

# Capital Investor Model Proceedings in Germany under the revised Capital Markets Model Case Act

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Capital investor model proceedings under the German Capital Markets Model Case Act are an accepted instrument of collective redress in mass disputes concerning capital investor claims. However, there was consensus that the structure of the proceedings needed to be improved to handle mass proceedings relating to capital markets law more effectively. To this end, in July 2024 the law was revised for the second time since its introduction in 2005, introducing changes not only to key aspects of the design of the proceedings, but also to their material scope of application and for the first time special rules for disclosure of evidence which are inspired by the rules applicable in follow-on competition damages case. This article summarises the key elements of the revised Capital Markets Model Case Act.

## 1. Introduction

The Capital Markets Model Case Act (*Kapitalanleger-Musterverfahrensgesetz – KapMuG*) was introduced in 2005 as a legislative response to mass claims following the IPO of Deutsche Telekom AG. Since then, capital investor model proceedings have become an established means of collective redress in Germany.<sup>2</sup> In contrast to other collective redress mechanisms such as representative actions<sup>3</sup> based on the Representative Actions Directive,<sup>4</sup> the capital investor model case proceedings do not replace individual actions. Instead, the aim is to ensure that factual and/or legal questions common to various individual actions are dealt with uniformly by way of a model case ruling which is binding on the courts deciding the individual actions, which are suspended for the duration of the model proceedings.<sup>5</sup> With only ten individual actions necessary, the threshold for starting model case proceedings is relatively low. Although capital investor model proceedings have become a popular instrument there has always been criticism of the design of the proceedings, which of-

ten take very long and are perceived as overly complicated in practice.<sup>6</sup> This criticism continued even after the first extensive reform of the Capital Markets Model Case Act in 2012.<sup>7</sup> A prime example of the shortcomings of the proceedings is the model case on the IPO of Deutsche Telekom AG<sup>8</sup> which took over fifteen years before ending with a settlement.

The German legislature intended to address the ongoing criticism with the latest reform which came into force on 20 July 2024.<sup>9</sup> The starting point of the reform was a draft bill published by the Federal Ministry of Justice (*Bundesministerium der Justiz*) on 28 December 2023.<sup>10</sup> In the further course of the legislative process, in particular after a highly critical expert hearing in the German *Bundestag's* Legal Affairs Committee, the draft bill was significantly amended<sup>11</sup> before the final version was adopted. As a result, key aspects of the very design of the capital investor model proceedings were changed in order to create a mechanism that is more flexible and more efficient in dealing with mass harm situations. This article provides an overview of the procedure

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2. Proof of this acceptance is the fact that there are currently around 100 proceedings pending; for a list of currently pending actions see [www.kapitalanlegermusterverfahren.de/sitemap/index.php](http://www.kapitalanlegermusterverfahren.de/sitemap/index.php). The official register can be found at [www.bundesanzeiger.de/pub/de/start?8](http://www.bundesanzeiger.de/pub/de/start?8) (search term: Musterverfahren).  
3. See section 1(1) of the Consumer Rights Enforcement Act (*Verbraucherrechtgedurchsetzungsgesetz – VDuG*).  
4. Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (O) L 409, 4 December 2020, 1.  
5. See Federal Parliament publication BT-Drs. 15/5091, 1 et seq.

6. For the points of criticism recognized by the legislature see Federal Parliament publication BT- Drs. 851/11, 1; BT-Drs. 20/10942, 1.  
7. See Act to Reform the Capital Markets Model Case Act and to amend other provisions (*Gesetz zur Reform des Kapitalanleger-Musterverfahrensgesetzes und zur Änderung anderer Vorschriften*) of 25 October 2012, BGBl. I 2012, No. 50, 2182.  
8. Last pending before the Frankfurt am Main Higher Regional Court (*Oberlandesgericht*), file no. 23 Kap 1/06.  
9. See Second Act to Reform the Capital Markets Model Case Act (*Zweites Gesetz zur Reform des Kapitalanleger-Musterverfahrensgesetzes*) of 16 July 2024, BGBl. I 2024, No. 240 of 19 July 2024.  
10. For a detailed discussion of this draft see Dieter Hettenbach, 'Der „Entwurf eines Zweiten Gesetzes zur Reform des Kapitalanleger-Musterverfahrensgesetzes“ – Überblick und erste Einschätzung' (2024) WM 237.  
11. For the previous draft of the government see Federal Parliament publication BT- Drs. 20/10942.

and the special features of the investor model proceedings since the latest reform.

