German Judges'
Association

Working Group on Mass Proceedings

Proposals

to better manage mass proceedings

through the judiciary

Status: 13.05.2022

Composition of the working group

Direction

Roland Kempfle, LL.M. (Wellington)
Judge at the Regional Court of Munich I
Member of the Presidium of the DRB

Members

Dr. Michaela Brunssen
Presiding Judge at the Regional Court
Cologne Regional Court

Sina Dörr
Judge at the Regional Court
Aachen Regional Court, currently seconded to the Federal Ministry of Justice

Dr Matthias Engelhardt
Judge at the Higher Regional Court
Nuremberg Higher Regional Court

Marco Hartrich
Presiding Judge at the Higher Regional Court
Celle Higher Regional Court

Dr Sabine Koch
Presiding Judge at the Regional Court
Kiel District Court

Dr Charlotte Rau
Judge at the Higher Regional Court
Frankfurt am Main Higher Regional Court

Wulf Schindler
Presiding Judge at the Regional Court
Regional Court Tübingen

Karin Spelge
Presiding Judge at the Federal Labour Court
Federal Labour Court

Dr Hendrike Wulfert-Markert
Judge at the Regional Court
Potsdam Regional Court, currently seconded as research associate to the Constitutional Court of the State of Brandenburg

Content

1. Work order

On 1 October 2021, the Federal Representative Assembly of the German Judges' Association in Dessau decided to establish a working group on mass proceedings. This working group should develop solutions to improve the handling of mass proceedings by the judiciary. The members of the working group are judges who themselves have practical experience in dealing with mass proceedings. Roland Kempfle, a member of the Presidium, has taken over the leadership of the working group.

2. The problem

The burden of mass proceedings on the German judiciary has been steadily increasing for several years. As a result, judges at civil courts in particular are sometimes working far beyond their breaking point. Claims for damages by investors, buyers of diesel cars, claims against insurers and the assertion of air passenger rights have one thing in common: such a large number of lawsuits are filed in similar cases that the courts affected by them have to work many times their actual capacity. An end to this development is not in sight. On the contrary, specialised law firms, debt collection service providers and online tools are actively recruiting consumers who might be affected by a particular constellation. In addition, pleadings are sometimes inflated to a hundred pages or more using the "copy & paste" method, without showing any recognisable reference to the individual case and without neatly allocating the extensive annexes. In addition, the law firms involved attach extensive annexes as files, which then have to be printed out in full by the courts, although in some cases only minimal parts of these annexes are relevant to the legal dispute. In the courts of first instance, the proportion of proceedings in which a judgement has to be written is extremely high, the willingness to settle is low and litigators - even in video hearings - often only appear through session representatives to make the motions without being able to answer the court's queries on the facts of the case and without the authority to shape the content.

Thus, the processing of such proceedings by judges who try to work out the special features of the respective individual case from the pleadings and to assess them legally, despite the volume and despite the mass, can take many times the usual - and in

The time required for this is not as long as that provided for in the personnel requirements statistics of the judiciary. In addition, judicial work has become noticeably more monotonous and redundant due to the large number of comparable cases, so that effects on the already difficult recruitment of junior staff are to be feared, as colleagues increasingly see themselves as a blog part of a value chain within the framework of a large-scale lawyer business model.

According to a survey of the 24 German Higher Regional Courts by the German Judges' Association, in the course of the diesel scandal alone, around 10,000 civil actions were filed against car manufacturers in 2018, around 40,000 in the "record year" 2019, another 30,000 in 2020 and around 37,500 in 2021 (cf. on the DRB's survey Rebehn, NJW-Spezial 10/2022, p. 17). At the Regional Court of Stuttgart alone, approx. 8,700 diesel cases were received in 2021. But also in other areas, the civil courts increasingly have to deal with mass proceedings. At the Frankfurt am Main Regional Court, 100 proceedings from Wirecard investors were received on a single day at the beginning of 2022, and there are already said to be promises of legal protection from insurers for over 20,000 proceedings.

The phenomenon is not new, but it is steadily increasing and leaving its mark. In a letter dated 21 October 2021, several presiding judges of the Regional Court of Augsburg addressed the chairman of the District Judges' Council of the Higher Regional Court of Munich and described the daily work of the judiciary. They point out that both the rule of law and the mental health and motivation of the employees of the judiciary are in danger of being damaged by mass proceedings. They state in this letter:

> *"To deal with the sheer additional and extensive mass, we have to throw overboard much of what we have learned and internalised: To grasp a case in all its details, to negotiate with the parties at eye level and to the point in order to work out a viable solution and, if necessary, to produce a sound and well-reasoned judgment. If we were to stick to this, the civil justice system would collapse in no time. (...) We cannot keep up this pace and this mass in a kind of ultra-run and keep limiting our working hours. Permanent overtime and 7-day weeks are already the order of the day for many colleagues. There are no breathers, the procedures are consistently running up; even in the summer months there is no short-term decrease in incoming cases; holidays are merely postponed working time, at the end of which mountains of files destroy the recovery in the blink of an eye."*

Increasingly, employees of the judiciary are threatened with burnout. The stress is not limited to judges, but also affects other employees of the courts, such as constables and service staff. In their letter, the colleagues go on to state:

> *"The "tipping point" at which even the most robust can no longer withstand the pressure seems to have been reached (in part) already, because fewer and fewer shoulders have to bear more and more of the load."*

More and more time spent on mass proceedings also leads to less and less time being available for other proceedings in which citizens seeking justice can expect a court decision in an acceptable amount of time. It is to be feared that proceedings that are sensitive to fundamental rights and may even be of existential importance will be delayed by the congestion caused by mass proceedings and that the previously high qualitative standards in case processing will come under pressure.

