



COMPARATIVE LAW REVIEW

VOLUME 17 · N. 3 · 2026

*Special Issue — Harmonizing and Enhancing the Enforcement of Consumer Law: A
Comparative Analysis of Germany and Italy*

COMPARATIVE LAW REVIEW

The Comparative Law Review is a biannual journal published by the
I. A. C. L. under the auspices and the hosting of the University of Perugia Department of Law.

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Comparative Law Review is registered at the Courthouse of Monza (Italy) - Nr. 1988 - May, 10th 2010.

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DISCLOSURE OF EVIDENCE IN REPRESENTATIVE ACTIONS UNDER GERMAN LAW¹

Malte Jochem

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This paper addresses the implementation of Article 18 of the Representative Actions Directive in Germany and, in this context, the possibilities for obtaining a disclosure of evidence by the opposing party or third parties in representative action proceedings under German law. It outlines the requirements imposed by the German Code of Civil Procedure on the disclosure of evidence and the sanctions available to the court if a disclosure order is not complied with. It also highlights the restrictive attitude taken by courts towards the disclosure of evidence by the opposing party and the limited practical significance of this instrument in German civil proceedings.

Keywords: Representative Actions Directive – Evidence – Disclosure of evidence – Civil Procedure – Germany

I. INTRODUCTION

Access to information and evidence is a decisive factor in the success of legal proceedings and, if not available, can deter potential plaintiffs from bringing a lawsuit in the first place. Due to the principle generally applicable in the procedural law systems of EU Member States, and in particular in Germany, that each party must present and prove the facts favourable to it in a trial, the procedural disclosure of evidence by the opponent or a third party is only an exception in European legal systems. This circumstance is particularly serious in areas where at least one person is subject to a structural information deficit, while another has a corresponding information advantage. Such information asymmetries occur in various areas of law, most prominently in the field of industrial property rights or antitrust law. Similarly, it can be observed that consumers are also structurally disadvantaged vis-à-vis traders, both in the market in general and in civil proceedings. A defining aspect of this disadvantage is the existence of information asymmetries and thus a typical information deficit for consumers. This has a negative impact on consumers in that, in the event of damage caused by a trader, they either do not file legal actions or have considerable difficulty proving this damage in court, as the relevant evidence is often exclusively in the hands of the defendant trader.

The EU legislator has responded to this problem, among others, with the Directive (EU) 2020/1828 of 25 November 2020 on representative actions (the Representative Actions Directive). Article 18 of this directive provides for a mechanism that is intended to enable qualified entities, which are exclusively entitled to bring legal action pursuant to Art. 7 para. 1 of the Representative Actions Directive, to obtain the disclosure of evidence by the opposing trader or third parties. Conversely, this right is also available to the defendant traders. Furthermore, Article 19 of the Representative Actions Directive provides for the introduction of sanctions in the event of non-compliance with a court order to disclose evidence. According to Article 24 of the Representative

¹ This paper was written in connection with a presentation given at the workshop “Harmonising and Enhancing the Enforcement of Consumer Law: A Comparative Analysis” at Villa Vigoni in May 2025.

Actions Directive, these provisions were to be implemented by the Member States by 25 December 2022.

In Germany, the Representative Actions Directive was implemented on 1 October 2023 with the Act Implementing the Representative Actions Directive (*Verbandsklagenrichtlinienumsetzungsgesetz*). The core component of this implementation act is the new Consumer Rights Enforcement Act (*Verbraucherrecht durchsetzungsgesetz, VDuG*), which implements the essential components of the Representative Actions Directive. With regard to the disclosure of evidence under Article 18 of the Representative Actions Directive, the German legislature decided against introducing new regulations. Instead, in the explanatory memorandum to the implementation act, it merely refers to Sections 142 to 144 of the German Code of Civil Procedure (*Zivilprozessordnung, ZPO*) and thus to existing law.² The only innovation is found in Section 6 VDuG, which, by implementing Article 19 of the Representative Actions Directive, introduces new sanctions in the event of non-compliance with court disclosure orders.

Based on the decision of the German legislature to refer to existing law for the disclosure of evidence in representative actions, this article aims to provide an overview of the existing provisions on the disclosure of evidence in German representative action proceedings by focusing on Sections 142 and 144 ZPO. Section 143 ZPO is not dealt with, even though the legislature has referred to it, as it is a provision that is practically irrelevant.

II. DISCLOSURE OF EVIDENCE PURSUANT TO SECTIONS 142, 144 ZPO

In German civil proceedings, Sections 142 and 144 ZPO enable the court to order the disclosure of evidence in relation to a party to the proceedings or a third party. The provisions are rooted in Roman law³ and have remained largely unchanged since their initial introduction in 1877. However, a substantive amendment and extension was made in 2001 in the course of the Civil Procedure Reform Act (*Zivilprozessreformgesetz*).⁴ At the time, this change led to mixed reactions in legal literature. On the one hand, considerable concerns were expressed about the extension of disclosure, as it was feared that this could lead to situations similar to those under US discovery rules.⁵ On the other hand, the changes in content were expressly welcomed with regard to the associated strengthening of the possibilities for determining the material truth.⁶

The fears of critics of the Civil Procedure Reform Act have not materialised. However, very similar reactions have been seen again in the course of the implementation of the Representative Actions Directive. The statements of some trade associations on the draft bill of the Act Implementing the Representative Actions Directive in particular refer to the perceived danger of “American conditions” should the implementation of Article 18 of the Representative Actions Directive lead

² German Parliament printed document (*Bundestagsdrucksache, BT-Drs.*) 20/6520, 73.

³ For details, see: V. Kern, *Urkundenvorlage bei Kartellschadensklagen*, Tübingen, 2020, 7 et seqq., 23 f.

⁴ Civil Procedure Reform Act of 27 July 2001, Federal Law Gazette I 2001, No. 40, 1887, 1890.

⁵ T. Lüpke and R. Müller, „Pre-Trial Discovery of Documents“ und § 142 ZPO – ein trojanisches Pferd im neuen Zivilprozessrecht?, in *Neue Zeitschrift für Insolvenz- und Sanierungsrecht*, 588, 589 (2002); S. Steuer, *Justizreform – von außen betrachtet*, in *Zeitschrift für Wirtschafts- und Bankrecht*, 1889 (2000).

⁶ R. Greger, *Zwischen Mediation und Inquisition – Neue Wege der Informationsbeschaffung im Zivilprozess*, in *Deutsches Steuerrecht*, 479, 484 (2005); A. Stadler, *Inquisitionsmaxime und Sachverhaltsaufklärung: erweiterte Urkundenvorlagepflichten von Parteien und Dritten nach der Zivilprozessrechtsreform*, in H. Nakamura, H. W. Fasching, H. F. Gaul and A. Georgiades, *Festschrift für K. E. Beys, Dem Rechtsdenker in Attischer Dialektik*, Volume Two, Athens, 2003, 1625, 1645; G. Wagner, *Urkundenedition durch Prozeßparteien – Auskunftspflicht und Weigerungsrechte*, in *JuristenZeitung*, 706, 719 (2007).

to an extension of the obligations to disclose evidence imposed by Sections 142 and 144 ZPO.⁷ Ultimately, there has been no change in content, which means that the existing provisions are to be reviewed with regard to their requirements.

II.1 Purpose and general procedure

With Section 142 ZPO, the legislature wanted to give the court the opportunity to obtain a comprehensive overview of the facts of the case at the earliest possible stage.⁸ The primary purpose of the provision is therefore to clarify inadequate party submissions and serves in particular to facilitate the conduct of the proceedings.⁹ The same applies to Section 144 ZPO, which enables the court to form an opinion of specific evidence on which a party has based its submissions through direct observation. In addition, Sections 142 and 144 ZPO can also serve to prove disputed facts, which is particularly relevant from the parties' point of view.¹⁰

The possibility of ordering the disclosure of evidence under Sections 142 and 144 ZPO is opened by one of the parties referring to certain evidence in its submissions. This is a necessary requirement as stipulated in the wording of Section 142 ZPO and is also seen as a general precondition regarding Section 144 ZPO. After that, the court has the option to order the disclosure of such evidence in its own discretion. Parties may request such disclosure, but the court is not obliged to comply with this request. Should the court order the disclosure, but the respective party does not comply with such order, the court may impose sanctions on this party.

