Claimants' Lawyer

The future of class actions in Germany from a claimant perspective

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Andreas Tilp is a renowned German lawyer with extensive experience in domestic and international litigation. He is an expert in the fields of banking and capital markets. Andreas has served as a court expert in cases before the German Bundestag and European Commission, and has advised the German government concerning the KapMuG. He founded TILP in 1994 to represent aggrieved investors. Nowadays, TILP still only represents claimants. It initiated the first KapMuG proceeding in German history against Volkswagen. We interviewed Andreas together with Marc Schiefer, who is also a director at TILP, over the phone.

The uncertain future of the imperfect KapMuG

We start by asking Andreas and Marc if there are any upcoming changes expected in class action law in Germany. This prompts Andreas to tell us about the history of the Capital Markets Model Case Act (*Kapitalanleger-Musterverfahrensgesetz – KapMuG*). He and TILP were at the forefront of developing the KapMuG and to this day, he jokingly calls it 'his baby'. He explains: "It all started in 2001, when TILP brought the first *Deutsche Telekom* case on behalf of shareholders that relied on allegedly misleading capital market information. In total, over 17,000 individual actions were brought, showing the need for a system to handle these cases more efficiently. Eventually, in 2005, the KapMuG was established to provide effective protection to these types of claims."[1] "That being said," Andreas continues, "the KapMuG makes it clear that even your own children are not perfect. In practice, it does not resolve the real problem since it is not aimed at compensating the individual harmed investor, but can only lead to a declaratory judgment." Under the KapMuG, it takes too much time to receive compensation. And Andreas thinks that the German legislator intended it to be slow: "The German legislator was not sleeping while drafting these laws. It intended these procedures to be so slow that they would become somewhat useless instruments."

But the fact that the KapMuG has a sunset clause is even more problematic in Andreas's eyes. It will end in October 2020 and it is still unclear whether the legislature wants to reform or renew it and what will happen with ongoing cases. "If the KapMuG ends, there are two opinions on what will happen with the current ongoing cases. Either the cases will move forward, but on what legal basis? Or the cases will go back to the initial lawsuits they once were before being transformed into KapMuG proceedings by the High Court. The original lawsuits still exist, but are frozen. If KapMuG ends they may have to be defrosted and proceed on that basis."

The MFK is ineffective

When we ask whether alternatives like the MFK Act (*Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage* – Law on the Establishment of a Civil Procedure for a Declaratory Model Action), are in better shape than the KapMuG, Andreas answers: "Although the MFK is a step in the right direction to improve enforcement of consumer rights by enabling qualified consumer associations to file representative actions, this law is also intentionally flawed." The first disadvantage that Andreas points to is that the action can only be brought by qualified institutions, on behalf of consumers such as consumer associations. This is a problem from the outset, "because the number of consumer associations in Germany is not very high and only a few of them are happy to litigate. Since claims can only be brought on behalf of

1 For further information, see: Practical Law, Class/collective actions in Germany: overview, https://uk.practicallaw.thomsonreuters.com/9-618-1132?transitionType=Default&contextData=%28sc.Default%29 (accessed on 15 July 2019); Re Deutsche Telekom AG Sec. Litig., 00 Civ. 9475, 2002 WL 244597 (S.D.N.Y. Feb. 20, 2002).

claimants who are consumers, it also closes the door to businesses. Secondly, and maybe more importantly, the injured people have to be passive, because they only register their claim, but cannot take part in the lawsuit."

And, as with the KapMuG, another major issue is that the outcome of the proceedings can only be a declaratory judgment and it takes a long time for individuals to obtain compensation. This can take up to 20 years due to possibility to appeal both the declaratory judgment in the Model Declaratory Action and the individual follow-on actions filed by consumers all the way to the Federal Court of Justice.

Andreas concludes that "the instrument is ineffective. In preparatory documents, the government speculated that within one year around 350 different kinds of lawsuit would be brought under the new law. In reality, there have been only four lawsuits, two of which were immediately rejected due to inadmissibility. If the government is serious about providing claimants with the possibility to initiate collective actions in all areas of substantive law, there should be an effective procedural framework that allows you to run such cases."

Alternatives to the KapMuG and MFK are insufficient

We ask whether, in Andreas's view, there are any alternatives that do provide the possibility of some kind of collective redress. He is not very positive about these. "Of course one can think of alternative methods for bundling claims. You can, for example, assign claims to a claim vehicle, but that is difficult to set up." Another option he sees is to bundle multiple single claimants into one lawsuit, but these multi-party actions are subject to strict criteria and in his view these constructions are risky: "One must be aware that the court has the power to split up a multi-party lawsuit again, and actually does so in practice. This is thus not a free-of-risk situation for claimants, because there is a cap on lawyer's fees of around EUR 230,000 each for the first instance and a cap on court fees of around EUR 330,000 in the first instance if a claim exceeds EUR 30 million. So bringing one bundled claim, risking the maximum costs award, can turn into risking the maximum costs award for each individual claim, if the claimed damages are big."

Europe will not bring any change

The foreseen European developments will not bring any improvement, according to Andreas. "I fear that the current government – if it stays in place – will not implement the European New Deal for Consumers sufficiently. The government will argue that Germany does not need to take any action to implement the European directive, because the KapMuG and the MFK already suffice, leaving many claimants empty-handed."