There is a considerable need for action to ensure the ability of the German judiciary to work and to counteract a loss of confidence in the ability of the judiciary to function, which is actually endangered by mass proceedings in particular.

3. starting point: definition of the term "mass proceedings" and explanation of currently occurring procedural structures

3.1 General

Mass proceedings are those legal disputes that concern a **large number of similar cases**, i.e. a large number of cases with essentially the same facts of life and essentially the same legal issues.

An adequate point of reference must be found for the question of whether a large number of similar cases can be assumed. This can be based on the respective court, the respective higher regional court district, the respective federal state or the federal territory.

Currently, mass proceedings in the ordinary courts occur mainly in banking and investment law, insurance law, travel law and general civil law. It is to be expected that mass proceedings will occur in all areas of life that are characterised by standardised, mass-used mechanisms (legal declarations, prospectuses, productions) (e.g. data protection damages actions before the ordinary courts (Art. 82 General Data Protection Regulation [GDPR]).

Examples of mass proceedings from court practice:

Banking and capital investment law

Mass proceedings in banking and capital investment law are regularly characterised by specialised law firms advertising on the internet against certain financial products and the focus of legal proceedings not being on the individual investment decision of the respective party to the action. This leads to text module-like, hardly individualised submissions on the situation of the investment decision. For example, after having looked at For example, after looking at the lists of limited partners, potential plaintiffs are actively recruited with regard to certain investments and with reference to existing legal protection insurance. If an investor acquired as a client in this way decides to sue, a machinery is set in motion with an almost unmanageable number of complaints and objections, for example against prospectuses, instructions and notices. There is no concentration on essential points or points that are decisive for the dispute, and facts giving rise to claims are not elaborated. If a similar approach is chosen by the defendant, the result will be bloated files that have little relation to the underlying investment decision.

Insurance law

In insurance law, mass proceedings occur, for example, after objections due to faulty information pursuant to § 5a VVG old version against the conclusion of life insurance contracts or due to faulty premium adjustments in private health insurance, where the reversal of a large number of premium adjustments over a long period of time has to be examined. Such proceedings are conducted on the plaintiff's and defendant's side by specialised law firms that exchange large volumes of text of standardised pleadings. The underlying calculations are extensive and can only be reliably verified with IT support. Another

The problem is that often only rudimentary submissions are made with regard to the facts giving rise to the claim, but information is requested from the defendant insurer about circumstances relating to the insurance relationship by means of a step-by-step action, although the policyholder has usually received corresponding letters. Thus, law firms specifically recruit policyholders as potential plaintiffs with the argument that the compilation of the documents for the lawsuit does not require any effort on their part. For the courts, on the other hand, the processing costs of this approach are disproportionately high.

Travel law

In the field of travel law, air passenger rights claims play a special role. In recent years, district courts in whose districts major airlines have their headquarters have had to process several thousand cases in this area. While on the plaintiff's and defendant's side a systematisation and the use of legal tech now lead to bundling effects and thus a considerable reduction in workload (for example, those affected now regularly enter the core data independently into masks, and complaints are bundled according to individual flights), these proceedings must be processed individually by judges and service units like all other incoming proceedings, for example, oral hearings must be held upon request.

Diesel lawsuits

The number of diesel claims continues to be at record levels (around 37,500 filings at the Higher Regional Courts alone in 2021, cf. Rebehn, NJW Spezial 10/2022, p. 17), with an increasing shift from VW to other vehicle manufacturers. In addition to the specific features of all mass proceedings, the high degree of technicalisation of the submission down to the smallest ramifications of engine functionalities should be mentioned here. As far as the Federal Court of Justice issues leading decisions (e.g. on the engine type EA 189 of the VW group), it can be observed that these are sometimes not taken into account by the legal representatives or at least only with a delay.

3.2 Structure of mass proceedings in labour law

There are two different types of mass proceedings in the labour courts.

3.2.1. mass actions against one and the same employer *(Variant 1)*

In variant 1, mass actions against a particular employer may arise after measures affecting a large number of employees. Typical cases in adjudication proceedings are dismissal protection actions against mass dismissals in connection with plant (partial) closures or actions for the adjustment of company pensions.

In this type of mass proceedings, the actions are usually brought before the labour court at the employer's registered office and thus before a single labour court. For example, 2,000 lawsuits against the approximately 6,000 dismissals in the insolvency of an airline have been filed at the Berlin Labour Court alone, and another 300 or so at the Düsseldorf Labour Court.

As a rule, the employer's side is represented by one and the same legal representative. The employees are represented by different lawyers, whereby some law firms are usually mandated by a large number of plaintiffs and several other law firms are mandated by a few or even only individual employees. Since no special admission to the bar is required at the Federal Labour Court, the parties are usually represented in the appeal proceedings by the same legal representatives as in the factual instances.