II.2 Types of evidence

A court order issued pursuant to Section 142 ZPO may extend to records (*Urkunden*) and other documents (*sonstige Unterlagen*). Records are those within the meaning of Sections 415 et seq. ZPO and include all written statements of thought.¹¹ The decisive factor here is that records must be *directly legible*, i.e. they do not require the use of additional (technical) aids to be read.¹² Consequently, this covers all documents that are usually in written form and are not held in electronic form. The term "other documents" is broader and can include family trees, plans, other drawings, photographs or X-rays, also as long as they are not held in electronic form.¹³ Copies of the

⁷See for example: Deutsche Wirtschaft, *Stellungnahme der deutschen Wirtschaft*, available at: https://www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/Stellungnahmen/2023/0303_Stellungnahme_GDV_VRUG.pdf?__blob=publicationFile&v=1, 5 f (last visited 9 March 2026); Verband der Chemischen Industrie e.V., *Referentenentwurf für ein Verbandsklagenrichtlinienumsetzungsgesetz (VRUG)*, available at: https://www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/Stellungnahmen/2023/0303_Stellungnahme_VCI_VRUG.pdf?__blob=publicationFile&v=1, 9 (last visited 9 March 2026).

⁸ BT-Drs. 14/4722, 78.

⁹ BGH, judgment of 27 May 2014, XI ZR 264/13; R. Greger, in Zöller, *Zivilprozessordnung*, Cologne, 2026 (36th Ed.), Section 142, margin no. 1.

¹⁰ This is the prevailing view, see, for example: BGH, decision of 26 October 2006, III ZB 2/06, cited from juris, margin no. 5; OLG Frankfurt, decision of 25 June 2018, 8 W 28/18, cited from juris, margin no. 17; OLG Saarbrücken, decision of 27 July 2020, 5 W 33/20, cited from juris, margin no. 7; D. Leipold, *Die gerichtliche Anordnung der Urkundenvorlage im reformierten deutschen Zivilprozess*, in E. Schilken, G. Kreft, G. Wagner and D. Eckardt, *Festschrift für Walter Gerhardt*, Cologne, 2004, 563, 585; R. Koch, *Mitwirkungsverantwortung im Zivilprozess*, Tübingen, 2013, 156; A. Stadler, in H.-J. Musielak and W. Voit, *Zivilprozessordnung*, Munich, 2025 (22nd Ed.), Section 142 ZPO, margin no. 1 with further references; G. Wagner, see fn. 6, 710; a different view is held by: U. P. Gruber and E. Kießling, *Die Vorlagepflichten der §§ 142 ff. ZPO nach der Reform 2002*, in *Zeitschrift für Zivilprozess*, 305, 311 et seqq. (Issue 116, 2003); I. Saenger, *Grundfragen und aktuelle Probleme des Beweisrechts aus deutscher Sicht*, in *Zeitschrift für Zivilprozess*, 139, 148 f. (Issue 121, 2008).

¹¹ Cf. BGH, judgment of 28 November 1975, V ZR 127/74, cited from juris, margin no. 6.

¹² C. Berger, in Stein/Jonas, *Kommentar zur Zivilprozessordnung*, Volume Five, Tübingen, 2015 (23rd Ed.), Section 415 ZPO, margin no. 1.

¹³ C. Althammer, in Stein/Jonas, *Kommentar zur Zivilprozessordnung*, Volume Two, Tübingen, 2016 (23rd Ed.), Section 142 ZPO, margin no. 13; R. Greger, see fn. 9, margin no. 4.

respective records of documents are also covered and are therefore equivalent to the originals.¹⁴ The scope of evidence is expanded by Section 144 ZPO, which allows for the disclosure of visual evidence, being all objects that can be perceived by sight, hearing, smell, taste or touch. According to the explicit legal provision in Section 371 para. 1 sentence 2 ZPO, electronic documents, such as text, audio or video files as well as emails, chat histories, screenshots, software or websites, are also considered visual evidence. The obligation to disclose evidence only applies to evidence in the possession of a party to the proceedings or a third party. It follows that only evidence that already exists at the time of the disclosure order is covered. Accordingly, the creation of records, other documents or visual evidence cannot, in principle, be ordered within the framework of Sections 142 and 144 ZPO.¹⁵

II.3 Requirements for party submissions

A significant barrier to excessive disclosure orders is the burden of presentation and substantiation incumbent on the parties for their respective submissions. Specifically, this means that a court can only order the disclosure of evidence in accordance with Sections 142 and 144 ZPO if the parties' submissions are conclusive (*schlüssig*). It is therefore necessary that the respective evidence relates to facts presented by a party that are relevant to the decision and that the party responsible for presenting these facts has fulfilled the requirements of the burden of substantiation incumbent upon it.

II.4 Statement of facts

In accordance with the principle of party submission (*Beibringungsgrundsatz*), the court may only rule on the facts presented by the parties. The prerequisite for taking evidence is therefore always that evidence is to be taken on a fact previously presented by one of the parties. In addition, the court may not derive anything from it that has not already been presented by the parties.¹⁶ If a party seeks the disclosure of evidence pursuant to Sections 142, 144 ZPO, it must first present the facts to which the respective evidence relates. In addition, it must justify the significance of the evidence for the desired decision, i.e. the relevance of the evidence to the proceedings or the decision, as well as its suitability as evidence.¹⁷ In contrast, it is irrelevant to the possibility of a disclosure order whether the facts presented here are disputed or undisputed between the parties.

II.5 Conclusiveness (Schlüssigkeit)

The standard civil procedural requirements apply to the presentation of facts by a party. This is therefore not a distinctive feature of the disclosure of evidence under Sections 142 and 144 ZPO. This means in particular that the order to disclose evidence can only be issued on the basis of conclusive submissions (*schlüssiger Vortrag*).¹⁸ Conclusiveness is always given if the facts presented, assuming they are true, in conjunction with a legal principle, are suitable for making the alleged legal consequence appear to have arisen,¹⁹ whereby the standard to be applied is the subsumption

¹⁴ J. Fritsche, in W. Krüger and T. Rauscher, *Münchener Kommentar zur Zivilprozessordnung*, Volume One, Munich, 2025 (7th Ed.), Sections 142-144 ZPO, margin no. 9.

¹⁵ BGH, judgment of 4 May 2018, V ZR 266/16, cited from juris, margin no. 12; H. Prütting, in H. Prütting and M. Gehrlein, *Zivilprozessordnung*, Hürth, 2024 (16th Ed.), Section 142 ZPO, margin no. 5.

¹⁶ BGH, judgment of 27 May 2014, XI ZR 264/13, cited from juris, margin no. 28.

¹⁷ BGH, judgment of 27 May 2014, XI ZR 264/13, cited from juris, margin no. 28; R. Greger, see fn. 9), margin no. 7; V. Kern, see fn. 3, 35.

¹⁸ BT-Drs. 14/6036, 121; BGH, judgment of 26 June 2007, XI ZR 277/05, cited from juris, margin no. 20.

¹⁹ BGH, decision of 14 March 2017, VI ZR 225/16, cited from juris, margin no. 7.

capability (*Subsumtionsfähigkeit*) of the submission.²⁰ In other words: If, according to the submissions of one party, which are assumed to be true, all factual requirements of the asserted claim are fulfilled, these submissions are deemed to be conclusive. The aim of the parties is thus to describe the respective facts so precisely that the court is able to examine their conclusiveness.²¹ The burden of substantiation therefore describes the necessity of presenting all the facts that are necessary for the examination of conclusiveness with sufficient precision.²² In this context it is not sufficient for a party to merely recite the elements of the asserted legal norm.²³ Rather, it must sufficiently substantiate its submission, i.e. explain the facts presented in more detail or analyse them in greater depth.²⁴

However, there are no strict guidelines regarding the scope or specific level of detail of the submissions. The Federal Court of Justice (*Bundesgerichtshof*, *BGH*) assumes in principle that this question must be answered on the basis of the circumstances of the individual case and depends on what is reasonable and possible for the respective party, particularly with regard to the opponent's submissions.²⁵

Thus, there is no blanket answer to the question of the scope of the burden of substantiation. It depends specifically on the individual case and can range from rather general statements to very detailed submissions. Clarity can only be gained from a reverse perspective: This is because a party's submission will in any case be unsubstantiated if the facts are described so imprecisely that the court is unable to subsume them.²⁶ Furthermore, a broadly general submission may initially be insufficient if the (detailed) submissions of the opposing party make the respective statement of facts appear "unclear" in terms of its conclusiveness.²⁷

As a result, the requirement to substantiate with respect to the disclosure of evidence can significantly limit a party's legal protection options if the requirements for the conclusiveness test are set (too) high. In practice, it is often the case that the party requesting the disclosure of evidence is not only not in possession of this evidence, but also has no knowledge of the facts to be proven that underlie the respective elements of the relevant legal norm. In such cases, such party will often be unable to do more than make relatively vague assertions, which may not be sufficient to enable a complete subsumption.

