

Chapter 2

German KapMuG Procedure

Abstract One of the types of mechanisms to be used to resolve a mass dispute, is the model case procedure. The German KapMuG procedure is an important example of such type of procedure. In this chapter, the KapMuG procedure is clarified: who can commence such procedure, what can parties achieve and how can they achieve this (what are the procedural steps).

Keywords KapMuG · Deutsche Telekom · Individual procedures · Beigeladenen · Oberlandesgericht

Introduction to Part I. (Collective redress mechanisms in the EU)

In the following chapters the three prototypes of collective redress mechanism will be set out by giving an overview of three important examples of these mechanisms. Firstly the German KapMuG model case procedure will be covered, secondly the Dutch collective action and thirdly the Dutch collective settlement. In order to put the mechanisms in perspective, the legislative history of the mechanism will first be briefly described. This will be followed by a description of the use and requirements of the specific collective redress mechanism. In what ways can the mechanism be used and by whom? The chapters conclude by describing the recent developments affecting the specific collective redress mechanisms.

2.1 Introduction

As collective litigation has a long history in Germany, the KapMuG test case procedure is not the first or only collective redress mechanism in the country. The commonest form of collective litigation in Germany is the association or interest group complaint, which originates from 1896. The 1896 Act on the Repression of

Unfair Competition¹ enabled associations whose purpose is to promote commercial interests, to bring a claim for an injunction in the case of misleading advertising.^{2,3} Later, in 1965, the possibility to bring a claim for injunction in the Unfair Competition Act (UWG) was extended to certain consumer associations (Verbraucherverbände)⁴; this right was been extended yet again, in 2004, to cover all acts of competition.⁵

With the increasing influence of the EU, the rules regulating the protection of consumers' interests and the right to seek injunctive relief gradually changed through EU legislation. The EU Directive on Injunctions for the Protection of Consumers' Interests⁶ was implemented in German law through the Act on Injunctive Relief⁷ (UKlaG), which came into force in 2002. This new act also contains the right to seek injunctive relief against the use of unfair standard contract terms.⁸ In the UKlaG the right to seek injunctive relief encompasses violations of all provisions protecting consumer interests.⁹

A collective claim for injunctive relief may be initiated by various eligible bodies.¹⁰ These bodies can be divided into *qualified entities*, in accordance with the list of qualified entities held by the Federal Office of Administration¹¹ and by the European Commission.¹² Another possible body is an association with legal personality for the promotion of commercial interests. This association must have a considerable number of businesses marketing goods or commercial services of the same or a similar type. Moreover, these organisations must also have enough staff and organisational and financial resources to perform the interest promotion functions laid down in their statutes.¹³ In addition to the important remedies of the UWG and the UKlaG, there are several smaller legal instruments for interest groups: for

¹ Dated 27 May 1896 (Official Journal, p. 145ff).

² Article 13 sub 2 and Article 3 German Unfair Competition Act. See also Schaumburg 2006, p. 24.

³ This act was replaced in 1909 by the Act Against Unfair Competition, Gesetz gegen den unlauteren Wettbewerb (UWG). Dates 7 June 1909 (Official Journal, p. 499).

⁴ Baetge 2007, p. 4.

⁵ See § 8 UWG of 3 July 2004 (Official Journal, Part I, p. 1414). See also Baetge 2007, p. 5.

⁶ Directive 98/27/EC of the European Parliament and of the Council of May 19, 1998, Official Journal L 166, p. 51.

⁷ Law Authorizing Suits for Injunctive Relief in Consumer Protection and other Matters (Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen). Dated 26 November 2001 in the version promulgated on Aug. 27, 2002, BGBl. I, p. 3422.

⁸ These were formerly included in § 13 of the AGB-Gesetz.

⁹ Baetge 2007, p. 5.

¹⁰ See Section 3(1)(2) UKlaG.

¹¹ See Section 4 UKlaG.

¹² See Article 4 Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interest.

¹³ See Section 3(1) UKlaG and Schaumburg 2006, pp. 143–146.

example, in the German Competition Act¹⁴ and the Telecommunications Act,¹⁵ as well as legislation relating to equal treatment of disabled persons¹⁶ and environmental protection.¹⁷ None of these, however, offer the possibility for individual plaintiffs to collectively claim damages. This can only be done through a joinder construction of the various plaintiffs.