3.2.2 Mass actions in disputes over the interpretation and validity of collective bargaining standards against different employers *(variant 2)*

In variant 2 mass proceedings, disputes arise over the interpretation or the validity of collective bargaining norms on mass proceedings, whereby a certain regulation content can be the subject of different collective agreements. For example, in a large number of collective agreements in the food industry, the amount of the night work supplement is determined by

differentiates whether workers perform night work permanently or only exceptionally. The dispute over the effectiveness of this differentiation has led to numerous lawsuits. Currently, there are about 450 appeals pending before the competent senate of the BAG on this issue, which are currently suspended due to a referral of the competent senate to the ECJ.

In this variant, the actions are typically brought before different labour courts and dealt with for the first time by a single panel of judges at the BAG. In this constellation, both the employees' and the employers' sides are usually represented by different legal representatives.

4. the problem of the uneven playing field

The mass proceedings in the diesel scandal make the structural imbalance between the judiciary and the parties involved in the proceedings visible in a drastic way (a so-called uneven playing field).

4.1. initial situation

To clarify the initial situation, here are some key figures on the diesel scandal, relating to the Volkswagen AG ("VW") group alone:

- The parties to the lawsuit: approx. 380,000 (legally insured) plaintiffs.
- The plaintiffs' representatives: Legal expenses insurers have spent **1.2 billion euros on** legal costs in the emissions scandal lawsuits.
- The defendant: VW, which the diesel scandal has so far cost a total of €32 billion and which, notwithstanding this, achieved an operating profit of €10.6 (19.3) billion in the reporting year 2020.
- The defendants' representatives: VW has spent a total of approximately **€1.8 billion on** its legal advisors' fees in connection with the diesel scandal (stock corporation litigation and US proceedings included). About five (narrower circle) internationally positioned high-end law firms are working for VW. The main law firm is Freshfields Bruckhaus Deringer Rechtsanwälte Steuerberater.

PartG mbB ("Freshfields"). Freshfields manages approximately 20 of the 50 most important German law firms for VW.

The plaintiffs' and defendants' representatives use the individual proceedings as a business model. New business models and industries are developing. In the diesel scandal, a new type of mass litigation law firm has emerged on the plaintiff and defendant side. In autumn 2021, Deloitte Legal Rechtsanwaltsgesellschaft mbH (part of the international full-service law firm Deloitte Legal with more than 2,500 lawyers worldwide) and Frommer Legal (a law firm specialised in copyright law, known for mass warnings) founded a joint law firm whose core business model includes the **IT technology-supported defence of mass actions** and handling of mass proceedings with procedure management platforms. On 27 December 2021, Freshfields established a new mass litigation unit. So-called legal engineers (lawyers with IT skills) are increasingly being recruited in law firms. The big commercial law firms (Freshfields, CMS Hasche Sigle, etc.) are expanding technology-based solutions for mass litigation.

4.2 Uneven playing field

The rough analysis of the current situation using the example of VW makes it clear that the judiciary is confronted with an initial situation that can be described with the Anglo-American concept of an *uneven playing field.* The concept of a *level playing field* describes an initial situation in which everyone has the same (starting) conditions, the same advantages and disadvantages. This concept of fairness states that the same rules apply to everyone.

The mass proceedings in the diesel scandal are in their starting point due to a structural This is characterised by an imbalance between the *players*, a so-called *uneven playing field.*

Strong Player 1: Company - Power of resource strength

Management (structured solution of the problem)

Financial strength (purchasing of the problem solution)

Manpower (legal, corporate, IT consultants)

- Knowledge management (structured approach to mass procedures, learning of the system)
- IT/technology-based management of mass proceedings

Strong Player 2: Consumer - Power of the Masses

- Mass of people seeking legal protection
- Financial strength: Litigation funding / legal expenses insurer
- IT/technology-based management of mass proceedings

Uneven player: judiciary - structurally outgunned

- Few human resources; no support from a powerful substructure in terms of personnel; no cooperation or assistance in the management of mass proceedings by IT experts, legal scholars and technical staff.
- Statutory judge ("lone wolf") is in tension, if not conflict, with structured management of mass proceedings
- Technically inferior: IT/technology-based approaches for the management of mass proceedings are lacking overall.

5. approaches to solutions

An established process management process could help to find a customised solution, but it takes time. The situation described for many courts, which are threatened with collapse due to mass proceedings, makes it necessary to find solutions now that promise relief in the short term. The following proposals are based on the experiences of the WG members from the perspective of their judicial practice.

From the AG's point of view, initial facilitations can be created in a timely manner through legal amendments, especially to the Civil Procedure Act (5.1.) and the Labour Court Act (5.2.). However, this alone will not be sufficient to reduce the burden on the civil courts by
mass proceedings to an adequate level on a permanent basis. In particular

guidelines on the structure and scope of the party's presentation should also be considered (5.3.). In order for the judiciary to be able to cope with mass proceedings, it is indispensable to considerably improve the staffing and technical equipment of the courts (5.4.). For particularly simple and standardised cases, the introduction of an accelerated online procedure is an option (5.5.). Finally, all possibilities of the use of digital tools including artificial intelligence by judges should be examined; the WG advises corresponding model projects with the participation of judges (5.6.).

