**Questionnaire 2016 Oxford-Leuven Collective Redress Project**

**National Report Germany**

**Prof. Dr. Astrid Stadler, University of Konstanz**

**Part A**

**What mechanisms does your country have to resolve mass disputes?**

**I. General remarks on the mechanisms and compensation schemes available to resolve mass disputes**

The German legal system does not provide very elaborate mechanisms for resolving mass disputes (with the exception of the Capital Market Test Case Act). Where mechanisms of collective redress are available they are strictly based on the idea of private enforcement. Only in German antitrust law, public authorities (namely the cartel authorities) have legal standing to sue the cartelists for skimming-off illegally gained profits. In principle, criminal courts can also award compensation of the victims in proceedings which are an annex to criminal proceedings (“Adhäsionsverfahren, Sec. 403 et seq. Code of Criminal Proceedings), but in practice this option is very rarely used by individuals and there are no rules for mass redress in this context.

In the ADR and Ombudsmen sector, there are well-established and widely accepted Ombudsman proceedings particularly in the banking and insurance sector. Furthermore there are numerous other sectoral conciliation committees (“Schlichtungsstellen”) or mediation bodies. In spring 2016, the German legislator finally implemented the EU ADR-Directive, enacted national provisions in this respect (the “Verbraucherstreitbeilegungsgesetz” -VSBG) and established a new nationwide conciliation committee (“Allgemeine Verbraucherschlichtungsstelle des Zentrums für Schlichtung e. V.” in Kehl) with a very broad scope of activities as required by the ADR Directive. Due to the short period of its existence there is no data or case law available with respect to the new committee. On August 1, 2016, the “Bundesamt für Justiz”, the German agency responsible for consumer protection, published a list of sectoral conciliation committees or institutions which by now have been officially recognized according to the ADR Directive (available at: https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Verbraucherschutz/Liste\_Verbraucherschlichtungsstellen.html;jsessionid=63B7319AAB5375404A0475134BA0B11C.1\_cid377?nn=7709020). The list includes 13 Ombudsmen and private or public ADR institutions – some of them having already a long history or at least some experience from activities in recent years. The most important Ombudsmen institutions in Germany will be covered by a particular national report and therefore this report will not go into details.

**II. Representative Actions for cease and desist orders (Sec. 1-2, 2a Act on Injunctive Relief, Sec. 8 Unfair Competition Act)**

* 1. Representative entities like consumer associations can sue undertakings for an injunction (cease-and-desist order) in the field of unfair standard contract terms (Sec. 1 Act on Injunctive Relief), in case of the violation of the rules against unfair competition or of unfair practices violating EU consumer protection rules (Sec. 2 Act on Injunctive Relief) and copyright law (Sec. 2a Act on Injunctive Relief). Judgments can be made public (as an exception to general data protection rules even the name of the defendant can be published); cease and desist court orders have a binding effect for subsequently filed individual claims by consumers against the same defendant with respect to the court’s finding of a violation of the law (Sec. 11 Act on Injunctive Relief).

2. These mechanisms were originally enacted in 1965 (Unfair Competition Act) and in 1976 for the sector of unfair standard contract terms. In 2002, provisions on representative actions based on the use of unfair standard contract terms were relocated to the new Act on Injunctive Relief (without substantive changes). At the same time the scope of application of representative actions was extended to violations of consumer law (Sec.2 Act on Injunctive Relief provides a list of the relevant EU Directives).

3. Scope: Sectorial (unfair standard contract terms, unfair competition law, consumer law, copyright law)

4. Remedies allowed: only injunctive relief and court orders to remove impairments (which have to be distinguished from damages awards: court orders to remove impairments impose on the defendant an obligation to eliminate the source of violation, but not to compensate any damages caused); with respect to unfair standard contract terms courts can also issue an order against associations to withdraw a recommendation of using a particular standard contract term if the term is illegal (this is of no practical importance).

5. Legal standing is given to all major consumer associations, chambers of commerce, the federal association to combat unfair competition (“Wettbewerbszentrale”) and all representative entities which are on the list of associations that have legal standing under Art.4 para 3 Directive 2009/22/EC. Sec. 4 Act on Injunctive Relief lists the criteria for so-called “qualified representative entities”. Those entities are reported to the EU Commission on a yearly basis.

6. Neither opt-in nor opt-out, representative actions without any participation of individuals.

7. General rules of civil procedure apply (Sec. 5 Act on Injunctive Relief).

8. There are no special rules on funding. Representative entities have to pay the costs out of their regular budgets (consumer associations in Germany are to a large extent funded by tax payers’ money). With respect to actions for injunctive relief Sec. 12 Unfair Competition Act courts may, upon application, reduce the amount in controversy which is the relevant basis for calculating court fees and lawyers’ fees. Applications are often made and granted in order to reduce the procedural risk for plaintiffs.

**III. Actions for skimming-off illegally gained profits (Sec. 10 Unfair Competition Act; Sec. 34a Antitrust Act)**

1. Representative entities can sue traders or service providers who violated the regulations of the Unfair Competition Act (or the Antitrust Act) intentionally and such gained illegal profits at the expense of a large number of consumers. The action can result in an order to pay the illegally gained profit to the Federal Budget.

2. The provisions were enacted in 2004 and 2005 in a stand-alone initiative.

3. Both provisions are restricted to unfair competition law respectively antitrust law.

4. Remedies allowed: skimming-off illegally gained profits

5. Legal standing: Legal standing is given to all major consumer associations, chambers of commerce, the federal association to combat unfair competition (“Wettbewerbszentrale”) and all representative entities which are on the list of associations which have legal standing under Art.4 para 3 Directive 2009/22/EC. In case of violations of antitrust rules the national cartel authorities also have legal standing for such an action (Sec. 33 Antitrust Act).

6. Neither opt-in nor opt-out, representative action without any participation of individuals.

7. The general rules of civil procedure apply.

8. There are no special rules on funding. Representative entities have to pay the costs out of their regular budgets. If the action is successful they can obtain a certain amount from the money paid by the defendant to the Federal budget in order to cover some administrative costs.