As was demonstrated most clearly in the Deutsche Telekom case,¹⁸ there was indeed a need for a proper collective redress mechanism that could facilitate the eventual compensation of victims in a mass dispute, especially in securities mass disputes, as the previously mentioned legislation did not relate to this area. The KapMuG collective redress mechanism, which was created to resolve the Telekom case, is seen as one of the first real mass damage claims in Germany.¹⁹

2.2 Deutsche Telekom and KapMuG History

In 1999, Deutsche Telekom developed a stock exchange prospectus (Börsenprospekt), which was one of the preconditions for its planned initial public offering (IPO).²⁰ This IPO occurred in June 2000. Within one year after this public offering, the share price dropped from EUR 67 to as low as EUR 8.42, because Deutsche Telekom had allegedly issued wrong information in the prospectus.²¹ Claimants contended that Deutsche Telekom had overstated the value of its real property by EUR 2 billion.²²

Because the Deutsche Telekom share was also called the people's share, it did not take long before the first of many shareholders filed a claim demanding a refund of the share's initial price.²³ The competent court for such claims is, pursuant to

¹⁴ See § 33(2) of the Law against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen or GWB) dated 26 August 1998 (Official Journal Part I, p. 2521).

¹⁵ See § 44(2) of the Telecommunications Law (Telekommunikationsgesetz or TKG) of 22 June 2004 (Official Journal Part I, p. 1190).

¹⁶ See § 13 of the Law on Equal Treatment of Disabled Persons (Gesetz zur Gleichstellung behinderter Menschen or BGG) of 27 April 2002, (Official Journal, Part I, p. 1467).

¹⁷ See § 61 of the Law on the Protection of the Environment and Landscape (Gesetz über Naturschutz und Landschaftspflege or BNatSchG) of 25 March 2002 (Official Journal, Part I, p. 1193).

¹⁸ For example, see Hess 2005.

¹⁹ Stadler 2009, p. 38.

²⁰ According to Section 32(3) German Stock Exchange Act (Börsengesetz).

²¹ Saam 2008, p. 21.

²² The Deutsche Telekom mass dispute is a classic example of a securities mass dispute.

²³ Based on Section 44(1) German Stock Exchange Act.

Section 44(1) of the German Stock Exchange Act, the one located at the registered office of the issuer: in this case, Frankfurt am Main.²⁴ This court was eventually confronted with between 16,000 and 17,000 shareholders, represented by more than 750 attorneys, who filed individual claims. With a single presiding judge being confronted with a flood of claims, it seemed impossible to resolve the Deutsche Telekom mass dispute in an efficient way. After almost three years, not a single oral hearing had taken place. This led to a number of plaintiffs lodging a constitutional appeal with the Federal Constitutional Court (Bundesverfassungsgericht) on the grounds of a denial of justice. To come to some sort of resolution of (or at least a beginning of a solution to) the Deutsche Telekom case, the German legislator came up with the Kapitalanleger Musterverfahrensgesetz (Capital Markets Model Case Act or KapMuG), which came into effect in 2005.²⁵

The KapMuG was initially intended to be in force for only five years. In 2010, however, when the KapMuG had not yet been fully reviewed and the legislator had not yet decided on a structural solution for mass disputes, it was extended for 2 years. After the KapMuG had been reviewed,²⁶ the German legislator decided to modify several points in it. The resulting revised KapMuG came into force on 1 November 2012, and will be in effect for a period of eight years (till 1 November 2020).²⁷ The KapMuG has been revised in five points:

- Its scope has been extended to include civil law suits where capital market information has been used in the sale and distribution of financial products and/or the provision of investment services.
- Investors are given the option of registering their claim and applying for a model case treatment, before deciding whether to bring a claim.
- The entire process has been accelerated by introducing a deadline for applying for a model case proceeding.
- A settlement between the parties must be accepted by the Higher Regional Court before it can become effective. This settlement option has an opt-out character, which means that once the settlement has been accepted, it binds all parties to the KapMuG proceedings unless they decide to opt out.
- The admissibility of the legal separation of joinder of claims in individual proceedings has been limited, in order to encourage collective legal action of the investors as early as the court of first instance.

In the next section the various steps in a KapMuG procedure will be set out.

²⁴ See Section 32b German Civil Procedure Code (Zivilprozessordnung).

²⁵ The KapMuG came into force on 1 November 2005. See Baetge 2007, p. 9.

²⁶ For the extensive report on the evaluation of the KapMuG see Halfmeier et al. 2010.

²⁷ Kapitalanleger-Musterverfahrensgesetz of 19 October 2012 (BGBl. I S. 2182).

2.3 How a KapMuG Procedure Is Initiated

The KapMuG procedure can be divided into three phases: the preliminary phase, the main phase and the phase in which the individual procedures will have to be resolved. Below, the KapMuG as it applied at the beginning of 2012 is described. The future developments of the KapMuG and the possible changes to the procedure—in addition to the amendments discussed in Sect. 2.2—will be discussed in Sect. 2.5.

