



THE ONLY GLOBAL ASSOCIATION OF YOUNG LAWYERS

Erin Brockovich turns European : is there an interest for class actions?

Litigation/Antitrust/Distribution law Commissions

Prague, 2014

National Report of Germany

Christian Wefers, LL.M. (Miami, USA)

Rechtsanwalt,

Fachanwalt für Bank- und Kapitalmarktrecht

Angela Reimer

Rechtsanwältin

DRRT

Mainzer Landstraße 49

60329 Frankfurt a.M., Germany

+49 (69) 3085-5048

cwefers@drdt.com; areimer@drdt.com

Evelyn Niitväli

Rechtsanwältin

BUNTSCHECK

Rechtsanwaltsgesellschaft mbH

Oskar-Schlemmer-Straße 11

80807 München, Germany

+49 (89) 89 08 308-0

evelyn.niitvaeli@buntscheck.com

General Reporters

<p>Jean-Philippe Arroyo J.P. Karsenty & Associés 30, rue d'Astorg 75008 – Paris – France + 33(0)1.47.63.74.75. jpharroyo@jpkarsenty.com</p>	<p>Joost Fanoy BarentsKrans N.V. Lange Voorhout 3 Postbus 30457 2500 GL Den Haag – The Netherlands +31 (0)70 376 07 50 joost.fanoy@barentskrans.nl</p>
---	---

19 March 2014

INTRODUCTION

Class actions are often related and associated to the American legal culture, as it is illustrated by several movies including the famous “Erin Brockovich” picture.

However, the class actions or collective redress actions exist also in other jurisdictions, notably in Europe.

Precisely, the European Commission has recently given an accurate definition of collective redress and of its aim in its communication named “Towards a European Horizontal Framework for Collective Redress”¹, accompanying its “Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law”²:

“Collective redress is a procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action. Collective redress facilitates access to justice in particular in cases where the individual damage is so low that potential claimants would not think it worth pursuing an individual claim. It also strengthens the negotiating power of potential claimants and contributes to the efficient administration of justice, by avoiding numerous proceedings concerning claims resulting from the same infringement of law.”

Although collective redress and class actions exist in several jurisdictions in the world, there are some differences arising from different legal and procedural cultures, notably between the Common Law and the Civil Law legal systems.

Thus, the purpose of this questionnaire is to identify such differences as well as the common points between the collective redress and class actions in various jurisdictions.

There is also a particular focus on class actions in the anti-trust field, which is one of the main areas for such actions, as shown by the recent proposal for an EU “Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union”³.

¹ COM(2013) 401/2

² C(2013) 3539/3

³ COM(2013) 404 final

1. Existence and scope of class actions/collective redress actions

1.1 In your jurisdiction, is there any specific legislation dealing with class actions/collective redress actions, and is there a specific definition of such actions?

The German Code of Civil Procedure (“GCCP”) does not provide for the possibility to bring mass claims. However, it does include a procedure called “*Streitgenossenschaft*,” i.e. joinder of parties, by which individual proceedings initiated by multiple claimants against the same defendant are heard at the same time (Sec. 59 – 62 of the GCCP).

There is, nonetheless, specific legislation dealing with mass claims in the area of capital markets - the Capital Markets Model Case Act (“**KapMuG**”). The KapMuG came into force in 2005 and prior to this date it was not possible to bring mass claims. In particular, the German civil procedure did not permit bringing a claim in the name of a more or less unknown group of claimants in the form of an U.S.-style class action. Hence, the most important development in German civil procedure as regards class actions was the introduction of the KapMuG in 2005.

The KapMuG allows identical or similar damage actions to be combined in an organized process. The law is designed to make sure that identical issues of law based on similar facts are decided coherently by the Higher Regional Court (“*Oberlandesgericht*”). On the other hand, it avoids the creation of a U.S.-style class action by keeping the cases separate.