**IV. Test case proceedings by consumer associations (Sec. 79 para 3 no. 3 Civil Procedure Code)**

1. Publicly funded consumer associations can enforce consumer claims based on an assignment or power of attorney within their statutory field of responsibility (consumer law). If the individual case raises significant legal issues of general relevance, it can be brought up to the Federal High Court (regardless of the amount in controversy) and thus result in an important although not legally binding precedent. The mechanism can either be used for a test case proceeding in a single case as just described, but it can also be used for collecting a limited number of consumer claims by pooling them in single action. Due to the high administrative efforts necessary to handle a large number of claims, consumer associations prefer to bring single test cases.

2. The present provision of the Civil Procedure Code had a predecessor in the former Act on Legal Representation which came into force in 2008 (stand-alone initiative).

3. The provision applies to consumer claims only, but the mechanism is not restricted to consumer contracts. It also applies to consumers’ claims arising from product liability or pharmaceutical cases for example.

4. The remedy available depends on the consumer claim. Normally it will be a monetary claim for damages or for the restitution of money. Declaratory relief is not available according to the wording of the provision.

5. Legal standing is granted only to German consumer associations which receive money from the Federal Budget (and are therefore deemed to be particularly reliable and reputable).

6. It is an individual claim enforced by a representative entity.

7. The general rules of civil procedure apply.

8. There are no specific rules on funding, but the general idea is that the consumer association pays for the litigation costs in order to overcome the rational apathy of individual consumers.

**V. Capital Market Test Case Proceedings (“KapMuG” – Kapitalanlegermusterverfahrensgesetz)**

1. The Act intends to help investors to enforce damage claims by establishing a model case proceeding with respect to facts or legal issues which are equally relevant to a large number of damages claims filed before courts in Germany. Courts of first instance where damage claims are pending can refer a list of common issues to the Court of Appeals which will decide on these issues in an intermediate stage of the proceedings. The Court of Appeals will appoint a test case plaintiff out of the group of investors who have already filed an action for damages. During the test case proceedings before the Court of Appeals all other individual proceedings are stayed and will be continued only once there is final decision on the common issues tried in the test case. The final decision of the Court of Appeals or (in case of an appeal) the Federal High Court is binding for all individual proceedings in which the common issues are also relevant.

2. The KapMuG was enacted in 2005 as a unique reaction of the German legislature to the so-called “Deutsche Telekom” case which involved more than 17.000 claimants and completely clogged the District Court in Frankfurt in 2003/2004. Because of ongoing criticism about the complexity and clumsiness of the KapMuG proceedings, in 2010 the German legislature initiated an evaluation of the practical implications of the KapMuG, and based on its (not very positive) results a small reform of the Act came into force in 2012. The German policy makers resisted however to follow all suggestions provided by the evaluation report, particularly its recommendation to establish a real group action procedure without the necessity of individual law suits.

3. The KapMuG represents a sectoral approach and applies only to claims for damages caused by false, misleading or omitted public capital market information of a company or for damage caused by false or misleading investment consulting based on such information. According to Sec. 1 KapMuG it also applies – in theory – to some special claims for performance based on German securities law.

4. The remedies available are only claims for damage and for specific performance.

5. There is no particular provision on legal standing. Investors have to sue the defendant individually in the first place. If the application for test case proceedings is successful and a minimum of 10 claimants from different proceedings agree to join the test case proceedings, the Court of Appeals will appoint a test case plaintiff. The test case plaintiff is not a representative of the other investors although the outcome of the test case has a binding effect upon them. Plaintiffs whose proceedings have been suspended with respect to the test case are allowed to participate in the test case proceedings as so-called “interested parties”. They can file motions and submit facts and evidence to the court. Since the 2012 reform, the test case plaintiff has been allowed to negotiate a settlement with the defendant on behalf of all claimants. The settlement becomes binding upon court approval and with the consent of a majority of claimants (70 %) based on an opt-out mechanism.

6. The system is neither a clear opt-in nor a clear opt-out system. Test case proceedings are available only where individual actions have been filed. Once the Court of Appeal has established test case proceedings all pending actions (for which the issues before the Court of Appeal are relevant) are suspended automatically and are subject to the binding effect of the test case decision. Even by a withdrawal of their individual actions claimants cannot escape the binding effect (for example if they file a new action again lateron). Therefore the system has been characterized as providing a mandatory participation which goes even beyond the opt-out effect.

A clear opt-out system applies when the test case plaintiff enters into a settlement with the defendant(s). The settlement – once approved by the court – becomes binding for all claimants if they do not opt-out within a certain period after having received a notice of the settlement. Another requirement for the binding effect is that altogether the settlement is accepted by 70% of the investors who have already filed an action against the defendant.

7. The KapMuG provides a number of special case management rules for the establishment and the conduct of the test case proceedings, in addition the general rules of civil procedure apply.

8. Investors must finance their individual actions based on general rules. Until the 2012 reform of the KapMuG, the legal representative of the test case plaintiff did not receive any additional remuneration for his engagement in the test case proceedings. Therefore in many cases, law firms were not eager for becoming selected for the test case. The 2012 reform changed the rules on costs and allowed a (small) additional fee for the legal representative of the test case proceedings. There is no separate accounting of the legal expenses in the test case proceedings, they are part of the individual proceedings for which the test case decision ultimately becomes binding.

**Part B**

**I. Representative Actions for cease and desist orders (Sec. 1-2, 2a Act on Injunctive Relief, Sec. 8 Unfair Competition Act)**

It is not possible to give the exact number of cases per year or in total as there is no official data available in this respect. The “vzbv” (the umbrella organisation of all German consumer associations) states on its website that they and the regional consumer associations initiate more than 1000 investigations per year. 50% of them are being settled out of court, 20-25% go to court and the “vzbv” has a success rate in court of more than 80% (http://www.vzbv.de/themen/rechtsdurchsetzung/urteile). A very large number of the cases, probably the majority of them, is related to the use of unfair and illegal standard contract terms. For a representative case in this field see the case study no. 2 below with respect to the skimming-off of illegally gained profit. The case described also includes actions for injunctions.