5.1 Statutory changes in civil procedure law

5.1.1 Introduction of a preliminary ruling procedure before the competent review court

The WG Mass Proceedings is in favour of the introduction of a preliminary ruling procedure in mass proceedings before the competent review court.

The introduction of such a preliminary ruling procedure promises speedy legal certainty on fundamental issues in dispute in certain mass cases. Such a procedure would therefore be in the interest of those seeking justice and also of legal expenses insurers.

In connection with the introduction of a possibility to stay other proceedings, for the decision of which the legal questions to be clarified in the preliminary ruling proceedings before the appellate court are of precedence, a considerable saving of resources could be achieved at the courts of instance. Resources would also be saved at the appellate court, as the "wave" of subsequent proceedings would remain at the courts of instance.

However, a provision would be necessary in this respect that the decision of the Court of Appeal in a preliminary ruling procedure also settles other preliminary ruling procedures filed in parallel on the same legal question. It would also be necessary to clarify in the law that the

The Court of Appeal must independently assess the relevance of the legal question referred for a preliminary ruling.

5.1.2 Introduction of the possibility of a stay under section 148 of the Code of Civil Procedure with regard to a case pending before the appellate court.

Pending preliminary ruling or appeal proceedings

A preliminary ruling procedure would only contribute to a noticeable saving of resources at the courts of instance if for subsequent proceedings for which the issues to be clarified in the preliminary ruling procedure are
are relevant to the decision on the legal issue , at the same time there would be a possibility to stay the proceedings pursuant to section 148 of the Code of Civil Procedure. Since this is a new type of procedure, an express possibility of a stay for this case would have to be created in the ZPO and thus also for the procedural rules of the specialised courts that refer to it.

Such a preliminary ruling procedure would save a considerable amount of time in subsequent proceedings, but also legal costs. In addition, it would create legal certainty for the competent judges. At present, pending subsequent proceedings are sometimes "left pending" until a supreme court decision on fundamental issues is available, due to the lack of a possibility to stay the proceedings, so that there is a risk that a complaint of delay will be filed.

In addition, it is advisable to already consider pending

The court is not obliged to create such a possibility to stay the appeal proceedings on the same legal question. According to previous case law,
the mere pendency of proceedings before the appellate court is not sufficient for this.

5.1.3. introduction of the possibility to decide in mass proceedings also without the consent of the parties in written proceedings according to section 128 (2) ZPO.

The introduction of the possibility to decide in mass proceedings - at first instance at least if the legal issues relevant to the decision have already been clarified, but at least in the appellate instance - also without the consent of the parties in written proceedings in accordance with section 128 (2) ZPO would considerably relieve the civil justice system. The AG does not deny that the principle of oral proceedings is a manifestation of the principle of immediacy laid down in the ZPO. However, it can be observed in court practice that the hearing dates in mass proceedings often only serve the purpose of filing an application, which counteracts the principle of oral proceedings. Moreover, the principle of immediacy, which can be shaped by the legislature, is in any case breached in the Code of Civil Procedure.

The introduction of the possibility to decide in mass proceedings by written procedure even without the consent of the parties would further conserve resources at the courts of instance and save litigation costs. It would nevertheless be possible to file an appeal against the final decision issued in written proceedings, as provided for in the respective rules of procedure, if there is sufficient appeal, so that the legal protection interest of the unsuccessful party would also be taken into account.

The introduction of the possibility, limited to mass proceedings, to decide in written proceedings according to section 128 (2) of the Code of Civil Procedure even without the consent of the parties would also not violate Art. 6 ECHR. The ECtHR does not derive an absolute right to an oral hearing from Art. 6 (1) ECHR, but always examines whether, according to the concrete circumstances and taking into account the particular circumstances of the relevant procedure (type) as well as an overall consideration of national

procedural rules and the role of the courts therein, an oral hearing was necessary *(ECHR 29.10.1991 - No. 22/1990/213/2775 [Helmers] para. 31, NJW 1992, 1813; further evidence in BVerfG 30 June 2014 - 2 BvR 792/11 - para. 21).* At least for the Court of Appeal and the Court of Review, taking such an overall view, a provision in the relevant procedural rules which leaves it to the discretion of the court in mass proceedings to dispense with an oral hearing and links this discretion to whether it is necessary to assess evidence or to discuss new factual submissions is compatible with Article 6.1 sentence 1 of the ECHR. This applies all the more if this discretion were additionally linked to the fact that the relevant legal questions have already been clarified. The decisive factor for this compatibility is the acceleration of the proceedings to be aimed for on the one hand, and the fact that there are no more difficult legal questions to be clarified that require discussion on the other.

5.1.4 Introduction of the possibility to decide in mass proceedings also without the consent of the parties on the basis of a video hearing in accordance with section 128a ZPO.

Furthermore, the possibility to decide in mass proceedings without the consent of the parties on the basis of a video hearing according to section 128a ZPO could be helpful.

At least in simple, similar cases, such as air passenger rights cases, this can also save time for the single judges. In addition, litigation costs could be (travel costs of lawyers/parties) could be saved . The principle of immediacy would only be broken in the interest of procedural economy.