The Higher Regional Court decides common issues of the proceedings based on the declaratory judgment proposal (“*Vorlagebeschluss*”). Once the common questions have been decided in a model order (“*Musterentscheid*”), the courts of first instance decide the individual cases on the basis of the binding model order. In other words, since the model order only covers a general question of fact or law, all individual aspects of a case (such as contributory negligence or amount of damages) have to be decided in the subsequent individual proceedings. The main stages of KapMuG proceedings are

- Filing an individual damage action at the Regional Court
- Motion for declaratory judgment, Sec. 1 KapMuG
- Litigation stay for other pending proceedings, if case is admitted as model case, Sec. 8 KapMuG
- Model proceeding at Higher Regional Court, Sec. 9-21 KapMuG
- Continuation of the litigation at the Regional Courts based on the model order

1.2 Are class actions/collective redress actions applicable to any legal action, irrespective of the legal ground and the area of law, or do they have a scope limited to some fields of law (such as consumer law, competition law, environmental law...)?

A model proceeding as described above cannot be brought in every legal field. Rather, the KapMuG covers securities litigation only. In particular, it applies in proceedings relating to (1) a claim for compensation of damages due to false, misleading or omitted public capital markets information, or (2) a claim for compensation of damages due to the use of false or misleading public capital markets information or omitting the disclosure about the fact that capital markets information is false or misleading, or (3) a claim to fulfilment of contract, which is based on an offer under the Securities Acquisition and Takeover Act.

As regards competition law, class actions in which the representative requests a remedy on behalf of an anonymous group of individuals are not available in Germany. However, there are certain options to bring an action on behalf of another party or to 'bundle' damages claims.

Under certain conditions, it is possible to bring an action in one's own name but on another's behalf. The right to do this can be based on either law or agreement. However, it must be noted that authorization for a third party to bring an action on behalf of another party is possible only if there is a legitimate interest to let the third party bring such action, and if the interests of the defendant will not be unreasonably impaired as a result of such authorization.

Pursuant to Sec. 60 of the GCCP, a plurality of persons may jointly sue if similar claims or obligations form the subject matter in dispute, and if such claims are based on an essentially similar factual and legal cause (joinder of parties). Thus, the victims of anti-competitive conduct could consolidate their actions if they concern the same subject matter. As regards the effect of such joinder of parties, it has to be noted that unless stipulated otherwise by civil law or the GCCP, joined parties shall deal with their opponent as individuals in such a form that the actions of one of the joined parties will neither benefit the other joined party nor place it at a disadvantage (Sec. 61 GCCP).

A model for bundling damages claims has been developed by the Belgian company Cartel Damages Claims ("CDC"). CDC acquired the damages claims of various companies affected by the German cement cartel by way of purchase and assignment. Then CDC brought an action for damages based on the accumulated claims. While the general admissibility of CDC's approach has been confirmed by the German Federal Supreme Court (German Federal Supreme Court, decision of 7 April 2009, KZR 42/08 – *Cement Cartel*), the Regional Court in Düsseldorf recently dismissed CDC's

action for damages and found that CDC's model for assigning claims from the victims of price fixing "violated public morals" (Regional Court Düsseldorf, decision of 17 December 2013, 37 O 200/09 (Kart) U – *Cement Cartel*).

1.3 Is there any interplay between several statutes, for instance between competition law and consumer law statutes? Is it allowed to bring a class action / collective redress action on the ground of several statutes, or is it mandatory to ground it on either set of statutes?

The KapMuG only applies to cases where capital market-related information has been used in the sale and distribution of financial products, and hence can be applied to certain classes of claims against banks and other investment advisers.

In individual damage actions and actions in which damages claims have been bundled as described above, the plaintiff(s) can bring claims based on various statutes.

1.4 Is it allowed to initiate summary/emergency proceedings in class actions / collective redress actions?

It is not possible to initiate summary/emergency proceedings using a model proceeding pursuant to the KapMuG.

1.5 Through class actions/collective redress actions, is it possible to claim cessation of unlawful practices/behaviors ("injunctive relief actions") and/or to claim compensation for damage suffered ("compensatory relief actions")?

