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CIVIL LAW ENFORCEMENT AND COLLECTIVE REDRESS IN ECONOMIC LAW. A COMPARISON BETWEEN COLLECTIVE REDRESS ACTIONS IN COMPETITION, ANTITRUST, COMPANY AND CAPITAL MARKETS LAW(*)

I. 1. In February 2011, the EU Commission initiated a broad public consultation in order to noticeably improve remedies for the impaired by means of a coherent collective redress system within the EU ([1]). Before, the Commission had already published two Green Papers intended to strengthen collective redress in European competition ([2]) and consumer protection ([3]) laws. These had been triggered by two landmark decisions by the ECJ: The decisions *Courage/Crehan* and *Manfredi* were the first to argue in favor of civil law enforcement in antitrust law on the European level, thus extending the law ([4]).

a) The European efforts to strengthen the civil law enforcement parallels US-American civil procedure, which has known "class action" for many years, compensating the structural inequality of the impaired and the at-fault party and thus facilitating trial ([5]). Where mass damages exist, similar cases with identical legal questions are conclusively decided in one central action. Additionally, US law knows the opponent's access to documents during pre-trial discovery, contingency fees for attorneys, and punitive damages. All these, as well as US-American fee bearing rules, make filing lawsuits in the US much more attractive than in Germany ([6]).

Contrary to the United States and much of continental Europe ([7]), collective redress actions are fairly rare in Germany. This reflects in part the German policy that evidence must be adduced, prohibiting "fishing" for evidence ([8]). More importantly, German legislature has shied away from

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([1]) European Commission, *COMMISSION STAFF WORKING DOCUMENT, PUBLIC CONSULTATION: Towards a Coherent European Approach to Collective Redress*, SEC(2011) 173 final (Brussels 2011).
([2]) Commission of the European Communities, *GREEN PAPER: Damages actions for breach of the EC antitrust rules*, COM(2005) 672 final (Brussels 2005); Commission of the European Communities, *WHITE PAPER on Damages actions for breach of the EC antitrust rules*, COM(2009) 165 final (Brussels 2008).
([3]) Commission of the European Communities, *GREEN PAPER On Consumer Collective Redress*, COM(2008) 794 final (Brussels 2008).
([4]) EuGH, 20.09.2001, C-453/99, 2001, I-6297, Courage Ltd. v. Crehan; EuGH, 13.07.2006, C-295/04 to C-298/04, 2006, I-06619, Manfredi u.a v. Lloyd Adriatico Assicurazioni SpA u.a.
([5]) The efficiency of legal remedies for smallest-scale damages is emphasized by W. Rubenstein - A. Conte - H. B. Newberg, *Newberg on Class Actions* (New York 2011), § 1:6; foundational H. Kalven – M. Rosenfield, *The Contemporary Function of the Class Law Suit*, 8 The University of Chicago Law Review (U. Chi. L. Rev.) 684, 1941. Trial-economic advantages and class actions' efficiency are covered in detail by R. Van den Bergh – S. Kerske, *Rechtsökonomische Aspekte der Sammelklage*, in Auf dem Weg zu einer europäischen Sammelklage?, M. Casper et al. (eds.) (Munich 2009), 17, at 22.
([6]) Contrary to the development in Europe, class action in the US has lost some importance, see R.H. Klonoff, *The Decline of Class Action*, 90 Washington University Law Review (Wash. Univ. L. Rev.) (2013) (forthcoming), available at www.ssrn.com/abstract=2038985.
([7]) England, Sweden, Spain and Norway codified class action, see H. Micklitz – A. Stadler, *Verbandsklagerecht Band 3*, in Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft, H. Micklitz – A. Stadler (eds.) (Münster 2005), 1373; H. Koch, *Sammelklage und Justizstandorte im internationalen Wettbewerb*, JuristenZeitung (JZ), 2011, 438, at 441.
([8]) Germany's Federal Court of Justice therefore rejected a request for evidence collection as too vague and therefore inadmissible, s. BGH, 09.07.1974, VI ZR 112/73, Neue Juristische Wochenschrift (NJW), 1974, 1710. According to the Court, general assumptions

scholarly suggestions to reform the system to make legal remedies more efficient, fearing a *litigious society* ([9]) and an uncontrollable outburst of liabilities. For example, not just anyone can claim breaches of competition in court, although sec. 1 of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*, or UWG) states consumer protection as its objective ([10]). In capital markets law, the initiative for the introduction of a general liability for wrong information on the capital market (Capital Markets Information Liability Act, *Kapitalmarktinformationshaftungsgesetz*, or KapInHG) failed years ago ([11]).

