



## **The German “Capital Markets Model Case Act”**

On 1 November 2005, the “Act on Model Case Proceedings in Disputes under Capital Markets Law (Capital Markets Model Case Act)” entered into force in Germany. The text of the bill can be found both in German and in English on the German Ministry of Justice's website ([www.bmj.bund.de/kapmug](http://www.bmj.bund.de/kapmug)).

With the Capital Markets Model Case Act, the German legislator has provided a way to handle capital market mass proceedings without transferring existing models from foreign jurisdictions, such as the American class action, into German law. Instead, the Act seeks to offer an alternative system based on the fundamental principles of German and European procedural law in order to improve securities mass proceedings.

### **What kind of cases does the law apply to?**

The Capital Markets Model Case Act is designed only for certain disputes under Capital Markets Law; it does not apply to any other civil law proceedings (e. g., product liability law suits).

The law applies to proceedings at first instance, in which

1. a claim for compensation of damages due to false, misleading or omitted public capital markets information or
  2. a claim to fulfilment of contract, which is based on an offer under the Securities Acquisition and Takeover Act,
- is asserted.

### **How does it work?**

In a pending Capital Market proceeding at first instance both the plaintiff and the defendant may enter an application for the establishment of a model case to the court. With their application they may seek the establishment of the (non-) existence of certain conditions justifying or ruling out entitlement, or even the clarification of certain legal questions by the next highest court of instance, the Higher Regional Court. Admissible applications will be publicly announced by the court trying the matter in a Complaint Registry, which is newly established by the electronic Federal Gazette and can be accessed via the Internet ([www.ebundesanzeiger.de](http://www.ebundesanzeiger.de)). Only if at least ten such applications, whose establishment objectives refer to the same subject matter, have been entered within four months, the court trying the matter will effect by order a decision of the Higher Regional Court. While this model



case proceeding is conducted by the Higher Regional Court, all pending proceedings, whose decisions are contingent upon the court's establishment to be made in the model case proceeding, are suspended ex officio.

The model case ruling by the Higher Regional Court is binding on the courts trying the matter, whose decisions depend on the establishment made in the model case proceeding. The court trying the matter will then decide each pending proceeding on the basis of the model case ruling.

### **What are the advantages?**

With the Capital Markets Model Case Act, investors have the possibility to check on the Internet (at the Complaint Registry), whether or not proceedings are already pending which relate to their own entitlement. This may motivate them to enter a claim themselves, because the costs of the taking of evidence in a model case proceeding will be apportioned to all parties afterwards. Issuers of securities or offerors of other investments may receive clarification on certain allegations of facts or legal questions within a short period of time. Courts have the possibility to find consistent rulings to related questions while reducing their workload on each case at the same time.

### **How does the new system differ from U.S.-style “class actions”?**

The Capital Markets Model Case Act introduces a model case procedure into German law, not a class action. It is only available to parties willing to initiate proceedings themselves, be it those of already pending proceedings or those joining in later. It does not allow raising a claim in the name of a - more or less unknown - “group” of plaintiffs, thereby putting unauthorized pressure on the defendant. Furthermore, the Higher Regional Court only gives a binding model case ruling to the court trying the matter; this court will then rule each proceeding itself, including the decision on individual damages. Moreover, unlike under the “American rule”, it is still the losing party who has to carry the costs of the law suit and lawyers may not ask for contingent fees under German law.

Plaintiffs, however, benefit from sharing the costs of the model case ruling, from being relieved of prepaying costs for the model case proceeding and by gaining time from a speedy decision on the most crucial issues of their joint case.

Finally, the law does not change any principles of German substantive civil law, e. g. it does not introduce “punitive damages” or other kinds of non-compensatory damages.

The effects of the new law will be monitored over the next five years. Due to the Act's "sunset clause" it will automatically be out of force on 1 November 2010 – unless the legislator decides to have it prolonged or even broadened to other mass civil case proceedings.