Compensatory relief actions are covered by the KapMuG (Sec. 1 KapMuG), however, this does not extend to injunctive relief actions. The latter actions are possible using other collective redress mechanisms, e.g. the joinder of parties.

1.6 If it is possible to claim compensation, can every type of damage suffered by the victims can be compensated, or only some types of harms (material damages/bodily injuries, death)?

The KapMuG does not cover every type of damages. According to applicable securities laws, the claim for compensation of damages compensates material damages only.

1.7 Can the compensation awarded to the victims exceed the compensation that would have been awarded if the claim had been pursued by means of individual actions? More particularly, are punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, allowed and applied in class actions / collective redress actions?

As the model proceeding will assert only mutual questions, whereas the damages are awarded at the Regional Court in the pending individual cases, the compensation will be evaluated based on the individual damage suffered. The compensation awarded to the plaintiffs will not exceed the compensation that would have been awarded if the claim would not have been covered under the model proceeding.

German law does not recognize punitive damages that could lead to overcompensation in favor of the damaged plaintiff.

1.8 More particularly in the anti-trust field, how does the ‘passing on’ defence (demonstrating that the claimant passed on the whole or part of the overcharge resulting from the infringement) play a role in your country and have such a defence been successful?

According to Sec. 33(3) of the German Act against Restraints of Competition (“**ACR**”), if a good or service is purchased at an excessive price, damages shall not be excluded on account of the resale of the good or service. However, this provision does not exclude the passing on defence by a defendant. Rather, the German Federal Supreme Court in a decision of 28 June 2011 confirmed that the passing on defence is generally permissible (German Federal Supreme Court, decision of 28 June 2011, KZR 75/10 – *ORWI*). In its decision, the Federal Supreme Court explicitly clarified that indirect purchasers are entitled to antitrust damages but on the flipside allowed the passing on defence. According to the Federal Supreme Court, the defendant has the right to show that the claimant has successfully passed on its damage (either completely or part of it) to the next market level. This approach is in line with a fundamental principle of German damages law, according to which compensation shall only be awarded to recover actual losses.

2. Standing and admissibility to bring class actions/collective redress actions

2.1 In your jurisdiction, may the class actions / collective redress actions be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement (“collective actions”), and/or can they be brought by an authorized representative entity/ ad hoc certified entity/ public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice (“representative actions”)?

Collective actions can be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement. At the same time an authorized representative entity/ ad hoc certified entity/ public authority can file a claim on behalf and in the name of two or more individuals or legal persons claiming to have suffered damages.

2.2 Are there any criteria/rules defining the cases where one or another kind of actions referred to in 2.1 could apply?

Yes, the rules that apply are general civil law rules, e.g. if the plaintiff is acting based on an assignment or special law, or if the plaintiff is a collection agency that brings the claim on behalf of various individuals/legal persons.

2.3 In case of representative actions, are there rules defining the requirements for representative entities (for instance: a non-profit character; a relationship between the main objectives of the entity and the rights that are claimed to have been violated; financial/human resources/legal expertise requirements...), and can the representative entities be sanctioned if they do not comply with such requirements?

The KapMuG does not require a specific status of the model plaintiff. The Higher Regional Court designates at its equitable discretion by order the model plaintiff from among the plaintiffs. The court considers the ability of the model plaintiff to lead the model case, consent among several plaintiffs designating a single model plaintiff and the amount of the claim. The order appointing the model plaintiff cannot be contested.

Representative entities can be public consumer associations as well as collection agencies. The requirements for collection agencies are defined in the German Legal Services Act.

As discussed above, the CDC model for assigning claims in the Cement Cartel was held to violate public morals. The claims that were assigned before 30 June 2008 were deemed void due to violation of the German Legal Advice Act (*Rechtsberatungsgesetz*) and the claims assigned after the introduction of the new law on legal services (*Rechtsdienstleistungsgesetz*) were deemed unconscionable. The court based its holding on the fact that CDC did not have the financial resources to cover the adverse party cost risk at the time of the assignments.

