



The revised German KapMuG

Prof. Axel Halfmeier LL.M.

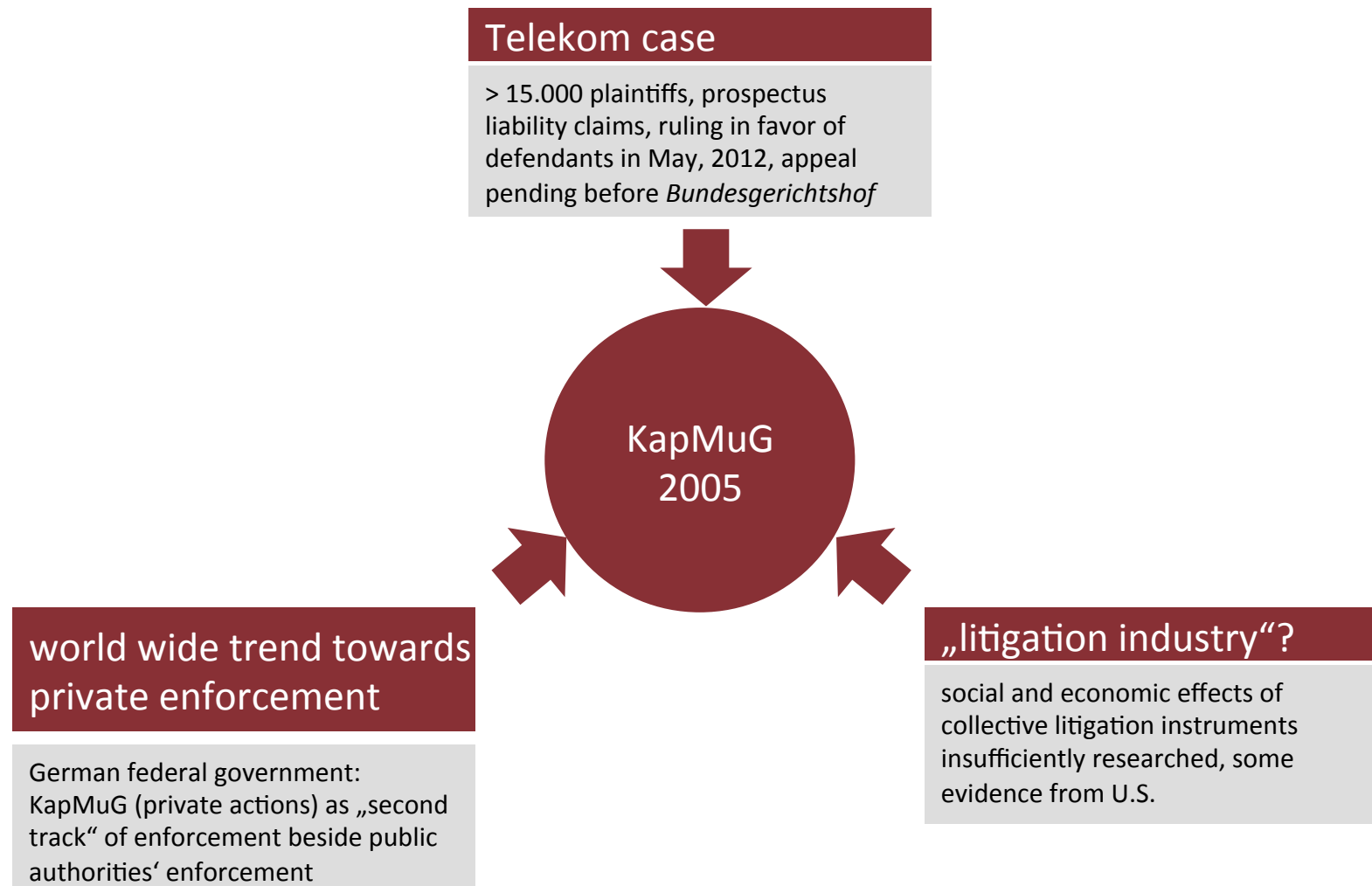


The revised German KapMuG

- KapMuG – a very brief history
 - KapMuG in context
 - KapMuG 2005 – 2012: evaluation
- KapMuG 2012: the revisions
 - „notification“ of claims
 - opt-out settlement procedure
- litigation strategy under the new KapMuG
 - plaintiffs' perspective
 - defendants' perspective
- new reform proposal: the green group action



Kapitalanleger-Musterverfahrensgesetz (KapMuG) in context





KapMuG 2005–2012: evaluation results

Study commissioned by Fed. Min. Justice (Halfmeier/Rott/Feess 2010)

1. KapMuG as a worthwhile start, potential for further development
2. Limitation of scope to capital markets liability as a historic contingency
3. Slow and complicated procedure – acceleration necessary
4. Little enforcement effect, recommendation to lower participation threshold
5. Facilitate settlements (learn from the Netherlands)