The ‘*preliminary phase*’ consists of the first instance proceedings by the individual plaintiffs/victims in the mass dispute. Model case proceedings can be initiated solely by parties and not by the court on its own motion.²⁸ In order to start a KapMuG procedure, plaintiffs first have to file separate individual applications to the competent District Court (Landesgericht) in which, for example, a claim for compensation of damages due to false, misleading or omitted information on public capital markets is asserted. A party to this procedure can apply for a KapMuG procedure, in which case this party will have to demonstrate to the District Court that a model case procedure ‘may have significance for other similar cases beyond the individual dispute concerned’.²⁹ The application must contain information on all factual and legal circumstances which serve to justify the establishment objective of a KapMuG procedure³⁰ and a description of the evidence the applicant intends to use to substantiate or refute factual claims.³¹

After the first application for a KapMuG procedure has been filed, the District Court will announce the request in a claim’s register or Klageregister.³² Within 6 months of this announcement/registration, at least nine³³ other parties have to have filed an application for a KapMuG procedure tool. If this requirement is met, the entire matter will be transferred to the Higher Regional Court (Oberlandesgericht). All points that are presented to the Oberlandesgericht must be ‘related to the same subject matter’ of the pending cases. After the Oberlandesgericht has confirmed that the matters that formed the basis for the application for a KapMuG procedure, will actually be part of a KapMuG procedure, the court of first instance before which the various initial claims are pending stays all proceedings which are related to the

²⁸ Stürner 2007, p. 257. The KapMuG can partly be seen as an opt-in system, as it will be accessible only when there is an adequate incentive for individual claimants to file a lawsuit in the first place. See Stadler 2009, p. 42. For an extensive study on the old KapMuG procedure (pre 2012) see Vorwerk et al. 2007; Reuschle et al. 2008.

²⁹ See Section 1(2) KapMuG. See also Baetge 2007, p. 15.

³⁰ In a model case, plaintiffs can establish the existence or non-existence of conditions that justify or rule out entitlement, or they can seek the clarification of legal questions, provided the decision in the legal dispute is contingent thereupon.

³¹ See Section 1(2) KapMuG.

³² See Section 3 KapMuG.

³³ See Section 6(1) KapMuG.

same subject matter of the test case and which are pending at the district courts.³⁴ This includes related cases in which the plaintiff has not applied for the model case.

At this point, the procedure has entered the ‘*main phase*’. The Oberlandesgericht will have to select one of the plaintiffs that filed an individual suit to become the main plaintiff in the model case. When doing so, the Oberlandesgericht will take into consideration the amount of the individual claim (if the claim is the subject matter of the model case) and whether several plaintiffs have already designated a single model case plaintiff.³⁵ The remaining plaintiffs in the suspended proceedings are summoned to the model case proceeding.³⁶ According to Section 14 KapMuG, these interested parties (Beigeladene) may participate in the proceeding and even file petitions, as long as these are not contrary to the statements and actions of the main plaintiff in the model case procedure. The role of the Beigeladene is merely supportive.³⁷

In the final stage of the model case proceeding, the Oberlandesgericht will, in accordance with general German procedural rules, render a declaratory ruling on the factual and/or legal issues listed.³⁸ This model case ruling has a final binding effect in relation to all suspended cases if it has not been appealed.³⁹ It remains unclear, however, if the model case has res judicata with respect to the Beigeladene or whether the procedure of this party must be seen as a Nebenintervention, which would mean that the judgment would have different effect between the various individual parties that are involved in the KapMuG procedure.⁴⁰ In this book, the option which states that the model case will have res judicata over the individual procedures has been taken as the starting point.⁴¹ After the 2012 revision of the KapMuG, it became possible also to have a court-approved settlement between the defendant and the model case plaintiff. Before the revision, all the parties needed to consent to the settlement; under the revised KapMuG, a court-approved settlement is binding on all parties, unless they opt out.⁴²

The third and final phase of the KapMuG proceedings consists again of the ‘*individual cases*’. These individual cases will be resolved by the court on the basis of the final ruling in the model case proceeding.⁴³ During the third and final stage, the courts trying the matter will decide the individual cases on the basis of the final ruling in the intermediate proceeding.

³⁴ See Section 7(1) KapMuG.

³⁵ See Section 8(2) KapMuG.

³⁶ As a result, the defendant, the model case plaintiffs and the so-called interested parties (victims of the other pending related cases) will be summoned to the model case procedure.

³⁷ The supporting party can be seen as a so-called Nebenpartei. See also Hess et al. 2008, p. 388.