## 2. Scope of application

The capital investor model case proceedings are available for legal disputes in which claims are asserted due to

- false, misleading or omitted public capital market information<sup>12</sup> or the use of such information or failure to disclose that the information is false or misleading;<sup>13</sup>
- contracts based on an offer in accordance with the German Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz – WpÜG*);<sup>14</sup>
- the loss of crypto assets or the means to access them on the basis of Article 75(8) of the Regulation (EU) 2023/1114.<sup>15</sup>

Public capital market information is defined as information about facts, circumstances, key figures and other company data that is intended for a large number of investors and relates to an issuer of securities or a provider of other investments.<sup>16</sup> According to the statute this includes inter alia information in a prospectus under Regulation (EU) 2017/1129<sup>17</sup>, in securities information sheets, in key investment information sheets from crowdfunding service providers, in crypto-asset white papers under Regulation (EU) 2023/1114, in the issuer's annual financial statements, management reports, consolidated financial statements, group management reports and half-year financial reports, in ratings relating to the issuer or offeror of other investments under Regulation (EC) No. 1060/2009<sup>18</sup> and in auditor reports on financial statements and consolidated financial statements of the issuer.<sup>19</sup>

A noteworthy aspect is that the Capital Markets Model Case Act is open to all types of investors. Institutional investors and consumers can thus be part of the same model case.

## 3. Basic structure of the model case proceedings and its relationship to individual actions

The key aspect of the Capital Markets Model Case Act is its relationship to individual proceedings. The model case proceedings focus on factual and legal issues common to a number of individual actions. Thus, conceptually they do not replace individual actions but such actions have to be initiated first. In the individual proceedings, claimants and/or defendants can file a model case application.<sup>20</sup> If courts dealing with the individual actions accept and publish<sup>21</sup> in total at least ten such applications, the model case proceedings are then initiated by a court decision in which the relevant common factual and legal issues are presented to the competent Higher Regional Court.<sup>22</sup> Once initiated, it is possible for (only) claimants from parallel proceedings on the same factual and legal issues to opt in by requesting that the proceedings be stayed by the court dealing with the action.<sup>23</sup> Potentially aggrieved investors who have not yet initiated individual actions can register their claims for a limited period of time in order to suspend the statute of limitations.<sup>24</sup>

In the model case proceedings, the Higher Regional Court rules on the referred factual and legal issues in a single trial and hands down a 'model case ruling'. Following the model case ruling, the individual actions commence in the lower courts and are decided on the basis of the model case ruling, which is binding on the lower courts.

12. See section 1(1) no. 1 of the Capital Markets Model Case Act.

13. See section 1(1) no. 2 of the Capital Markets Model Case Act.

14. See section 1(1) no. 3 of the Capital Markets Model Case Act.

15. Regulation (EU) 2023/1114 of the European Parliament and the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937; see section 1(1) no. 4 of the Capital Markets Model Case Act.

16. See the first sentence of section 1(2) of the Capital Markets Model Case Act.

17. Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.

18. Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies. See for more context on this addition to the definition of public capital market information

Dieter Hettenbach, 'Das neue KapMuG' (2024) WM 1437, 1438; Michael Zoller, 'Die KapMuG-Reform: Was kommt, was bleibt?' (2024) BB 1923, 1924.

19. See for these examples as well as other examples the second sentence of section 1(2) of the Capital Markets Model Case Act.

20. See section 2(1) of the Capital Markets Model Case Act.

21. Once the model proceedings application has been published in the model case register, the individual proceedings are interrupted; see section 6 of the Capital Markets Model Case Act.

22. See section 7 of the Capital Markets Model Case Act.

23. See section 10(2) of the Capital Markets Model Case Act. According to section 10(1) of the Capital Markets Model Case Act, the individual proceedings in which a model case application was filed and which were subsequently interrupted are also stayed.

24. See section 13 of the Capital Markets Model Case Act and below at V.3. Claim can be registered within 6 months after the opening order of the Higher Regional Court (see section 9 of the Capital Markets Model Case Act) has been published in the model case.