2.4 Is the admissibility of a class action / collective redress action examined by the courts at an early stage of the proceedings, or is it ruled together with the merits of the case?

The first step in KapMuG proceedings is the procedural admission of the case under the model law. It is comparable to a class certification of a U.S. class action and, therefore, is examined at a very early stage of the proceedings. Only after the admission as a model case will the case proceed on the merits. Other representative actions proceed according to general civil procedure rules.

2.5 Is it possible for third parties to bring actions? If so, are indirect purchasers able to bring actions with respect to antitrust infringements?

According to Sec. 33(1) of the ARC, actions for violation of German or European antitrust laws can be brought by ‘the person affected’. This can be other market participants, such as customers or suppliers, as well as competitors. As already mentioned in response to question 1.8., in a judgment of 28 June 2011 the German Federal Supreme Court explicitly confirmed the standing of indirect purchasers in private damages actions. Such broad standard of who has the right to bring an action is in line with the decision of the European Court of Justice in the *Courage* case (European Court of Justice, decision of 20 September 2001, C-453/99 – *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, [2001] ECR I-6297).

2.6 How may claims be aggregated? For example, is it possible for multiple plaintiffs to file a complaint jointly?

Under the KapMuG rules, claims will not be aggregated, hence, it is not possible for multiple plaintiffs to file a complaint jointly. On the other hand, the KapMuG requires at least ten (10) claims to be filed and registered in order to initiate a proceeding based on it.

Based on civil procedure rules, various claims can be aggregated and multiple plaintiffs can file a complaint jointly, if the factual circumstances are mutual.

2.7 More generally, what procedural defences are available for defendants short of trial and therefore before the national court decides on the merits of a collective action?

Defendants can bring general procedural defences, e.g. objections to legal standing of the claimant or expiration of the statute of limitations.

3. “Opt-in” vs “Opt-out” systems and information on the class action/collective redress action

3.1 In your jurisdiction, is the claimant party/group formed on the basis of express content of the natural or legal persons claiming to have been harmed (“opt-in” principle), or is it composed of all individual belonging to the defined group and claiming to have been harmed by the same of similar practice unless they actively opt out of the group (“opt-out” principle)?

The German legislator refused to create an “opt-in” and an “opt-out” collective action. However, the KapMuG is considered to be “opt-in” as individual claims have to be filed or registered with the court. Following a revision of the KapMuG in

November 2012, potential claimants of the pending KapMuG proceeding can file a motion to register the claim at the Higher Regional Court. It is not required that an individual case is filed at an early stage. However, after three month of the rendered decision in the model case, the claimant has to file a damage action or declaratory action of the registered claims. If, however, the claimant has already filed a damage action, a registration is neither possible nor required.

3.2 What are the effects of the judgment on the victims in the “opt-in” or “opt-out” system chosen in your jurisdiction?

The model case ruling is final and binds the courts of the first instance that are deciding the individual cases. The individual actions filed at the Regional Court proceed after the declaratory judgment has been rendered.

3.3 May a member of the claimant party be free to leave the claimant party at any time before the final judgment is rendered or the case is otherwise settled, and if he/she/it may, on which conditions?

The joint plaintiffs are able to withdraw their claim at any point of the proceedings. However, they might still face the cost risk.

The other possibility is to “opt-out” of a settlement, if a plaintiff does not want to be included. The revised version of the KapMuG allows the model plaintiff and the model defendant to agree on a settlement that binds all parties, except those that decide to opt-out within a month of the Higher Regional Court’s decision. Prior to the revised KapMuG, a settlement required the consent of all parties, which made settlements practically impossible to reach.

Before the court determines whether an offer is appropriate, a hearing with the joint parties will be held. Once the court has approved the settlement, the joint parties may object to the settlement within a one month period and opt-out of the settlement. After this period, the proceedings will end and the settlement will bind all parties who have not opted out.

