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Investor protection through model case procedures – implementing collective goals and individual rights under the 2012 Amendment of the German Capital Markets Model Case Act (KapMuG)

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Inhalt

* Professor of Law, member of the executive committee of the House of Finance, Goethe-University Frankfurt, I would like to thank Priv.-Doz. Rainer Kulms (editor-in-chief) for stimulating suggestions. All remaining shortcomings are mine. This article is a revised and expanded version of a paper on "Implementing liability on the basis of model case procedures – the example of the German Capital Markets Model Case Act ("KapMuG")" presented at the International legal symposium in the honour of the 50th anniversary of The Marianne and Marcus Wallenberg Foundation at the Stockholm Center for Commercial Law on August 30, 2013 and to be published in the SCCL publication series.

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Model case procedures have some fundamentals in common with collective redress in civil law countries. This is particularly true in the field of investor protection which is highly regulated and marked by resulting enforcement failures, which led the German legislator to the enactment of the KapMuG and its recent amendment which highlight exemplary elements of model case procedure. A survey of the ongoing activities of the European Union in the area of collective redress and of its repercussions on the member state level therefore forms a suitable basis for the following analysis of the 2012 amendment of the KapMuG. It clearly brings into focus a shift from sector-specific regulation with an emphasis on the cross-border aspect of protecting consumers towards a "coherent approach" strengthening the enforcement of EU law. As a result, regulatory policy and collective redress are two sides of the same coin today. With respect to the KapMuG such a development brings about some tension between its aim to aggregate small individual claims as efficiently as possible and the dominant role of individual procedural rights in German civil procedure. This conflict can be illustrated by some specific rules of the KapMuG: its scope of application, the three-tier procedure of a model case procedure, the newly introduced notification of claims and the new opt-out settlement under the amended §§ 17-19.

Keywords: collective litigation, investor protection, test cases, German Markets Model Case Act (KapMuG)

I. Introduction

In the long run the enforceability of investor rights may go hand in hand with the attractiveness of the respective capital market. That is why collective redress for retail

investors is conceptualized as a question of market organization to be regulated by the legislator in light of the underlying market participants' interests. This became particularly clear when thousands of retail investors bought *Telekom*-shares at the beginning of the century on the basis of alleged misrepresentations in the prospectus[1] and the Frankfurt trial court became inundated by 2100 individual lawsuits brought by 15000 individual plaintiffs with the help of 700 attorneys involved.[2] In reaction to the resulting congestion of the court, the German legislator enacted the German Capital Markets Model Case Act ("KapMuG"), which has been serving as an experimental law with a sunset clause until 1.11.2010, just being prolonged after an interim evaluation for another eight years until 2020.[3] In the meantime, in the *Telekom*-case there have been two decisions on the basis of such model case procedures by the Higher Regional Court (*Oberlandesgericht*) in Frankfurt in favor of the defendants (file nos. 23 Kap 1/06 and 23 Kap 2/06)[4], with an appeal pending before the Federal Supreme Court of Justice (*Bundesgerichtshof*).

This legislative history already highlights the essential economic background of the statute, laying the foundation for its specific regulatory significance. Since in the *Telekom*-case the sheer number of claims could have threatened the enforcement of the underlying regulation within reasonable timeframe, the model case procedure as provided for by the German Capital Markets Model Case Act is supposed to be a means to aggregate, to a certain degree, small individual claims.[5] As such it aims to promote judicial efficiency and to reduce the risk of inconsistent adjudications in the same or very similar cases. This brings into focus the tension these model case procedures under

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[1] For the allegation in detail see A. Tilp, ‚Das Kapitalanleger-Musterverfahrensgesetz: Stresstest für den Telekom-Prozess', *Festschrift Krämer* (2009) p. 331 at p. 334-337.

[2] For the legislative history confer T. Duve and C. Pfitzner, ‚Braucht der Kapitalmarkt ein neues Gesetz für Massenverfahren?' *Betriebsberater [BB]* (2005) p. 673; A. Keller and C. Kolling, ‚Das Gesetz zur Einführung von Kapitalanleger-Musterverfahren – Ein Überblick', *Bank- und Kapitalmarktrecht [BKR]* (2005) p. 399.

[3] For the original version see „Kapitalanleger-Musterverfahrensgesetz" (German Capital Markets Model Case Act ["KapMuG"]) of 16.08.2005 BGBl. I S. 2437; for the recent enactment of the prolongation see BGBl. I 2012, p. 2182.

[4] BGH, court order of May 16, 2012, file no. 23 Kap 1/06, BeckRS 2012, 10607; BGH, court order of July 3, 2013, file no. 23 Kap 2/06, BeckRS 2013, 11428.

[5] T. Möllers and S. Seidenschwann, ‚Der erweiterte Anwendungsbereich des KapMuG – Neues und altes Recht unter Berücksichtigung von BGH',*Neue Zeitschrift für Gesellschaftsrecht [NZG]* (2012) p. 1268.

the KapMuG are subject to: the tension between individual investor protection and the regulatory goal of "regulation through litigation"[6].

At the same time, this over-arching leitmotif of model case procedures may serve as the guideline for the following analysis of the question in how far the German KapMuG may serve as a suitable example of effective investor protection and its enforcement in light of specific parameters: A brief look at the conceptual framework of collective redress against the background of the development in this field in the EU and its Member States (II.) may help to put the device of model case procedures into perspective. On the level of substantive law (III.), the tension between individual and collective interests is reflected by the specific scope of application of the KapMuG (III.B.) and the procedural implementation of a three-tier procedure (III.C.). At the same time, the balancing of regulatory vs. individual interests leads to questions about the procedural position of the individual investor, as they become apparent from the new instrument of notification of claims (III.D.) and the investor's right to opt out of a settlement (III.E.).

II. Conceptual Framework

A. Development of collective redress in Europe: Towards a "coherent approach"

As becomes clear from the afore-mentioned goal of model case procedures under the German KapMuG, the latter possess characteristics of consumer collective redress mechanisms. Looking at the EU regulatory concept, collective redress is part and parcel of a strategy towards an effective enforcement of the underlying regulatory goals, supplementing any public enforcement.[7] This may serve as an explanation why collective redress as a means to improve consumers' material rights has gradually been introduced to a growing number of fields of regulation. Under the Directive on misleading advertising of 1984 Member States may empower persons or organizations with a "legitimate interest" to bring legal action.[8] The regulatory goal of consumer protection becomes even more apparent in the case of the Directive on injunctions for

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[6] See the corresponding title of the book edited by K. Viscusi, *Regulation through Litigation* (AEI-Brookings Joint Center for Regulatory Studies [2002]).
[7] B. Hess,' "Private law enforcement" und Kollektivklagen', *JuristenZeitung [JZ]* (2011) p. 66 at p. 70.
[8] Art. 4 (1) of the Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, of 10 September 1984, O.J. L250/17 of 19 September 1984.

the protection of consumers' interests enacted in 2009[9] because any payment by the defendant for noncompliance with a court order will benefit public funds, thus resulting in a potential tool to implement regulatory policy. The Directive 2004/48/EC on the enforcement of intellectual property rights is another instance of such a regulatory strategy in the field of collective redress, aiming at an effective prevention of counterfeiting and product piracy and the effective enforcement of intellectual property rights.[10] In the field of antitrust the Commission published a White Paper on April 2, 2008, treating among other measures to ensure effective antitrust enforcement the regulation of collective redress, without, however, forwarding concrete legislative proposals.[11] The following draft proposal presented informally in 2009 met intense internal debate and fierce criticism raised by the member states, so that it was withdrawn.[12] Subsequently in October 2010, the EU commissioners for Consumer policy, Justice and Competition proposed in a more general "coherent approach" taken in a Joint information note "Towards a Coherent European Approach to Collective Redress: Next Steps" very clearly that collective redress has to be looked at "…as an instrument to strengthen the enforcement of EU law"[13], hence as an implementation tool for regulatory goals of the EU.