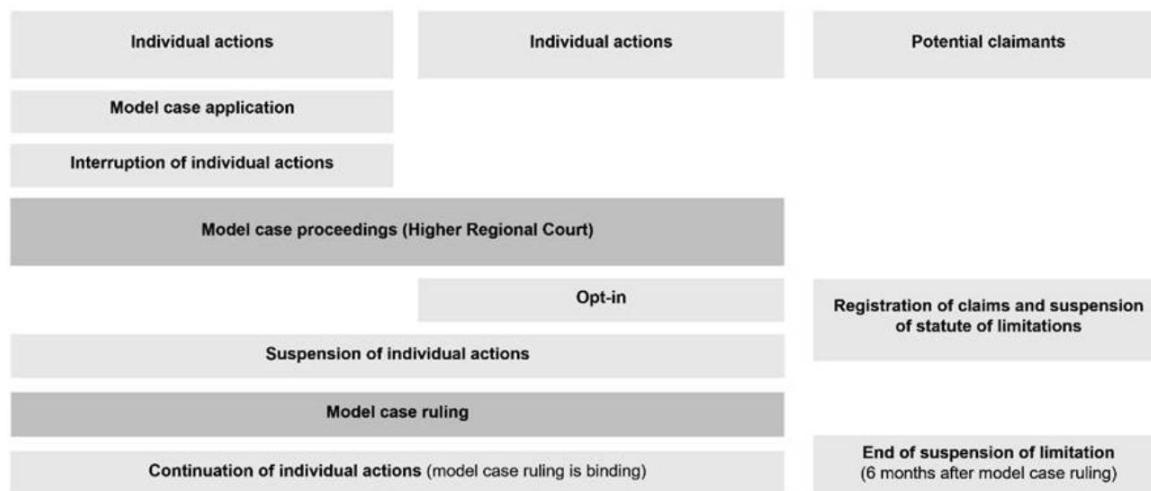
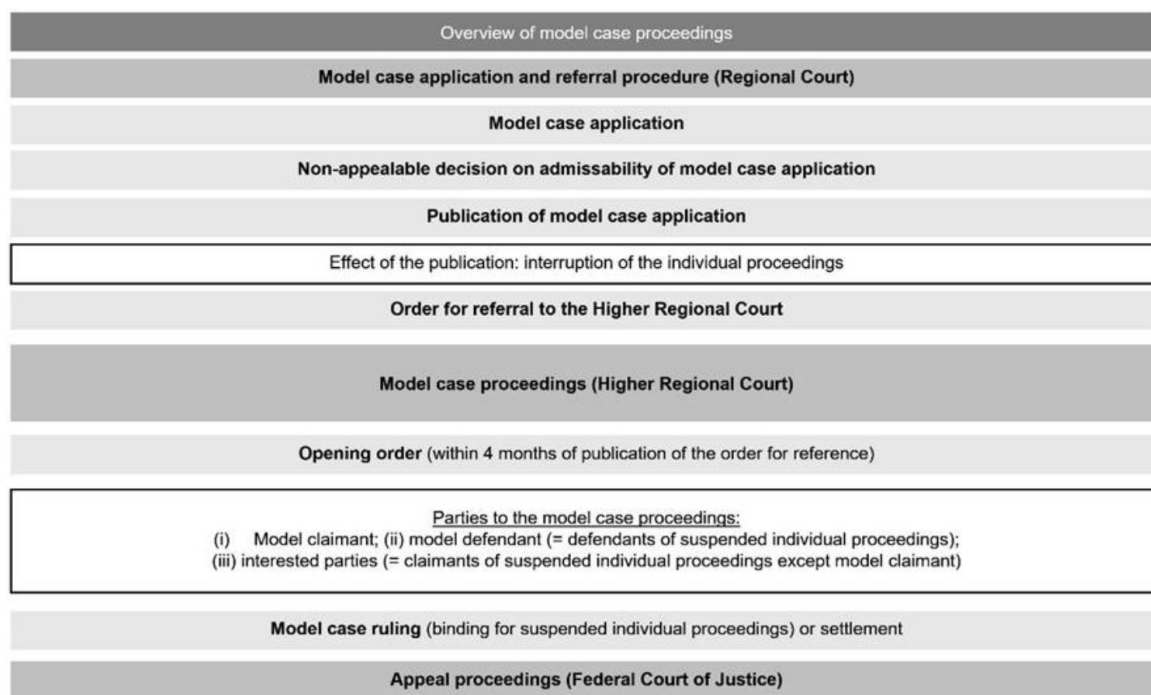


Diagram illustrating the relationship between individual proceedings and model proceedings.



Overview of the individual steps in the model case proceedings.

#### 4. Initiation of model case proceedings

##### 4.1. Model case application

The initiation of model case proceedings presupposes that an individual action (*Ausgangsverfahren*) is already pending. In the individual action at first instance, both claimant and defendant may file a model case application (*Musterverfahrens Antrag*) which is aimed at establishing the existence or non-existence of certain factual and/or legal prerequisites for claims or legal relationships (known as declaratory objectives – *Feststellungsziele*).<sup>25</sup> The court of first instance before which the individual

action is pending then decides on the admissibility of the model case application by way of an unappealable order.<sup>26</sup> If the application is admissible, the court will publish it in the model case register (*Musterverfahrensregister*).<sup>27</sup> The second sentence of section 4(1) of the Capital Markets Model Case Act stipulates that publication should take place within three months of receipt of the application. However, the law does not provide for any consequences if the deadline is missed. Therefore, some authors already assume that this deadline will often be disregarded in view of the usually rather complex matters at hand and the fact that court must first grant the other party a fair hearing before deciding.<sup>28</sup>

25. See section 2 of the Capital Markets Model Case Act.  
26. See section 3 of the Capital Markets Model Case Act.

27. See section 4 of the Capital Markets Model Case Act; for the register itself see [www.bundesanzeiger.de](http://www.bundesanzeiger.de) (search term: Musterverfahren).