b) At least in competition and antitrust law, collective redress is somewhat important in Germany. The UWG's syndicate action and the decision proceedings are meant to simplify collective redress and enforcement. A relatively new law is the Act on Exemplary Proceedings in Capital Market Disputes (*Kapitalanleger-Musterverfahrensgesetz*, or KapMuG), introduced in 2005 as a reaction to the *Telekom* trial, which included 17 000 plaintiffs ([12]). The KapMuG is meant to eliminate deficits in the field of collective redress in German civil procedure ([13]). Since the 17 000 individual law suits are only put on hold for the duration of the exemplary procedure and since all individual plaintiffs can actively participate in the trial as intervening parties, there has not been a significant relief for the courts yet, and the record is disillusioning: Still, there is no end in sight for

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„out of the blue" can also be neglected and do not result into a new hearing, s. BGH, 19.09.1985, IX ZR 138/84, NJW, 1986, 246, at 247; generally, R. Stürner, *Die Aufklärungspflicht der Parteien des Zivilprozesses* (Tübingen 1976), 106 et seqq.

([9]) The so-called *litigious society* tries to blame another person or company for every risk of life or accident. The English Judge Lord Denning became famous for his saying about the US legal system: "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself, and at no risk of having to pay anything to the other side.", s. Court of Appeal (Civil Division), 13.05.1982, [1983] 2 All E.R. 72, at 74, Smith Kline & French Laboratories Ltd v. Bloch (Interlocutory Injunction); for more detail, s. G. Wagner, *Neue Perspektiven im Schadensersatzrecht – Kommerzialisierung, Strafschadensersatz, Kollektivschaden*, Gutachten A für den 66. Deutschen Juristentag (Munich 2006), 16 et seqq. On the general idea of a "litigious society" and its dangers for society, see J. K. Lieberman, *The litigious society* (New York 1981).

([10]) For criticism of the former legal situation, see G. Schricker, *Soll der einzelne Verbraucher ein Recht zur Klage wegen unlauteren Wettbewerbs erhalten?*, Zeitschrift für Rechtspolitik (ZRP), 1975, 189, at 194; T. M. J. Möllers, in The Enforcement of Competition Law in Europe, T. M. J. Möllers – A. Heinemann (eds.) (New York 2007), 210 et seqq., 278 et seqq. Some courts tried to aid by applying sec. 1004, 823 § 1 Civil Code (BGB), e.g. BGH, 20.05.2009, I ZR 218/07, Gewerblicher Rechtsschutz und Urheberrecht (GRUR), 2009, 980 et seqq.

([11]) Bundesministerium der Finanzen (BMF), Diskussionsentwurf eines Gesetz zur Verbesserung der Haftung für falsche Kapitalmarktinformationen (Kapitalmarktinformationshaftungsgesetz – KapInHaG) see Neue Zeitschrift für Gesellschaftsrecht (NZG), 2004, 1042 = http://www.kapitalmarktrecht-im-internet.eu/de/Rechtsgebiete/Kapitalmarktrecht/Artikelgesetze/245/KapInHaG.htm. See K. J. Hopt – H. Voigt, *Prospekt- und Kapitalmarktinformationshaftung – Recht und Reform in der Europäischen Union, der Schweiz und den USA –*, Zeitschrift für Wirtschafts- und Bankrecht (WM), 2004, 1801; T. M. J. Möllers, *Der Weg zu einer Haftung für Kapitalmarktinformationen*, JZ, 2005, 75; R. Veil, *Die Haftung des Emittenten für fehlerhafte Information des Kapitalmarkts nach dem geplanten KapInHaG*, Bank- und KapitalmarktR (BKR), 2005, 91; P. O. Mülbert – S. Steup, *Emittentenhaftung für fehlerhafte Kapitalmarktinformation am Beispiel der fehlerhaften Regelpublizität – das System der Kapitalmarktinformationshaftung nach AnSVG und WpPG mit Ausblick auf die Transparenzrichtlinie –*, WM, 2005, 1633; T. M. J. Möllers, *§ 17 Vorschläge einer kapitalmarktrechtlichen Haftung nach künftigem Recht*, in Ad-hoc-Publizität, T. M. J. Möllers – K. Rotter (eds.) (Munich 2003), no. 45 et seqq., suggests an alternative.