This approach was adopted and further specified by the European Parliament in its resolution "Towards a coherent European approach to collective redress", in which it proposes "… a horizontal framework including a common set of principles providing uniform access to justice via collective redress within the EU and specifically but not exclusively dealing with the infringement of consumers' rights…" in 2012.[14] In addition to the regulatory significance of collective redress, the European Parliament also clarifies the method how to achieve it by providing in its resolution the "…need to take

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[9] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, O.J. L 110/30 of 1 May 2009.
[10] Directive 2004/48/EC of the European Parliament and the Council on the enforcement of intellectual property rights of 29 April 2004 , OJ L 195, 2.06.2004, p. 16.
[11] White Paper on Damages actions for breach of the EC antitrust rules, Brussels, 2.04.2008, COM (2008) 165 final.
[12] For details of the draft proposal see F. Wagner-v. Papp, Der Richtlinien-Entwurf zu kartellrechtlichen Schadensersatzklagen, *Europäisches Wirtschafts- und Steuerrecht [EWS]* (2009) p. 445.
[13] SEK (2010) 1192 (Oct. 5, 2010), p. 3, http://ec.europa.eu/transparency/regdoc/rep/2/2010/EN/2-2010-1192-EN-1-0.Pdf (accessed on October 30, 2013).
[14] European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Apprach to Collective Redress' (2011/2089(INI)), para 15, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN, last accessed on October 30, 2013.

due account of the legal traditions and legal orders of the individual Member States…"[15]

With a view to this resolution, the European Commission published another set of proposals on private group litigation in 2013, including among others a Draft Recommendation on promoting group claims[16], which, of course by its nature, is non-binding and a proposal for a directive on private antitrust damage actions. It was jointly issued by the Justice, Consumer Affairs and Competition department of the Commission. The proposed binding directive on private antitrust damage actions must, to be sure, be considered and passed by the European Parliament and the Council yet.[17] It includes rules on the use of evidence, the effect of decisions by national competition authorities, the applicability of joint and several liability, and the availability of a pass-on defense.

In contrast, in the non-binding recommendation, the Commission takes a coherent approach envisaging the regulation of collective redress across different sectors, urging Member States to provide for relief for private plaintiffs for violations of competition, consumer protection, environmental and other laws on a collective basis under certain circumstances.[18] Its goal is not, however, harmonization as in the case of private antitrust damage actions. Instead, the Commission lays out some common, non-binding principles that should serve as guidelines for the Member States' conception of collective redress mechanisms, overall aiming at facilitating access to justice, stopping illegal practices and enabling victims of mass damages to obtain compensation.[19]

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[15] European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Apprach to Collective Redress' (2011/2089(INI)), para 16, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN, last accessed on October 30, 2013.

[16] European Commission, Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C (2013) 3539/3, 11.6.2013, available at http://ec.europa.eu/justice/civil/files/c_2013_3539_en.pdf, last accessed on October 30, 2013.

[17] European Commission, Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member states and of the European Union, Luxembourg, 11.6.2013, COM (2013) 404 final.

[18] European Commission, Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C (2013) 3539/3, 11.6.2013, http://ec.europa.eu/justice/civil/files/c_2013_3539_en.pdf, last accessed on October 30, 2013.

[19] European Commission, Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights

Among these principles one can distinguish between general principles common to injunctive and compensatory collective redress[20] and more specific ones relating to injunctive collective redress[21] or compensatory collective redress[22] respectively.

B. General principles common to collective redress in the Member States

1. Injunctive collective redress – representative actions

The principles common to injunctive collective redress necessarily focus on standing to bring a representative action. The most common collective redress mechanism, group actions, as they are available in Bulgaria, Denmark, Finland, France, Germany, Hungary, Italy, the Netherlands, Poland, Portugal, Spain, Sweden and the UK (England and Wales), are brought by groups of victims or by an ombudsman, consumer organization or a leading plaintiff and the judgment following a collection action can be enforced by all members of the group separately.[23] In representative collective actions, which are available in Austria, Bulgaria, France, Germany, Greece, Lithuania and the UK, the person, organization or authority acting on behalf of a group of individuals can enforce the judgment he/it obtains, but not all members of the group represented.[24] It is clear that this type of collective action will lend itself for injunction procedures, but not lead to financial damages to consumers, as is the case in Austria, Bulgaria, France, Germany, Greece, Lithuania and the United Kingdom. It stands to reason that in case of eventual damages obtained by the representative, but not enforceable by the individual victims, those are used for public policy purposes after being collected by the

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granted under Union Law, C (2013) 3539/3, 11.6.2013, I. para. 1, available at http://ec.europa.eu/justice/civil/files/c_2013_3539_en.pdf, last accessed on October 30, 2013.

[20] European Commission, Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C (2013) 3539/3, 11.6.2013, III., available at http://ec.europa.eu/justice/civil/files/c_2013_3539_en.pdf, last accessed on October 30, 2013.

[21] European Commission, Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C (2013) 3539/3, 11.6.2013, IV., available at http://ec.europa.eu/justice/civil/files/c_2013_3539_en.pdf, last accessed on October 30, 2013.

[22] European Commission, Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C (2013) 3539/3, 11.6.2013, V., available at http://ec.europa.eu/justice/civil/files/c_2013_3539_en.pdf, last accessed on October 30, 2013.

[23] For this classification see *European Parliament, Directorate General for Internal Policies*, Overview of existing collective redress schemes in EU Member States, July 2011, IP/A/IMCO/NT/2011-17, p. 38; critical of classifications in light of the evolution of new types of collective actions and of combinations of the prototypes mentioned above cf. A. Stadler, Grenzüberschreitender kollektiver Rechtsschutz in Europa, *JuristenZeitung [JZ]* (2009) p. 121-122.

[24] I. Benöhr, 'Consumer Dispute Resolution after The Lisbon Treaty: Collective Actions and Alternative Procedures', 36 *J. Cons. Policy* (2013) p. 87 at p. 91.

representative consumer organization, without being distributed among the victims.[25] Therefore, the Recommendation provides for clear-cut requirements to grant standing to bring a representative action. Standing is only granted to public authorities, officially designated representative entities and entities certified on an ad hoc basis by a national authority or court for a particular representative action.[26] From the public policy goals to be pursued it follows that the two latter entities should have a non-profit making character, their main objective should be directly related to the rights granted under Union law that are claimed to have been violated and they should have sufficient capacity in terms of financial resources, human resources, and legal expertise.[27]

The necessary link between substantive law and regulatory infrastructure leads to a considerable importance and potential difficulty of the right choice of the entity granted standing to bring a representative action.[28] This may to some degree explain why group actions are the more common collective redress mechanism and available in Bulgaria, Denmark, Finland, France, Germany, Hungary, Italy, the Netherlands, Poland, Portugal, Spain, Sweden and the UK (England and Wales).[29] They are brought by groups of victims or by an ombudsman, consumer organization or a leading plaintiff and the judgment following a collection action can be enforced by all members of the group separately, so that the identity of the representative does not play a role as important as in the case of a representative collective action.[30] The Swedish legislator, for example, takes a broad approach not only with respect to the types of infringements covered by collective redress mechanisms, but also with regard to the forms of class actions which are permitted, ranging from class actions to be initiated by private individuals to

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[25] I. Benöhr, 'Consumer Dispute Resolution after The Lisbon Treaty: Collective Actions and Alternative Procedures', 36 *J. Cons. Policy* (2013) p. 87 at p. 91.
[26] European Commission, Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C (2013) 3539/3, 11.6.2013, III. paras. 4-7, available at http://ec.europa.eu/justice/civil/files/c_2013_3539_en.pdf, last accessed on October 30, 2013.
[27] European Commission, Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C (2013) 3539/3, 11.6.2013, III. para. 4, available at http://ec.europa.eu/justice/civil/files/c_2013_3539_en.pdf, last accessed on October 30, 2013.
[28] D. Fairgrieve/G. Howells, 'Collective Redress Procedures: European Debates', in D. Fairgrieve and E. Lein, eds., *Extraterritoriality and Collective Redress* (Oxford: Oxford University Press 2012) p. 15 at p. 39; for the practical difficulties cf. A. Layton, 'Collective Redress: Policy Objectives and Practical Problems', in D. Fairgrieve and E. Lein, eds., *Extraterritoriality and Collective Redress*, (Oxford, Oxford University Press 2012) p. 93, 97-98.
[29] European Parliament, Directorate General for Internal Policies, *Overview of existing collective redress schemes in EU Member States*, July 2011, IP/A/IMCO/NT/2011-17, p. 38-40.
[30] For this classification see European Parliament, Directorate General for Internal Policies, *Overview of existing collective redress schemes in EU Member States*, July 2011, IP/A/IMCO/NT/2011-17, p. 38.

representative procedures in the field of consumer and environmental law that organizations such as consumer associations or a government-appointed authority are granted standing for.[31] Another example of a rather variable approach is the Portuguese system of collective redress. Law 83/1995 on the right to take part in administrative proceedings and the right of popular action offers the possibility of a so-called 'popular action' that can be initiated by a private individual, an association, or foundation on behalf of all the group members concerned, so that it has the effect of a representative litigation.[32] More variety has been, however, introduced by special legislation, such as provided for in Arts. 31 and 32 of the Securities Code, approved by Decree-Law 486/99 of November 13, 1999. These provisions give standing to noninstitutional investors, to associations for the protection of investors and to foundations whose aim is the protection of investors in securities.