**II. Actions for skimming-off illegally gained profits (Sec. 10 Unfair Competition Act; Sec. 34a Antitrust Act)**

**1. Number of cases:**

a) With respect to Sec. 34a Antitrust Act not a single case has been reported since its coming into force in 2005. One reason for this effect is probably that the right of representative entities to bring such an action is subsidiary to the cartel authorities’ right of skimming-off illegally gained profits from cartellists. Whenever the cartel authorities investigate a case and impose fines on the members of the cartel, they will also consider skimming-off the profits resulting from the cartel (or either take these illegally gained profits into account when deciding on the amount of the fines). Because of the selection of cases by the cartel authorities only stand-alone actions are left to representative entities. Without an official investigation and a binding decision on the existence of the cartel, representative actions for skimming-off illegally gained profits involve an enormous procedural risk and will not be filed.

b) With respect to Sec. 10 Unfair Competition Act there have been approx. 12-15 cases since the coming into force of this provision in 2004. One reason for the reluctance of representative entities to bring such actions is the high procedural risk of claimants due to their burden of proof with respect to the defendant’s intentional violation of competition rules. Another obstacle is the lack of financial incentives for claimants (the amount to be paid by defendants goes to the Federal Budget). The Federal Ministry of Justice now considers to lower the threshold in substantive law (e.g. to require only gross negligence instead of an intentional violation for example) and to establish a fund into which the money can be paid and from which it would be available for special consumer protection projects. Details are not yet available and it is very unlikely that a legislative initiative will be started before the federal elections in 2017.

**2. Nature of cases**

**No. 1: District Court Bonn, 12.5.2005 (12 O 33/05):** It was the first action based on the new provision. The defendant, a retail seller of matrasses, had referred in his advertisements to a “very good” result of a product test of his matrasses published by “Stiftung Warentest” (a non-profit German consumer organisation conducting independant products’ tests). The test result was in reality only a “satisfactory”. The plaintiff could not prove that the defendant had used the wrong test result intentionally because the defendant was able to explain that it was simply a transcription error by one of its employees. This defense was plausible as the employee had made similar mistakes in the past and had once even used a test result in advertisements that was worse than the one actually awarded by “Stiftung Warentest”. Thus, one of the basic requirements of Sec. 10 Unfair Competition Act was not fulfilled and the action was dismissed. There was no appeal.

**No. 2: District Court Berlin, 25.9. 2007 (16 O115/06**): The plaintiff sued the defendant for the disclosure of information which was necessary to calculate the illegally gained profits for an action under Sec. 10 Unfair Competition Act. The defendant had allegedly violated competition rules by using a design of his websites which did not indicate clearly enough for customers that the download of mobile phone ringtones was not free of charge, but lead to a subscription for three tones per month for the price of 4,99 Euros per month. The District Court dismissed the action because the plaintiff could not prove that the defendant had violated the law intentionally. The court held that a previous written warning sent to the defendant can lead to the assumption that the defendant *from then on* was aware of his illegal practice. Such an assumption requires however that the written warning was made with respect to exactly the same (illigal) conduct as the subsequent action under Sec. 10.

**No. 3: District Court Heilbronn, Settlement 11. 12.2008 (23 O 136/05); Court of Appeal Stuttgart, 2.11.2006 (2 U 58/06).** In 2006, the “vzbv” sued the discounter “Lidl” because of its misleading advertisement of matrasses. “Lidl” had used out-dated results of product tests by “Stiftung Warentest”. The Court of Appeals in Stuttgart confirmed that “Lidl” was obliged to disclose information to the plaintiff in order allow the “vzbv” to calculate the illegally gained profit. Upon an action for payment filed by the “vzbv” later on, “Lidl” settled the case and paid 25.000 Euro to the Federal Budget. The “vzbv” had estimated that the total amount of the illegal profit war approx. 400.000 but – due to the procedural risk – had sued “Lidl” only for 25.000 Euros.

**No. 4:** **District Court Munic I, 22.7.2008 (33 O 17282/07);** **Court of Appeals Munic, 15.4.2010 (6 U 4400/08):** The regional consumer association in Hamburg (“Verbraucherzentrale Hamburg” (supported by a litigation funder) had sued a telecommunication provider who in 2002 had undisputedly used an illegal method in its invoices in order to convert the former German currency to Euros. There were clear European provisions in this respect and the ECJ had confirmed that the defendants’ method was not in line with these rules. The method brought up the price for phone calls to a round figure and thus overcharged customers. The action was dismissed in both instances because the defendant’s behaviour was classified as a breach of individual contracts only, but not as competing activitiy or a violation of competition rules. According to Sec. 10 Unfair Competition Act, however, the defendant must have gained the profit by an intentional violation of competition rules.

**No. 4: Court of Appeals Hamm, 14.2.2008 (4 U 135/07):** The plaintiff had filed an action against the defendant for the disclosure of information which was necessary to calculate the illegally gained profits for an action under Sec. 10 Unfair Competition Act. The plaintiff alleged that the defendant had violated competition rules by selling a pharmaceutical product “F” which contained additives that were not allowed in Germany. Again it turned out to be difficult to prove an intentional violation of the law. The plaintiff argued that the defendant must have been aware of the illegality because of a previous law suit in which the court had ordered the defendant to stop selling a similar product which contained the same additives. The Court of Appelas Hamm dismissed the action based on the finding that there was only gross negligence on behalf of the defendant. The new product “F” was imported from the Netherlands where could be legally put on the market. Therefore – due to EU regulations – the defendant had reason to believe that he was also allowed to sell the same product in Germany.

