

Class actions in Germany

New German inefficiency?

KapMuG

Kapitalanleger- Musterverfahrensgesetz

Capital Markets Model Case Act
Capital Market Investors' Model Proceedings

http://www.gesetze-im-internet.de/englisch_kapmug/englisch_kapmug.html

History (1)

Deutsche Telekom

2001: >16.000 individual claims

2005: „old“ KapMuG
an experimental answer

2012: „new“ KapMuG:
expiry date 01.11.2020

2019: extension / revision planned

>100 cases pending

History (2)

Since 2015 Dieselgate

2018: Amendment to Code of Civil Procedure:

Model Declaratory Action,

a new form of collective redress for consumers by an action initiated only by „qualified“ institutions as claimants with an opt-in by registration

Scope of Application

Damage claims of capital market investors for

false or misleading public information by
security issuers

omission of a public information on issues
relevant for the market

essentially concerning information in
sales prospectuses and offer documents
ad-hoc declarations
financial statements

Characteristics:

Hybrid Proceedings

- individual Claims remain and are stayed
- **partial class grouping** for **preliminary rulings** on common issues
- **one lead „model“ claimant** all other claimants are summoned as interested parties (participants)
- **binding precedent** for all participants (not on other non-litigating investors)

Legislative aims:

Main guideline: No American-type class action

- Effective Procedure for claims and enforcement
- „one for all“ clarification of facts and law
- Saving of costs and time
- Lowering of case burden of Courts

Structure: 3 sections

- Application /establishment of model case proceedings and referral / submission to Court of Appeal
- Conduction of model case proceedings
- Effects of model case ruling / settlement

Establishment of proceedings (1)

by first instance court

- in pending case
- **on application** only,
by claimant or defendant,
to **declare** the objectives to be determined as
to factual or legal conditions prerequisite or
preclusive of the claim,
stating facts and evidence,
demonstrating **significance** for similar cases

Establishment of proceedings (2)

Publication of the application in the **Complaint Register*** of Federal Gazette
by first instance court
if satisfied that

- „declaratory objectives“ to be determined are decisive for the claim
- Evidence presented is suitable /admissable
- Significance for other cases is stated
- No dilatory action intended

*this also reflects all further developments of the case

Referral Decision (1)

by first instance court

when within six months after publication **nine further concurrent applications** are listed

stating the objectives to be determined

summarizing the actual „life“ situation*
the applications are based on

* *fattispecie*?

Referral Decision (2)

- Referral to Court of Appeal (CoA)
- all pending „similar“ cases (and subsequent claims) are suspended
- CoA cannot ammend or drop any declaratory objectives to be determined except if they have no relevance / materiality for the decision

Model Case Proceedings (1)

- Registration of claims within six months (to stay limitation)
- Nomination of the model (lead) plaintiff
- Admission of additional declaratory objectives to be determined
- Oral hearing

Model Case Proceedings (2)

Decision on Model Case

Ruling on all declaratory objectives, with narrow exceptions

open to Appeal to Federal Supreme Court on points of law only

Settlement also concluding all first instance claims

Approval by CoA (and by 70% of participants)

Participants may declare withdrawal within a month

Elements:

- the distribution of the benefits among the parties,
- proof of entitlement to benefits
- date of the benefits
- allocation of the costs of the model proceedings

Effects of decision / settlement

- **Binding** for all suspended cases
- These will be resumed and individual claims decided by the first instant courts
- Appeal and cassation on non-binding elements possible, e.g. amount of individual damages

Obvious Shortcomings:

A piecemeal, bureaucratic regulation

Dual proceedings

Thus no time saving (Telekom case still open)

Decisions binding only for participants
(not for registrants)

No opt-in into binding Settlement

New Developments

KapMuG possible amendments

- Sun-set clause abolished
- Greater influence of CoA on determination of declaratory objectives
- Provisions to streamline the proceedings

Model Declaratory Action

- New „general“ civil procedure, s. 606 CCP
- Concerning legal and factual prerequisites for claims in B2C legal relations
- Qualified institutions as claimants
- Registration of 50 consumers in the Claims` registry