2. Compensatory collective redress

a) Collective interest action and joint representative action in France

A much narrower approach is taken in French law where two procedural instruments of a representative nature are worth mentioning in this context, that is the collective interest action (action d'intéret collectif) and the joint representative action. The first one grants standing to certain consumer associations to bring claims in cases of an infringement of the so-called 'collective consumer interest' (Art. 421-1(1) of the Code de la consommation).[33] Considering that it is only available to accredited consumer associations and that the resulting damages will be awarded to these associations, the representative nature of this procedural mechanism becomes clear.[34] In contrast, the joint representative action can be initiated in the individual interest of consumers, but in light of the limitations on the way in which the mandate to act can be solicited its practicality is highly limited.[35] Against this background, the French government initiated a new Consumers Act providing for compensatory group actions (action de

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[31] see R. Nordh, 'Group Actions in Sweden: Reflections on the purpose of civil litigation, the need for reforms, and a forthcoming proposal', 11 *Duke J. Comp. & Int'l L.* (2001) p. 381 at p. 397-398.
[32] H. Sousa Antunes, 'Portugal' in: The Globalization of Class Actions, *Annals Am. Acad. Pol. Sci.* 2009, p. 161, at p. 162-166.
[33] D. Fairgrieve/G. Howells, 'Collective Redress Procedures: European Debates', in D. Fairgrieve and E. Lein, eds., *Extraterritoriality and Collective Redress* (Oxford: Oxford University Press 2012) p. 15 at p. 23; V. Magnier, 'France' in: The Globalization of Class Actions, *Annals Am. Acad. Pol. Sci* 2009, p. 114 at p. 116.
[34] V. Magnier, 'France' in: The Globalization of Class Actions, *Annals Am. Acad. Pol. Sci* 2009, p. 114 at p. 116-117.
[35] For the prohibition of solicitation through a website cf. Cour de Cassation, Civ. 1ère, 26 May 2011, No. 10-15676.

groupe) in Arts. 1 and 2 on May 2, 2013, which is still pending before Parliament.[36] According to Art. 1 of the proposed act, these actions can only be brought in consumer and competition cases (Art. L 423-1). Only material, but no moral damages can be claimed by national consumer associations, who act on behalf of consumers and are the only entities with standing to initiate such an action (Art. L. 423-1), so that the representative nature of this procedure is beyond question.

b) Collective action in England and Wales – Sectoral approach

Things are not quite as clear with respect to England and Wales. Despite the research-based support for the introduction of a generic opt-out collective action,[37] the Civil Justice Council of England and Wales forwarded rather detailed recommendations to the Lord Chancellor proposing a flexible form of collective action which could be brought on either an opt-in or opt-out basis according to the court's decision in light of the circumstances of the individual case in July 2008.[38] Even so, Part 19.6 of the Civil Procedure Rules provides for a representative action granting standing for a claim for damages to an entity with no interest in the action itself, other than that of acting in a representative capacity.[39] Sectoral examples can be found in competition law (section 47B Competition Act 1998) and, as far as the dimension of consumer law is concerned, the Consumers' Association is the only such body that may bring such a representative action (Specified Body [Consumer Claims] Order 2005 SI 2005/2365).[40]

This was supposed to be fundamentally changed in 2009, when the Financial Services Bill introduced by HM Treasury adopted the reforms proposed in the CJC report, enlarging the range of potential claimants in the newly created class action to include pre-designated bodies, individual claimants and bodies authorized on an ad hoc basis by

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[36] Projet de Loi relative à la consommation, no. 1015, déposé le 2 mai 2013, available at http://www.assemblee-nationale.fr/14/projets/pl1357.asp, last visited on October 15, 2013.
[37] R. Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need*, Research Paper for submission to the Civil Justice Council of England and Wales, 2008.
[38] J. Sorabji et al. (eds.), *Improving Access to Justice through Collective Actions – Developing a More Efficient and Effective Procedure to Collective Actions: Final Report*, Civil Justice Council of England and Wales, London, November 2008, Recommendation 3, p. 145, available at http://www.judiciary.gov.uk/JCO%2FDocuments%2FCJC%2FPublications%2FCJC+papers%2FCJC+Improving+Access+to+Justice+through+Collective+Actions.pdf, last accessed on October 30, 2013.
[39] C. Hodges, 'England and Wales', in: The Globalization of Class Actions, *Annals Am. Acad. Pol. Sci* 2009, p. 105 at p. 106-108.
[40] For more details about the development cf. J. Sorabji, 'Collective Action Reform in England and Wales', in D. Faigrieve and E. Lein, eds., *Extraterritoriality and Collective Redress* (Oxford, Oxford University Press 2012) p. 43 at p. 49-56.

the court.[41] In light of the upcoming general election, these provisions relating to collective actions were withdrawn from the Bill in April 2010. Instead, the consumer redress scheme as provided for in the Financial Services Act 2010 is a new possibility for the Financial Services Authority, the Financial Conduct Authority respectively, to intervene in cases of retail mis-selling and to award compensation to those investors it believes were affected. On the other hand, the legislator has been reluctant to introduce and facilitate actual collective damages claims in the narrow sense.[42] Only recently, the Parliamentary Commission on Banking Standards (PCBS) has appointed a small panel of members to look at mis-selling, which has called for new legislation ensuring stronger collective redress powers.[43]

c) Collective redress by sectors in Germany

Germany also follows a sectoral approach in the field of collective redress, so that one has to differentiate among the mechanisms procedural law has to offer according to the specific law and redress that is sought.[44] The oldest and most common collective redress mechanism is the association or interest group complaint (*Verbandsklage*), whose rules were enacted in 1896 as part of the Act against Unfair Competition. Associations who aim to promote commercial interests (*Verbände zur Förderung gewerblicher Interessen*) have standing to bring a claim for injunction in the context of deceptive advertising. This type of representative action was extended to consumer associations in 1965 and 1977 in certain respects: first the consumer associations were granted standing to seek injunctive relief under the Unfair Competition Act (§ 8 UWG), in 1977 the same applied to the Law on Standard Terms in contracts (AGBG). The Law on Standard Terms in contracts was repealed in 2002 though, but with respect to its substantive rules integrated in large part in the German Civil Code (§§ 305-310 BGB).[45]

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[41] Financial Services HC Bill (2009-10) [6] cls 18(5), 22(2)(b), (c), 24(2)(b), available at http://www.publications.parliament.uk/pa/cm200910/cmbills/006/2010006.pdf, last accessed on October 30, 2013; for details cf. J. Sorabji, 'Collective Action Reform in England and Wales', in D. Faigrieve and E. Lein, eds., *Extraterritoriality and Collective Redress* (Oxford, Oxford University Press 2012) p. 43 at p. 60-61.

[42] For the priority of regulatory collective mechanisms over procedural rules of court in England and Wales see C. Hodges, 'England and Wales', in: The Globalization of Class Actions, *Annals Am. Acad. Pol. Sci.* 2009, 105, 106.

[43] Panel on mis-selling and cross-selling (10th April 2013)(SJ015), Note 5, download at http://www.publications.parliament.uk/pa/jt201213/jtselect/jtpcbs/writev/misselling/sj015.htm.

[44] For an overview see D. Baetge, 'Germany', in: The Globalization of Class Actions, *Annals Am. Acad. Pol. Sci.* 2009, 125-137.

[45] Schuldrechtsmodernisierungsgesetz [Act to modernize the law of obligations] of November 26, 2001, BGBl. I p. 3138.