([12]) N. Oberhuber, *17 000 Anleger gegen die Telekom*, Frankfurter Allgemeine Sonntagszeitung (FAS), 6.4.2008, 53; priorly T. M. J. Möllers – T. Weichert, *Das Kapitalanleger-Musterverfahrensgesetz*, NJW, 2005, 2737 et seqq.

([13]) Gesetz zur Einführung von Kapitalanleger-Musterverfahren (KapMusterEinfG) (16.8.2005), Bundesgesetzblatt (BGBl.) I, 2005, 2437 – Art. 1 introduced the Act on Exemplary Proceedings in Capital Market Disputes (*Gesetz über Kapitalanleger-Musterverfahren*, KapMuG). Originally containing a five-year sunset clause, the code's validity was extended for two years in 2010, now lasting until October 31, 2012, see Parliamentary Printing Matter (BT-Drucks.) 17/2095, at 1.With some changes and amendments, its validity will be extended beyond that date, see Parliamentary Printing matter (BT-Drucks.) 17/10160.

the *Telekom* trial ([14]). The number of only eleven other KapMuG trials is conceivably low ([15]). Since the KapMuG's introduction in 2005, only four procedures have been closed with an exemplary ruling ([16]), plaintiff only winning one of these cases ([17]). In addition, one has to realize that even in obvious fraud cases such as *Comroad* ([18]), only a very low number of impaired investors even file a suit ([19]). Even if the defendant is being prosecuted ([20]) or convicted ([21]) for insider dealings, civil damage claims rarely are successful and, accordingly, only rarely brought to court. Consequently, scholarly critics drastically deny that the KapMuG substantially improved the situation ([22]). Still, the German legislature plans to renew the law and has presented a draft bill for a KapMuG reform ([23]).

c) Triggered by the ECJ's *Courage/Crehan* and *Manfredi* judgments, a change can be observed as now, mostly ad hoc interest groups and litigation businesses are the ones to file suit

([14]) Recently, it was decided by the Higher Regional Court (OLG) Frankfurt, 16.5.2012, 23 Kap 1/06, Zeitschrift für Wirtschaftsrecht (ZIP) 2012, 1236, and is now pending at the Federal Court of Justice (BGH), XI ZB 12/12; Practicing laywers expect the Telekom trial to last at least another five years, TILP Rechtsanwälte, *Konsultation zum kollektiven Rechtsschutz: Stellungnahme zum Arbeitsdokument der Kommissionsdienststellen vom 4. Februar 2011 SEK(2011) 173 endg.* (Kirchentellinsfurt 2011), at 10.

([15]) This can be seen in the register of actions, available at www.bundesanzeiger.de.

([16]) KG Berlin, 03.03.2009, 4 Sch 2/06 KapMuG, Perseus Immobilien Verwaltungs GmbH & Co. KG – LBB Fonds 13; KG Berlin, 18.05.2009, 24 Kap 4/08, Okeanus Immobilienfonds für Deutschland Verwaltungsgesellschaft mbH &Co KG – Zweiter IBV-Immobilienfonds für Deutschland; KG Berlin, 16.02.2009, 24 Kap 15/07, Bavaria Immobilien Verwaltungs GmbH & Co. Objekverwaltungs KG – LBB Fonds Sechs; OLG München, 30.12.2011, Kap 1/07, Film & Entertainment VIP Medienfonds 4 GmbH & Co. KG.

([17]) For the plaintiffs, the only successful decision was Film & Entertainment VIP Medienfonds 4 GmbH & Co KG (Kap 1/07) by the Higher Regional Court (OLG) Munich, since the court affirmed the prospectus' wrongfulness. All other exemplary decisions rejected the possibility of declaring the declaration goals, considered the exemplary proceedings inadmissible or closed the procedure after a majority of plaintiffs had reached out-of-court settlements, leaving no one as exemplary plaintiff.