However, in current practice, conducting a video hearing does not always mean saving time for judges,

but is in part associated with considerable additional effort compared to scheduling a hearing in person due to cumbersome organisation, which is the responsibility of the judges. In this respect, the judicial administrations are called upon to create solutions that do not require more time for the judges than in the case of scheduling a hearing in person. This includes, in particular, specialised personnel who prepare online hearings technically and organisationally.

5.1.5. introduction of a possibility for the competent appellate court to decide fundamental questions of law irrespective of the resolution of the appellate proceedings beyond section 565 p. 2 ZPO.

In practice, it can be observed that appellants who are in danger of losing before the appellate court on a fundamental legal question evade the decision of the supreme court by withdrawing the appeal.

In order to prevent this "flight into revision withdrawal", a possibility beyond section 565 sentence 2 of the Code of Civil Procedure should be introduced to decide fundamental questions of law by the competent revision court even if the revision proceedings are disposed of - be it by revision withdrawal or otherwise.

The AG is in favour of introducing this possibility for the review court to make a decision if there is an "objective interest in clarification". The concept of an objective interest in clarification is characterised by the established case law of the Federal Constitutional Court. According to this
The Federal Constitutional Court requires a "special objective interest" in abstract
a "special objective interest" in the "clarification" of the validity of the norm under constitutional review (established case law since BVerfG, judgments of 30 May 1956 - 1 BvF 3/53 -, lastly

BVerfGE 127, 293 (319), marginal no. 100, juris, and of 20 March 2013 - 2 BvF 1/05 -, BVerfGE 133, 241 (259), marginal no. 45, juris). In view of this, a corresponding use of the term (i.e. an objective interest in clarifying the legal question put up for review) would allow for the legally secure and uniform handling of the newly created instrument.

Such a decision-making possibility would increase legal certainty, as legal questions relevant to the decision would thus be clarified by the highest courts earlier than has been the case up to now. The "strong player" would no longer be able to "buy his way out" of an appeal by withdrawing it, acknowledging it or settling it, and would thus be able to keep the legal question relevant to the decision in abeyance after he has learned of a preliminary legal opinion of the appellate court. This applies in particular in references for a preliminary ruling under Article 267 TFEU, which could be upheld if the possibility of clarifying the legal question were opened despite the proceedings having been disposed of.

5.1.6. creating the possibility of ordering secrecy for submitted documents by means of a resolution, without having to hold a hearing on the exclusion of the public pursuant to sections 172, 174 GVG.

In insurance cases, especially in premium increase actions, the presentation of the insurer's premium calculation and its verification by expert opinions, which must be provided in part, requires the submission of extensive attachments that contain business secrets and with regard to which the insurer has a legitimate interest in secrecy. In contrast, the law firms acting on the policyholder side often have a great interest in using the findings from the calculations in parallel cases. However, a decision to keep the necessary information confidential requires, pursuant to §§ 172 no. 2, 174 (3) GVG, the mandatory

Conducting an oral hearing in which the public is formally excluded (also OLG Hamm decision of 22.03.2019 - file no. 20 W 4/19) and then the decision to keep the information secret is only made for the persons present. Currently, there are no statutory provisions for a uniform and effective protection of secrets in German civil (procedural) law. For example, § 172 no. 2 GVG, § 174 para. 3 GVG are not considered sufficiently effective for the protection of business secrets. Even an in-camera procedure (see e.g. § 138 TKG) does not apply in civil proceedings (cf. MüKoEuWettbR/Makatsch/Kacholdt, 3rd ed. 2020, GWB § 33g marginal no. 90).

Existing regulations for a more pragmatic solution for mass proceedings could be used for a substantial simplification of the cumbersome procedure of the current law. For the protection of trade secrets in actions brought under the Trade Secrets Act (entered into force on 26 April 2019), Sections 16, 19, 20 GeschGehG, for example, provide that information may be classified as confidential by the court upon application and that the litigants are then obliged to keep this information confidential. The court may order various measures for its protection by way of an order as of the pendency of the legal dispute, if the party making the application makes a prima facie case that it is information in the sense of a trade secret. The classification of the information as confidential and the order of restrictions within the meaning of section 19 (1) GeschGehG can only be challenged together with the appeal on the merits, so that a possible delaying tactic of the parties can be stopped and cumbersome procedures are excluded. However, other, more open approaches are also conceivable, such as the protection of confidential information in intellectual property rights, e.g. in §§ 140 c, 140 d PatG, §§ 101 a, 101 b UrhG.

The creation of a possibility comparable to such regulations to order the secrecy of submitted documents by way of a decision without an oral hearing would thus have had a positive effect, especially in the

The new system will make work considerably easier in cases of mass incidents under insurance law.

5.1.7. limiting the number of instances in mass proceedings to one instance of facts

A considerable acceleration of proceedings and relief of the civil judiciary could be achieved if the court of appeal in mass proceedings were limited to one instance of fact.