28. For the corresponding analysis see Thomas Lieb-scher, Ben Steinbrück and Marcel Vollmerhausen, 'Der Regierungsentwurf zur Reform des Kapitalanleger-

Upon publication of the application in the register, the individual proceedings in which an application was successful are interrupted insofar as the decision in the legal dispute is likely to depend on the asserted declaratory objectives.<sup>29</sup> If the individual action concerns multiple matters in dispute that are separable in terms of content, the court may have to interrupt the proceedings only partially and continue the legal dispute insofar as it does not depend on the asserted declaratory objectives.<sup>30</sup> In addition, if feasible and procedurally efficient, the court can also order a separation into two different proceedings<sup>31</sup> with the result that only the proceedings which depend on the declaratory objective are interrupted.<sup>32</sup>

#### 4.2. Order for referral to the Higher Regional Court

If at least nine model case applications relating to the same subject are published in the model case register within six months of the publication of the first model case application, the court at which the first published model case application was filed shall issue a non-appealable order (*Vorlagebeschluss*) to refer the matter to the competent Higher Regional Court.<sup>33</sup>

The order for referral contains (i) the declaratory objectives, (ii), a brief description of the common facts underlying the model case applications, (iii) the specified means of evidence and (iv) a summary of all underlying and published model case applications.<sup>34</sup> This information is intended to enable the Higher Regional Court to make a decision on the opening of the model case proceedings without first having to extensively study the files.<sup>35</sup>

After the order for referral has been issued, further model case applications regarding the same subject are inadmissible.<sup>36</sup> Any applications filed in spite of this will be rejected by an incontestable court order.<sup>37</sup>

#### 4.3. Order for opening of model case proceedings

The Higher Regional Court opens the model case proceedings by incontestable order insofar as it deems a hearing and decision in a model case proceeding on the declaratory objectives contained in the order for referral to be suitable.<sup>38</sup> According to the explanatory memorandum, it shall also be possible to only partially open the proceedings.<sup>39</sup>

When deciding whether and to what extent to initiate model proceedings, the following aspects will have to be taken into account by the Higher Regional Court: (i) the expected scope of the model proceedings for cases with similar content, (ii) its possible contribution to the further development of the law and to ensuring uniform case law, (iii) the expected guidance and relief for the courts of lower instances and (iv) whether the conceivable declaratory objectives are suitable for a joint hearing and decision within a reasonable period of time.<sup>40</sup>

The Higher Regional Court is authorised to structure the matter in dispute<sup>41</sup> and can thereby determine an order or priority for several declaratory objectives, up to and including issuing a partial model decision.<sup>42</sup> It can also reformulate the objectives of the declaratory judgment,<sup>43</sup> but in principle remains bound by the party applications.<sup>44</sup> According to the explanatory memorandum, it is also conceivable that model proceedings that would otherwise not have been suitable only become suitable as a result of the Higher Regional Court reformulating and restructuring the declaratory objectives.<sup>45</sup>

The Higher Regional Court's opening order consists of the declaratory objectives of the model case,<sup>46</sup> a brief description of the common underlying facts,<sup>47</sup> and the name of the model claimant.<sup>48</sup> It is published in the model case register.<sup>49</sup>

Following the publication of the opening order, the courts at first instance before which the interrupted individual actions are pending will suspend those proceedings insofar as they are likely to depend on the declaratory objectives of the model case proceed-

Musterverfahrensgesetzes (KapMuG) (2024) WM 1058, 1059; Uwe Schmidt, 'Kapitalanleger-Musterverfahrensgesetz – ein totes Pferd?' (2024), ZRP 104, 105.

29. See section 6 of the Capital Markets Model Case Act.

30. See Federal Parliament publication BT-Drs. 20/10942, 32.

31. See section 145(1) of the German Code of Civil Procedure (*Zivilprozessordnung – ZPO*).

32. See Federal Parliament publication BT-Drs. 20/10942, 32.

33. See section 7(1), (2) of the Capital Markets Model Case Act.

34. See section 7(3) of the Capital Markets Model Case Act.

35. See Federal Parliament publication BT-Drs. 20/11787, 46.

36. See section 8 of the Capital Markets Model Case Act.

37. See section 8 in conjunction with section 3 of the Capital Markets Model Case Act. Claimants who have filed an inadmissible model case application can, however, apply for an opt-in once the model case proceedings are opened, see below V.2.

38. See the first sentence of section 9(1) of the Capital Markets Model Case Act.

39. See Federal Parliament publication BT-Drs. 20/10942, 35; Federal Parliament publication BT-Drs. 20/11787, 46 et seq.

40. See Federal Parliament publication BT-Drs. 20/10942, 34.

41. See the second sentence of section 9(1) of the Capital Markets Model Case Act.

42. See Federal Parliament publication BT-Drs. 20/11787, 47.

43. See the second sentence of section 9(1) of the Capital Markets Model Case Act.

44. See Federal Parliament publication BT-Drs. 20/11787, 47.

45. See Federal Parliament BT-Drs. 20/11787, 47.

46. See section 9(2) no. 1 of the Capital Markets Model Case Act.

47. See section 9(2) no. 2 of the Capital Markets Model Case Act.

48. See section 9(2) no. 3 in conjunction with section 9(3) of the Capital Markets Model Case Act.

49. See section 9(6) sentence 1 of the Capital Markets Model Case Act; for the register see [www.bundesanzeiger.de](http://www.bundesanzeiger.de) (search term: Musterverfahren).

ings.<sup>50</sup> This provision extracts from the model proceedings those individual actions that are no longer sufficiently dependent on the model proceedings, in particular because the Higher Regional Court may have only opened model case proceedings on certain declaratory objectives that were not contained in all model case applications.<sup>51</sup> In addition, the decision to suspend the individual proceedings also determines the status as a party to the model case proceedings (see below).