**No. 5**: **District Court Hanau, 17.9.2008 (1 O 569/08)**: This case again deals with a subscription trap on the internet. The “vzbv” sued an internet service provider who had offered an “online advent calender” and had given the impression to users that participation and registration was free of charge. Only from a small footnote it became clear that users had to pay 59,- Euros. The “vzbv” had sent a written warning to the service provider and when they did not sign a cease-and-desist undertaking the “vzbv” obtained a court injunction. The subsequent action based on Sec. 10 Unfair Competition Act to disclose all relevant information for the calculation of the illegally gained profit was successful. An action for skimming-off the illegally gained profit, however, was not filed and there is no publicly available information as to the final outcome of the case.

**No. 6: Court of Appeals Frankfurt, 4.12.2008 (6 U 186/07):** The defendant had offered on his internet website access to art design and poems without clearly indicating that using a confirmation button already lead to a subscription of three months and a price of 39 Euros per month. The court held that this was an illegal “subscription trap” and that the defendant must have been aware of the violation of competition rules. There is no information on the final outcome of the case available.

**No. 7:** **District Court Hanau, 1.9.2008 (9 O 551/08**): Plaintiff “vzbv” had sued “Online Service Ltd” for the disclosure of information necessary for the plaintiff to calculate the illegally gained profits for an action under Sec. 10 Competition Act. The defendant had allegedly violated competition rules by not indicating clearly on his websites that the use of particular services was not free of charge. The action was successful only in part. The District Court held that the defendant had not violated competition rules intentionally before receiving a written warning from the plaintiff. Only once he had received such a warning the defendant must have been aware of the fact that his practice was illegal and must have realized that the previously obtained legal advice from his lawyers was probably not correct.

**No. 8: Court of Appeals Schleswig Holstein, 26.3.2013 (2 U 7/12):** In this case the plaintiff requested a court injunction against the defendant, a telecommunication service provider, to not use any more several standard contract terms, particularly one which required customers to pay a 10 Euros fee for a return debit note. The action was also for the disclosure of the necessary information necessary to calculate the profit illegally gained from the use of that practice. As a consequence of a former proceeding the defendant had already reduced the handling fee from almost 30 Euros to 10 Euros, but insisted that this practice was lawful. The court of first instance granted the cease-and-desist order, but dismissed the action under Sec. 10 Competition Act based on the lack of an intentional violation by the defendant. Upon appeal, the Court of Appeals confirmed the cease-and-desist order and also granted an order for disclosure. It held that the defendant, a big undertaking with its own legal department, could be expected to know the relevant case law with respect to unfair standard contract terms and therefore had acted at least with *dolus eventuali*s. The Court of Appeals did not allow a further appeal on points of law and the respective motion by the defendants to set aside this non-admission was dismissed by the Federal High Court (BGH, 24.7.2014, III ZR 123/13).

In a second stage, however, the parties are now litigating the question whether the defendant correctly complied with the order to disclose the relevant information: **Federal High Court, 4.5.2016 (I ZR 64/16), Court of Appeals Schleswig Holstein, 25.2.2016 (2 U 7/15), District Court Kiel, 19.6.2015 (17 O48/15).** In the enforcement proceedings the defendants alleged that tehy had given all information required to an independent certified accountant as ordered by the court. The court thus intened to protect the trade secrets of the defendant with respect to some information (e.g., the name of customers). However, the Court of Appeals and the Federal High Court held that the information provided to the certified accountant was not detailed enough. Therefore the defendant’s motions to stay the excecution proceedings and to suspend the enforcement of a penalty payment were dismissed.

According to information provided by the”vzbv” an action for payment is now pending before the District Court Kiel. The defendant has already announced to pay voluntarily an amount of 147.000 Euros. The “vzbv” estimates that the total amount of illegally gained profit is approx. 450.000 Euros.

**No. 9: District Court Munic, 17.9.2014 (37 O 16359/13):** The plaintiff – a professional association of dentists – sued a Munic dentist for the disclosure of information and for the accounting of illegally gained profits. The case was based on the defendant’s advertising on his internet website where he offered dental services for prices which were allegedly “inappropriately low” compared to the official dentists’ fee schedule. The action was dismissed because the plaintiff could not prove that the dentist actually gained any relevant profit from this strategy at the expense of his patients. Although the defendant admitted that he had attracted new customers by his advertising this was not sufficient to prove any profit. The defendant may have enticed patients away from other dentists, but the court held that Sec. 10 Unfair Competition Act required evidence that any profit was made at the expense of consumers. It was not sufficient to simply inflict damage on competitors.

**No. 10: District Court Hannover, 17.11.2015 (18 O 36/15):** The plaintiff sued a home savings and loan association which administrated approx. 3.5 million buildings savings contracts in 2013. The plaintiff claimed the disclosure of information and accounting of illegally gained profits. The defendant had charged customers with a handling fees of at least 10 Euros for each return debit note and thus violated the rules against unfair standard contract terms. The court granted the order and held that there was an intentional violation of the law and that the defendant had acted intentionally – at least since he had received a written warning from the plaintiff in April 2012.

**3. Case studies:**

**(1) District Court Darmstadt 13.1.2009 (16 O 366/07), Court of Appeals Frankfurt 4.12.2008 (6 U 186/07):**

a. Facts: The defendant was responsible for several websites were consumers could use special search engines. The company canvassed customers with the statement “today free of charge”. Customers who registered and did not revoke their registration at the same day bought a subscription running 24 months for 7 Euro per month.

b/c. The claimant, the “vzbv” (the umbrella organisation of all German consumer associations), alleged that the advertisement was misleading. The case was brought up by customer complaints to consumer associations.

d. The claim was brought before the District Court in Darmstadt (the seat of the defendant)

e. There is no information about third-party funding, so the action was apparently funded by “vzbv”.

f. The case started in 2006 when the “vzbv” sent a written warning to the defendant explaining that its advertisement was illegal and asking for a cease-and-desist undertaking (the normal practice in these cases). The undertaking was signed by the defendant but the practice did not stop. The action filed by “vzbv” in 2007 was an “action by stages” where in the first stage the claimant sues for the disclosure of information about the defendant’s use of the website, the turn-over, costs, taxes etc. – information necessary to calculate the illegally gained profit. In the second stage there is normally an action for the account of profits. In this case there were court proceedings only with respect to the request for disclosure. The “vzbv” is still negotiating the sum to be paid with the defendant.