The rules on the right for consumer associations and commercial interest groups to seek injunctive relief have been included in the newly drafted and enacted Act on Injunctive Relief of 2002 (§ 1 UKlaG).[46] The latter goes beyond the regulation of injunctive relief against the use of unfair standard contract terms, making reference to violations of any provision protecting consumer interests in its § 2 UKlaG. Besides this rather general rule, there are specific provisions granting standing to certain qualified associations or interest groups in special sectoral laws, such as the Act against Restraints of Competition (§ 33 para. 2 GWB), the Telecommunications Act (§ 44 para. 2), the Disability Discrimination Act (§ 13 "Behindertengleichstellungsgesetz [BGG]), and the Federal Nature Conservation Act (§ 61 BNatSchG). In all these cases collective redress is limited to injunctive relief sought by consumer associations and qualified interest groups, making up for enforcement deficits and thus pursuing regulatory goals quite directly.[47]

At the same time, from the point of view of consumers another enforcement deficit is remaining because on the basis of such proceedings only injunctive relief, but no monetary compensation is available. It is true that the German legislator introduced claims for skimming off excess profits in the Unfair Competition Act (§ 10 UWG) and in the Act against Restraints of Competition (§ 34, 34a GWB), which an infringer can be held liable for by consumer associations. Any resulting revenues then, however, have to be handed over to the Federal Treasury, thus only leaving the risk of litigation to the associations.[48] Therefore this more recent amendment to the portfolio of procedural devices of collective litigation in Germany has not really changed the latter's primary regulatory focus.[49]

d) Collective actions and settlements under Dutch law

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[46] Unterlassungsklagengesetz [Act on Injunctive Relief] of November 26, 2001, BGBl. I p. 3138 at p. 3173.

[47] H.W. Micklitz and A. Stadler, 'Collective legal actions in Europe, especially in German civil procedure', 17 *EBLR* (2006) p. 1473 at p. 1477.

[48] For incisive criticism cf. H.W. Micklitz and A. Stadler, 'Collective legal actions in Europe, especially in German civil procedure', 17 *EBLR* (2006) p. 1473 at p. 1484.

[49] On the goal of the skimming-off claim to further consumer protection see F. Henning-Bodewig, 'A new Act against Unfair Competition in Germany', 36 *Int'l Rev. of Intellectual Property and Competition Law [IIC]* (2005) p. 421 at p. 432; for its doctrinal classification between tort law providing pecuniary damages and unjust enrichment and its aim to deprive infringers of their unjustified gains for general preventive reasons cf. H.W. Micklitz and A. Stadler, *Unrechtsgewinnabschöpfung*, (Baden-Baden, Nomos 2003) p. 113.

In contrast, in the Netherlands the 2005 enacted Act on Collective Settlements Mass Damage Claims (*Wet collectieve afhandeling massaschade* [WCAM]), which is one of two distinct mechanisms of collective redress under Dutch law besides the representative collective action according to the general principles of the Dutch law of civil procedure under Articles 3:305a-c of the Dutch Civil Code (*Burgerlijk Wetboek*; BW), introduced an innovative settlement procedure. Even though there have been some spectacular WCAM cases involving financial mass damages recently, such as the *Dexia*[50]-, the *Vie d'Or*[51]-, the *Shell*[52]- and the *Converium*[53]-case, there is no denying the fact that the number of representative group action cases is higher and increasing.[54] The latter's scope of application is quite broad and has included the misleading prospectus by market introduction of *World Online*[55] and *securities*[56] cases.

Even so, the prominence of the enumerated WCAM-cases indicates that these settlements may be gaining in popularity and for financial institutions collective actions may indeed act as an incentive to enter into a settlement.[57] In order for this line of reasoning to work, the settlement under WCAM provides for a procedural novelty, that is the opt-out approach. As a result, the settlements negotiated by investors associations have a binding effect on all investors similarly situated, except for those who declare to "opt-out".[58] A 2012 amendment of the Code of Civil Procedure may also boost collective settlements, admitting questions to be immediately submitted to the Supreme

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[50] Amsterdam Court of Appeals, 25 Jan. 2007, LJN: AZ7033, *NJ* 2007 No. 427 (*Dexia*).
[51] Amsterdam Court of Appeals, 29 April 2009, LJN: BI2717, *NJ* 2009 No. 448 (*Vie d'Or*).
[52] Amsterdam Court of Appeals, 29 May 2009, LJN: BI5744, *NJ* 2009 No. 506 (*Shell Petroleum N.V. and the Shell Transport and Trading Comp Ltd. Et al. v. Dexia Bank Nederland N.V. et al.);* for details cf. I. Tzankova and H. v. Lith, 'Class Actions and Class Settlements Going Global: the Netherlands', in D. Fairgrieve and E. Lein, eds., *Extraterritoriality and Collective Redress* (Oxford, Oxford University Press 2012) p.67 at p. 77-78.
[53] *Converium,* Court of Appeal of Amsterdam of 17 January, 2012, LJN: BV1026, *NJ* 2012 No. 355; for details cf. I. Tzankova and H. v. Lith, 'Class Actions and Class Settlements Going Global: the Netherlands', in D. Fairgrieve and E. Lein, eds., *Extraterritoriality and Collective Redress* (Oxford, Oxford University Press 2012) p.67 at p.78-81.
[54] For the large number of collective redress cases in the financial sector and the *Dexia*- and the *Shell*-case in particular see I. Benöhr, 'Consumer Dispute Resolution after The Lisbon Treaty: Collective Actions and Alternative Procedures', *J Consum. Policy* 36 (2013) p. 87 at p. 92.
[55] HR, 27 November 2009, LJN: BH2162, Ondernemingsrecht 2010, p. 119 (*World Online*).
[56] HR, 5 June 2009, LJN: BH2822, *NJ* 2012 No. 182 (*Effectenlease*).
[57] For the interaction between the collective action the collective settlement cf. I. Tzankova and H. v. Lith, 'Class Actions and Class Settlements Going Global: the Netherlands, in D. Fairgrieve and E. Lein, eds., *Extraterritoriality and Collective Redress* (Oxford, Oxford University Press 2012) p.67 at p. 74.
[58] From a procedural point of view H.W. Micklitz and A. Stadler, 'Collective legal actions in Europe, especially in German civil procedure', 17 *EBLR* (2006) p.1473 at p. 1490-1492.

Court by courts, if directly relevant to the case.[59] It is true that this amendment applies not only to class settlements, but to any situation of a greater number of claims based on the same or similar factual or legal issues. In light of the fast clarification of questions of law to be expected from the Supreme Court, it may induce parties to settle and pave the way for an expansion of the settlement system.

Apart from this enlarged potential range for settlements, the Dutch legislator has also widened their scope of potential application in an Act of June 26, 2013, amending the Dutch Collective Settlements Act, which extends the latter's applicability to bankruptcy cases and the introduction of a pre-trial hearing.[60] The latter can be requested by either party to find out whether a settlement is viable. Thus incentives to settle are created early on. Since a party failing to discharge his obligation to appear may be charged with the costs of the parties that appear, on this occasion, the opt-out mechanism can produce additional effects. Therefore overall, as a result of the Amendment the regulatory interest in a far-reaching settlement of a mass damage situation compels individual class members to opt out at an earlier stage of the litigation, if they disapprove of the settlement.

3. Model case procedures

The opt-out approach of the Dutch Collective Settlements Act makes it considerably easier for the parties to reach a binding settlement, thus moving forward the litigation effectively. Quite similarly, achieving judicial efficiency in mass damage cases with a great number of claims on the basis of a judgment given effect over and above the parties to the model case itself is the issue of primary importance in model case procedures as established in Germany, Austria and Greece, Portugal and to a certain degree in England.[61] Therefore this form of collective redress seems to put the emphasis

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[59] Wet prejudiciële vragen aan de Hoge Raad (Prejudicial Questions to Supreme Court), February 9, 2012, Staatsblad 2012, 65, available at http://www.eerstekamer.nl/9370000/1/j9vvhwtbnzpbzzc/vixgkclhezh0/f=y.pdf, last accessed on October 30, 2013.

[60] Wet tot wijziging van de Wet collectieve afwikkeling massaschade (Collective Settlements Act Amendment), June 26, 2013, Staatsblad 2013, 255, available at http://www.eerstekamer.nl/9370000/1/j9vvhwtbnzpbzzc/vjavdaqvvpzo/f=y.pdf, last accessed on October 30, 2013.