## 5. Parties involved and relationship to individual proceedings and claims

### 5.1. Parties to the model case proceedings

The parties to the model case proceedings are the model claimant, the model defendant(s) and the interested parties (*Beigeladene*).<sup>52</sup>

The model claimant is determined by the Higher Regional Court from the group of claimants who have filed a published model case application.<sup>53</sup> Since the most recent reform of the Capital Markets Model Case Act, claimants whose proceedings have been suspended following an opt-in but who have not filed a model case application (see below at 2.) are no longer eligible as model claimants.<sup>54</sup> The model defendant is the defendant in the suspended proceedings.<sup>55</sup> The claimants of the suspended proceedings who were not selected as model claimant participate as interested parties.<sup>56</sup> They are entitled to make any procedural statements and to take all procedural actions insofar as their declarations and actions do not contradict those of the model claimant.<sup>57</sup> It follows from this that the model claimant plays a central role in the model proceedings, as the model claimant essentially determines the conduct of the proceedings on the claimants' side.

### 5.2. Suspension of further individual proceedings (opt-in model)

It is also possible to participate in the model case proceedings and to obtain a stay of the individual action if no model case application has been filed in the individual proceedings. Since the most recent re-

form, the Capital Markets Model Case Act provides for a unilateral opt-in model, which stipulates that further individual proceedings that were not previously interrupted can be suspended (only) at the claimant's request if the outcome of the individual proceedings is 'likely' to depend on the declaratory objectives of the model case proceedings.<sup>58</sup> Suspension of the individual proceedings is permitted until the final and binding conclusion of the model case proceedings.<sup>59</sup>

This provision represents a fundamental policy shift compared to the previous concept, which provided for the court of first instance to suspend *ex officio* all pending individual proceedings that are dependent on the model case proceeding, including those that have only become pending in the course of the model case proceedings.<sup>60</sup> By switching from the previous compulsory participation to an opt-in model, the legislature aims to reduce the number of parties involved in the model proceedings.<sup>61</sup> The underlying rationale behind this was the legislature's assumption that the previously high number of parties<sup>62</sup> involved in the proceedings was one of the main reasons for the complexity and excessive length criticised in former model case proceedings.<sup>63</sup>

The opt-in model and its specific design are widely considered to be the most controversial and questionable provision of the latest reform. There are three main reasons for this.

First, most practitioners did not share the legislature's assumption that the number of participants in the proceedings was the main reason for the proceedings being so cumbersome.<sup>64</sup> It is therefore feared that, on the one hand, the intended streamlining of proceedings will not occur as a result of the amendment but, on the other hand, the opt-in model will lead to significantly more parallel individual proceedings and divergent decisions.<sup>65</sup>

Second, it is difficult to comprehend why the opt-in provision is only unilaterally available to claimants and not also to defendants. Earlier drafts of the law provided for a bilateral opt-in model,<sup>66</sup> which was subsequently limited to claimants at the 'last minute' of the legislative process. The only reason

50. See section 10(1) sentence 1 of the Capital Markets Model Case Act.

51. Federal Parliament publication BT-Drs. 20/10942, 36 et seq.

52. See section 11(1) of the Capital Markets Model Case Act.

53. See section 9(3) in conjunction with section 6 of the Capital Markets Model Case Act.

54. In contrast see section 9(2) sentence 1 of the Capital Markets Model Case Act in the version valid until 19 July 2024.

55. See section 11(3) of the Capital Markets Model Case Act.

56. See section 11(4) sentence 1 of the Capital Markets Model Case Act.

57. See section 11(4) sentence 2 of the Capital Markets Model Case Act.

58. See section 10(2) sentence 1 of the Capital Markets Model Case Act.

59. See section 10(2) sentence 1 of the Capital Markets Model Case Act.

60. See section 8(1) of the Capital Markets Model Case Act in the version valid until 19 July 2024.

61. See Federal Parliament publication BT-Drs. 20/10942, 26, 36.

62. For example, well over 10,000 investors were involved in the Telekom proceedings.

63. See Federal Parliament publication BT-Drs. 20/10942, 25 et seq.

64. See Liebscher/Steinbrück/Vollmerhausen (n 28) 1064; Hans Christian Kirchner, Tobias Lühmann and Julian Taufmann, 'Reform des Kaptalanleger-Musterverfahrensgesetzes' (2024) NJW 2359, 2362; Zoller (n 18) 1925.

