisdiction. In such cases, it is generally sufficient for a claimant to be based outside Germany as long as the defendant maintains its seat in the district of the court (§17, *German Code of Civil Procedure*). The jurisdiction of German courts can also be established by other circumstances (for example, the place of relevant infringement (§32)).

Generally, there is no *forum non conveniens* defence under German law. However, this has not resulted in forum shopping. One main reason may be the lack of a comprehensive mechanism for collective redress, discovery and punitive damages under German law. In general, Germany cannot be seen as particularly claimant friendly.

In addition, foreign claimants will face several hurdles when bringing actions in Germany:

- The language of the courts is German. This requires briefs to be written in German and hearings to be conducted in German. In general, even exhibits must be translated into German by court admitted translators.
- Claimants from outside the EU and the European Economic Area (EEA) may be required to provide security for costs on request by the defendant pursuant to § 110 of the German Code of Civil Procedure. Depending on the amount in dispute, this may constitute a significant obstacle since courts tend to require security for at least two instances.

Professional claimants

While professional pooling of claims for commercial reasons is not illegal per se under German law, certain restrictions apply. According to the German Legal Services Law (*Rechtsdienstleistungsgesetz*), a permit is required for commercial collection agencies (§2(2), section 1).

In the *CDC case* (see *Question 1, Current trends*), the lack of monetary capacity of such a professional commercial claimant was sufficient for the court to decide that the underlying assignment was invalid for infringement of public policy. However, it remains to be seen whether arguments other than the lack of monetary capacity will be raised successfully as challenges to such concepts.

QUALIFICATION, JOINDER AND TEST CASES

6. WHAT ARE THE KEY PROCEDURAL ELEMENTS FOR MAINTAINING A CASE AS A CLASS ACTION?

Certification/qualification

There is currently no general collective redress mechanism. Accordingly, German law does not have any rules governing the certification of or qualification for class/collective actions.

Minimum/maximum number of claimants

There is currently no general collective redress mechanism. Accordingly, there are no rules on the number of claimants.

Joining other claimants

There is currently no general collective redress mechanism. Accordingly, there are no rules on joinder.

Test cases

There is currently no general collective redress mechanism. Accordingly, there are no rules on test cases.

TIMETABLING

7. WHAT IS THE USUAL PROCEDURAL TIMETABLE FOR A CASE?

There is currently no general collective redress mechanism. Accordingly, there are no rules on timetables. As a very general rule, it takes about one to two years to receive the judgment of the court of first instance. The appeal may also last about one to two years. An additional further appeal to the Federal Court of Justice may also 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?

There is currently no general collective redress mechanism. However, certain specific areas of law provide for procedural rules in relation to collective redress (*see Questions 2 and 3*).

FUNDING AND COSTS

FUNDING

9. WHAT ARE THE RULES GOVERNING LAWYERS' FEES IN CLASS/COLLECTIVE ACTIONS?

There is currently no general collective redress mechanism. Accordingly, there are no specific rules governing lawyer's fees in class/collective actions.

10. IS THIRD PARTY FUNDING OF CLASS/COLLECTIVE ACTIONS PERMITTED?

There is currently no general collective redress mechanism. Accordingly, there are no specific rules governing third-party funding of class/collective actions.

11. IS FINANCIAL SUPPORT AVAILABLE FROM ANY GOVERNMENT OR OTHER PUBLIC BODY FOR CLASS/COLLECTIVE ACTION LITIGATION?

There is currently no general collective redress mechanism. Accordingly, there is no government funding for class/collective actions.

12. ARE OTHER FUNDING OPTIONS AVAILABLE TO CLAIMANTS IN CLASS/ COLLECTIVE ACTIONS?

There is currently no general collective redress mechanism. Accordingly, there are no specific funding options available for class/collective actions.

COSTS

13. WHAT ARE THE KEY RULES FOR COSTS/FEEES IN CLASS/COLLECTIVE ACTION LITIGATION?

There is currently no general collective redress mechanism. Accordingly, there are no specific rules governing costs of class/collective actions.

KEY EFFECTS OF THE COSTS/FUNDING REGIME

14. WHAT ARE THE KEY EFFECTS OF THE CURRENT COSTS/FUNDING REGIME?

There is currently no general collective redress mechanism. Accordingly, this question is moot.

DISCLOSURE AND PRIVILEGE

15. WHAT IS THE PROCEDURE FOR DISCLOSURE OF DOCUMENTS IN A CLASS/ COLLECTIVE ACTION?

Before litigation

There is currently no general mechanism for collective redress in Germany. Therefore, there are no specific rules governing pre-litigation disclosure in class/collective actions. In addition, disclosure can only be sought successfully if the party seeking disclosure has a right to disclosure under substantive law.

During litigation

There is currently no general mechanism for collective redress in Germany. Therefore, there are no specific rules governing disclosure during litigation in class/collective actions. In addition, disclosure can only be sought successfully in very narrow instances upon justified requests for specific and relevant documents. The decision to order disclosure is at the discretion of the court (§142, *Code of Civil Procedure*).