3.4 May a natural or legal person claiming to have been harmed in the same mass harm situation be able to join the claimant party at any time before the judgment is rendered or the case is otherwise settled?

The claimant has to file a motion to register the claim at the Higher Regional Court within a period of six months, which starts to run at the publication of the model proceeding. If the claim is not filed at the Regional Court or registered at the Higher Regional Court, then the claimant is not covered by the pending model proceeding. Hence, the result is that the statute of limitations is not tolled and could expire. A filing during the settlement stage would be considered untimely.

3.5 Is the defendant informed about the composition of the claimant party, and in which conditions?

The model defendant is aware of the filed cases and of the appointed model plaintiff and any other interested parties. The parties of the model proceeding are also named in the litigation register of the Higher Regional Court.

Since 2012, the KapMuG allows the registration of claims without actual participation in the proceedings. The model defendants receive a notice of the registration and have an overview of who is registered.

3.6 Are there any provisions regulating the way the victims of the practice are informed about a possible or actual class action / collective redress action? More particularly, are there safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its responsibility for the alleged infringement is established by the final judgment?

The claimants are informed about a pending model case based on the information published by the court. As the information is publicly available, the defendant is not protected from being identified as a party in the case. Hence, there are no safeguards regarding the protection of the reputation or the company goodwill of the defendant.

3.7 Is there any registry of class actions / collective redress actions in your jurisdiction? If there is such a registry, how is it possible to access it?

Joint actions are not registered, only the model cases are listed, pursuant to Sec. 10 KapMuG. On the court's website and in the German federal gazette, the Higher Regional Court discloses the parties, declaratory judgment proposals and any rendered orders.

4. Interplay of class actions / collective redress actions and public enforcement

4.1 In your jurisdiction, do class actions / collective redress actions have to follow on from infringement decisions adopted by public authorities in regulated policy areas like competition law (“follow-on actions”) or is it possible to start a stand-alone action (ie, without a prior finding of infringement of any applicable antitrust laws by a national court or competent authority)?

As explained above (cf. question 1.2), class actions are not available for breaches of antitrust law in Germany. However, there are other options, i.e. to bring an action on behalf of another party or to ‘bundle’ damages claims. With regard to the latter, it is possible to start stand-alone actions, i.e. actions do not have to follow on from infringement decisions.

4.2 Are such stand-alone and/or follow-on actions available for both bilateral antitrust infringements (eg, a cartel) as well as unilateral antitrust infringements (eg, an abuse of a position of dominance)?

Yes, stand-alone and follow-on actions are available for both bilateral as well as unilateral antitrust infringements.

4.3 In such cases, are there rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation? What kind of devices to obtain evidence are available for plaintiffs? Is, for example, discovery possible in your country?

The German legal system does not provide for pre-trial discovery. The GCCP is rather restrictive as regards the disclosure of documents between the parties. While there are certain possibilities for gaining access to documents which are in the possession of the defendant or third parties, the hurdles for such access are comparatively high.

According to Sec. 142 of the GCCP, the court may direct one of the parties or a third party to produce records or documents as well as any other material that are in their possession provided that the party asking for the production can identify such document. However, this option is limited to documents or other material to which one of the parties has made reference.

Moreover, Sec. 422 of the GCCP provides for the right to request the production of a document if the other party is under an obligation to do so pursuant to the stipulations of German civil law. Such obligation does, *inter alia*, exist if the party can show a legal interest in inspecting a certain document and if (1) the document was

drafted in his interest, (2) the document certifies a legal relationship between himself and another, or (3) the document contains negotiations in a legal transaction (Sec. 810 of the German Civil Code (“GCC”).