65. See Liebscher/Steinbrück/Vollmerhausen (n 28) 1065 with further references.

66. See Federal Parliament publication BT-Drs. 20/10942, 10.

given for this restriction was that it was intended to strengthen the claimant's right to determine the manner in which the legal action is pursued.<sup>67</sup> However, in view of the (constitutional) principle of equal procedural treatment of the parties, this reasoning seems questionable.<sup>68</sup>

Third, according to the new statutory provision, it is sufficient for a suspension of the individual proceedings if the outcome of the individual proceeding is (merely) "likely" to depend on the declaratory objectives of the model case proceedings.<sup>69</sup> According to the case law of the Federal Court of Justice (*Bundesgerichtshof*) on the preceding provision, the constitutional requirement of legal protection (*Gebot des effektiven Rechtsschutzes*)<sup>70</sup> meant that the individual proceedings could only be suspended if they were definitely (not only likely to be) dependent on the model case proceedings.<sup>71</sup> It therefore remains to be seen whether the new provision is compatible with constitutional law and how courts will deal with applications to suspend proceedings that are only likely to be dependent on the model case proceedings.<sup>72</sup>

### 5.3. Registration of claims and suspension of the statute of limitations

Investors who have not yet initiated individual proceedings and therefore cannot participate in the model case proceedings can instead register their claims with the Higher Regional Court within six months of the publication of the order opening the model case proceedings.<sup>73</sup> Upon registration, the limitation period for the registered claims will be suspended retroactively from the date the opening order was published.<sup>74</sup> Due to the retroactive effect there can be cases where the limitation period has already expired at the time of registration but not at the time of the publication of the opening order, effectively extending the limitation period. In contrast to the prior provision,<sup>75</sup> there is no more specific deadline by which the investors must file an action with regard to the registered claims. From an investor's perspective, it is therefore advantageous to

register the claims, as the outcome of the model proceedings can be awaited before risking any further costs and without the risk of the underlying claims becoming time-barred in the meantime. The registration must be made in writing by a lawyer.<sup>76</sup>

## 6. Disclosure of evidence

The outcome of proceedings related to capital markets law might depend on whether the parties can obtain sufficient information to support their submissions.<sup>77</sup> As part of the latest reform, a provision on the disclosure of evidence in model case proceedings has been introduced for the first time.<sup>78</sup> The provision is based on the idea that there is usually an asymmetry of information between the parties involved in capital markets liability proceedings and that such asymmetry needs to be balanced out.<sup>79</sup> To this end, the legislature has drawn heavily on a provision in section 33g of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*)<sup>80</sup> which was introduced to transpose the requirements of the Damages Directive of 26 November 2014.<sup>81</sup>

Against this background, the provision in section 17(1) and (2) of the Capital Markets Model Case Act stipulates that the court shall, upon application by the model claimant or a model defendant<sup>82</sup>, order the other parties or a third party to disclose evidence that is relevant for the presentation of facts or the defence. Common prerequisites for an application both on the claimant's and the defendant's side are that (a) the evidence is necessary for the claim or the defence, and (b) the evidence is described as precisely as possible on the basis of the facts that are reasonably accessible. Furthermore, the order may also not be issued if it would be disproportionate when taking into account the legitimate interests of the parties involved and any third parties.<sup>83</sup> Mere 'fishing expeditions' are therefore not permitted.<sup>84</sup>

As opposed to orders for the disclosure of evidence in representative actions based on the Representative Actions Directive of 25 November 2020,<sup>85</sup> the law

67. See Federal Parliament publication BT-Drs. 20/11787, 47.

68. See Kirchner/Lühmann/Taufmann (n 63) 2362.

69. See the first sentence of section 10(2) of the Capital Markets Model Case Act.

70. See Art. 19(4) of the German Constitution.

71. See Federal Court of Justice, decision of 30 April 2019, file no. XI ZB 13/18 (2019) NJW 3444, 3445 et seq.; for a dissenting opinion see Higher Regional Court of Munich, decision of 19 September 2022, file no. 8 U 8302/21, (2022) WM 2067, 2075 et seq.

72. See Hettenbach (n 18) 1440 who considers a referral to the Germany Constitutional Court as a not unlikely scenario.

73. See section 13 of the Capital Markets Model Case Act.

74. See section 204(1) no. 6a of the German Civil Code (*Bürgerliches Gesetzbuch – BGB*).

75. See section 204(1) no. 6a of the German Civil Code in the version valid until 19 July 2024.

76. See section 13(1) sentence 2 of the Capital Markets Model Case Act.

77. Cf. Peter A. Gundermann and Christian Herrmann, 'Die Vorlage von Beweismitteln in Kapitalanleger-Musterverfahren nach Einführung des § 17 KapMuG' (2024) BKR 881.

78. See section 17 of the Capital Markets Model Case Act.

79. See Federal Parliament publication BT-Drs. 20/11787, 2.

80. See Federal Parliament publication BT-Drs. 20/11787, 48.

81. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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.