II.6 Prohibition of "fishing expeditions"

In this regard, it should be noted that, according to general opinion, all measures under German law aimed at obtaining information or evidence that require the cooperation of the non-risk-bearing opponent or third parties must not lead to "fishing expeditions".²⁸ According to the prevailing

²⁰ D. von Selle, in V. Vorwerk and C. Wolf, *Beck'scher Online-Kommentar Zivilprozessordnung*, Munich, 2025 (59th Ed.), Section 138 ZPO, margin no. 10 f. with further references.

²¹ M. Rust, *Die Substantiierungslast im Zivilprozess*, Baden-Baden, 2021, 26.

²² M. Rust, see fn. 21, 37.

²³ D. von Selle, see fn 20, margin no. 1.1.

²⁴ W. Scheuerle, *Zivilprozessrecht*, in *JuristenZeitung*, 32, 33 (1963).

²⁵ BGH, judgment of 27 September 2001, IX ZR 281/00, cited from juris, margin no. 14 with further references; BGH, judgment of 15 January 2004, I ZR 196/01, cited from juris, margin no. 25.

²⁶ D. von Selle see fn 20, margin no. 10.1 with further references.

²⁷ M. Rust, see fn. 21, 27 et seqq.

²⁸ Cf. G. Chudoba, *Der ausforschende Beweis Antrag*, Berlin, 1993, 17 f.; R. Stürner, *Die Aufklärungspflicht der Parteien im Zivilprozess*, Tübingen, 1976, 108 with further references.

view, this applies in particular to the area of Sections 142 and 144 ZPO.²⁹ The legislature has also emphasised that motions aimed at issuing a disclosure order pursuant to Section 142 ZPO must not lead to a “fishing expedition” as this would violate procedural rules.³⁰ Investigative motions for evidence (*ausforschende Beweisanträge*) in connection with the disclosure of records, other documents or visual evidence are therefore generally inadmissible. Difficulties already exist in this problem area because the term “investigative evidence” (*Ausforschungsbeweis*) is not legally defined and has a history of over a century of inconsistent and controversial development in case law and literature.³¹ Essentially, investigative evidence and the investigative motion for evidence aimed at it concern the behaviour of the party bearing the burden of proof, which is aimed at exploring facts or evidence previously unknown to it in order to subsequently base its submission on them or make them the subject of further evidence-taking.³² For Sections 142 and 144 ZPO, this means that an investigative motion for evidence, and thus a “fishing expedition”, is to be assumed if the party requesting the disclosure order does not intend to prove unknown facts, but rather wishes to learn about them for the purpose of its further submission.³³

If the prohibition of “fishing expeditions” were to be regarded as indispensable and understood in an absolute sense, very high requirements would have to be placed on the presentation of facts for this reason alone. However, this is not possible for factual reasons, because it can never be ruled out that a previously unknown piece of evidence also contains information that is not (yet) part of the parties’ submissions. This assumption is also made by case law in connection with documentary evidence when it states that the court may not infer anything from the document that has not *yet* been presented by the parties.³⁴ On the other hand, under German civil procedural law, it is also recognised that there are situations in which a party can only present its case to a limited extent due to a lack of information. It is precisely for these reasons that there are voices in the legal literature that consider investigative motions for evidence to be permissible to a limited extent.³⁵ Permissible investigative motions for evidence associated with reduced conclusiveness requirements must therefore be distinguished from impermissible investigative motions for evidence. Ultimately, it is simply a matter of setting reasonable limits for when a statement of facts is (still) conclusive according to the principles described above and when these requirements have not been met, meaning that the statement is no longer conclusive.

There are various constellations that are discussed in connection with these kinds of “fishing expeditions”. The most relevant case of this is the so-called “allegation in the blue” (*Behauptung ins Blaue hinein*).

²⁹ BGH, decision of 29 November 2016, VI ZB 23/16, cited from juris, margin no. 15; BGH, decision of 14 June 2007, VII ZR 230/06, cited from juris, margin no. 10; OLG Stuttgart, judgment of 15 August 2024, 2 U 30/22, cited from juris, margin no. 144; OLG Frankfurt, judgment of 28 November 2024, 6 U 79/19, cited from juris, margin no. 196; U. P. Gruber and E. Kießling, see fn. 10, 318; T. Lüpke and R. Müller, see fn. 5, 588; H. Prütting, see fn 15, margin no. 2; T. Klink, *Der Commercial Court nach dem Justizstandort-Stärkungsgesetz – ein Modellprojekt für grenzüberschreitende Gerichtsverfahren*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 349, 350 (2024); B. Dombeck, *ZPO-Novelle*, in *BRAK-Mitteilungen*, 122, 124 (2001).

³⁰ BT-Drs. 14/6036, 121.

³¹ In detail: G. Chudoba, see fn. 28, 18, 21 et seqq., 43 et seqq.

³² G. Chudoba, see fn 28, 61.

³³ V. Kern, see fn 3, 48 with further references; R. Koch, see fn 10, 159 f.

³⁴ BGH, judgment of 27 May 2014, XI ZR 264/13, cited from juris, margin no. 28; OLG Stuttgart, judgment of 15 August 2024, 2 U 30/22, cited from juris, margin no. 144; OLG München, decision of 1 March 2021, 8 U 4122/20, cited from juris, margin no. 67.

³⁵ P. F. Schlosser, *Französische Anregungen zur Urkundenvorlagepflicht nach § 142 ZPO*, in M. Coester, D. Martiny and K. A. Prinz von Sachsen Gessaphe, *Privatrecht in Europa, Festschrift für Hans Jürgen Sonnenberger*, Munich, 2004, 135, 148 f.; G. Wagner, see fn. 6, 709.

This refers to motions for evidence or, in connection with Sections 142 and 144 ZPO, factual statements that are made “at random” or “on a whim”. Primarily, this refers to statements of fact that are substantiated and therefore conclusive, but are ultimately based on arbitrary assumptions and were therefore made “at random”.³⁶ According to the prevailing opinion, such arbitrary assertions constitute an abuse of law which is ultimately justified by a lack of need for legal protection.³⁷ From this it is argued that there is a need to limit the admissibility of submissions based on assumptions with the aim of protecting against abuse.³⁸ For this reason, restrictive standards must apply to the assumption of prohibited “fishing expedition” in this sense. In this regard, the Federal Court of Justice repeatedly emphasises that restraint is required when assuming arbitrariness and that, in principle, it can only be assumed in the absence of *any evidence* for the accuracy of the assertion made.³⁹ For Sections 142 and 144 ZPO, this means that a disclosure order can only be rejected on the grounds of arbitrariness if there is nothing to support the accuracy of the relevant facts presented other than an abstract possibility.⁴⁰ If, on the other hand, a party has presented actual evidence, these are not, correctly, “at random”.

However, it should be noted that courts sometimes tend to set the requirements higher than that. For example, the Higher Regional Court of Frankfurt argued in a decision from 2024 that the requirements for conclusiveness should not be set too low in order to avoid a “fishing expedition”.⁴¹

II.7 Example of restrictive stance taken by courts

The restrictive stance taken by the courts with regard to the conclusiveness required for disclosure is particularly evident in a ruling by the Higher Regional Court of Karlsruhe from 2018.⁴² In this case, the plaintiff asserted claims in connection with defectively manufactured breast implants. The defectiveness of the implants was undisputed, and the responsible persons at the manufacturing company were convicted of criminal offences in France in connection with this matter. One of the defendants was the entity responsible for monitoring and certifying the manufacturer of these breast implants under Directive 93/42/EEC. In its action, the plaintiff argued that this defendant had found numerous deviations during its audits and, in particular, had uncovered irregularities in the implants. In support of this submission, the plaintiff requested the disclosure of the audits and deviation reports by the defendant in accordance with Section 142 ZPO. The defendant, on the other hand, argued that it had not violated any obligations and that the deviations did not relate to the points alleged by the plaintiff. Also, it admitted that it found deviations although it did not specify which deviations these were.