As regards follow-on claims, under the German Code of Criminal Procedure an aggrieved person may have the right to gain access to the files of the German Federal Cartel Office (*Bundeskartellamt* – “FCO”) provided that the legitimate interests of the aggrieved person outweigh the legitimate interests of the wrongdoer or third parties in non-disclosure, and that granting access does not jeopardize the FCO’s investigation (Sec. 406e of the German Code of Criminal Procedure). Such right to inspect the file pursuant to Sec. 406e of the German Code of Criminal Procedure is only available to qualified German lawyers. It must be noted, however, that the FCO is quite restrictive as regards granting such access to the file. In particular, the FCO regularly denies third-party access to the leniency applications of cartel participants and so far such denials have been upheld by the courts (Higher Regional Court Düsseldorf, decision of 22 August 2012, V-4 Kart 5 + 6/11 (OWI) – *Kaffeeröster*; District Court (*Amtsgericht*) Bonn, decision of 18 January 2012, 51 Gs 53/09 – *Pfleiderer*).

In addition, plaintiffs have the right, pursuant to Sec. 242 GCC, to request the defendant to disclose certain information required for the estimation of damages, provided the plaintiff can prove that his claim is justified on the merits of the case, and that he is unable, through no fault of his own, to prove the amount of loss suffered. In practice, such a disclosure request will frequently be combined with the actual claim.

4.4 Are there rules on limitation periods allowing potential claimants to wait with class actions until the public authority takes its decision as regards the infringement?

As a general rule, the limitation period for bringing a claim is three years (pursuant to Sec. 195 GCC). This limitation period commences upon the expiry of the year in which the claim arises and in which the claimant becomes aware of the circumstances giving rise to the claim and of the identity of the defendant, or ought to have become aware of those matters but for his gross negligence (Sec. 199(1) GCC).

The limitation period of a claim for damages is, however, suspended if proceedings are initiated by the FCO, a competition authority of one of the German Federal States, the European Commission or the competition authority of another Member State of the European Union (Sec. 33(5) of the ARC).

4.5 Does a decision of the national competition authority or national court create a rebuttable presumption of proof? For EU jurisdictions, how does the judgment of the Court of Justice EU in *Masterfoods* (20 September 2001, C-344/98) play a role in your country with respect to actions based on cartel damages?

According to Sec. 33(4) of the ARC, if a violation of antitrust law has already been established by a final decision of the FCO, a competition authority of one of the German Federal States, the European Commission or the competition authority – or a court acting as such – of another EU Member State, the court shall be bound by this finding. Thus, the plaintiff does not have to present further evidence as regards to the violation. The binding effect, however, only applies to the fact that a violation has occurred. It does not cover the questions of loss and causation. In contrast thereto, in a stand-alone action alleging a breach of antitrust law, the plaintiff has to prove the existence of the violation before the question of damages is addressed by the court.

5. Funding of the class actions / collective redress actions, attorney's fees

5.1 In your jurisdiction, is it possible to have class actions financed by third parties who are not parties to the proceedings?

Third party litigation funding is possible in Germany. Some companies offer litigation funding services. However, lawyers are prohibited from working on a contingency fees basis.

5.2 Is the claimant required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action?

The claimant is not required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action.

5.3 Can the court stay the proceedings for any reason relating to the funding of the action (for instance: conflict of interest between the financing third party and the claimant and/or its members; the third party has insufficient resources in order to meet its financial commitments to the claimant party; the claimant party has insufficient resources to meet any adverse costs should the collective procedure fail; the fund provider is a competitor of the defendant)?

The court could stay the proceeding on the merits of the case, if the litigation funding is void under certain circumstances or if there is a risk that the court and lawyer fees cannot be paid.

5.4 Do public funds providing financial support for potential claimants in collective redress/ class actions exist in your jurisdiction?

The potential claimants may apply for financial support. If the potential claimants are unable to pay the costs of litigation, or are able to pay them only in part or only as

installments due to their personal and economic circumstances, financial support will be granted. It is further required that the action they intend to bring has sufficient prospects of success and does not seem frivolous.

5.5 Are contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management allowed in your jurisdiction?

No contingency fee system is established in Germany. The legal fees are strictly regulated by law (Lawyers' Compensation Act). The Act determines the fees a legal counsel is entitled (and obligated) to charge the client. These legal fees depend on the amount in dispute. Contingency fees are in principle illegal under German law. The reason is that such an agreement would in 99% of the cases be void.