82. Whether the restriction to the model claimant and the model defendant must be interpreted as excluding a right of interests parties to submit a disclosure application is not clear, see for a discussion of this issue Hettenbach (n 18) 1442.

83. See section 17(3) of the Capital Markets Model Case Act.

84. See Gundermann/Herrmann (n 77) 884.

85. See section 6(1) of the Consumer Rights Enforcement Act.

does not provide for any coercive measures such as fines if the order is not complied with. Non-compliance may, however, have consequences under rules of evidence and may be assessed by the court as obstruction of evidence, with the result that the statement that was to be proven with the evidence in question may be treated as proven and established.<sup>86</sup> Whether and to what extent an appeal can be lodged against the decision granting or rejecting an application for the submission of evidence has not yet been conclusively clarified.<sup>87</sup>

It can be expected that the new provision on the submission of evidence will be used frequently and above all by model claimants. It is also likely that this will ultimately result in more orders for the disclosure of evidence in future. Previously, such orders were rare, as the requirements for the otherwise applicable general provisions under German civil procedural law<sup>88</sup> were usually not met.<sup>89</sup> But considering that German courts have been reluctant to broadly grant claims based on section 33g of the Act against Restraints of Competition in competition damages cases with the guiding principle of effective enforcement of Articles 101 and 102 TFEU in the background, it is not particularly likely that courts will be more open to such access to evidence claims in capital investor model proceedings.<sup>90</sup>

## 7. Possible outcomes of the model case proceedings

### 7.1. Settlement

In the course of the model case proceedings, the model claimant and model defendant may decide to come to a court settlement. In this case, the position of the interested parties, i.e. those claimants that participate in the model proceedings but are not model claimants, must also be considered. To ensure this, sections 20 et seqq. of the Capital Markets Model Case Act lay down special requirements for an effective settlement.

First, the interested parties must be given an opportunity to comment on the settlement proposal,<sup>91</sup> which can originate either from the model claimant and model defendant or from the court after approval by the model claimant and model defen-

dant.<sup>92</sup> The court must then consider whether the settlement is an appropriate amicable outcome of the suspended individual actions, taking into account the facts and disputes in the model case proceedings to date and the comments made by the interested parties.<sup>93</sup> If the court decides that the settlement is appropriate taking into account the facts of the matter and status of the dispute as well as the comments by the interested parties, it will approve the settlement.<sup>94</sup> From this point onwards, the settlement can no longer be revoked by the model claimant and model defendant.<sup>95</sup>

The court-approved settlement is then served on the interested parties; service can also be replaced by publication in the model case register.<sup>96</sup> From the date of service of the settlement, the interested parties are granted one month to declare their withdrawal from the settlement.<sup>97</sup> If fewer than thirty per cent of the interested parties declare their withdrawal, the court will declare by incontestable order that the settlement has become effective.<sup>98</sup>

The model proceedings are terminated upon the settlement becoming effective.<sup>99</sup> The suspended individual proceedings of those interested parties that have not withdrawn from the settlement are then also terminated by order of the relevant court of first instance, with the court also deciding on the costs by taking into account the provisions in the settlement.<sup>100</sup>

### 7.2. Consensual termination and withdrawal of claims

The model proceedings can also be terminated by a unanimous declaration by all parties involved,<sup>101</sup> which in practice should only occur very rarely, if at all. Whether actions are withdrawn by individual parties in the suspended individual proceedings, however, has no influence on the progress of the model case.<sup>102</sup> If the party withdrawing the action in the individual proceedings was also the model claimant, the Higher Regional Court will appoint a new model claimant from among the interested parties who have filed a published model case application.<sup>103</sup>

86. See Gundermann/Herrmann (n 77) 885.

87. See Gundermann/Herrmann (n 77) 884.

88. See section 142 of the German Code of Civil Procedure.

89. See Gundermann/Herrmann (n 77) 882; see in particular on the strict requirements regarding the specification of the evidence documents for an order for the disclosure of evidence pursuant to section 142 of the German Code of Civil Procedure Althammer, 'Sec. 142 ZPO' in *Stein/Jonas, Kommentar zur Zivilprozessordnung* (23<sup>rd</sup> ed., Mohr Siebeck 2016), para. 18.

90. See for a more restrictive understanding of the new rules also Michael Zoller, 'Das neue KapMuG: Kein Platz für Ausforschung!' (2024) BKR 955.