The court rejected the plaintiff's application and did not order the disclosure of evidence on the grounds that the requirements for conclusiveness of the submissions had not been met. In the

³⁶ BVerfG, decision of 14 April 2003, 1 BvR 1998/02, cited from juris, margin no. 13; BGH, judgment of 23 April 1991, X ZR 77/89, cited from juris, margin no. 20; K. Kiethe, *Zulässigkeit von Beweisantritten bei Behauptungen auf Grundlage einer zivilrechtlichen Vermutungsbasis*, in *Monatsschrift für Deutsches Recht*, 1325, 1328 (2003).

³⁷ In detail: M. Rust, see fn 21, 59 et seqq.

³⁸ BVerfG, decision of 14 April 2003, 1 BvR 1998/02, cited from juris, margin no. 13; BGH, decision of 12 September 2023, VI ZR 371/21, cited from juris, margin no. 13 with further references; G. Baumgärtel, *Zwei wichtige BGH-Entscheidungen zu Ausforschungsbeweis und „Behauptung ins Blaue hinein“*, in *Monatsschrift für Deutsches Recht*, 987 with further references (1995); R. Koch, see fn 10, 161 with further references; M. Rust, see fn 21, 59 with further references.

³⁹ BGH, decision of 12 September 2023, VI ZR 371/21, cited from juris, margin no. 14 with further references; BGH, judgment of 25 April 1995, VI ZR 178/94, cited from juris, margin no. 13 with further references; BGH, judgment of 23 April 1991, X ZR 77/89, cited from juris, margin no. 20 with further references.

⁴⁰ M. Rust see fn 21, 70.

⁴¹ OLG Frankfurt, judgment of 28 November 2024, 6 U 79/19, cited from juris, margin no. 195.

⁴² OLG Karlsruhe, judgment of 27 June 2018, 7 U 96/17.

court's view, the plaintiff would have had to explain whether the defendant's audits were generally completed without any deviations being identified or whether finding a certain number of deviations was usual.⁴³ The court also held that the plaintiff failed to show that the investigations by the French supervisory authorities or the criminal proceedings against those responsible provided any indication with regard to the alleged violation of duty by the defendant.⁴⁴ The court concluded that the plaintiff was merely seeking to obtain new information and held that this is inadmissible. In the opinion of the court, the defendant was therefore not obliged to disclose the requested evidence or to provide any other information on the deviations found in the audits. It should be noted that, in its decision, the court did find that the plaintiff was dependent on information from the defendant's sphere but nevertheless stated that this did not mean that the court had to take these interests into particular account in its discretionary decision.⁴⁵

II.8 Description of relevant evidence

Furthermore, it is necessary for a party to have referred to the evidence in question. One of the parties (or an intervener pursuant to Section 67 ZPO) must explicitly or implicitly name the evidence in their submission.⁴⁶ It is therefore necessary to identify and thus specify the relevant evidence. However, the exact degree of specificity required for the issuance of a disclosure order remains unclear from the wording of the law. Due to the sanctions that may be imposed on a party or third party in the event of non-compliance with a disclosure order, it must be evident to the opponent of the disclosure order which evidence is to be produced. It is therefore necessary to precisely identify the evidence to be disclosed or, at least, to ensure that it is identifiable.⁴⁷ The requirement for specificity in this regard allows for a certain degree of leeway. In principle, both the designation of a specific file folder containing several documents and the designation of a single document can make the requested documents identifiable. As a first step, it must therefore be clarified what this requirement for specificity refers to.

In case law and legal literature, reference is made in relation to Section 142 ZPO to the fact that the significance of a specifically identified record or other document for the requested decision must be apparent from the conclusive submission of the party. From this, it is concluded that ordering the disclosure of entire collections of documents or categories of documents is inadmissible within the framework of Section 142 ZPO.⁴⁸ Without further justification, the term “the” or “a” document is always used here, which is why, in principle, only a *single* record or other document is the object of reference for the requirement of specificity. The wording of the law does not provide for this restriction and instead refers only to “records or other documents to which a party has referred”. However, the legislature also refers exclusively to “one” or “the” record.⁴⁹ According to the prevailing opinion, this means that the disclosure of collections of documents or categories of documents cannot be requested. The submission of the party requesting the

⁴³ OLG Karlsruhe, judgment of 27 June 2018, 7 U 96/17, cited from juris, margin no. 33.

⁴⁴ OLG Karlsruhe, judgment of 27 June 2018, 7 U 96/17, cited from juris, margin no. 33.

⁴⁵ OLG Karlsruhe, judgment of 27 June 2018, 7 U 96/17, cited from juris, margin no. 33.

⁴⁶ R. Greger, see fn 9, margin no. 6.

⁴⁷ BGH, judgment of 16 March 2017, I ZR 205/15, cited from juris, margin no. 30; R. Greger, see fn 9, margin no. 6; A. Stadler, see fn. 10, margin no. 4a.

⁴⁸ BGH, judgment of 27 May 2014, XI ZR 264/13, cited from juris, margin no. 28; OLG Koblenz, judgment of 23 August 2018, U 311/17 Kart, cited from juris, margin no. 33; OLG Stuttgart, decision of 29 March 2023, 20 Kap 2/17, cited from juris, margin no. 1063; C. Althammer, see fn. 13, margin no. 11; J. Fritsche, see fn 14, margin no. 11; A. Stadler, see fn 10, margin no. 4a with further references; D. von Selle, in V. Vorwerk and C. Wolf, *Beck'scher Online-Kommentar Zivilprozessordnung*, Munich, 2025 (59th Ed.), Section 142 ZPO, margin no. 10; J. Zekoll and G. A. Haas, *Ausweitung ohne Ausforschung – zur Urkundenvorlagepflicht nach § 142 ZPO*, in *JuristenZeitung*, 1140, 1145 (2017).

⁴⁹ BT-Drs. 14/6036, 121.

disclosure of evidence must therefore be precise enough to identify *individual* records or documents. The same applies to visual evidence within the framework of Section 144 ZPO which means that a disclosure of evidence under German law can generally only relate to a single individual piece of evidence or several individually identified pieces of evidence.

With regard to the specific degree of identification, the prevailing opinion is based on a restrictive understanding and thus on a high degree of identification. It is pointed out, for example, that the respective evidence must be “easily” identifiable,⁵⁰ that a precise description and summary of the content of the evidence is necessary,⁵¹ or that, in the case of text-based evidence, a description of the type, date and content is generally necessary.⁵² In the past, the Regional Court of Berlin, for example, applied a very strict standard and, in connection with a request for the disclosure of an entire loan file held by a bank pursuant to Section 142 ZPO, demanded a precise description only of an individual document, the content of which must be at least vaguely described.⁵³ Furthermore, the court demanded that the party requesting disclosure must be certain of the existence of such individual document based on *its own perception*.⁵⁴ Moreover, if the scope of evidence requested is particularly large, courts sometimes assume that there has been insufficient specification.⁵⁵ Ultimately, in order to prevent “fishing expeditions”, it is pointed out that general assumptions that certain evidence would normally exist and therefore must also exist in the specific case to be decided are not sufficient for the necessary specification.⁵⁶ There are only a few decisions in which the courts have accepted lower requirements for specification. This includes a decision by the Regional Court of Ingolstadt, in which the court deemed it sufficient to refer to a specific file folder in which the requested document was located.⁵⁷ In addition, the Higher Regional Court of Saarbrücken also considered the order to submit “the medical records” to be admissible.⁵⁸

II.9 Protection of legitimate interests

As shown above, the disclosure of evidence is already limited by the (strict) requirements imposed on the parties to conclusively present and substantiate the facts necessary for a disclosure order and to specify the evidence sought. However, this does not specifically protect the legitimate interests of the addressees of a disclosure order, but rather limits the possibility of evidence disclosure as a whole. For this reason, it may happen that a party fulfils all the requirements of Sections 142 and 144 ZPO, but that the legitimate interests of the addressee, such as the protection of confidentiality, nevertheless argue against the order to disclose evidence. If the addressee is a third party, their interests are protected in accordance with Sections 142 para. 2 and 144 para. 2 ZPO by making the submission dependent on reasonableness and the absence of rights to refuse to give evidence. If, on the other hand, a party is the addressee of the order to disclose evidence, their interests are not specifically taken into account according to the wording. However, according to the legislative intention, the interests of a party are protected in connection with the exercise of judicial discretion.⁵⁹

⁵⁰ A. Meier-Hoffmann, *Informationsbeschaffung qua Vorlageanordnung im reformierten Kapitalmusterverfahren*, in *Zeitschrift für Wirtschaftsrecht*, 418, 420 (2025).