[61] *European Parliament, Directorate General for Internal Policies*, Overview of existing collective redress schemes in EU Member States, July 2011, IP/A/IMCO/NT/2011-17, p. 39; for the procedural function cf. H.-W. Micklitz and A. Stadler, 'Collective legal actions in Europe, especially in German civil procedure', 17 *EBLR* (2006) p. 1473 at p. 1478.

on its procedural function to aggregate a multitude of equal or similar cases into one single proceeding just as is the case in the collective settlement under the WCAM.[62]

In contrast to the important role of consumer associations and interest groups in the above-mentioned fields of consumer-related mass litigation, in model case act procedures only individuals have standing. Under Portuguese law test claims are provided for in the rules of administrative procedure law and are brought to bear if twenty actions have been initiated with respect to the same legal relationship or if twenty actions can be decided on the basis of an application of the same norms to identical situations of fact.[63] Austrian law leaves room for a representative test case action such that the Consumer Information Association can represent a consumer who assigns claims to it and there is agreement between the parties that the result of the test case is also binding for the other claims.[64] More specifically, in litigation in the field of partial debenture a statute of 1874 authorizes the appointment of a curator representing investors in court, thus exemplifying an early model case procedure for investor protection purposes.[65] In contrast, in Switzerland these procedures have originated from agreements between the defendant and the claimants that a test case brought by one of the claimants will be binding between the defendant and all claimants, without however producing res iudicata effect for anyone not formal party to the litigation.[66] Similarly to Austrian law, Art. 86 of the Swiss Act on Collective Investment ('Kollektivanlagengesetz' [KAG]) provides for the appointment of a representative of the investors for liability claims precluding single investors from any action and producing res iudicata effect for every investor.[67]

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[62] H.-W. Micklitz and A. Stadler, 'Collective legal actions in Europe, especially in German civil procedure', 17 *EBLR* (2006) p. 1473 at p. 1478.
[63] H. Sousa Antunes, 'Portugal' in: The Globalization of Class Actions, *Annals Am. Acad. Pol. Sci.* 2009, p. 161, at p. 162-163.
[64] European Parliament, Directorate General for Internal Policies, *Overview of existing collective redress schemes in EU Member States*, July 2011, IP/A/IMCO/NT/2011-17, p. 14; G. Kodek, 'Austria' in: The Globalization of Class Actions, *Annals Am. Acad. Pol. Sci.* 2009, p. 86, at p.87; for the related problems cf. S. Kalss, 'Civil Law Protection for Investors in Austria', 13 *EBOR* (2012) p. 211, at p. 215-217.
[65] Reference is made to this early example in the explanatory memorandum to the KapMuG, see *Begründung KapMuG-RegE*, Bundestags-Drucks. 15/5091, p. 16.
[66] For the background in the 80s when a number of claims by farmers under the Nuclear Liability Act following the nuclear explosion in Chernobyl led to the first test-case contract between the Swiss federal government and the claimants see S. Baumgartner, 'Class Actions and Group Litigation in Switzerland', 27 *Nw. J. Int'l L. & Bus.* (2007) p. 301 at p. 342.
[67] Schweizerische Eidgenossenschaft, *Kollektiver Rechtsschutz in der Schweiz – Bestandsaufnahme und Handlungsmöglichkeiten, Bericht des Bundesrates*, Bern, July 3, 2013, available at https://www.bj.admin.ch//content/dam/data/pressemitteilung/2013/2013-07-03/ber-br-d.pdf, last accessed

Similar to the above-mentioned model case procedures the English civil procedural rules enable courts to select and determine a small number of claims in order to manage mass litigation, when there are a lot of claims raising the same factual or legal issues. Similar to the German model case procedures the English civil procedural rules also enable courts to select and determine a small number of claims in order to manage mass litigation, when there are a lot of claims raising the same factual or legal issues. This has been the case in the bank charges litigation[68], when the Financial Ombudsman Service and the County courts were flooded by individual claims which came to a standstill when the Office of Fair Trading and the bank set up what virtually amounted to a test case.[69] Other examples include the extreme *Railtrack*-case of 2005 with almost 48,000 former shareholders suing the Government for allegedly trying to withhold shareholder compensation upon the re-nationalisation of the business.[70] In particular, the group litigation order according to Part 19 III of the Civil Procedure Rules[71] offers possibilities of flexible case management thanks to the discretion granted to the judge. The latter's guideline is just as in model case procedures procedural efficiency, i.e. a minimum of delays and low and proportionate cost.[72] Not surprisingly, the group litigation order has to rely on a register and cannot do without a binding effect of the ensuing judgment for the registered parties. The discretion of the court goes so far as to select a claim from the register as a test claim (Rule 19.13 [b]).

Looking at the German law of civil procedure and its principles more generally, it comes as no surprise that in Germany a very distinct model of model case procedure prevails in comparison with the legal systems just described. The important role of the principle of party control over the proceedings (*Dispositionsmaxime*) and the closely related principle of party control of facts and means of proof (*Verhandlungsgrundsatz* or *Beibringungsgrundsatz*) illustrate the dominant role of the individual parties in

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on October 30, 2013; for the legal situation under the former Act on Investment Funds (‚Anlagefondsgesetz' [AFG]) see *Begründung KapMuG-RegE*, Bundestags-Drucks. 15/5091, p. 16.

[68] *The Office of Fair Trading v. Abbey National Plc & Others* [2009] UKSC 6.

[69] C. Hodges, *Developments in Collective Redress in the European Union and United Kingdom* (Working Paper 2010), available at http://globalclassactions.stanford.edu/sites/default/files/documents/1010%20Class%20Actions%20UK%202010%20Report.pdf, last accessed on October 30, 2013, p. 6-7.

[70] *Geoffrey Rutherford Weir & Ors v. (1) Secretary of State for Transport (2) Department for Transport* [2005] EWHC 2192 (Ch).

[71] Rules of Civil Procedure, Part 19 III Group Litigation, available at http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part19#III, last accessed on October 30, 2013.

[72] see C. Hodges, 'England and Wales', in: The Globalization of Class Actions, *Annals Am. Acad. Pol. Sci.* 2009, p. 105 at p. 109.

German civil procedure and the resulting procedural problems to bundle the underlying claims that belong to different claimants. Accordingly, these are the issues that shape the current German legal debate in this field.

III. The German Capital Markets Model Case Act (KapMuG) of 2005 and its amendment of 2012

A. Capital markets model cases – practical experience and empirical findings

It stands to reason that the significant role of individual procedural rights brings about distinct limits to collective litigation mechanisms. As a result, when it comes to retail investor protection, in the German two-tier legal framework for the provision of investment services hand in hand with its implementation via civil liability in courts goes its public enforcement by supervisory authorities.[73] On the EU-level the potential divergence between the enforcement of the MiFID and investor enforcement of good behavior by investment firms becomes evident, civil liability regimes and procedural mechanisms in this field falling within the legislative power of the Member States.[74] At the same time, this makes clear the significance of the liability as provided for by Art. 6 of the Prospectus Directive[75], serving as the legal basis for the *Telekom* plaintiffs' claims.

Until September 2009 in 24 cases petitions for determination in a model procedure were filed, in 12 procedures model case procedures were initiated, but only two led to model case decisions, another two to final rulings.[76] Up to that point there had only been model case decisions in the *DaimlerChrysler*- and the *LBB Fonds 13*-cases, the first one

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[73] See from the perspective of substantive law O. Cherednychenko, 'The Regulation of Retail Investment Services in the EU: Towards the Improvement of Investor Rights?' 33 *J. Consum. Policy* (2010) p. 403 at p. 416-418.

[74] O. Cherednychenko, 'The Regulation of Retail Investment Services in the EU: Towards the Improvement of Investor Rights?', 33 *J. Consum. Policy* (2010) p. 403 at p. 417; N. Moloney, 'Effective Policy Design for the Retail Investment Services Market: Challenges and Choices', in: G. Ferrarini and E. Wymeersch (eds.), *Investor Protection in Europe: Corporate Law Making, The MiFID and Beyond Post FSAP* (Oxford University Press 2006) p. 382 at p. 424-425.

[75] Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, O.J. L 327, 11.12.2010, p. 1-12.

[76] For an exhaustive empirical overview cf. A. Halfmeier/P. Rott/E. Feess, *Evaluation des Kapitalanleger-Musterverfahrensgesetzes; Forschungsvorhaben im Auftrag des Bundesministeriums der Justiz, Abschlussbericht*, Frankfurt am Main, 14. Oktober 2009, Frankfurt School of Finance & Management 2010, p. 50-55.

being decided against the claimants, the latter finding a few errors in the prospectus. The empirical findings of the study by *Halfmeier/Feess* of 2009 do not, of course, consider yet the decisions in the *Telekom*-case[77] mentioned above. Looking at the number of cases reported as model cases, one also has to take into consideration that a lot of times petitions for determination in a model procedure are filed, but rejected and not reported on grounds of inadmissibility.

B. Scope of application

This restriction touches on the scope of application of the German Capital Markets Model Case Act (KapMuG) of 2005. According to § 1 para. 1 sent. 1 of the KapMuG the main procedure of a model case must be concerned with a claim for damages because of inaccurate, misleading or omitted public capital market information. As a result, claims for damages based on alleged breaches of duties of an investment advisory contract cannot be brought in a model case procedure.[78] This limitation makes it clear that model case decisions do not primarily aim at awarding damages to investors, but rather at clarifying common questions of fact or law with binding effect for a large number of similar cases. In doing so, a model case decision will deal with closely connected questions, such as (a) the materiality of specific information, (b) its accurate and possibly misleading content, (c) the knowledge of the defendant about the deficiencies of this information.[79] Since these questions will typically be relevant for a variety of claims, jurisdiction to render a model case decision does not lie with trial courts, but with the higher-level regional appellate courts.