([18]) See BGH, 09.05.2005, II ZR 287/02, Zeitschrift für Wirtschaftsrecht (ZIP), 2005, 1270; T. M. J. Möllers, *Konkrete Kausalität, Preiskausalität und uferlose Haftungsausdehnung – ComROAD I - VIII*, NZG, 2008, 413 et seqq. offers an overview of the Comroad I-VIII decisions.

([19]) 1-5% of impaired investors are said to file an action, see TILP Rechtsanwälte, *Konsultation zum kollektiven Rechtsschutz: Stellungnahme zum Arbeitsdokument der Kommissionsdienststellen vom 4. Februar 2011 SEK(2011) 173 endg.*, supra (Fn. 14), 10; K. Rotter, *Der Referentenentwurf des BMJ zum KapMuG – Ein Schritt in die richtige Richtung!*, Verbraucher und Recht (VuR), 2011, 443, at 443.

([20]) In what is allegedly Germany's largest investment fraud scandal, the Munich prosecution has been investigating against several board members of the Association for the Protection of Capital Investors (*Schutzgemeinschaft der Kapitalanleger*, or SdK), since 2008, suspecting market manipulation and insider tradings, s. A. Hadelüken – H. Wilhelm, *Verspieltes Vertrauen*, Süddeutsche Zeitung (SZ), 16.11.2010, 25.

([21]) Only recently, the former hedge-fund manager Helmut Kiener was sentenced to ten years and eight months in prison for fraud. He had embezzled more than 300 million Euros belonging to 4900 investors and two large banks, using a Ponzi scheme. It remains to be seen whether the civil damages claims will be successful, as it is yet unclear where the embezzled funds can be found, s. M. Zydra, *Die Suche nach den verschwundenen Millionen*, Süddeutsche Zeitung (SZ), 23.7.2011, 23. For more details on certificate issuers' investigative duties, s. ("know your product") T. M. J. Möllers – K. J. Puhle, *Know your product – Ermittlungspflichten von Zertifikate-Emittenten, Ein Beitrag zur Vergleichsfallmethode und zur Typenlehre*, JZ, 2012, 592 et seqq.

([22]) Harsh words are chosen by A. Stadler, *Das neue Gesetz über Musterfeststellungsverfahren im deutschen Kapitalanlegerschutz*, in Festschrift für W. H. Rechtberger et al. (Wien 2005), 663, at 670: "At a relatively high level of regulation, the KapMuG only offers minimal progress.[…] At least in terms of easing the courts' burden and better trial efficiency, no significant improvement should be expected from the new bill." (Translation not authorized). TILP Rechtsanwälte, *Konsultation zum kollektiven Rechtsschutz: Stellungnahme zum Arbeitsdokument der Kommissionsdienststellen vom 4. Februar 2011 SEK(2011) 173 endg.*, supra (Fn. 14), 10 et seqq. are also skeptical.

([23]) See Bundesministeriums der Justiz, *Referentenentwurf: Gesetz zur Reform des Kapitalanleger-Musterverfahrensgesetz* (21.7.2011).

after several claims were ceded to them ([24]). They bear the fees and risks of the claims and, in turn, receive 20-25% of the gross margin ([25]). This kind of litigation is now regarded as admissible in Germany, too ([26]). The majority of ad hoc interest groups, however, is still located abroad and participates in German trials from there ([27]).

This paper aims to show the forms of collective redress in competition, company and capital markets laws, and to compare those elements that might be beneficial in the other fields of law. Important elements include the basis of information for the impaired party (II.) as well as financial incentives for raising a claim (III.) and the party's standing (IV). The draft bill for the KapMuG reform will be evaluated as well. Ideally, the German legislature's reform ideas could compensate competition disadvantages which have been described above, especially in relation to the facilitated US model ([28]). Also, the European class action discussion could benefit from its German counterpart.