⁵¹ A. Stadler, see fn. 10, margin no. 4a.

⁵² J. Zekoll and G. A. Haas, see fn 48, 1145.

⁵³ LG Berlin, judgment of 1 September 2010, 10 O 471/09, cited from juris, margin no. 82.

⁵⁴ LG Berlin, judgment of 1 September 2010, 10 O 471/09, cited from juris, margin no. 82.

⁵⁵ LG Köln, judgment of 27 February 2008, 4 O 272/07, cited from juris, margin no. 96.

⁵⁶ C. Althammer, see fn 13, margin no. 18; A. Stadler, see fn. 10, margin no. 4a; D. von Selle, see fn 20, margin no. 10.

⁵⁷ LG Ingolstadt, decision of 22 March 2002, 4 O 1729/01; W. Uhlenbruck, *Gerichtliche Anordnung der Vorlage von Urkunden gegenüber dem Insolvenzverwalter*, in *Neue Zeitschrift für Insolvenz- und Sanierungsrecht*, 589 f. (2002).

⁵⁸ OLG Saarbrücken, judgment of 30 April 2003, 1 U 682/02 - 161; D. Leipold, see fn10, 571.

⁵⁹ BT-Drs. 14/6036, 120.

II.10 Parties

According to the wording of Sections 142 and 144 ZPO, orders to disclose evidence can be issued to the parties without particular restrictions if the above conditions are met. There is no provision similar to that applying to third parties under Sections 142 para. 2 and 144 para. 2 ZPO and referring to the right of witnesses to refuse to give evidence. The legislature has not forgotten to refer to the parties' general rights to refuse to give evidence. These simply do not exist in the same form as for witnesses, since the German Code of Civil Procedure only allows parties to act as witnesses in exceptional cases and they are therefore not usually obliged to give evidence as witnesses. Accordingly, there was originally no perceived need to expressly standardise the parties' rights to refuse to give evidence.⁶⁰ Nevertheless, the parties have legitimate interests in not participating in the proceedings, in particular in not disclosing evidence, and these interests must be taken into account in connection with the order to disclose evidence.

The legislature has also recognised this and, in connection with an amendment to Section 142 ZPO by the Civil Procedure Reform Act (*Zivilprozessreformgesetz*) in 2001, pointed out that parties must also be able to legitimately refuse to disclose evidence under certain circumstances, for example when secrets worthy of protection are involved.⁶¹ However, the legislature has not provided any guidelines on how exactly and, above all, at what stage of the proceedings the court must take these legitimate interests into account.

While the Federal Court of Justice in some cases has referred to a general reservation of reasonableness (*Zumutbarkeit*) in this regard,⁶² it is generally assumed that this must be taken into account in the context of the court's discretionary decision. Since the court cannot be obliged to order the disclosure of evidence but decides at its own discretion, the legitimate interests of a party in non-disclosure can be easily examined there.⁶³

The most relevant case groups of legitimate interest that may justify a refusal to disclose evidence include the interest in protecting the sphere of trust between lawyers and their clients and the interest in protecting secrets (in particular trade secrets).

Legal literature rightly points out on numerous occasions that documents which fall within the sphere of trust between lawyers and their clients – regardless of who possesses them and in what context they were drafted – must be exempt from disclosure.⁶⁴ In some cases, it is also pointed out that this protection can only apply within the limits of what is also provided for in Section 383 No. 6 ZPO for the right to refuse to give evidence.⁶⁵

With regard to the protection of secrets, in representative action proceedings in which the disclosure of evidence by the trader is sought, the protection of documents prepared for the trader's own legal defence and of trade secrets is particularly relevant. In the first case, protection is to be affirmed insofar as it concerns a legal assessment and a substantive legal defence.⁶⁶ This also includes preventive conflict avoidance, which may include obtaining information about the legal situation or consulting the company's internal legal department.⁶⁷ With regard to the second case,

⁶⁰ G. Wagner see fn 6, 715.

⁶¹ BT-Drs. 14/6036, 120.

⁶² BGH, judgment of 1 August 2006, X ZR 114/03 (*Restschadstoffentfernung*), cited from juris, margin no. 42.

⁶³ BGH, judgment of 17 July 2014, III ZR 514/13, in *Deutsche Notar-Zeitschrift*, 837, margin no. 27 (2014); D. von Selle, see fn 20, margin no. 15.

⁶⁴ S. Konrad, *Der Schutz der Vertrauenssphäre zwischen Rechtsanwalt und Mandant im Zivilprozess*, in *Neue Juristische Wochenschrift*, 710, 713 (2004); J. Kraayvanger and M. C. Hilgard, *Urkundenvorlegung im Zivilprozess*, in *Neue Justiz*, 572, 574 (2003); G. Wagner, see fn 6, 716 et seq.; for a detailed discussion of this topic, see G. Rühl, *Die Begrenzung des § 142 ZPO durch das Anwaltsprivileg*, in *Zeitschrift für Zivilprozess*, 25 et seq. (Issue 125, 2012).

⁶⁵ A. Stadler, see fn. 10, margin no. 7 with further references.

⁶⁶ S. Konrad, see fn 64, 713.

⁶⁷ S. Konrad, see fn 64, 713.

the protection of trade secrets, the possibility of a legitimate interest is also generally affirmed.⁶⁸ In this case, a legitimate interest in refusing disclosure will generally be recognised if disclosure would result in a lasting distortion of competition.⁶⁹

II.11 Third parties

II.12 Right to refuse to give evidence

Regarding the explicitly standardised rights to refuse to give evidence, Sections 142 para. 2 and 144 para. 2 ZPO refer to Sections 383 to 390 ZPO and thus to the rights of refusal applicable to witnesses. In terms of content, the legally standardised cases of justified refusal to give evidence relate to personal (Section 383 ZPO) and factual (Section 384 ZPO) reasons.

One of the most important cases in the area of personal reasons is the protection of professionals who are bound to secrecy in accordance with Section 383 para. 1 No. 6 ZPO. Persons who have been entrusted with a special position of trust by public or private law and who are obliged to protect that trust are therefore not obliged to disclose evidence.⁷⁰ This includes, in particular, lawyers, tax advisers, auditors and, in principle, notaries. For the right of refusal to apply, it is irrelevant how and from whom the third party acquired their knowledge.⁷¹ In this respect, it is sufficient if they have obtained knowledge of objectively confidential facts in connection with their mandate.⁷² If the evidence requested relates to such facts, there is no obligation to disclose it. The situation is different only if the professional bound by professional secrecy has been released from his duty of confidentiality by the protected person. In this case, the obligation to disclose the evidence is reinstated in accordance with Sections 142 para. 2 sentence 1, 144 para. 2 sentence 1 and 385 para. 2 ZPO.

In the area of factual reasons, pursuant to Section 384 No. 1 ZPO, there is no obligation to disclose evidence if this would lead to direct financial damage to the third party. It is sufficient for the assumption of such financial damage if the enforcement of an existing claim against the third party would be facilitated by the disclosure of the respective evidence.⁷³ This rather low threshold for assuming a right of refusal can be justified by the fact that, otherwise, the court would have to conduct a conclusiveness review of the possible bases for the claim, which might require further information from the third party, which they are not actually obliged to provide due to their right to refuse to give evidence.⁷⁴ Furthermore, the risk of criminal prosecution precludes an obligation to disclose evidence as a factual reason pursuant to Section 384 No. 2 ZPO. In the context of representative actions, the protection of trade secrets of companies that are obliged as third parties to disclose evidence might be particularly relevant. Such confidentiality interests are conclusively protected by Section 384 No. 3 ZPO – and thus not in connection with other unreasonableness⁷⁵.