This rather limited scope of application of the KapMuG makes evident one important aspect of this procedure – its two goals being directed towards the implementation of the Prospectus Directive and towards the enforcement of individual retail investor rights

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[77] BGH, court order of May 16, 2012, file no. 23 Kap 1/06, BeckRS 2012, 10607; BGH, court order of July 3, 2013, file no. 23 Kap 2/06, BeckRS 2013, 11428.

[78] As stated in the explicit wording of the former § 1 para. 1 no. 1 of the KapMuG; see the case law of the German Federal Court of Justice BGH, *NZG* 2007 p. 350; BGH, *BGHZ* 177, 88; BGH, *NJW* 2009 p. 513; BGH, *NJW* 2009 p. 2539; BGH, *NZG* 2011 p. 151; BGH, *NZG* 2012 p. 1268.

[79] In more detail on the legal questions typically highly relevant for a test case see A. Halfmeier/P. Rott/E. Feess, *Evaluation des Kapitalanleger-Musterverfahrensgesetzes, Forschungsvorhaben im Auftrag des Bundesministeriums der Justiz, Abschlussbericht*, Fankfurt School of Management, 2009, p. 43-48; for a very brief overview cf. F. Contratto, 'Access to Justice for Investors in the Wake of the Financial Crisis', *SZW/RSDA* (2009) p. 176 at p. 185-187.

being on an at least almost equal footing.[80] How this translates into the actual model case procedure as provided for by the KapMuG remains to be seen. It is true, though, that in § 1 para. 1 no. 2 of the recent amendment of the KapMuG of 2012 the scope of application of the model case procedure has been broadened to now also include claims for damages resulting from the *use* of inaccurate or misleading public capital market information as well as those flowing from the failure to adequately inform about the inaccurate or the misleading content of public capital market information.[81]

This broadening, however, comes at a price for potential claimants. At first glance, this amendment seems to finally subject the same facts of retail investor disputes to a coherent and comprehensive set of procedural rules, thus possibly avoiding inconsistent decisions.[82] At the same time, the inclusion of these claims may lead to a stay of the proceedings in the individual lawsuit of a retail investor where the trial court finds of its own motion that the decision will depend on the declaratory judgment as desired in the model case procedure (§ 8 of the German Model Case Act 2012). As a result, the individual claimant will find himself to be part of a mass litigation and subject to the delays this will entail. This sheds some light on the problems arising from the way an individual may be forced into a model case under the KapMuG leaving it by and large to the judgment of the courts whether to stay an individual lawsuit with a view to a pending model case.[83] Critics point out resulting unnecessary delays which may be in conflict with Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European

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[80] On the regulatory goal to be implemented by the KapMuG see the Explanatory Memorandum to the German Model Test Case Act BT-Drucks. 15/5091, p. 16; B. Hess, ,"'Private law enforcement" und Kollektivklagen', *JuristenZeitung [JZ]* (2011) p. 66 at p. 68.

[81] Explanatory Memorandum to the Amendment to the German Model Test Case Act of 2012 BT-Drucks. 17/8799, p. 16; for more details see A. Halfmeier, 'Zur Neufassung des KapMuG und zur Verjährungshemmung bei Prospekthaftungsansprüchen', *Der Betrieb [DB]* (2012), 2145.

[82] K. Rotter, ,Stellungnahme zum Entwurf eines Gesetzes zur Reform des Kapitalanleger-Musterverfahrensgesetzes v. 16.4.2012', p. 6, download at http://www.bundestag.de/bundestag/ausschuesse17/a06/anhoerungen/archiv/20_KapMug/04_Stellungnahmen/Stellungnahme_Rotter.pdf; pointing out pros and cons D. Junck, Die Reform des Kapitalanleger-Musterverfahrensgesetzes aus dem Blickwinkel der richterlichen Praxis v. 25.4.2012, p. 3-5, download at http://www.bundestag.de/bundestag/ausschuesse17/a06/anhoerungen/archiv/20_KapMug/04_Stellungnahmen/Stellungnahme_Junck.pdf.

[83] For the margin of discretion of the court in this question see in the Explanatory Memorandum to the German Model Test Case Act BT-Drucks. 15/5091, p. 20.

Union.[84] This is why there is the proposition to replace this approach with an opt-in or opt-out mechanism as it is common in other jurisdictions.[85]

C. The three-tier procedure of a model case procedure

Even though a model case procedure is marked by its adversarial structure involving two parties, its main characteristics indicate some regulatory control over the progress of the proceedings and a certain tension between these two different procedural principles.[86] The initiative to file a petition for a model case decision is left to the parties, it can be either the plaintiff or the defendant to file such a petition in a case pending before the trial court.[87] Once the sufficiency of the motion is approved, the latter is published in an electronic register (§ 2 of the German Capital Markets Model Case Act [KapMuG]). As a result, the underlying individual proceedings are stayed (§§ 5, 6 para. 5 of the German Capital Markets Model Case Act 2012 [KapMuG]) for six months until the quorum of at least nine more parallel petitions for determination in a model case procedure is reached. Otherwise the original proceeding of the individual lawsuit continues. In case the quorum is reached, the trial court issues the order for reference to the higher regional court ("Oberlandesgericht"), defining once and for all the legal questions to be subjected to the model case procedure. In view of the overriding importance of this ruling and its implications for the outcomes and success of the individual plaintiffs' claims, the role of the trial court formulating this order for reference is of utmost importance, since this ruling is binding on the higher regional court according to § 6 para. 1 sent. 2 of the German Model Case Act 2012 (KapMuG).[88]

Under the former KapMuG the trial court also had jurisdiction to decide about plaintiffs' petitions to extend the scope of the determination in the model case procedure. This inefficient division of responsibilities between the trial court and the

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[84] A. Halfmeier, ‚Zur Neufassung des KapMuG und zur Verjährungshemmung bei Prospekthaftungsansprüchen', *Der Betrieb [DB]* (2012) p. 2145 at p. 2146.
[85] A. Halfmeier, ‚Zur Neufassung des KapMuG und zur Verjährungshemmung bei Prospekthaftungsansprüchen', *Der Betrieb [DB]* (2012) p. 2145 at p. 2146.
[86] For a discussion of the KapMuG of 2005 against the background of basic principles of German civil procedure see B. Hess, ‚Der Regierungsentwurf für ein Kapitalanlegermusterfahrensgesetz – eine kritische Bestandsaufnahme', *Wertpapier-Mitteilungen [WM]* (2004) p. 2329-2331.
[87] For brief overviews over the course of procedure of a model case procedure cf. B. Hess, 'Musterverfahren im Kapitalmarktrecht', *Zeitschrift für Wirtschaftsrecht [ZIP]* (2005) p. 1713 at p. 1714-1717; F. Contratto, 'Access to Justice for Investors in the Wake of the Financial Crisis: Test Cases as a Panacea?' *SZW/RSDA* (2009) p. 176 at p. 186-187.
[88] For procedural delays resulting from the court's freedom to formulate the ruling with binding effect on the higher court cf. M. Vollkommer, *Neue Juristische Wochenschrift [NJW]* (2007) p. 3094 at p. 3098.

higher regional court after the announcement of the order for reference to the higher regional court has now been eliminated in § 15 of the German Model Case Act 2012 (KapMuG) that provides for a transition of the control over the proceeding to the higher regional court.[89] Notwithstanding this improvement serious delays and inefficiencies still result from the plaintiffs' right unlimited in time to submit a motion to extend the scope of the determination in the model case procedure, which seems to be one of the greatest obstacles to a rapid and reliable conduct of the model case procedure.[90]

Once the model case is before the higher regional court, the court selects of its own motion the lead plaintiff according to the criteria enumerated under § 9 para. 2 of the German Model Case Act 2012 (KapMuG).[91] The other plaintiffs are joined to the proceeding as third-party petitioners who can validly undertake procedural steps as long as they are not inconsistent with the lead plaintiff's declarations and litigation acts (§ 14 of the German Model Case Act 2012 [KapMuG]) and who are bound by the model case decision (§ 22 para. 1 of the German Model Case Act 2012 [KapMuG]).[92]

This model case decision then forms the basis for the award of individual damages in the individual cases before the trial courts (§ 22 of the German Model Case Act 2012 [KapMuG]). It goes without saying that a lot of times individual retail investors will, at this stage, still be confronted with difficult especially factual issues to be resolved in order to state their damage claims successfully. Problems such as establishing individual reliance on misstatements or causation of investment decisions by misstatements come to mind.[93]

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[89] For criticism against the former rule see for example A. Halfmeier/P. Rott/E. Feess, *Evaluation des Kapitalanleger-Musterverfahrensgesetzes, Forschungsvorhaben im Auftrag des Bundesministeriums der Justiz, Abschlussbericht*, Fankfurt School of Management, 2009, p. 57; for a positive evaluation of the new § 15 of the KapMuG 2012 see K. Rotter, ‚Der Referentenentwurf des BMJ zum KapMuG – Ein Schritt in die richtige Richtung!' *Verbraucher und Recht [VuR]* (2011) p. 443 at p. 447.