g. The case involved mostly legal issues. The underlying facts were proved by screenshots which depicted the statement “today free of charge” and showed that customers had to scroll down in order to get the information that by registration they will get a subscription which is not free of charge when the website was used more than 24 hours.

h. The proceedings took from 2007 to 2010 (first instance and appeal), there was an appeal on points of law to the Federal High Court which was not successful, but there is no publicly available information as to the date of the Federal High Courts’ decision.

i. The court of first instance and the Court of Appeals held that the advertising was misleading and violating the Unfair Competition Act. They also held that the defendant was – at least after receiving the “vzbv’s” written warning – aware of the fact that the practice was illegal. As a number of customers had to pay the monthly fee for the two year period of the subscription there was also profit gained “at the expense” of a considerable number of consumers. The requirements of Sec. 10 Unfair Competition Act were thus fulfilled. In the first instance, however, the plaintiffs’ action also covered the use of the allegedly misleading advertising during a period which was before the “vzbv” had sent a written warning to the defendant. In this respect the action was dismissed (probably because an intentional violation could not be proved for that period). For the period after the defendant had received the written warning the action for disclosure of the relevant information necessary for the exact calculation of profits was successful. The Court of Appeal did not allow a further appeal on points of law to the Federal High Court. The defendants filed an appeal to the Federal High Court asking to set aside the non-admission, but that appeal was dismissed.

In an action for payment (of 400.000 Euros) the “vzbv” was only successful in part. The defendant could prove that from its turn-over of 400.000 Euros resulting from the use of the websites approx. 385.000 had to be deduced because of commissions to be paid to employees and third parties. Defendants were finally ordered to pay only 12.300 Euros + interest.

j. There was no compensation of the customers (as the action was not for the recovery of damages). According to information provided by the “vzbv” the defendants finally paid 12.300 Euros, but the enforcement was difficult due to the fact that defendant became insolvent.

k. The defendant had to pay the legal expenses of the action brought against him.

l. There is no information available as to the remuneration of the lawyers. Their fees are based on a system of fixed fees depending on the amount in controversy.

m. Yes, see above i.

n. Not that I know of.

o. There was a criminal investigation against the defendant, but the investigation was closed due to the difficulty of proving an intentional violation.

p. There were no prominent media reports.

**(2) District Court Kiel, 14.5.2014 (4 O 95/13), Court of Appeals Schleswig-Holstein, 19.3.2015 (2 U 6/14)**

a. The defendant, a mobile phone service provider, used several standard contract terms which according to the plaintiff were illegal. Particularly two clauses were in dispute. One standard contract term requried customers to pay a deposit of an amount of Euros 9.97 for securing the return of the SIM card after the termination of the contract. Another contract term required customers to pay a so-called “no-use-fee” if they did not use (not even partially) a particular service under the contract. With respect to the first contract term (deposit) the plaintiff sued for a cease-and-desist order, with respect to the second contract term (“no-use-fee”) the “vzbv” asked for a disclosure order with respect to the information and figures necessary to calculate the illegally gained profit.

The case came up through several complaints of customers made to consumer associations.

b. /c. The action was initiated by the “vzbv” who was the plaintiff. The defendant was the mobile phone service provider.

d. The action was brought before the District Court in Kiel.

e. There is no information that third party funding was involved, therefore the litigation was financed by the plaintiff.

f. The case started in April 2011 when the “vzbv” sent a first written warning to the defendant which objected to the use of a standard contract term used by the defendant. With respect to that clause the “vzbv” obtained a cease-and-desist order from the District Court Kiel (2 O 136/11, 29.11. 2011) which was confirmed on the defendant’s appeal by the Court of Appeals Schleswig-Holstein on 3 July 2012 (2 U 12/11). The defendant then changed the wording of its contract clause with respect to the refund of the deposit. Customers could get the refund although they returned the SIM card only after the period of 14 day which was the deadline according to the contract.

The “vzbv”, however, still claimed that the contract term was illegal and sent another written warning to the defendant in February 2013. The defendant declined to sign an undertaking not to use the terms in the future on 26 February 2013. As a consequence, on 23 April 2013 the “vzbv” filed an action for a court order prohibiting the use of the new contract term and for the disclosure of the relevant information necessary to calculate illegally gained profits from the use of the former contract clause regarding the SIM card. The court issued an order for the disclosure of that information and held that the contract terms were unfair. It held, that although the defendant remained the owner of the SIM cards he had no legitimate interest to receive them after the termination of the contract. The defendant himself had admitted that the SIM cards were all immediately destroyed and that there was no indication as to any misuse of SIM cards by customers after the termination of the contract.

With respect to the “no-use-fee” general contract term the “vzbv” obtained a judgment by default against the defendant in August 2011 according to which the defendant was not allowed to use the contract term any more. Upon the defendant’s motion to set aside the judgment by default the court decision was confirmed and another appeal dismissed by the Court of Appeals in July 2012. Since August 2012 the contract term has not been used any more by the defendant. In December 2012, the “vzbv” asked the defendant to disclose the amount of the profit illegally gained by the use of the “no-use-fee” since 1 June 2011, which the defendant declined. With its action filed on 23 April 2013 the plaintiff also sues for the disclosure of the necessary information and for the disgorgement of the profit.

g. The main issue were questions of law, namely whether the respective standard contract terms were unfair. Therefore no evidence was necessary in this respect.

h. The case took approximately 2 years from the filing of the action, but 4 years from the first steps taken by the “vzbv”. The final decision of the Court of Appeals Schleswig-Holstein was announced in March 2015.

i. The Court of Appeals rejected the appeal of the defendants and confirmed the illegal use of the standard contract term with respect to the deposit for the SIM card. It also confirmed the decision of the first instance with respect to the disclosure of relevant information for the disgorgement of profits. The court held that the use of unfair general contract terms is relevant for a fair competition and confirmed that the defendant acted at least with eventual intent (*dolus eventualis*). In this respect the court rejected the argument that “intent” can be assumed only if there was a previous court decision declaring the standard contract term in dispute illegal. In the case at hand the unfairness of the “no-use-fee” was obvious.