There are, at least in theory, exceptions to this rule as per a judgment by the German Constitutional Court (1 BvR 2576/04), but the requirements are so difficult to satisfy that, in practice, contingency fees still do not play a significant role in German civil litigation.

If the party is not able to pay for the attorney's fees, success fees are allowed in a limited number of cases, Sec. 4a Lawyers' Compensation Act. Under these circumstances, the client and his attorney are allowed to agree on either success fees or a fee below the legal requirements in the Lawyers' Compensation Act.

5.6 Does the losing party of a class action / collective redress action have to reimburse necessary legal costs borne by the winning party ("loser pays principle"), and in which proportion?

Like in most other European legal systems, Germany applies the "loser pays principle", Sec. 91 of the GCCP. The non-prevailing party has to bear the costs of the legal dispute, in particular any costs incurred by the other party, to the extent these costs were required in order to bring an appropriate action or to appropriately defend against an action. However, it has to be noted that there is a statutory limitation as regards the amount of attorneys' fees that are recoverable. The legal costs can only be recovered within the limits of the Lawyers' Compensation Act. If the legal costs of the prevailing party exceed the statutory fee, the excess amount has to be borne by the prevailing party.

5.7 More generally, are there any rules and/or safeguards aimed at avoiding incentives to abuse the collective redress systems?

The KapMuG was implemented to improve and provide an effective collective redress mechanism. As the application of the law is confined to securities litigation,

the risk for an abuse of such collective redress system is limited. The KapMuG follows strict rules and makes it difficult to abuse the regulations based on the structure of the law.

5.8 Are the parties to an action able to insure against the cost risks?

It is not common in Germany to insure against adverse party costs or other costs resulting from the litigation for the model proceeding. As described in question 5.9 below, the defendant can request the court to order for security of costs.

Another possibility in order to avoid the risk of bearing the costs of the litigation is to obtain the financial support of a litigation funder, who will assume the cost risks.

In individual actions, claimants often insure themselves against the costs of a potential litigation.

5.9 Is a defendant able to apply for an order for security of costs? If so, what are the difficulties to obtain such an order?

The defendant can apply for an order for security of costs in cases where the plaintiff does not reside in a Member State of the European Union or in a signatory state of the Agreement on the European Economic Area.

The court may at its sole discretion determine the nature and the amount of the security. Unless the court has ordered or the parties have agreed otherwise, the security is to be provided, in the form of an irrevocable and unconditional guaranty of an unlimited term, issued in writing by a financial institution authorized to pursue its business in Germany, or by lodging cash or such securities that are suited to serve as security pursuant to Sec. 234 GCC.

5.10 Are there (other) ethical or Bar rules in your country relevant with respect to class actions?

The bar rules of the German Lawyers' Association do not include specific regulations regarding class actions.

6. Cross-border cases

6.1 In your jurisdiction, are there specific international private law rules (conflict of law and of jurisdiction rules) applicable to class actions / collective redress actions, or do the general international private law rules apply to such actions?

Pursuant to Sec. 11 KapMuG, the general civil procedure rules applies which covers the applicable international private law rules, e.g. jurisdictional rules.

6.2 Are there rules prohibiting a single collective action to take place in a single forum?

No.

6.3 Can a representative entity designated by a foreign country have legal standing to bring representative actions in your jurisdiction?

Yes. The Highest Federal Court suggested in its decision regarding the Cement Cartel that it is possible to bring actions similar to "opt-in" class actions by invoking the German civil law and procedure. As described above, various cement purchasers assigned their damages claims against members of the cement cartel to a Belgian company.

6.4 What are the rules where there are several actions regarding the same facts and practices brought in different jurisdictions? Is it for example possible to bring an action against a company and/or individual domiciled outside of the jurisdiction (e.g., against a parent company domiciled outside of the jurisdiction which has a subsidiary within the jurisdiction)?