[90] See with references to court decisions B.W. Schmitz and J. Rudolf, ‚Entwicklungen der Rechtsprechung zum KapMuG', *Neue Zeitschrift für Gesellschaftsrecht [NZG]* (2011) p. 1201 at p. 1206.

[91] For criticism against the court's discretion to select a lead plaintiff confer T. Duve and C. Pfitzner, 'Braucht der Kapitalmarkt ein neues Gesetz für Massenverfahren? Der Entwurf eines Gesetzes über Musterverfahren in kapitalmarktrechtlichen Streitigkeiten (KapMuG) auf dem Prüfstand', *Betriebsberater [BB]* (2005) p. 674 at p. 678.

[92] For more details on the position of the joined third-party petitioners in the proceeding before the higher regional court under the KapMuG 2005, which does not substantially differ from KapMuG 2012 in this respect, confer B. Hess, 'Der Regierungsentwurf für ein Kapitalanlegermusterverfahrensgesetz – eine kritische Bestandsaufnahme', *Wertpapiermitteilungen [WM]* (2004) p. 2329 at p. 2330-2331.

[93] For the causation problem and the closely-related issue of a shifting of the burden of proof confer *ComROAD I* and *II*, BGH, *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2007 p. 345 and 346;

Looking at the model case procedure as a whole, there is no denying the fact that it struggles with the frictions that result from the partial collectivization of claims. The latter may come into conflict with some basic principles of German civil procedure forming the foundation for the adversarial system, in particular the principle of party disposition. According to the latter it is for the parties to delimit the subject-matter of the proceedings.[94] In light of the final definition and formulation of the legal issues to be subjected to the model case decision in the order for reference to the higher regional court issued by the trial court, it is clear that the parties' control is largely restricted. This goes even further, considering the higher regional court's selection of the lead plaintiff that is therefore also removed from party control.

D. Notification of claims and individual lawsuits

In addition, the parties' control over legal proceedings under this general principle also extends to the parties' common agreement when to initiate the proceeding and when to end it. This raises the question how plaintiffs can join a model case procedure after its initiation. The model case decision by the higher regional court is binding for the individual lawsuits whose proceedings have been stayed and are continued afterwards. In order to fully participate in the model case procedure in such a way, a retail investor has, of course, to file an individual lawsuit to begin with. This is particularly true because the regular limitation periods for claims based on issuer liability because of incorrect ad-hoc notification are relatively short, that is one year only pursuant to § 37b, 37c of the German Securities Trading Act.[95]

ComROAD III, BGH, *Neue Zeitschrift für Gesellschaftsrecht(NZG)* 2007 p. 269; *ComROAD IV*, BGH, *Wertpapier-Mitteilungen (WM)* 2007 p. 1557; *ComROAD V*, BGH, *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2007 p. 711; *ComROAD VI (2007)*, BGH, *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2008 p. 382 at p. 383; *ComROAD VII*, BGH, *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2008 p. 385; *ComROAD VIII*, BGH, *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2008 p. 386; see also J. Hennrichs, ‚Haftungsrechtliche Aspekte des Rating', in: *Festschr. Hadding*, 2004, p. 875 at p. 891; T. Möllers, 'Kausalität für den Differenzschaden und uferlose Haftungsausdehnung- Comroad I – VIII', *Neue Zeitschrift für Gesellschaftsrecht [NZG]* (2008) p. 413; *IKB*, BGH, *Zeitschrift für Wirtschaftsrecht [ZIP]* 2012 at p. 318; for details on the *IKB*-decision cf. among others Bachmann, ‚Anmerkung',*JuristenZeitung (JZ)* (2012) p. 571; Klöhn, ‚Die Haftung wegen fehlerhafter Ad-hoc-Publizität gem. §§ 37b, 37c WpHG nach dem IKB-Urteil des BGH', Die Aktiengesellschaft [AG] (2012) p. 345 at p. 356.

[94] H.J. Musielak, *Kommentar zur Zivilprozessordnung*, 10th ed. 2013, Einleitung, Rn. 35.

[95] Pointing out the relatively short limitation periods in this field as a potential reason for a high number of individual subsequent claims A. Halfmeier/P. Rott/E. Fees, *Evaluation des Kapitalanleger-Musterverfahrensgesetzes, Forschungsvorhaben im Auftrag des Bundesministeriums der Justiz, Abschlussbericht*, Fankfurt School of Management, 2009, p. 47-48.

If a plaintiff now wants to avoid the limitation of his claims and at the same time participate in the effect of the model case procedure, each and every plaintiff will have to file a conventional lawsuit. This would then add to the above-mentioned congestion of the courts.[96] On the other hand, such a litigation strategy may turn out to be irrational for the individual claimant because of high litigation costs.[97] The latter include a share of the costs of the overall model case procedure proportionate to the claim in relation to the total amount of claims (§ 24 para. 1 and 2 of the German Model Case Act of 2012 [KapMuG]). This applies for example to costs arising from the collection of evidence and inquiries the claimant did not initiate or in any way control and he would therefore not have asked for in his individual lawsuit.[98] In any case, he is forced into the model case procedure for the reasons stated above in order to ensure to be able to ultimately enforce his individual claims. It stands to reason that one may question this practice to force an individual claimant into lawsuits. In fact, it reveals aspects of the model case procedure that show an instance where the law tries to take advantage of the individual claimants' incentives and their purses to use them and their lawsuits as a tool to enforce the regulatory goals of ad-hoc disclosure. In light of high litigation costs this enforcement policy may prove ineffective.[99]

On the other hand, the question has been raised how to mitigate the incentive effect resulting from the threat of a limitation of individual claims to file an individual lawsuit thus contributing to a growing congestion of courts and to further delays of the proceedings. In the recent amendment of the KapMuG 2012 the legislator did not go so far as to introduce a true opt-in mechanism that would only require a claimant to simply declare his participation in the model case procedure with no need to file a lawsuit.[100]

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[96] Pointing out that in 2003 there were approximately another 17.000 investors trying to avoid the limitation of their claims by way of registering with the Public Legal Information and Arbitration Office [Öffentliche Rechtsauskunfts- und Vergleichsstelle] A. Tilp, 'Das Kapitalanleger-Musterverfahrensgesetz: Stresstest für den Telekom-Prozess', in: *Festschrift Krämer*, 2009, p. 331 at p. 333.

[97] Further details on the incentive effects of relatively high entry requirements and the non-existence of a nonformal participation A. Halfmeier/P. Rott/E. Fees, *Evaluation des Kapitalanleger-Musterverfahrensgesetzes, Forschungsvorhaben im Auftrag des Bundesministeriums der Justiz, Abschlussbericht*, Fankfurt School of Management, 2009, p. 101-103.

[98] B.-W. Schmitz, in: M. Habersack/P. Mülbert/M. Schlitt (eds.), *Handbuch der Kapitalmarktinformation*, 2008, § 32 Rdnr. 312; A. Halfmeier, ‚Zur Neufassung des KapMuG und zur Verjährungshemmung bei Prospekthaftungsansprüchen', *Der Betrieb [DB]* (2012) p. 2145 at p. 2146-2147.

[99] For details on the litigation costs and criticism in this respect see K. Rotter, ‚Der Referentenentwurf des BMJ zum KapMuG – Ein Schritt in die richtige Richtung' *Verbraucher und Recht [VuR]* (2011) p. 443.

[100] Critical of this only half-hearted solution of notification A. Halfmeier, ‚Zur Neufassung des KapMuG und zur Verjährungshemmung bei Prospekthaftungsansprüchen', *Der Betrieb [DB]* (2012) p. 2145 at p. 2146-2147 and p. 2151.