The Court of Appeals did not allow a further appeal on points of law the Federal High Court. The defendants filed an appeal to the Federal High Court asking to set aside the non-admission, but the motion was withdrawn (BGH III ZR 128/15).

J. Due to the nature of this action there is no compensation of the victims. There was no action filed by the “vzbv” for the disgorgement of a certain amount of the illegally gained profit. The legal department of the “vzbv” is still in negotiations with the defendant for a settlement. The amount in dispute is approximately 430.000 Euros.

k. Due to the loser pays rule all costs of the proceedings had to be paid by the defendant.

l. There is no exact information on the remuneration of the lawyers. They normally receive only the fixed fees based on the amount in controversy.

m. s. above

n. no.

o. not that I know of.

p. no.

**III. Test case proceedings by consumer associations (Sec. 79 para 3 no. 3 Civil Procedure Code)**

There are numerous cases in which these provisions are used to conduct test case proceedings.

The most prominent one is taken here to illustrate the mechanism.

The “vzv” filed an action against one of the big traders of electric appliances. The claim of a single consumer was assigned to the “vzbv”. The consumer had bought a baking oven from the defendant, but 17 months after the delivery of the oven the enamel coating of the oven started to splinter and a repair was not possible. Due to the defect of the good, the defendant delivered a new one, but asked the consumer to pay a compensation of 70 Euros for the use of the defective oven for 17 months. The consumer paid under reserve. According to the applicable national rules at that time, traders were allowed to claim a compensation for the use of the defective product in cases like this. The “vzbv” sued the trader for a refund of the 70 Euros (an actions for declaratory relief would not have been admissible!) and took the case up to the Federal High Court. The judges of the Federal High Court referred the question of how to interpret the applicable provisions of the Directive 1999/44 EC on the sale of consumer goods to the European Court of Justice. The ECJ held that according to the Directive traders were not allowed to ask for a compensation for the use of defective products (ECJ, 174.2008 – C-404/06). Therefore the German provisions were violating EU law. Accordingly, the Federal High Court ordered the refund of the 70 Euros (BGH, 26.11 2008 – VIII ZR 200/05). Finally the German legislature became active and changed the national rules in order to comply with the ECJ’s interpretation.

**IV. Capital Market Test Case Proceedings (“KapMuG” – Kapitalanlegermusterverfahrensgesetz)**

**1. Number of cases**

The official statistics of the German Federal Office of Statistics identify only those proceedings which are “real” KapMuG-proceedings in the sense of test case proceedings before the Court of Appeals. There is not data available with respect to cases in the first instance where applications for KapMuG proceedings had been filed, but were not successful (either because the District Court dismissed the motion or because there was finally not the necessary number of 10 applications for test case proceedings). Therefore there are only figures available with respect to test case proceedings before the Court of Appeals – the latest data is from 2014[[1]](#footnote-1).

2014: 124 proceedings

2013: 89 proceedings

2012: 18 proceedings

2011: 8 proceedings

2010: 56 proceedings

According to the official statistics there were no KapMuG proceedings between 2005-2010. This is definitely not correct, because a number of court decisions from KapMuG proceedings have been issued and published since 2006, for example by the Court of Appeals in Munic, Stuttgart, Cologne and Frankfurt. According to the file numbers used for example by the Court of Appeals in Munic in 2007 it seems that there were at least 34 KapMuG proceedings pending, 2 in 2008, and 4 in 2009. The Court of Appeals in Frankfurt had 1 in 2006 (Telekom)

The evaluation of the KapMuG (commissioned by the Federal Ministry of Justice) by Halfmeier/Rott/Feess, published in 2010 is based on the following figures: from 2005 (when the KapMuG came into force) to September 2009: 24 cases in which applications for test case proceedings under the KapMuG have been published, in 12 cases test case proceedings actually began before Court of Appeals.

**2. Nature of cases (selection of representative cases)**

**No. 1: Telekom Case, Court of Appeals Frankfurt**

The first case under the KapMuG (enacted in 2005). Approximately 17.000 small investors had sued Deutsche Telekom, the Federal Republic of Germany (as the former main shareholder of Deutsche Telekom AG), KfW (Kreditanstalt für Wiederaufbau – a large banking institute), and several banks as members of a consortium for damages. Allegedly the prospectus used for the third initial public offering in 2000 was not correct with respect to the accounting profit of 8.2 billion Euros from an intracompany sale of the US subsidiary “Sprint” and the validation of the value of real estate owned by Deutsche Telekom. The actions were filed in 2003 and 2004 before the District Court in Frankfurt. During the first 2 years of the proceedings not much happened as the court was waiting for the German legislature to enact a new law which should help in the handling of such a complex mass litigation.

When the KapMuG had come into force in 2005, the District Court Frankfurt published the decision to refer a list of legal and factual issues to the Court of Appeals Frankfurt for a binding decision in a test case under the new KapMuG (LG Frankfurt 3/7 OH 1/06, 3-7OH 1/06, 3/07 OH 1 06, 3-07 OH 1/06). The Court of Appeals appointed a test case plaintiff, the legal representative is the law firm *Tilp & Partners* which is specialized in capital market litigation, particularly in KapMuG proceedings. The proceedings in the test case dragged on because the KapMuG allows parties the filing of supplementary motions for new issues at almost any time. Another reason for the lengthy proceedings was that the chairman of the chamber at the Court of Appeals who was in charge of the case retired during the proceedings and – due to a lawsuit among potential successors – it took several months before the chamber could continue with the case. In May 2012, the Court of Appeals Frankfurt finally announced the test case decision. It held that the prospectus used by Deutsche Telekom was correct with respect to all the allegations raised by the claimants (16.5.2012, 23 Kap 1/06). The test case plaintiff appealed and in October 2014 the Federal High Court remanded the case (21.10.2014, XI ZB 12/12). It held that the prospectus was at least partially wrong and misleading. As the Court of Appeals had not yet decided on the requirements of fault and the causal link between the misleading information and the damages caused, the case is now again pending before the Court of Appeals in Frankfurt. The parties are waiting for a new test case decision. Once that decision has been made (and has become res judicata) all the proceedings in first instances (which are still suspended as long as the test case proceedings are not finished) will have to be continued in order to decide on the individual damages claims based on the binding test case decision(s).