Generally, several actions regarding the same facts and practices can be brought in different jurisdictions. Under certain circumstances, cases might be stayed pending the outcome of the case in another jurisdiction.

7. Alternative dispute resolution

7.1 In your jurisdiction, is there any specific mechanism of collective alternative dispute resolution allowing the settlement of class actions / collective redress actions? If so, are the parties required to engage in alternative dispute resolution prior to trial and are the implications for refusing?

The German legislator and law promote out-of-court agreements. Before a complaint is permitted, the parties have to show that they could not reach an out-of-court agreement.

In addition, the German Civil Procedure Law provides regulations about potential arbitration, Sec. 1025 et seq. GCCP. However, the parties have to have entered into an arbitration agreement prior to or at the time of the dispute.

The revised KapMuG in November 2012 improved and made the settlement proceeding of a model case more effective. The settlement is only valid if a quorum of 70% of the interested parties agree. Plaintiffs have the possibility to "opt-out" after a

settlement is reached, if they do not want to be bound by the settlement. The settlement agreement will not be published.

7.2 Are the parties encourages to settle the dispute out of court in any way, and is it a usual practice in your jurisdiction?

It is common practice in Germany to encourage the parties to settle their dispute out of court, using an out of court approach, dispute resolution offers at the court by a special chamber or arbitration.

7.3 Are limitation periods applicable to the claims suspended during the period when the parties try and negotiate a settlement through collective alternative dispute resolution mechanisms or any other means?

The statute of limitations is tolled during settlement negotiations or arbitration pursuant to Sec. 204 GCC.

7.4 Can a seller of a good or any contracting party insulate himself/herself/itself from a class action by including, in the terms of use or in a purchase agreement, a mandatory arbitration clause, thus prohibiting the consumer from bringing a class action in court?

A seller of a good or any contracting party can include a mandatory arbitration clause in the general terms and conditions.

Arbitration agreements in which a consumer is involved must be contained in a record or document signed by the parties. Hence, an arbitration agreement involving a consumer has to be signed in addition to the purchase agreement, unless it is notarized. The highest court in Germany held that the consumer cannot waive this requirement. Accordingly, an arbitration clause that is included in the general terms and conditions involving a consumer are void.

8. Enforcement of the court decision

8.1 Are there any provisions regulating the way the victims of the practice are informed about decision rendered in a class action / collective redress action concerning them? If there are such provisions, who is in charge of such information (the court/ an independent entity/ the claimant/the defendant)?

The Higher Regional Court is responsible to publish all relevant case information about a model case, in order to allow sufficient information to register the claim with

the court or file an individual action. Proceedings other than a model case are not published and each claimant is responsible to pursue the rights individually.

8.2 Are there any provision regulating the way the court order is enforced and the possible compensation paid by the defendant? If there are such provisions, who is in charge of the enforcement, notably of the payment of the damages (a public authority/ an independent entity/ the claimant/the defendant)?

The enforcement of the rendered judgment in the individual cases follows the basic civil procedural rules, Sec. 704 et seq. GCCP. The defendant is responsible to pay the damage award and can be forced to execute the payment. The enforcement is executed by the bailiff, based on an enforcement order.

8.3 In relation to injunctive orders, are there rules ensuring their effective compliance by the losing defendant (for instance: payment of a fixed amount for each day's delay or any other amount provided)?

An injunctive order may impose a fine on a non-complying losing defendant. The fine could be a fixed amount for each day's delay or any other amount assessed by the court to ensure compliance. The court of first instance can also order a fine for each count of the violation and, in the case that such payment cannot be obtained, the losing defendant can be sent to detention of up to six months. The individual fine may not be levied in an amount in excess of €250,000, and the detention may not be longer than a total of two years.

Prior to a decision, the court has to issue a notice, unless such notice is set out in the injunctive order.

Moreover, the plaintiff can also, by a motion, request a security for any damages that may arise as a result of future violations.