16. ARE THERE SPECIAL CONSIDERATIONS FOR PRIVILEGE IN RELATION TO CLASS/COLLECTIVE ACTIONS?

There is currently no general collective redress mechanism. In general, disclosure cannot be successfully sought and this also holds true in collective/class actions (*see Question 15*). Therefore, the issue of privilege is not a crucial item in German proceedings.

EVIDENCE

17. WHAT IS THE PROCEDURE FOR FILING FACTUAL AND EXPERT WITNESS EVIDENCE IN CLASS/COLLECTIVE ACTIONS?

There is currently no general collective redress mechanism. Therefore, there are no specific rules governing evidence in class/collective actions.

DEFENCE

18. CAN ONE DEFENDANT APPLY TO JOIN OTHER POSSIBLE DEFENDANTS IN A CLASS/COLLECTIVE ACTION?

Joining other defendants

There is currently no general collective redress mechanism. Therefore, there are no specific rules governing joinder in class/collective actions.

Rights of multiple defendants

There is currently no general collective redress mechanism. Therefore, there are no specific rules governing issues regarding multiple defendants in class/collective actions.

DAMAGES AND RELIEF

19. WHAT IS THE MEASURE OF DAMAGES UNDER NATIONAL LAW IN THE FIELD OF CLASS/COLLECTIVE ACTIONS?

Damages

There is currently no general collective redress mechanism. Therefore, there are no specific rules governing damages and distribution of recovered damages in class/collective actions.

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**

There is currently no general collective redress mechanism. Therefore, there are no specific rules governing declaratory relief in class/collective actions.

Interim awards

There is currently no general collective redress mechanism. Therefore, there are no specific rules governing interim awards in class/collective actions.

SETTLEMENT**21. WHAT RULES APPLY TO SETTLEMENT OF CLASS/COLLECTIVE ACTIONS?****Settlement rules**

There is currently no general collective redress mechanism. Therefore, there are no specific rules governing settlements in class/collective actions.

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?**

There is currently no general collective redress mechanism. Therefore, there are no specific rules governing appeals in class/collective actions.

ALTERNATIVE DISPUTE RESOLUTION

23. IS ALTERNATIVE DISPUTE RESOLUTION (ADR) AVAILABLE IN CLASS/COLLECTIVE ACTIONS?

There is currently no general collective redress mechanism. Therefore, there are no specific rules governing ADR in class/collective actions.

PROPOSALS FOR REFORM

24. ARE THERE ANY PROPOSALS FOR REFORM CONCERNING CLASS/COLLECTIVE ACTIONS?

In May 2014, the Green Party's Parliamentary Group proposed a draft bill to the German parliament on "The Introduction of Group Proceedings" (*Entwurf eines Gesetzes über die Einführung von Gruppenverfahren*). The draft bill seeks to introduce the first mechanism for general collective redress into German civil procedure law (*Official Parliamentary Publication Journal (OPPJ), BT-Drs. 18/1464*). The draft bill passed the first deliberation in September 2014 and is currently pending with several parliamentary committees, including the Committee for Law and Consumer Protection.

However, it is unclear whether the draft bill will be voted by the parliament during the current legislative period as it was a proposal from an opposition party with insufficient voting power. The proposal can be accessed at: <http://dip21.bundestag.de/dip21/btd/18/014/1801464.pdf>

The introduction of group proceedings is inspired by successful collective redress mechanisms in other jurisdictions (*OPPJ BT-Drs. 18/1464, p16*) and with a view to the EU Commission's recommendations for reform (*OPPJ BT-Drs. 18/1464, p1*). The draft bill aims to overcome the shortcomings of the Capital Markets Model Case Act (KapMuG) by providing a system that does not require individual lawsuits at the outset. The proposal is made to both:

- Better serve effective individual legal protection, especially for small claims.
- Facilitate effective law enforcement through individual pursuit of claims.

An outline of the draft bill's main proposals is set out below.

Admissible claims and subject of proceedings

According to the draft bill, group proceedings could be brought for all kinds of claims under substantive law except for family matters and matters of voluntary jurisdiction (*Freiwillige Gerichtsbarkeit*). In effect, group proceedings would also replace the current KapMuG (*OPPJ BT-Drs. 18/1464, p12, 18*). In contrast to the KapMuG, individual lawsuits would no longer be a requirement to apply for model proceedings. Rather, instead of model proceedings, group proceedings would address the common questions of fact and law that are relevant for the group claimants. Therefore, it would be a requirement for the admissibility of group proceedings that the members of a group assert their claims or legal relationships based on the same facts. Furthermore, the decision on such claims would depend on the same or similar facts or legal questions.

In addition to bringing actions for performance or declaratory judgment as group proceedings, the draft bill also provides for the ability for a court to decide individual factual and/or legal questions. However, the draft bill requires such questions to be relevant for the resolution of claims asserted by group members.