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Andreas is also very sceptical of the possibilities of having a settlement declared binding in a European court on an opt-out basis: "Maybe this will work on paper, but not in reality. German judges will never accept such a settlement, not even from a Dutch court."

Third party funding not commonly accepted

Andreas reacts enthusiastically to the question of how third party funding is assessed in Germany. He explains that the current status of third party funding is somewhat unclear but that allowing it would provide many parties with access to justice "Germany has a long history of funding firms. In 1998, when a new stock market was introduced, one of the first firms registered (Foris) was a funding firm. Nevertheless, there seems to be a tendency to dislike them." He points to a recent case in which a consumer association filed an action for skimming of profits against a telecommunications company.[2] The action of the consumer association was funded by German funding firm Foris. Andreas explains: "It was agreed beforehand that Foris would receive around 20% of the award. Initially, the courts did not find this funding construction problematic, but in the third instance, it ruled that it was 'against good morals' that an action for skimming of profits is partially brought on the basis of the financial interest of the litigation funder. The court therefore declared the action inadmissible and dismissed the lawsuit. This creates a huge problem, because claimants have a big issue accessing justice. Who will pay for them instead?" Andreas feels that not allowing third party

2 German Supreme Court, 13 September 2018, File No. I ZR 26/16 (Prozessfinanzierer I); German Supreme Court, 9 May 2019, File No. I ZR 205/17 (Prozessfinanzierer II).

funding is unjust. "Not allowing funding firms to step in cripples collective actions." The solution he sees "to ease the nerves of the government" is regulating funding firms.

Germany should introduce discovery

Andreas's enthusiasm increases when we start discussing the US system of class actions, although he is not necessarily a fan of punitive damages. His enthusiasm is more linked to the system of discovery as he tells us "the success factor of the US system is dependent on discovery. Although not specifically a class action instrument, it is the answer for finding the truth." This contrasts with Germany where according to him the possibilities for requesting information from the other party are very limited. He adds: "In reality, there is no discovery." The introduction of a discovery system in Germany would not lead to abuse, according to Andreas, since the party that loses the litigation compensates the winning party for its litigation costs under a statutory fee schedule, and bears the court fees.[3]

Landmark case

Considering his enthusiasm and knowledge of the class action system in the United States, it is not surprising that Andreas first points to an American case when asked about landmark cases. He believes that the *Morrison* decision[4] in 2010 was a real game changer worldwide: "From then on, non-US claimants were forced to sue in countries other than the US."

> The *Morrison* case concerned the purchase of HomeSide Lending – a company servicing mortgages – by the National Australia Bank in 1998. Since National Australia Bank was forced to write down USD 450 million, and later USD 1.75 billion in value from HomeSide's assets, its share price decreased. The claimants purchased those shares before the value inflation and sued HomeSide Lending for manipulating financial models that pushed up the alleged value of HomeSide Lending's services together with National Australia Bank for its awareness of the deception. Only Australian investors remained by the time the case reached the US Supreme Court. The US Supreme Court debated whether the fact that the alleged fraud occurred in the US meant that it should be subject to US securities law, or whether the fact that the alleged fraud related to Australian securities meant that US securities laws did not apply. The US Supreme Court ruled in favour of the defendants, finding that US securities laws did not apply. Therefore, foreign claimants do not have a cause of action under US securities laws to sue foreign and American defendants for misconduct relating to securities traded on foreign exchanges (also known as F-cubed claims).

Another landmark case that Andreas mentions is the *Shell* WCAM case.[5] Because it was a multi-jurisdictional case, it really showed the development in settlement proceedings.

> In Shell, investors sought compensation for damage incurred as a result of misrepresentations made by Shell concerning its oil and gas reserves. In the US, a class settlement was reached for shareholders who bought shares on a US stock exchange between 8 April 1999 and 18 March 2004 or were residing in the US at the time of the purchase. Shell also reached a settlement with non-US investors who purchased their shares on a non-US stock exchange and agreed to pay more than USD 350 million. Shell sought to have this settlement declared binding using WCAM. The Amsterdam Court of Appeal assumed jurisdiction and declared the settlement binding on all members of the class on an opt-out basis, even though the majority were residing outside of the Netherlands and a securities class action was pending in the US.

3 Practical Law, Class/collective actions in Germany: overview, https://uk.practicallaw.thomsonreuters.com/9-618-1132?transitionType=Default&contextData=%28sc.Default%29 (accessed on 15 July 2019).

4 No. 08–1191, *Morrison v National Australia Bank Ltd.*, 561 U.S. 247 (2010) (24 June 2010).

5 Amsterdam Court of Appeal 29 May 2009, ECLI:NL:GHAMS:2009:BI5744.

Of course, Andreas also highlights the importance of the *Volkswagen* 'Dieselgate' case. "That case encompasses all aspects that are currently the main areas for claimants in the US: cartel, consumer claims, securities, and human rights claims." These are also the areas where Andreas expects claims will increase over the years. He believes the *Volkswagen* case can serve as an example.

Predictions for the future

We ask Andreas and Marc to tell us in one sentence what they believe will be the biggest development in the future of class actions. They reply: "We would like to see an EU class action law aimed at providing compensation that is based on an opt-out system that allows discovery and third party funding."