91. See section 20(1) sentence 2 of the Capital Markets Model Case Act.

92. See section 20(1) sentence 1 of the Capital Markets Model Case Act.

93. See section 21(1) of the Capital Markets Model Case Act.

94. See section 21(1) of the Capital Markets Model Case Act.

95. See section 21(2) of the Capital Markets Model Case Act.

96. See section 22(1) of the Capital Markets Model Case Act.

97. See section 22(2) of the Capital Markets Model Case Act.

98. See sections 21(3), 26(1) sentence 1 of the Capital Markets Model Case Act.

99. See section 26(2) of the Capital Markets Model Case Act.

100. See section 26(3) sentence 1 of the Capital Markets Model Case Act.

101. See section 18(6) of the Capital Markets Model Case Act.

102. See section 18(3) of the Capital Markets Model Case Act.

103. See section 18(4) in conjunction with section 9(3) sentence 2 of the Capital Markets Model Case Act.

### 7.3. Model case ruling

Provided that the proceedings have not been terminated in any other way in the meantime, the Higher Regional Court will issue a model case ruling after at least one oral hearing has taken place.<sup>104</sup> The model case ruling is served on the parties; service can also be replaced by publication in the model case register.<sup>105</sup> An appeal against the decision may be lodged with the Federal Court of Justice within one month of service.<sup>106</sup>

As soon as the model case ruling becomes final, it is binding for all courts of first instance in the suspended individual proceedings.<sup>107</sup> The suspended individual proceedings will then be continued upon a party's submission of the final and binding model decision.<sup>108</sup>

## 8. Relationship of the Capital Markets Model Case Act and representative actions under the Consumer Rights Enforcement Act

The subject matter of disputes that fall within the scope of the Capital Markets Model Case Act can also be covered by the Consumer Rights Enforcement Act, which was introduced in October 2023 in order to transpose the Representative Actions Directive (RAD)<sup>109,110</sup>. An example of this is investor disputes concerning the Prospectus Regulation (EU) 2017/1129, which is listed in Annex I (no. 60) of the RAD.

Following a lengthy discussion as to whether the two instruments of collective redress are mutually exclusive in such cases,<sup>111</sup> the legislature decided that both can be brought and adjudicated in parallel.<sup>112</sup> If a consumer asserts claims based on a matter for which both a model case proceeding and a representative action are pending, he can therefore decide at the outset which of the two proceedings he wishes to join.

If the consumer is already party to a model case proceeding and a representative action under the Consumer Rights Enforcement Act is subsequently brought, the consumer can decide to join this action and withdraw the individual action on which

his participation in the model case proceedings is predicated; the consent of the defendant in the individual proceedings is not required in this case.<sup>113</sup> On the other hand, if the consumer has already registered his claims in the register of representative actions<sup>114</sup> before a model case application was filed, it is no longer possible to participate in the model case proceedings because any individual action of the claimant will already be suspended in this case.<sup>115</sup>

## 9. No 'sunset clause'

Previously, the Capital Markets Model Case Act contained a clause limiting the existence of the Act until a specific future date. The relevant expiry date was changed multiple times in the past in order to keep the Act and to make time for a proper evaluation. As part of the latest reform in July 2024, however, the legislature decided to not include a 'sunset clause' any longer.

## 10. Concluding remarks

The German capital investor model case proceedings are finally here to stay. They are an element of civil procedure that have proven to be helpful in resolving a large number of capital investor claims. They remain a unique option in German civil procedure for determining common legal and factual questions in a manner that is binding on lower courts when deciding on the investors' individual actions. The new law is another example that Germany becomes more open to allow procedures for the disclosure of evidence. More importantly, however, the latest reform shows that Germany heavily relies on the opt-in mechanism as a principle set in stone for collective redress. For the capital investor model case proceedings this is unfortunate, as there is no longer an option to suspend all pending individual proceedings, allowing for a truly uniform decision and ultimately relieving the courts (for the time of the model proceedings) of the burden of conducting thousands of individual proceedings in some cases. As a consequence, it may well be that small and speedily handled individual cases, rather than larger model case proceedings, will lead to a change in case law in specific capital investment matters.

104. See section 19(1) sentence 1 of the Capital Markets Model Case Act.

105. See section 18(1) sentences 1 and 2 of the Capital Markets Model Case Act.

106. See sections 23 et seq. of the Capital Markets Model Case Act in conjunction with sections 574 et seqq. of the German Code of Civil Procedure.

107. See section 25(1) sentence 1 of the Capital Markets Model Case Act.

108. See section 25(4) sentence 1 of the Capital Markets Model Case Act.

109. Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (O) L 409, 4 December 2020, 1.

110. For an overview of the action for redress measures under German law see Henner Schläfke and Tobias Lühmann, 'Collective Redress in Germany and the Transposition of the Representative Actions Directive' (2023) Mass Claims nr. 2, 1 et seqq.

111. For detailed information on the previous state of the dispute and proposed solutions see Tim Melhardt 'Das Kapitalanleger-Musterverfahren nach dem Entwurf zum zweiten KapMuG-Reformgesetz' (2024) ZIP 920, 921.

112. See section 1(3) of the Capital Markets Model Case Act and section 1(3) of the Consumer Rights Enforcement Act.

113. See section 18(2) sentence 1 of the Capital Markets Model Case Act.

114. See section 46(1) sentence 1 of the Consumer Rights Enforcement Act.

115. See section 11(1) of the Consumer Rights Enforcement Act.