⁶⁸ A. Stadler, see fn. 10, margin no. 7 with further references; G. Wagner, see fn 6, 716 et seqq.; J. Kraayvanger and M. C. Hilgard, see fn 64, 574.

⁶⁹ J. Kraayvanger and M. C. Hilgard, see fn 64, 574.

⁷⁰ R. Greger, see fn 9, margin no. 16.

⁷¹ BGH, decision of 16 February 2011, IV ZB 23/09, cited from juris, margin no. 10.

⁷² R. Greger, see fn 9, margin no. 20a.

⁷³ BGH, decision of 26 October 2006, III ZB 2/06, cited from juris, margin no. 7 with further references; C. Althammer, see fn 13, margin no. 26; E. Schneider, *Die Zumutbarkeit der Urkundenvorlage durch Dritte*, in *Monatsschrift für Deutsches Recht*, 1, 2 with further references (2004).

⁷⁴ E. Schneider, see fn 73, 2.

⁷⁵ A. Stadler, see fn. 10, margin no. 8 (there, fn. 118); R. Greger, see fn 9, 483; a different view is held by: K. Schmidt, N. Schwab and M. Wildschütz, *Die Auswirkungen der Reform des Zivilprozesses auf das arbeitsgerichtliche Verfahren (Teil 1)*; in *Neue Zeitschrift für Arbeitsrecht*, 1161, 1164 (2001).

II.13 Unreasonableness

In addition to the above-mentioned rights of refusal, the legislature has included the criterion of (general) unreasonableness in Sections 142 para. 2 and 144 para. 2 ZPO. The focus of the reasonableness requirement here is on the practical concordance of individual interests to be guaranteed by the state, which generally requires a weighing of interests between general legal obligations and reasons for deviating from them.⁷⁶ Due to the apparent similarity to the principle of proportionality and to hardship and equity clauses, general principles of proportionality are ultimately decisive here.⁷⁷ When weighing up the interests involved, the court must take into account, for example, the right to effective legal protection, the significance of the proceedings for the parties, the actual effort involved in disclosing the evidence and the interference with the constitutionally protected interests of third parties.⁷⁸ Here, the interest of the party to the proceedings who benefits from the disclosure of evidence in being granted effective legal protection will be weighted more heavily the greater the expected gain in knowledge from the evidence and the more important the evidence is for determining the facts of the case in dispute.⁷⁹ In connection with unreasonableness, two cases are primarily discussed, in addition to interests protected by fundamental rights that must be taken into account in individual cases: The first case concerns the considerable time and personnel costs associated with a disclosure that could be incurred by the third party. In particular, if the requested evidence relates to events that occurred a long time ago or if the scope of the disclosure order is very large, this could mean a considerable amount of time and expense for the third party. One justification for assuming unreasonableness on these grounds was sometimes seen in the fact that Sections 142 and 144 ZPO do not explicitly provide for compensation for the third party and that the provisions of the law on the compensation of witnesses and experts applicable until 30 June 2004 (*Gesetz über die Entschädigung von Zeugen und Sachverständigen*) did not provide for this either.⁸⁰ With the introduction of Section 23 para. 2 of the German Judicial Remuneration and Compensation Act (*Justizvergütungs- und -entschädigungsgesetz, JVEG*), which now expressly covers court orders for the disclosure of evidence pursuant to Sections 142 and 144 ZPO, this justification does no longer apply. In theory, a considerable amount of time or expense can still justify unreasonableness.⁸¹ However, due to the existing compensation mechanism for third parties, this can only be considered if the specific expense is not covered by Sections 23 para. 2 and 19 JVEG or if the amount of compensation obtained under the JVEG falls significantly short of the actual costs.⁸² In this context, it should also be considered that the scope of disclosure orders will generally be very limited due to the strict requirements for the identification of individual pieces of evidence. Cases that constitute unreasonableness for these reasons are therefore likely to be rare.

The second case relates to disruptions to the third party's business operations that would occur if the order to disclose evidence were complied with. This could include contract documents or deeds of security that are essential for the third party's professional activities and whose disclosure, even

⁷⁶ C. Basler and K. Meßerschmidt, *Zumutbarkeit von Beweiserhebungen und Wohnungsbetroffenheit im Zivilprozess*, in *Neue Juristische Wochenschrift*, 3329, 3330 (2014).

⁷⁷ C. Basler and K. Meßerschmidt, see fn 76, 3330; U. P. Gruber and E. Kießling, see fn 10, 326.

⁷⁸ J. Zekoll and J. Bolt, *Die Pflicht zur Vorlage von Urkunden im Zivilprozess – Amerikanische Verhältnisse in Deutschland?*, in *Neue Juristische Wochenschrift*, 3129, 3132 (2002); A. Kapoor, *Die neuen Vorlagepflichten für Urkunden und Augenscheinsgegenstände in der Zivilprozessordnung*, Baden-Baden, 2009, 207 et seqq.

⁷⁹ A. Kapoor, see fn 78, 207.

⁸⁰ J. Zekoll and J. Bolt, fn 78, 3133.

⁸¹ C. Althammer, see fn 13, margin no. 27; R. Greger, see fn. 9, 483; D. von Selle see fn 20 margin no. 14; J. Zekoll and J. Bolt, see fn 78, 3133.

⁸² A. Kapoor, see fn 78, 210.

for a short period of time, would cause massive disruption.⁸³ Even if the interests of the third party are to be recognised in these cases, ultimately these will only be rare cases in which a disclosure can be completely omitted. This is because even in cases where such evidence is indispensable, it is in many cases still possible to submit a copy that is equivalent to the original and is therefore also covered.⁸⁴

II.14 Disclosure despite the involvement of trade secrets

In connection with the protection of trade secrets, the question often arises as to whether disclosure can be ordered even though such secrets are involved, if sufficient protection is otherwise possible. For a long time now, there have been calls for the creation of an “in camera” procedure for civil proceedings in this context.⁸⁵ Such a procedure would allow the conflicting interests of the parties, i.e. the interest in legal protection of the party seeking disclosure on the one hand and the interest in confidentiality of the opponent on the other, to be appropriately balanced. Since disclosure would only be made to the court or an expert, the evidence in question could be used in full for the proceedings without being disclosed to the public or another party to the proceedings.⁸⁶

Such a procedure would not be entirely foreign to German law. In administrative law, for example, Section 99 para. 2 of the German Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*) already contains a provision that allows for in camera proceedings in certain cases. The Federal Constitutional Court (*Bundesverfassungsgericht*) has also dealt with in camera proceedings in connection with this provision. It has stated that fundamental constitutional principles, such as in particular the right to a fair hearing under Article 103 para. 1 of the German Constitution (*Grundgesetz*), do not preclude in camera proceedings.⁸⁷ However, in the opinion of the Federal Constitutional Court, an explicit legal basis is required for such proceedings.⁸⁸ In civil procedural law, and thus also for representative actions, the legislature has not yet made use of this option, meaning that no genuine in camera proceeding is available for representative actions.

However, it should be noted that the Federal Court of Justice generally considers it permissible to take confidentiality interests into account by allowing the party obliged to disclose evidence to redact the evidence to be disclosed (in particular textual documents) to the extent required by confidentiality interests.⁸⁹

Since 1 April 2025, this option of redaction has been supplemented by Section 273a ZPO, which was newly added to the German Code of Civil Procedure. This generally provides for the protection of trade secrets in civil proceedings and enables the court to classify certain information as confidential at the request of a party. The prerequisite for this is that the information in question is a trade secret within the meaning of Section 2 No. 1 of the Act on the Protection of Trade Secrets (*Gesetz zum Schutz von Geschäftsgeheimnissen, GeschGehG*). For the confidentiality procedure and the possible measures to be taken by the court, Section 273a ZPO references Sections 16 to 20 *GeschGehG*. The court may, among other things, impose special confidentiality obligations on the

⁸³ E. Schneider, fn 73, 2; C. Althammer, see fn 13, margin no. 27 with further references; R. Greger, see fn 9, 483; J. Zekoll and J. Bolt, see fn 78, 3132 (in the event of imminent serious damage).