Neither Article 19 (4) sentence 1 of the Basic Law nor the principle of the rule of law require a chain of instances. Rather, it is the task of the legislature to decide, after weighing and balancing the various interests affected, whether it should remain with one instance or whether several instances should be provided and under which conditions they can be invoked *(see BVerfG 24 June 2014 - 1 BvR 2926/13 marginal no. 32, BVerfGE 136, 382; see also BVerfG 8 June 2021 - 2 BvR 1306/20 marginal no. 21).*

5.2 Special features in labour law

When dealing with mass labour court proceedings, practical problems arise due to the involvement of honorary judges in the decisions as provided for in labour law. This leads to delays in the course of proceedings, especially when decisions are made in written proceedings. In labour courts, decisions are made in all instances with honorary judges who change from session to session. The same chamber or the same senate therefore decides in mass proceedings on different days of the session with different members of the bench. The honorary judges must therefore be reintroduced to the legal issues at each session or familiarise themselves with them. Therefore, even in subsequent proceedings in mass cases, the decisions to be made on the day of the session can only be discussed with the honorary judges on that day,

so that there cannot yet be a finalised decision. 2 of the Code of Civil Procedure (ZPO) applies to the setting down of the decision, or whether the decision must be available in its entirety on the day of the hearing on which a decision is made by written procedure, because the time limit for the submission of written pleadings corresponds to the end of the oral proceedings, it is difficult to comply with these legal requirements because of the necessary involvement of the honorary judges, to whom the decision must be forwarded for signature in appeal and revision proceedings *(section 69, subsection 1, sentence 1 and section 75, subsection 2 of the ArbGG).*

Against this background, the WG Mass Procedure proposes the following possible solutions:

5.2.1 Decision by written procedure, pronouncement by service

In view of the problems described in the practical procedure, it would therefore be essential to clarify in the ArbGG that in mass proceedings in the case of decisions by written procedure, the pronouncement is replaced by the service of the judgment (section 310 (3) ZPO).

If there are reservations about such a regulation with regard to Art. 6 ECHR, a clarification in the ArbGG would be desirable to the effect that only the operative part signed by all judges must be available when the decision reached in the written procedure is pronounced and that otherwise it can be proceeded with as in the case of a decision after oral proceedings, i.e. the decision can be set down in writing after the pronouncement of the decision and sent to the honorary judges by post for their signature. On the one hand, this makes it possible to involve the volunteer judges provided for in labour court proceedings in the decision-making process and, on the other hand, it makes it possible to have a practicable procedure for setting aside the decision reached.

One of these provisions was intended to enable a decision in the first instance in mass proceedings - in deviation from section 46 (2) sentence 2 ArbGG - to be made by written procedure, provided that the legal questions to be decided have already been clarified by the highest courts.

5.2.2 Suspension possibility

In order to enable a stay also in mass labour court proceedings of variant 1 (mass dismissal protection actions), it would be necessary to clarify by law that the special duty to promote proceedings existing in dismissal protection proceedings *(section 61a ArbGG) does* not prevent the stay of these proceedings.

In addition, the aim should be that a stay decision in mass proceedings is possible in all instances - also in the appellate instance - without the participation of honorary judges. This applies all the more if such a stay decision would be prejudiced for the current bench by previous stays due to the special features of labour court proceedings described above. For the opening of a decision solely by the professional judge members of the senates of the BAG, a reference to the provision of section 55 (1) no. 8 ArbGG would be necessary not only, as is currently the case, for the appeal proceedings in section 64 (7) ArbGG, but also for the revision proceedings in section 72 (6) ArbGG.

5.2.3 Exception to the obligation under section 72 (3) ArbGG

For the reasons outlined above, the decision by order of dismissal pursuant to section 552a of the Code of Civil Procedure *(*ZPO*)*, which is also admissible in appeal proceedings before the Labour Court *(see BAG 23 July 2019 - 3 AZR 357/17), is not* very practicable. Honorary judges do not participate in the reference order required prior to such a decision. The order of dismissal issued on the basis of this reference must nevertheless be coordinated with the volunteer judges. More practical

with comparable effect would therefore be an exception to the binding effect of the Federal Labour Court on the admission of an *appeal* in mass proceedings, as provided for in section 72 (3) ArbGG, insofar as the legal questions raised have been clarified in the meantime and the appeal would have no prospect of success, i.e. the court of *appeal has decided the* case "correctly" (*cf. on the comparable legal situation in the case of a complaint of non-admission AR-Heinkel 10th ed. section 72a ArbGG marginal no. 14).*

5.3 Structure, scope and timing of the parties' submissions

An increasing problem, which occurs especially in mass proceedings and causes a far above-average amount of work at the courts, is the "bloating" of pleadings with text modules, partly without any recognisable reference to the concrete facts of the case, partly without a clear allocation of the annexes.

In addition, there is an increasing phenomenon that even after the reply of the plaintiff, further pleadings are continuously exchanged and, last but not least, often submitted a few days before or even during the oral proceedings. This prevents the court from conducting the proceedings efficiently, at least when it has to take note of the written submissions and decide on them in order to avoid hearing objections.

The WG agrees that the possibility of concrete guidelines on the structure and scope of the parties' submissions would make the courts' work considerably easier.

5.3.1 Structure of the party submission

Structuring in mass proceedings can help to filter out the relevant criteria in which cases differ in (page-long) text module passages and thus facilitate the penetration of the file. However, even in short factual presentations (e.g. air passenger rights), the

so directly relevant excerpts of files or prepared

factual overviews are generated, which facilitate further processing.