KapMuG 2012: Most important revisions

Evaluation results

Potential for further development

Scope of Application

Acceleration of procedure

Participation threshold

Settlement

New law effective 1 November 2012

New KapMuG expires in 2020

Extension to claims based on inadequate investment advice, if capital markets information is relevant

various technical improvements, but no change to two-level procedure

„Notification of claims“ will stop the statute of limitation period

Opt-out settlement with court approval



KapMuG 2012: „notification“ (*Anmeldung*) of claims

- § 10 KapMuG:
 - *Oberlandesgericht* chooses model plaintiff and publishes information on the proceedings
 - 6 months time for further claimants to „notify“ their claims to the court and the defendant
 - content of notification: information regarding the parties as well as „amount and grounds“ of the claim
- Effect of notification:
 - Notifying parties are not participants in the model procedure, results do not bind them
 - but: statute of limitation period is suspended
 - Problem: extent of suspensive effect may depend on description of the „grounds“ of the claim (i.e. in cases of several alleged errors in a prospectus)



KapMuG 2012: opt-out settlement procedure

- §§ 17 to 19 KapMuG:
 - model plaintiff or model defendant may file settlement proposal with the court (court may recommend)
 - approval of the settlement by the court if it finds that the settlement is an adequate solution on the basis of the current state of proceedings in the model procedure
 - opt-out possibility for the other participants
 - settlement will become final only if less than 30% of the participants opt out (head count, not value)
- settlement effective for all participants who have not opted out, end of model procedure and of the individual proceedings
- no legal effect for „notifiers“ or other claimants who have not filed suit – but maybe de facto effect



Litigation strategy under the KapMuG 2012: Plaintiffs' perspective

- use „notification“ to reduce costs
- 10 plaintiffs – 10,000 notifiers

- Problem: specific time window for notification must be used
- internal organisation, pooling of costs?

- build up a „threat“ by many (unfounded) notifications of claims

- Problem: notification not for free, lawyer must be used, costs depend on value in controversy

- aim at a quick settlement
- plaintiff attorney normally not interested in long procedure

- possible conflict with client interests (settlement „too low“)
- possibly division of plaintiff group, opt-outs



Litigation strategy under the KapMuG 2012: Defendant's perspective

- financial risk of „hardline defense“ may be higher:
 - if defendant wins, no cost shifting with regard to the „notifiers“
 - if defendant loses, „notifiers“ are likely to sue

- „hardline defense“ remains an option
- delays in the beginning of the procedure may cause limitation period to run out before „notification“ window opens

- problem: how to reach finality
- opt-out possible
- settlement under KapMuG creates three claimant groups:
 - plaintiffs of original proceedings (settlement has legal effect)
 - „notifiers“ (effect only with explicit consent)
 - other claimants (if limitation period has not run out)

- „cooperative“ defense strategy easier through opt-out settlement possibility



June 2013: „group procedure“ (*Gruppenverfahren*) – parliamentary proposal by *Die Grünen* –

Deutscher Bundestag
17. Wahlperiode

Drucksache 17/
05.06.20

Gesetzentwurf

der Abgeordneten Jerzy Montag, Nicole Maisch, Volker Beck (Köln), Inger, Memet Kilic, Dr. Konstantin von Notz, Markus Tressel, Wolfgang Winkler und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Entwurf eines Gesetzes über die Einführung von Gruppenverfahren

A. Problem

Zentrale gesellschaftliche Bereiche wie insbesondere der Konsum von Lebensmitteln, die Versorgung mit Strom, Gas und Wasser, der Transport mit öffentlichen Verkehrsmitteln, die Versorgung der Bürgerinnen und Bürger durch Versicherungen, ihre Altersversorgung sowie die Sicherung einer fairen marktwirtschaftlichen Ordnung durch Wettbewerbsrecht und der Schutz werden heute in weiten Teilen in den Strukturen des Privatrechts geregelt.

Das Privatrecht wird jedoch immer noch mit den Mitteln des 19. Jahrhunderts durch einen Prozessrecht, das fast ausschließlich auf der individuellen Rechtsdurchsetzung der Bürgerinnen und Bürger beruht und das der gestiegenen gesellschaftlichen Bedeutung des Privatrechts nicht gerecht wird.

B. Lösung

Die deutsche Zivilprozessordnung hat sich zwar für die individuelle Rechtsdurchsetzung der neuen Herausforderungen und der gesellschaftlichen Bedeutung des Privatrechts nicht angepasst. Es sind neue Instrumente notwendig.

- reform proposal in German parliament
- aims at replacing the KapMuG
- differences to KapMuG:
 - unlimited scope of application (all civil and commercial matters)
 - no ordinary filing of suit required
 - one group plaintiff, at least ten further participants necessary
 - opt-in possibility (costs similar to „notification“ under the KapMuG, cost ceiling inspired by Danish model)
 - results are binding on all participants
- but: mainly symbolic value before the federal election (autumn 2013)



Thank you!

Contact:

Prof. Axel Halfmeier
Leuphana Universität Lüneburg
Wilschenbrucher Weg 69
21335 Lüneburg, Germany

phone +49 4131 677 7925
halfmeier@leuphana.de
www.leuphana.de