⁸⁴ J. Fritsche, see fn 14, margin no. 9.

⁸⁵ J. Kraayvanger and M. C. Hilgard (fn. see fn 64, 574 f.; G. Wagner, see fn 6, 717 f.; A. Stadler, see fn. 10, margin no. 7a

⁸⁶ A. Stadler, see fn. 10, margin no. 7a

⁸⁷ BVerfG, decision of 27 October 1999, 1 BvR 385/90, cited from juris, margin no. 90; BVerfG, decision of 14 March 2006, 1 BvR 2087/03, cited from juris, margin no. 112.

⁸⁸ BVerfG, decision of 14 March 2006, 1 BvR 2087/03, cited from juris, margin no. 113.

⁸⁹ BGH, judgment of 1 August 2006, X ZR 114/03 (*Restschadstoffentfernung*), cited from juris, margin no. 42. See also: A. Stadler, see fn. 10, para. 7a (there, footnote 104), who points out that this will often not provide sufficient protection.

parties, their legal representatives or witnesses, the violation of which may be punished with a fine of up to EUR 100,000 (Sections 16 para. 2, 17 GeschGehG). Furthermore, Section 19 GeschGehG provides for the limited possibility of excluding persons (for example the public) from the oral hearing or from access to certain documents requiring confidentiality.⁹⁰ Finally, Section 19 para. 1 sentence 4 GeschGehG allows for further measures which the court may take at its own discretion.

II.15 Enforceability and sanctions

If a party to the proceedings or a third party fails to comply with the court's disclosure order without a legitimate interest in the above sense being established, the question arises as to what measures the court can then take. If the addressee of the disclosure order is a third party, the possible legal consequences of refusal to comply are derived from the provisions on the right to refuse to give evidence. Due to the reference in Sections 142 para. 2 and 144 para. 2 ZPO, Section 390 ZPO applies. According to this, in the event of an unjustified refusal, the third party may be required to bear the costs incurred as a result of the refusal and a fine of up to EUR 1,000 may be imposed. In the event of repeated refusal, the court may order coercive detention for a maximum of six months pursuant to Sections 390 para. 2, 802j ZPO.⁹¹

The situation is different if the disclosure order is directed against a party to the proceedings and that party refuses to cooperate without justification. In this case, the law does not provide for any means of enforcing disclosure. While this continues to be the case for general civil proceedings, the legislature has changed this for representative action proceedings by means of Section 6 VDuG (based on Art. 19 of the Representative Actions Directive). The court now has the option of threatening the refusing party with a fine in representative action proceedings and imposing it if the refusal persists. This may amount to a maximum of EUR 250,000 and may be imposed repeatedly.⁹² With regard to the possibility of imposing an administrative fine, its proportionality is also criticised on the grounds that there are insufficient safeguards for sensitive company information.⁹³ In particular, it is argued that there is a lack of protective mechanisms such as "legal professional privilege", which is known from common law jurisdictions.⁹⁴ In fact, however, the current legislative framework allows a large amount of relevant information worthy of protection to be protected from disclosure. As explained above, the court has the option (especially regarding parties) to take *generally* legitimate interests into account in its discretionary decision. Even if further protective mechanisms for a fairer balance of interests, such as a genuine in camera procedure, are desirable, it seems questionable whether there is actually a significant gap in protection regarding legitimate confidentiality interests.

Furthermore, it should be noted that the newly introduced possibility of imposing a fine on parties is criticised on the grounds that it is alien to German civil proceedings.⁹⁵ In this regard, there are isolated opinions that this constitutes a violation of the principle of the rule of law

⁹⁰ See also A. Stadler, see fn. 10, margin no. 7a with further references.

⁹¹ R. Greger, in Zöller, *Zivilprozessordnung*, Cologne, 2026 (36th Ed.), Section 390 ZPO, margin no. 7.

⁹² However, there are doubts as to whether the fine can be repeated an unlimited number of times: H. Wais, in D. Skauradszun, *Verbraucherrecht durchsetzungsgesetz (VDuG)*, Munich, 2024, Section 6 VDuG, margin no. 9 (exactly once); H. Großerichter, in F. Reuschle, H. Großerichter and F. Kruis, *Verbraucherrecht durchsetzungsgesetz (VDuG)*, Berlin, 2025, Section 6 VDuG, margin no. 7 with further references.

⁹³ M. Mekat and A. Amrhein, *Die Umsetzung der Verbandsklagen-RL in Deutschland nach dem Referentenentwurf*, in *Recht Automobil Wirtschaft*, 23, 27 (2023).

⁹⁴ M. Mekat and A. Amrhein, see fn 93, 27.

⁹⁵ A. J. Baumert, in *Zeitschrift für Zivilprozess*, 235, 236 f. (Issue 137, 2024); *id.*, *Ermessensreduzierung auf Null bei § 6 VDuG*, in *Zeitschrift für Wirtschaftsrecht*, 1955, 1962 (2025); A. Bruns, *Die neue deutsche Verbandsklage auf Abhilfeleistung im Spiegel der ELI-UNIDROIT Model Rules und der Prozessrechtsdogmatik*, in *Zeitschrift für Zivilprozess International*, 293, 311 (Issue 27, 2022).

(*Rechtsstaatsprinzip*) under Article 20 para. 3 of the German Constitution in the form of fair trial and the right to justice (*Justitzgewähr*).⁹⁶ However, no specific justification for this assertion is provided. Finally, it is argued that the court must *mandatorily* refrain from threatening and imposing a fine if it is already clear beforehand that the party concerned will not comply with the disclosure order despite a fine (for example, because it has stated this when asked by the court).⁹⁷ However, this argument alone is not convincing, as the party addressed could otherwise simply *claim* that it would continue to refuse to cooperate even if a penalty payment were imposed. Furthermore, the special situation involving the disclosure of evidence is not sufficiently taken into account here. In representative action proceedings, Sections 142 and 144 ZPO, which serve to implement Article 18 of the Representative Actions Directive, also expressly serve to reduce information asymmetries to the detriment of consumers.⁹⁸ It is precisely this interest of consumers and the qualified entity bringing the action in compensating for the information asymmetry and thus in the enforcement of disclosure that must be taken into account. Unlike Section 141 para. 3 ZPO, which is invoked to restrict the possibility of imposing fines,⁹⁹ this is not merely a matter of better understanding the subject matter of the proceedings.¹⁰⁰ Ultimately, the restrictive view discussed here is apparently based on the assumption that, in the event of an unjustified refusal to disclose, even if a fine is imposed, the party obliged to disclose will *inevitably* lose the case.¹⁰¹ However, as will be shown shortly, this is not the case. The concerns about Section 6 VDuG are therefore misguided.¹⁰² The second option available to the court – irrespective of the imposition of a fine – is the free assessment (*freie Würdigung*) of the party's unjustified refusal by the court in accordance with Sections 286, 427 sentence 2 ZPO and Section 371 para. 3 ZPO.¹⁰³ According to this, the court may consider assertions about the nature and content of the evidence in question by the party requesting disclosure to be proven. This may result in the refusing party losing the case. However, this outcome is not mandatory, especially since the court is not obliged to draw a *specific* conclusion from the refusal to disclose evidence.

II.16 Practical relevance

The above considerations show that German law does in principle provide for provisions that allow for the disclosure of evidence by the opposing party or third parties in representative actions, but that these are associated with considerable difficulties. Qualified entities seeking disclosure of evidence are confronted with relatively high requirements in substantiating their request for disclosure (and thus the underlying claim). Also, courts generally require a very detailed description of only individual pieces of evidence. Entire categories of evidence cannot be requested. These strict requirements are a manifestation of the principle of “*nemo tenetur edere contra se*” applicable in German civil proceedings, which is (unfortunately) often adhered to very strictly and which is repeated mantra-like when it comes to the obligations of the party not bearing the burden of proof

⁹⁶ A. J. Baumert, in *Zeitschrift für Zivilprozess*, 235, 236 (Issue 137, 2024); *id.*, *Ermessensreduzierung auf Null bei § 6 VDuG*, in *Zeitschrift für Wirtschaftsrecht*, 1955, 1959 f. with further references (2025).