**No. 2: Conergy AG**

In October 2008, the Munic law firm *Rotter* filed actions on behalf of investors against Conergy AG – a company operating in the solar industry - based on alleged violations of accounting rules (the published turnover figures that were too high) and the late public ad hoc announcements with respect to a delay in the delivery of silicium and moduls (both necessary for the production). Ad hoc announcements of October 2007 had caused a breakdown of share prices. Board members had sold their own shares in March 2007 resulting in a profit of a double digit million euro amount. In June 2010 the District Court Hamburg decided to refer the case for test case proceedings to the Court of Appeals Hamburg. The proceedings are still pending. There was also a criminal investigations against board members of Conergy AG resulting in criminal court proceedings based on a possible violation of insider trade rules and manipulation of financial statements.

**No. 3: Correalcredit Bank AG**

From 2006-2008 numerous actions for damages based on allegedly omitted ad hoc announcements (in 2004) were filed against Correalcredit Bank AG before the District Court Frankfurt. Upon application of the plaintiffs a model case procedure according to the KapMuG followed. The central issue to be adjudicated upon was whether the defendant had informed the public in due time about their plans to sue former board members who had engaged in derivative activities thus gambling with the existence of the company. On August 20, 2014 the Court of Appeals in Frankfurt confirmed the main issues in favour of the plaintiff’s side and dismissed the defendant’s applications. An appeal on points of law is pending before the Federal High Court (File no. II ZB 24/14).

**No 4: Hypo Real Estate**

Private and institutional investors sued Hypo Real Estate for a total amount of damages of approx. 1 billion Euros. The actions are based on an alleged failure of Hypo Real Estate to publish ad hoc announcements with respect to insider information. Due to the global financial crisis the Hypo Real Estate Bank almost collapsed in 2008 when it announced considerable write offs for U.S. certificates. The value of its shares dropped by 35%. As a result of the situation of Hypo Real Estate other banks were also on the brink of insolvency. The Federal Government stepped in and supported Hypo Real Estate by investing more than 100 billion Euros. On December 15, 2014 the Court of Appeals of Munic (Kap 3/10) confirmed that between 8/2007 and 8/2008 HRE had mislead investors about the risks of the certificates HRE held with respect to the U.S. subprime market. HRE filed an appeal on points of law to the Federal High Court (BGH XI ZB 13/14, 1.12.2015). Should the Federal High Court confirm the decision of the Court of Appeals of Munic, the law suits against the defendant pending in the first instance and stayed until the model case decision becomes res judicata will continue. Plaintiffs still have to prove the causal link between defendant’s failure to publish an ad hoc announcement and the damage of investors suffered due to the deterioration of share prices. The model case is still pending before the Federal High Court.

**No. 5 VIP 4 GmbH & Co. KG Investmentfund**

VIP 4 is an investment fund for film, media and entertainment. Investors sued the defendant VIP and several others persons responsible for the defendant’s prospectus based on allegedly false and misleading information in the defendant’s prospectus published in 2004. The District Court Munic I referred a list of 32 common issues of fact and law to the Court of Appeals in Munic for a binding decision in a model case proceeding (District Ct. Munic I, 15.11.2007, 22 OH 2145/07). In its model case decision the Court of Appeals in Munic (30.12.2011, Kap 1/07) confirmed the allegations of the plaintiff only in part. Defendants’ filed an appeal on points of law to the Federal High Court. On 27 July 2014, the Federal High Court overturned the decision of the Court of Appeals of Munic with respect to some of its findings (particularly those related to tax law) and referred the case back to the Court of Appeals for a new trial. With respect so other issues the Federal High Court gave a final decision as no further evidence taking was necessary.

**No. 6 Volkswagen “Dieselgate”**

In September 2015 Volkswagen AG admitted the use of illegal defeat devices installed in numerous VW diesel cars in the U.S., in Germany and elsewhere in order to manipulate emission control tests. When this information became public the price of Volkswagen AG’s shares dropped by 35%. In October 2015, *Tilp* law firm which is specialized in KapMuG proceedings filed actions for damages on behalf of 278 institutional investors against Volkswagen AG in the District Court of Braunschweig claiming approx. 3.25 billion Euros. Since then several other complaints have been filed, *Tilp* represents more than 1200 investors who suffered loss with respect to their VW AG and Porsche shares. The amount of damages claimed in the Braunschweig law suits is thus the highest ever claimed in Germany. On August 8, 2016 the District Court of Braunschweig referred a list of 193 issues of fact and law to the Court of Appeals Braunschweig for a decision in model case proceedings. The Court of Appeals announced to open the KapMuG proceedings by the end of 2016. Nevertheless the situation of investors is not satisfactory because not all of them wanted to sue Volkswagen AG. As it is, however, possible that for a large part of the investors claims the period of limitation expired at September 19, 2016 (it is a highly controversial issue), claimants needed to stop the limitation period from running. There were only two ways to preserve the claims. Claimants must either file an action against VW AG before September 19 or formally register as a claimant in a KapMuG proceeding. Due to the fact that the model case proceedings could not start officially before September 19, 2016, numerous investors decided to sue Volkswagen AG, others obviously rely on the possibility that a longer period of limitation can apply in this case. Parallel to the German law suit, damages actions filed by investors are also pending in the U.S. In July 2016, one of the plaintiffs in the Braunschweig litigation sued Volkswagen of America in New Jersey and attempts to obtain a discovery order under 28 USC § 1782 against VWoA for the production of approx. 18 mio. documents which might be usefuel for the plaintiffs in the Braunschweig proceedings. The motion is pending.