In particular, digitisation opens up a number of new possibilities for civil courts to offer meaningful structures for appropriate presentation. The introduction of the electronic file to date still lags far behind the possibilities of digitisation. There, pleadings are merely presented in their previous form as Word or pdf documents, or as scans, and read on the screen. Digital tools that support the development of the facts of the case, for example by structuring the entry, recording and linking of data or enabling their structuring, have hardly been used by the judiciary so far or are not yet available. In the course of the necessary further digitisation of state services, digital access to the justice system will also play a role. In this context, suitable possibilities should be examined in which structure the facts of the case, offers of evidence and legal explanations are fed into the EDP of the justice system and processed.

The use of online tools to record facts is inevitably associated with a structuring of the parties' submissions. Parties who are not represented by lawyers are guided by targeted queries to submit relevant descriptions of the facts. The design of the interrogation systems determines how and which facts are recorded. The principle of the right to be heard also requires free text fields. The defendant's side receives the facts recorded in this way and can also "confirm", "deny" and/or add its own facts at the appropriate point, guided by input masks. The result of the facts recorded in this way can relieve the court of work as an automatically generated "table of facts" like a file extract. It can be shown at a glance where facts are in dispute, which offers of proof have been made, etc. This pre-structuring facilitates the work within the court. This pre-structuring facilitates the work within the courts and at the same time helps the parties to gain a simple overview of the facts described.

If the facts are to be recorded in a structured manner by lawyers, for example, only free text fields could be used.

but which, according to certain factual sections (alternatively

The legal system is not restricted by the fact that it is subdivided into different types of claims (e.g., bases of claims) or other substantive structuring requirements. This does not restrict the lawyer's freedom. What is important is that the opposing party must structure its submission or its legal arguments according to structuring guidelines or guided by a digital tool in such a way that an automatic allocation to the relevant parts of the plaintiff's submission can take place. Such structured recording also serves lawyers by providing a simple overview and helps them to fully grasp the facts of the case and to avoid errors. In this case, the court should also receive an automatically generated "relation table" or digital excerpt from the file, which shows the disputed and relevant points.

The submissions do not have to be made "in a table". If it is made via digital input fields, it can be presented in very different ways depending on who is viewing it (also as continuous text separated by parties, like a normal pleading).

The WG does not only see no major disadvantages in such structural requirements, but on the contrary, advantages for the legal profession and the litigants, as the risk of overlooking relevant factual submissions that may be disputed could be reduced by appropriate structures in data entry. However, such solutions should not be developed by the judiciary alone.

The WG is expressly in favour of joint model projects by judges and lawyers in order to develop practical solutions.

5.3.2 Scope and timing of the parties' submissions

The AG would find a possibility to limit the scope or number of pleadings in civil proceedings to be a considerable relief that would bring an extraordinary increase in the efficiency of the civil court's work.

Such requirements exist not only in countries with an Anglo-American legal tradition, such as Ireland, but also in Israel, Luxembourg, the Netherlands and Portugal. The associated considerable gain in efficiency would affect the entire civil justice system beyond the handling of mass proceedings.

The AG is also in favour of reforming the right to reject late submissions. The time limits of section 132 of the Code of Civil Procedure (ZPO) do not work in practice, especially since they are too short (1 week or 3 days), especially for the volumes of pleadings that are common in mass proceedings. The possibility to exclude the reference to pleadings received later pursuant to section 137 (3) sentence 1 ZPO as inappropriate and to require their introduction into the proceedings in the free speech required by section 137 (2) ZPO (Zöller, 33rd ed., section 132 marginal no. 4) is counterproductive especially in mass proceedings and shows that the ZPO is in large parts no longer tailored to today's judicial practice.

The instruments of rejecting late submissions have also proven ineffective in court practice. The requirements for the presentation of the prerequisites for rejection are already high by the legislative design of §§ 282, 283, 296 ZPO, and the case law of the highest courts, in particular the so-called catch-all requirement, has further tightened these requirements for presentation. In particular, in cases where evidence is still pending for other reasons, the effective rejection of late submissions is practically impossible with regard to the standard requirement. The problem is particularly aggravated where judges are unable to order the necessary catch-all measures without delay in order to fulfil the catch-all requirement due to heavy workloads. In these cases, the delay of the legal proceedings is inevitable.

The AG would therefore welcome clear, binding and enforceable legal requirements on the scope and timing of party submissions as a considerable facilitation both for the handling of mass proceedings, but also other proceedings before the labour and civil courts.

5.4 Staffing of the courts

It is already clear that after the diesel cases, the judiciary will be faced with further mass proceedings in other areas. In order to cope with these, the current staff at the courts concerned is not even close to being sufficient. The organisation of work provided for by the ZPO - judges as "lone fighters" - is also not suitable for handling mass proceedings ("uneven playing field", see above). This imbalance must be eliminated.

5.4.1 Significant increase in staffing levels

Since mass proceedings are not a temporary phenomenon, it is indispensable to adjust the staffing of the courts concerned - not only by individual posts that are saved elsewhere, but to a sufficient extent. This includes increasing the number of judges as well as the number of specialised court staff.

5.4.2 Introduction of an assistant judge

The WG also advocates the introduction of a judicial assistant at the courts that are particularly affected by mass proceedings, in order to support the judges, for example, in the preparation of the facts of the case and legal research. While the highest federal courts have academic staff, the judges of the lower courts generally do not have any professional support at their disposal.