Group composition and representation

Under the draft bill's proposals, group proceedings would need to be initiated by a minimum of ten persons. The group must have a representative (referred to as the "group claimant") who is either a person from the members of the group or a representative acting in the public interest (such as a registered consumer organisation or a professional (trade) association). The group claimant must be both willing and capable of leading the proceedings on behalf of the group. The group claimant, as well as any group member, must be represented by counsel. The draft bill also permits the formation/constitution of subgroups.

Competent court

Under the draft bill's proposals, the court of the defendant's place of general jurisdiction will have exclusive jurisdiction over group proceedings. In proceedings against a defendant with no domestic place of general jurisdiction, any court with jurisdiction over the claim of at least one member of the group will have jurisdiction over the group proceeding.

Opt-in regime

The draft bill provides for an opt-in regime for group proceedings (*OPPJ BT-Drs. 18/1464, p16*). For persons who opt-in to group proceedings, the effect of court's decision would be limited to persons that:

- Have declared participation in the group proceedings as group members.
- Did not leave the group before the closing of the hearing by the court of first instance.

In order to avoid contradictory outcomes between individual lawsuits of group members and the group proceedings, any individual legal proceeding commenced by an individual group member would be suspended until the group proceedings have been decided with finality or until the claimant leaves the group. As a consequence of the opt-in model, a person outside the group or person who has left the group would not be prevented from lodging an individual, separate claim against the defendant. The court is not bound by the outcome of any pertinent group proceedings.

Procedure

Under the draft bill, the court would decide on admissibility by way of an order to open group proceedings. This decision first requires an oral hearing on admissibility. In addition to these requirements the:

- Group as such must be sufficiently determinable.
- Group proceedings must be preferable to a large number of individual actions.
- Order of the court would be subject to appeal.

At a minimum, the court order granting the application must contain:

- The prayers for relief to be dealt with.

- A short description of the common facts.
- Information for the determination of group membership.
- The name and address of the group claimant and its counsel.

The court order would then be published in the claims register along with a court-ordered deadline for others to join the group proceedings as group members. If joinder is sought after this deadline, a late joinder is admissible until close of the hearing in the first instance if such late joinder would serve the matter.

The group proceedings would be led by the group claimant on behalf of the group. The members of the group would not be formal parties to the proceedings (*OPPJ, BT-Drs. 18/1464, p23*). Instead, group members would have very limited procedural rights. Group members must therefore be informed about the progress of the proceedings by the court, especially about any submission filed and any court order rendered throughout the proceedings. However, as part of their limited role, they would be able to file motions to replace the group claimant. In addition, the group members are free to leave the group proceedings at any time before close of the oral hearing in the first instance.

Judgment

Under the draft bill, the court would make its decision by judgment. Such a judgment will be binding on the defendant, the group claimant, and all group members who have not left the group before the close of the hearing in the first instance. Judgments addressing single factual and/or legal questions are also binding (*OPPJ, BT-Drs. 18/1464, p18*). It is expected that the parties will resolve their entire dispute on the basis of such factors alone without the need to litigate further individual aspects of the matter (*OPPJ, BT-Drs. 18/1464, p18*). The judgment can be appealed like any ordinary judgment. Further appeal to the Federal Court of Justice will be possible under the ordinary rules. If the judgment is issued as a first instance judgment by the appellate court, further appeal will be possible to the Federal Court of Justice.

Settlement

Under the draft bill, group claimants and defendants will have the capacity to conclude a settlement. To do so, a formal settlement proposal must be submitted to the court. Group members will be able to comment on the proposal. The court will have discretion to approve the settlement proposal if it deems the proposal appropriate in light of the facts and legal assessment and the comments of other group members (if any). After the court has approved the settlement, defendants and group claimants will not be able to withdraw from the settlement any longer. The settlement, however, will only become binding if fewer than 30% of the group members opt-out of the settlement during a certain period after receiving service of the settlement.

Costs

In accordance with the “loser pays” principle, under the draft bill the prevailing party will be entitled to a reimbursement of costs (*OPPJ, BT-Drs. 18/1464, p18*). Should the group have to bear the defendant’s costs, each group member will be severally liable for its individual share based on the value of its underlying individual claim. To facilitate foreseeability of cost risks, a cap will apply to simple group members leaving it to the group claimant to bear the remainder (if any). This (slightly) higher cost risk for the group claimant is meant to prevent initiation of frivolous group proceedings (*OPPJ, BT-Drs. 18/1464, p25*).

ONLINE RESOURCES

FEDERAL OFFICE OF JUSTICE (*BUNDESAMT FÜR JUSTIZ*)

W www.bundesjustizamt.de/EN/Home/homepage_node.html

Description. Central service authority of the federal German judiciary, and is the port of call for international legal transactions. A limited collection of German law is available in English at www.gesetze-im-internet.de/Teilliste_translations.html