3. Case study

**Daimler Aktiengesellschaft**

a. Investors sued Daimler AG for damages based on the failure to publish ad hoc announcements with respect to the fact that the chairman of the supervisory board, *Jürgen Schrempp*, would resign from his position. Since May 17, 2005 there had been an internal discussion about the resignation of Jürgen *Schrempp* planned for the end of 2005. In July 2005, the chairman of the workers’ council received the information and a formal decision of the supervisory board was scheduled for July 27, 2005. The next day an ad hoc announcement was published resulting in a rise of Daimler’s share prices. Plaintiffs argued that an ad hoc announcement should have been made as early as May 2005 and claim recovery of damages which they suffered from selling their shares at a low price.

b. The action was initiated by investors.

c. The parties were Daimler Aktiengesellschaft as the defendant and numerous investors as plaintiffs.

d. The claim was brought before the District Court Stuttgart.

e. There is no information about third party funding.

f. In 2006, the District Court in Stuttgart referred the case for test case proceedings to the Court of Appeals of Stuttgart (District Ct. Stuttgart, 3.7.2006 – 21 O 408/05). In a first decision published in February 2007 (901 Kap 1/06) the court declined that Daimler was liable for damages. The test case plaintiff filed an appeal on points of law to the Federal High Court. The Federal High Court overturned the decision of the Court of Appeals in Stuttgart for procedural reasons (particularly a violation of the right to be heard). Therefore the Court of Appels in Stuttgart scheduled a new trial and again dismissed the applications of the plaintiffs (Court of Appeals Stuttgart, 22.4.2009, 20 Kap1/08). The main argument was that in case of a step by step development of an event within the company, ad hoc announcement should not be based on intermediate steps. An ad hoc announcement was not necessary before the resignation of *Jürgen Schrempp* was “likely to a certain degree”. The judges concluded that this was not the case before the formal decision of the supervisory board on July 27, 2005. Again, plaintiffs filed an appeal on points of law to the Federal High Court. The Federal High Court in November 2010 (II ZB 7/09) stayed proceedings and made a reference to the European Court of Justice for a preliminary ruling on Directive 2003/6/EC on insider trade and market abuse (“Market Abuse Directive”).

On June 28, 2012 the European Court of Justice decided (C-19/11) that also intermediate steps of an event could raise the obligation of a company to publish an ad hoc announcement. Therefore the Federal High Court again overturned the (second) decision of the Court of Appeals of Stuttgart and referred the case back (Federal High Court, 23.4.2013, II ZB 7/09). It emphasized that already a first communication of *Jürgen Schrempp* to the chairman of the supervisory board in May 2005 could, in principle, require an ad hoc announcement. The Court of Appeals of Stuttgart had to take further evidence with respect to the question of how likely a resignation of *Schrempp* was in May 2005. The Court of Appeals has to decide whether the conversation between *Schrempp* and *Kopper* in May 2005 was only an “exchange of ideas” or the first clear step to *Schrempp’s* resignation. The court suggested a settlement and announced a decision for September 21, 2015 if no settlement was concluded. Until now, no decision has been published.

g. The core questions are issues of law. The evidence necessary could be obtained by witnesses.

h. Until today the case has lasted for more than 10 years.

i. The outcome is not yet clear as explained sub. f.

j. Until now there is no compensation of investors.

k. The loser pays rule will apply.

m. Yes, several as described sub f

n. There were no parallel proceedings in other jurisdictions.

o. There were administrative proceedings initiated by the German Federal Financial Supervisory Agency (“BaFin”). “BaFin” had imposed an administrative fine on Daimler AG. The decision was, however, set aside by the Regional Court of Frankfurt. The Court argued that due to the fact that it was not clear whether and when an ad hoc announcement should have been published Daimler AG was [mistake](https://dict.leo.org/ende/index_de.html#/search=mistake&searchLoc=0&resultOrder=basic&multiwordShowSingle=on&pos=0)n [as](https://dict.leo.org/ende/index_de.html#/search=as&searchLoc=0&resultOrder=basic&multiwordShowSingle=on&pos=0) [to](https://dict.leo.org/ende/index_de.html#/search=to&searchLoc=0&resultOrder=basic&multiwordShowSingle=on&pos=0) [the](https://dict.leo.org/ende/index_de.html#/search=the&searchLoc=0&resultOrder=basic&multiwordShowSingle=on&pos=0) [wrongful](https://dict.leo.org/ende/index_de.html#/search=wrongful&searchLoc=0&resultOrder=basic&multiwordShowSingle=on&pos=0) [nature](https://dict.leo.org/ende/index_de.html#/search=nature&searchLoc=0&resultOrder=basic&multiwordShowSingle=on&pos=0) [of](https://dict.leo.org/ende/index_de.html#/search=of&searchLoc=0&resultOrder=basic&multiwordShowSingle=on&pos=0) [the](https://dict.leo.org/ende/index_de.html#/search=the&searchLoc=0&resultOrder=basic&multiwordShowSingle=on&pos=0) [act](https://dict.leo.org/ende/index_de.html#/search=act&searchLoc=0&resultOrder=basic&multiwordShowSingle=on&pos=0) and could not be held liable under criminal and administrative law (15.8.2008, 934 OWi 7411 Js 233764/07). Upon an appeal on points of law, the Court of Appeals in Frankfurt, however, overturned the decision and held that Daimler AG should have published an ad hoc announcement as early as possible. Daimler AG then accepted the administrative fine and there was no new decision by the Regional Court of Frankfurt.

p. There is a lot of media attention to the case, but it seems that the reports are extremely objective. There is no indication that they influenced the court decisions.

|  |  |
| --- | --- |
|  |  |

1. Statistisches Bundesamt, Fachserie 10, Reihe 2.1, Rechtspflege Zivilgerichte 2014, published 16 November 2015. [↑](#footnote-ref-1)