They could also make use of such a "support pool". The decision and the conduct of the proceedings would, of course, remain with the judges; however, research and preparatory work, such as the elaboration of questions relevant to the decision and facts requiring evidence, could be delegated to the judicial assistance. Decisive

is that the fluctuation in such a "support pool" should not be too high.

may, in order to ensure corresponding practical relief.

In Lower Saxony, judicial assistance was introduced in 2020 for civil and labour courts. The WG Mass Proceedings is in favour of establishing a corresponding assistance at courts affected by mass proceedings in other federal states as well, if the experience with the model there is good.

5.5. Accelerated online procedure for standardised cases

The proposal of the working group "Modernisation of Civil Procedure" to introduce an accelerated online procedure (BOV) is welcomed for very standardised procedural constellations. However, the more complex the subject matter of the dispute, the less suitable a procedure is for a BOV.

From the point of view of the duration of proceedings, however, the advantages of a BOV should not be overestimated. Time expenditure for judicial activities nevertheless arises and must be taken into account in Pebb§y.

The following suggestions are made for the introduction of a BOV:

5.5.1 Scope of application and limit of the amount in dispute

The BOV should be limited to a few, highly standardisable proceedings (especially air passenger rights cases). The proposal of the WG "Modernisation of Civil Procedure" on the personal scope of application (consumer as plaintiff, business as defendant) is shared. There are also no objections to introducing the BOV for amounts in dispute up to €5,000. Air passenger rights cases in particular require such a limit on the amount in dispute.

5.5.2 Design

The development of intelligent query and input systems can facilitate access to justice. However, care must be taken not to push the boundary to legal advice in the process.

A BOV should be possible without a pronouncement date. The simplified procedure according to § 495a ZPO does not require such a date.

The transition to the regular procedure should be possible for the court in the BOV at any stage of the proceedings upon application or ex officio. The proposal of the WG "Modernisation of Civil Procedure" to make the continuation at the general civil court dependent on the payment of a (further) advance on court costs seems practicable. Thus, the continuation depends on the party to the action.

5.5.3 Time expenditure

In the BOV, too, judicial activity requires time for factual and legal examination, hearings, taking of evidence and drafting of judgements. These times must be realistically taken into account when calculating the Pebb§y products. If online proceedings are really to be "accelerated", sufficient staffing of the courts is nevertheless indispensable.

5.6. Exploiting the potential of digitalisation

Digitalisation and the use of artificial intelligence (AI) offer considerable potential to facilitate the processing of mass proceedings for the judiciary. For example, in a first step ("AI 1st stage"), the use of AI could support judges in removing recurring lecture in mass proceedings (samples, text modules, copies from case databases, etc.) from the case management system, which is tailored to the specific case.

The court has to distinguish between the arguments relating to the case and those relating to the case in order to focus on the facts relevant to the decision.

The potential of digitalisation should be exploited precisely to facilitate the processing of mass proceedings. In the long run, the analogue way of working of the German judiciary is not up to the technical "upgrading" that the judiciary is encountering and will encounter even more in the foreseeable future. From a judicial perspective, it seems important that digital tools and AI facilitate and support the work of the judiciary, but should not take over the judge's very own activities.

The first model projects for the use of AI in the justice system already exist, but not yet on a larger scale.

The Mass Proceedings WG therefore proposes that the DRB advocate for model projects with judicial practitioners to exploit the potential of digitalisation, including the use of digital tools up to and including artificial intelligence, to facilitate the processing of mass proceedings.

6. summary

The burden of mass proceedings on the German judiciary has been steadily increasing for years. Judges at civil courts in particular are sometimes working far beyond their limits. There is a considerable need for action to ensure the ability of the German judiciary to work and to counteract a loss of confidence in the ability of the judiciary to function, which is actually endangered by mass proceedings in particular.

The WG on Mass Proceedings sees the following possible solutions:

1. **Changes to civil procedure law**

   - Introduction of a preliminary ruling procedure before the competent review court

   -introduction of the possibility of a stay pursuant to section 148 of the Code of Civil Procedure with regard to a case filed with the

   Court of appeal pending preliminary ruling or appeal proceedings

   - Introduction of the possibility, in mass proceedings even without the consent of the parties, to

to decide by written procedure in accordance with section 128 (2) of the Code of Civil Procedure (ZPO)

   - Introduction of the possibility to decide in mass proceedings also without the consent of the parties on the basis of a video hearing pursuant to section 128a ZPO

   -introduction of a possibility for the competent appellate court to decide fundamental questions of law irrespective of the disposal of the appellate proceedings beyond section 565 sentence 2 ZPO

   - Creation of a possibility to order secrecy for submitted documents by resolution without holding a hearing on the exclusion of the public pursuant to §§ 172, 174 GVG for this purpose.

   -Limitation of the court of appeal in mass proceedings to one factual instance

2. **Amendments to the Labour Court Act**

   -Decision by written procedure, pronouncement by service -

   Possibility of suspension

   -Exception from the obligation under section 72 (3) ArbGG

0. Guidelines on the structure, scope and timing of the party's submission

1. Staffing of the courts

-Significant increase in staffing levels

- Introduction of an assistant judge

2. Accelerated online procedure for standardised cases

3. Exploiting the potential of digitalisation