³⁸ Stadler 2009, p. 43.

³⁹ According to Section 15 KapMuG, the model case can be appealed only on points of law.

⁴⁰ See Stadler 2009, p. 43; and Hess et al. 2008, pp. 531–533; and Vorwerk et al. 2007, pp. 240–241.

⁴¹ See also Fees and Halfmeier 2012, p. 14.

⁴² See Section 17 KapMuG et seq.

⁴³ See Section 16 KapMuG.

2.4 What Plaintiffs Can Achieve Through a KapMuG Procedure

In a model case, plaintiffs can establish the existence or non-existence of conditions that justify or rule out entitlement, or they can seek the clarification of legal questions, provided the decision in the legal dispute is contingent thereupon (this is known as the establishment objective of the KapMuG).⁴⁴ Whereas the main plaintiff will claim monetary damages, the other plaintiffs receive only a declaratory ruling on the factual and/or legal issues listed. This ruling can be used in the subsequent individual proceedings. The declaratory judgment may only state something about general legal or factual issues and not about individual issues (such as the causal relationship and individual and demonstrable loss). This declaratory judgment will be binding for all plaintiffs. Should, for example, the court rule in favour of the defendant, plaintiffs will be left empty-handed.⁴⁵

If the ‘model case plaintiff’ agrees to settle his individual dispute, the settlement could also be used to resolve the mass dispute. As mentioned above, this settlement is binding to all parties, unless they opt out of the settlement. Since a mass dispute often contains several thousands of plaintiffs, this implies that these plaintiffs have to agree to the settlement individually (by not opting out of the settlement). The size of the group of plaintiffs makes it unlikely that every plaintiff will agree to a settlement. Because of the sheer numbers of plaintiffs involved in a mass dispute, it is unlikely that a KapMuG mass dispute will be resolved through a settlement.

2.5 Recent Experience with the Act, and Future Developments

Since the enactment of the KapMuG, the case that resulted in the act—the Telekom case—has been pending. The Oberlandesgericht started a KapMuG model case in July 2006.⁴⁶ The list of main issues of fact/law to be decided by the court stopped at 33.⁴⁷ The oral hearings did not begin until April 2008. An illustration of the sheer number of people involved is that the court had to relocate from the courtroom to a large public hall. In May 2012 the District Court ruled in favour of the defendants, stating that there was no proof of a misleading prospectus. The claimants, however, filed for an appeal and on 21 October 2014, the Bundesgerichtshof ruled in favour

⁴⁴ See Section 1(1) KapMuG.

⁴⁵ See also Fees and Halfmeier 2012, p. 14.

⁴⁶ Court order 11-7-2006, 3/7 OH 1/06.

⁴⁷ If all sub items are taken into account the list comes to more than 180. See also Stadler 2009, p. 46.

of the claimants, stating that Deutsche Telekom used a misleading prospectus.⁴⁸ As no court has yet decided on the issues of causation and negligence, the model case procedure will be continued before the Oberlandesgericht.

There are also examples of KapMuG cases that were resolved quicker. An example is the Daimler-Chrysler case. Because this case involved only one key issue, the court was able to come to a decision relatively quickly. The court, however, decided in favour of the defendant company, which caused the plaintiffs to appeal. In March 2008 the test case judgment was overturned and the Oberlandesgericht had to deal with the matter again.⁴⁹ In total, eight KapMuG cases have been filed with a court. As the KapMuG is a form of trial legislation, it should have expired automatically after 5 years, on 1 November 2010.⁵⁰ As already noted, however, it was evaluated, after which the German government decided that it should remain in force for longer. In July 2010, the act was prolonged until 31 October 2012.⁵¹ The revised KapMuG act that came into force on 1 November 2012 will be in effect for eight years (until 1 November 2020).⁵²

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⁴⁸ BGH, Beschluss vom 21. Oktober 2014 - XI ZB 12/12.

⁴⁹ Stadler 2009, p. 46.

⁵⁰ See the 'sunset clause' in Article 9(2) of the Act Introducing Model Proceedings in Securities Litigation (Gesetz zur Einführung von Kapitalanleger-Musterverfahren) of Aug. 16, 2005, BGBl. I, p. 2437.

⁵¹ BGBl. I Nr. 39. of 29. July 2010, S. 977, 979.

⁵² Kapitalanleger-Musterverfahrensgesetz of 19 October 2012 (BGBl. I S. 2182).

Collective Redress and Private International Law in the
EU

Bosters, M.W.F.

2017, XV, 268 p., Hardcover

ISBN: 978-94-6265-185-2

A product of T.M.C. Asser Press