Instead, § 10 para. 2-4 of the German Model Case Act of 2012 provides that a simple "notification" of claims will suspend their limitation. After the model case procedure the notifying person has three more months to file his lawsuit before limitation sets in.[101] To be sure, this procedural simplification for the individual claimant, by no means, amounts to an actual joinder of procedures because the notifier does not participate in the model case procedure and the decision is not binding for him.[102]

E. Opt-out settlement with court approval

The only very limited participation of a notifier also shows itself in his non-inclusion in the newly introduced opt-out settlement under the recently amended §§ 17-19 of the German Model Case Act of 2012 (KapMuG). This new procedure, partly borrowed from the above mentioned 2005 Dutch Act on Collective Settlements Mass Damage Claims (*Wet collectieve afhandeling massaschade* [WCAM]), offers the opportunity to plaintiffs in a model case procedure to submit to the court a proposal for settlement.[103] The latter has to be approved by the court by way of an order from which no appeal shall lie, if it considers the proposal reasonable in light of the previous presentation of the main features of the case and the results of the hearings conducted with the parties so far (§ 18 para. 1 of the German Model Case Act of 2012 [KapMuG]).

This seemingly high degree of court control over the settlement might be taken as an indication for prevailing regulatory interests brought to bear in the rules on the opt-out settlement. At the same time, judging from the Explanatory Memorandum the legislator primarily aimed at ensuring practicality and non-discrimination[104], therefore § 18 para. 1 of the German Model Case Act of 2012 can be taken as a provision to ensure a judicial assessment as to the basic fairness of the settlement proposal. This becomes apparent from the possibility to invalidate the settlement by an opt-out of at least 30% of the joined parties pursuant to § 17 para. 1 sent. 4 of the German Model Case Act of 2012 [KapMuG]. In addition to this invalidation of the settlement proposal by at least

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[101] For details on the limitation of claims under this new provision confer A. Halfmeier, ‚Zur Neufassung des KapMuG und zur Verjährungshemmung bei Prospekthaftungsansprüchen', *Der Betrieb [DB]* (2012) p. 2145 at p. 2147-2149.

[102] K. Rotter, ‚Der Referentenentwurf des BMJ zum KapMuG – Ein Schritt in die richtige Richtung', *Verbraucher und Recht [VuR]* (2011) p. 443.

[103] For parallels and differences with regard to the Dutch rule see A. Halfmeier, ‚Zur Neufassung des KapMuG und zur Verjährungshemmung bei Prospekthaftungsansprüchen', *Der Betrieb [DB]* (2012) p. 2145 at p. 2150.

[104] Explanatory Memorandum to the Amendment to the German Model Test Case Act of 2012 BT-Drucks. 17/8799, p. 24-25.

30% of the plaintiffs, the amendment of 2012 also offers the possibility to a joined party to opt-out on his or her own in case of discontent pursuant to § 19 para. 2 of the German Model Case Act of 2012 [KapMuG].

Comparing the legal effect of the settlement under the German Model Case Act of 2012 with that under the Dutch Act on Collective Settlements Mass Damage Claims (*Wet collectieve afhandeling massaschade* [WCAM]), there are notable differences: Whereas the settlement in a German model case procedure is only binding on the parties to the proceedings, under the WCAM a settlement is binding on every affected person irrespective of a lawsuit that has been filed.[105] In addition, the Dutch provision enumerates a few reasons why a settlement may not be considered to be reasonable and therefore may not be approved by the court as opposed to the German approach that without more seems to assume in general the reasonableness of the proposal.[106] Overall, one might conclude from these instances that the German procedure leaves a little more room for individual investor interests vs. regulatory goals than is the case in the settlement pursuant to the Dutch Act on Collective Settlements Mass Damage Claims (*Wet collectieve afhandeling massaschade* [WCAM]).

IV. Summary

The German Model Case Procedure Act can be characterized by its main goals to improve individual investor protection by facilitating the enforcement of individual claims, to facilitate the enforcement of capital market regulation, and to reduce the burden on the judicial system.[107] These goals could not all be fully achieved at once with the German Model Case Procedure Act of 2005, as has become apparent on the occasion of the first cases, namely the *Telekom*-case to be litigated in such a procedure. These goals are, however, the criteria to focus on, when it comes to evaluating the latest amendment of this act in 2012.

They are also the cornerstones of the on-going debate on collective redress in Europe where the European Commission has lately proposed a coherent approach. The latter calls for the regulation of collective redress across different sectors and urges the

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[105] A. Mom, *Kollektiver Rechtsschutz in den Niederlanden* (Tübingen, Mohr Siebeck 2011) p. 363.
[106] For details on the Dutch provisions concerning the settlement confer A. Mom, *Kollektiver Rechtsschutz in den Niederlanden* (Tübingen, Mohr Siebeck 2011) p. 353, 456-457.
[107] Explanatory Memorandum to the German Model Case Act BT-Drucks. 15/5091, p. 16.

Member States to provide for relief for private plaintiffs in these sectors such as competition law, consumer protection, and environmental law. The general principles common to injunctive and compensatory collective redress laid out by the Commission are not targeted towards harmonization and make clear the broad variety of collective redress mechanisms in the Member States. Apart from Germany, only a few of them provide for model case procedures, such as Austria, Portugal, Switzerland and to a certain degree England and Wales. In light of the considerable role of the individual claimant in this type of procedure, the importance of the German model is hardly surprising, given the dominant role of individual parties in German civil procedure. Therefore this is also the determinant of the German Model Case Procedure Act.

By broadening the scope of application of the German Model Case Procedure Act in the Amendment of 2012, the legislator decided to include claims for damages resulting from the use of inaccurate or misleading public capital market information as well as those flowing from a failure to inform about such inaccurate or misleading content. Besides improving investor protection, this enlarged scope of application may also subject an individual claimant to a mass litigation and the possibly resulting delays and limitations of his procedural rights.

The German model case procedure is characterized by a three-tier procedure, starting from the petition for a model case decision in the trial court, leading to the resolution of the legal issues raised in the petition by the higher regional court and going back to the individual lawsuits before the trial courts. The sometimes procedurally time-consuming ping-pong match between the lower and the higher court produced long delays and proved to be very inefficient at times. That is why the amendment has tried to improve the conduct of the proceedings in order to accelerate the model case procedure and to enhance its efficiency. Even so, these changes have not eased the overall friction between the procedural needs necessarily arising from the bundling of individual claims and the regulatory goals sometimes lurking behind them.

The newly introduced notification of claims does not amount to a full-fledged opt-in mechanism, but only suspends the limitation of claims. Therefore the participation threshold is not effectively lowered and enforcement will not increase notably. As far as the new opt-out settlement under the amendment of the German Model Case Act of 2012 is concerned, one has to note that both regulatory interests as well as individual

investor interests enter into it. This shows in the necessary court approval from which no appeal shall lie, but which can be invalidated by an opt-out of at least 30% of the joined parties, who can also opt-out on their own in order to avoid participation.

The remaining shortcomings and compromises of the amendment led the Green Party to present a reform proposal in the German Bundestag that aimed to replace the German Model Case Procedure Act with a universal group procedure act applicable to all civil and commercial matters in June 2013.[108] No ordinary filing of a lawsuit would be necessary anymore and there would be opt-in possibilities in order to keep costs low and eliminate participation thresholds.[109] At the same time, opt-out mechanisms were rejected because of the potential binding effect of the later decision on disagreeing parties against their will, if they fail to opt-out explicitly.[110] Not surprisingly, the proposal ultimately had symbolic status only resulting from the subsequent general elections, which did not provide the Greens with the necessary votes necessary in parliament to pave the way for success. Therefore the remaining questions about the KapMuG of 2012 still have to be resolved.

[108] *Gesetzentwurf der Fraktion BÜNDNIS 90/DIE GRÜNEN*, Entwurf eines Gesetzes über die Einführung von Gruppenverfahren, BT-Drucks. 17/13756 v. 5.06.2013, Art. 1 of the draft, p. 4 and p. 12.
[109] *Gesetzentwurf der Fraktion BÜNDNIS 90/DIE GRÜNEN*, Entwurf eines Gesetzes über die Einführung von Gruppenverfahren, BT-Drucks. 17/13756 v. 5.06.2013, p. 13-15.
[110] *Gesetzentwurf der Fraktion BÜNDNIS 90/DIE GRÜNEN*, Entwurf eines Gesetzes über die Einführung von Gruppenverfahren, BT-Drucks. 17/13756 v. 5.06.2013, p. 15.

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