⁹⁷ A. J. Baumert, *Ermessensreduzierung auf Null bei § 6 VDuG*, in *Zeitschrift für Wirtschaftsrecht*, 1955, 1961 f. (2025).

⁹⁸ Recital 68 of the Representative Actions Directive.

⁹⁹ A. J. Baumert, *Ermessensreduzierung auf Null bei § 6 VDuG*, in *Zeitschrift für Wirtschaftsrecht*, 1955, 1957 f. (2025).

¹⁰⁰ On the purpose of Section 141 ZPO, see R. Greger, in Zöller, *Zivilprozessordnung*, Cologne, 2026 (36th Ed.), Section 141 ZPO, margin no. 1 with further references.

¹⁰¹ A. J. Baumert, *Ermessensreduzierung auf Null bei § 6 VDuG*, in *Zeitschrift für Wirtschaftsrecht*, 1955, 1960 (2025).

¹⁰² Similarly: A. Stadler, in H.-J. Musielak and W. Voit, *Zivilprozessordnung*, Munich, 2025 (22nd Ed.), Section 6 VDuG, margin no. 1 (there, fn. 3).

¹⁰³ BGH, judgment of 26 June 2007, XI ZR 277/05, cited from juris, margin no. 20; R. Greger, see fn. 9, margin no. 15 with further references; D. von Selle, in V. Vorwerk and C. Wolf, *Beck'scher Online-Kommentar Zivilprozessordnung*, Munich, 2025 (57th Ed.), Section 144 ZPO, margin no. 10.

to cooperate in clarifying the facts of the case. According to this principle, no party is obliged to provide the opponent with the material for winning the case that it does not already have at its disposal.¹⁰⁴ It is often pointed out that this principle has already been breached many times in civil procedure law and has therefore actually become obsolete.¹⁰⁵ Therefore, this principle cannot be used to justify strict requirements for the admissibility of disclosure orders. Rather, it would already be possible under the existing legal framework to allow disclosure of evidence even under less stringent conditions. This is demonstrated, for example, by the case law of the Federal Court of Justice on technical property rights. There, the Federal Court of Justice had to assess Section 142 ZPO in the context of Directive 2004/48/EG. This ultimately led to a differentiated interpretation of Section 142 ZPO, according to which – unlike in other cases – it is sufficient for a disclosure order if a “certain probability” of the underlying claim is demonstrated.¹⁰⁶ However, the Federal Court of Justice has explicitly ruled out the transfer of these lower requirements to general civil proceedings.¹⁰⁷

In addition, courts rarely make use of the possibility of issuing a disclosure order pursuant to Sections 142 and 144 ZPO. This was made clear, for example, in a public hearing of the Committee on Legal Affairs and Consumer Protection (*Ausschuss für Recht und Verbraucherschutz*) in the German Bundestag on 9 September 2020. A judge questioned there as an expert explained with regard to Section 142 ZPO that it is “unusual” to issue such an order and that judges rarely make use of it.¹⁰⁸ In practice, Sections 142 and 144 ZPO are therefore only relevant to a very limited extent. As a rule, requests aimed at these provisions will not result in the actual disclosure of evidence. Rather, this is the exception. For this reason, in practice, other regulations whose (primary) purpose is different are more likely to be used, for example the request for disclosure of information and documents (insofar as the case allows) under Art. 15 GDPR.

III. POSSIBLE IMPLEMENTATION DEFICIT COMPARED TO ART. 18 OF THE REPRESENTATIVE ACTIONS DIRECTIVE

To date, it remains unclear whether Sections 142 and 144 ZPO actually implement the provisions of Article 18 of the Representative Actions Directive completely and accurately. In any case, the legislature has assumed this to be the case, and this has not yet been analysed in depth in legal literature. I believe that there may be a shortfall in implementation in various areas. For example, it could be argued that the issuance of a disclosure order under Article 18 of the Representative Actions Directive is not at the discretion of the court, but rather a binding decision. If the applicant can meet all the requirements for disclosure and proportionality is also maintained, the court would have to order the disclosure. In this case, the German provisions, which provide for a discretionary decision, would not be in line with the Representative Actions Directive.

¹⁰⁴ BGH, decision of 26 October 2006, III ZB 2/06, cited from juris, margin no. 7; BGH, judgment of 7 December 1999, XI ZR 67/99, cited from juris, margin no. 16; BGH, judgment of 17 October 1996, IX ZR 293/95, cited from juris, margin no. 17; BGH, judgment of 11 June 1990, II ZR 159/89, cited from juris, margin no. 9; BGH, judgment of 26 June 1958, II ZR 66/57, in *Neue Juristische Wochenschrift*, 1491, 1492 (1958).

¹⁰⁵ R. Greger, in Zöller, *Zivilprozessordnung*, Cologne, 2026 (36th Ed.), before Section 284 ZPO, margin no. 34e; C. Katzenmeier, *Aufklärungs-/Mitwirkungspflicht der nicht beweisbelasteten Partei im Zivilprozeß*, in *JuristenZeitung*, 533, 540 (2002); A. Stadler, in H.-J. Musielak and W. Voit, *Zivilprozessordnung*, Munich, 2025 (22nd Ed.), Section 138 ZPO, margin no. 11; *id.*, see fn. 10, 1627; R. Koch, see fn 10, 176; D. Waterstraat, *Informationspflichten der nicht risikobelasteten Partei im Zivilprozess*, in *Zeitschrift für Zivilprozess*, 459, 484 (Issue 118, 2005).

¹⁰⁶ BGH, judgment of 1 August 2006, X ZR 114/03, cited from juris, margin no. 43 (*Restschadstoffentfernung*).

¹⁰⁷ BGH, judgment of 28 February 2008, IX ZR 177/05, cited from juris, margin no. 21.

¹⁰⁸ German Bundestag, verbatim transcript of the 103rd meeting of the Committee on Legal Affairs and Consumer Protection on 9 September 2020, 25.

Another point concerns the types of evidence covered. Even though the types of evidence covered by Sections 142 and 144 ZPO are very extensive and typically cover the most important types (physical and electronic documents), not all types of evidence known in civil procedure law are covered. In particular, the type of evidence “witness” is not covered. Since Article 18 of the Representative Actions Directive refers to “evidence” in general terms, it can be assumed, at least according to the wording, that in principle all types of evidence admissible under the respective national civil procedure law must be subject to a disclosure order. In this case, it would also be necessary to clarify how the evidence “witness” can be “disclosed”. In this respect, it would be conceivable, for example, to require the naming of further witnesses.

The last point I would like to address in this context is the description and identification of the evidence to be disclosed by the applicant. Article 18 of the Representative Actions Directive only states that the applicant must have “indicated” that further evidence lies in the control of the opposing party or a third party. However, based on the wording, a mere “indication” is less than the specific identification of individual pieces of evidence required under German law.

IV. CONCLUSION

Considering all of the above, the possibilities for the disclosure of evidence in representative actions under German law ultimately paint a rather sobering picture:

1. German law generally allows for orders by the court to disclose evidence addressed at the opposing party or a third party pursuant to Sections 142 and 144 of the German Code of Civil Procedure (*Zivilprozessordnung*). Furthermore, the scope of types of evidence covered by these provisions is broad and includes any type of document or file held physically or electronically as well as other visual evidence. In addition, the court can enforce disclosure orders issued against the opponent or third parties by imposing fines, ordering coercive detention (third parties only) or assessing any refusal to comply to the detriment of the non-cooperating party (parties to the proceedings only).
2. However, German courts generally uphold the restrictive principle of “*nemo tenetur edere contra se*” and require relatively strict requirements to be met by the party seeking disclosure. In this respect, the request for disclosure must be as detailed and substantiated as possible. Furthermore, a precise description of the individual pieces of evidence to be disclosed is required. Ultimately, judges rarely make use of the possibility of issuing a disclosure order. For these reasons, these two provisions are unfortunately only of limited significance in practice.
3. There are aspects that give rise to the question of whether German law already fully implements the provisions of Article 18 of the Representative Actions Directive. Further analysis will be required to determine whether this is the case and, if so, to what extent.