2. The term "collective redress" can be applied to groups of cases with differing regulatory goals ([29]). Low value damages can be matched individually, but can be so low when separated that they barely provoke filing a claim ([30]). At the same time, the number of impaired persons is high, often resulting in a significant total damage. Value dating by banks is an example traditionally given for such injury ([31]). Since procedural risks are much higher than the damage suffered, the

([24]) The Belgian Cartel Damage Claims corporation (CDC), headquartered in Brussels, is well-known for its concentration of combined action for damages in antitrust cases.
([25]) U. Classen, *Cartel Damage Claims, - CDC -, Schadensersatzklagen aus Kartellverstößen*, Presentation at the ICC Round Table Chefjuristen, 27.10.2009, at 5, available at http://www.carteldamageclaims.com/Presentations/ICC%20Herzogenaurach%2027%2010%202009_.pdf.
([26]) BGH, 07.04.2009, KZR 42/08, Wettbewerb in Recht und Praxis (WRP), 2009, 745, at 746; OLG Düsseldorf, 14.05.2008, U (Kart) 14/07, Wirtschaft und Wettbewerb (WuW), 2008, 845; H. Koch, *Sammelklage und Justizstandorte im internationalen Wettbewerb*, supra, 441; K. Wissenbach, *Von der behördlichen Kartellrechtsdurchsetzung zum privaten Schadenersatzprozess* (Halle/Saale 2010), 322 et seqq.
([27]) For instance, the above-mentioned Belgian CDC in the „Heidelberg Cement Cartel" case, see LG Düsseldorf, 21.02.2007, 34 O (Kart) 147/05, Betriebs-Berater (BB), 2007, 847 et seqq.; BGH, 07.04.2009, KZR 42/08, supra, 745 et seqq.
([28]) Recently, A. F. Peter, *Warum die Initiative "Law – Made in Germany" bislang zum Scheitern verurteilt ist*, JZ, 2011, 939 et seqq. put it very urgently; Parliamentary Printing Matter (BT-Drucks.) 15/5091, at 17; H. Koch, *Sammelklage und Justizstandorte im internationalen Wettbewerb*, supra, 443 et seqq. A study by the Federal Consumer Association (*Verbraucherzentrale Bundesverband*, vzbv) observes deficits in the enforcement of capital markets law, see J. Keßler – H. Micklitz – N. Reich, *Darstellung der Arbeitsweise von Finanzaufsichtsbehörden in ausgewählten Ländern und deren Verbraucherorientierung* (Berlin 2009), 38 et seqq., 240 et seqq., available at http://www.vzbv.de/mediapics/studie_finanzaufsicht_vergleich_eu_kessler_micklitz_okt_2009.pdf.
([29]) G. Wagner, *Kollektiver Rechtsschutz – Regelungsbedarf bei Massen- und Streuschäden*, in Auf dem Weg zu einer europäischen Sammelklage?, M. Casper et al. (eds.) (Munich 2009), 41, at 49 et seqq.; S. Lange, *Das begrenzte Gruppenverfahren* (Tübingen 2011), 12 et seqq.; H. Koch, *Sammelklage und Justizstandorte im internationalen Wettbewerb*, supra, 442 et seqq.
([30]) See G. Wagner, *Kollektiver Rechtsschutz – Regelungsbedarf bei Massen- und Streuschäden*, in Auf dem Weg zu einer europäischen Sammelklage?, M. Casper et al. (eds.) (Munich 2009), 41, at 50 et seqq.
([31]) Whereas the write-off for a money transferal is usually undertaken on the same day, the credit was usually not entered until a few days later. The bank gained significant amounts in interest, whereas the customer's individual injury was comparatively small. After law suits were filed by the consumer's rights associations, the Federal Court of Germany declared the practice illegal, see BGH, 17.1.1989, XI ZR 54/88, BGHZ 106, 259, at 259; BGH, 6.5.1997, XI ZR 208/96, BGHZ 135, 316, at 316.

impaired person refrains from filing individual suit, a phenomenon called "rational apathy" ([32]). By contrast, where mass damages are concerned, the impaired suffer substantial losses which they claim in court. Therefore, there is no immediate deficit in enforcement. Due to the large amount of plaintiffs, however, courts are usually incapable of finishing the proceedings in appropriate time. Consequently, the danger for trials to last for several years is high, pulling court capacities from other cases. Thus, mostly practical, trial-oriented economic reasons stand in favor of uniting the cases in one central trial ([33]). The above-mentioned KapMuG regulates such a procedure.

Finally, damages on common goods, such as environmental damages, are typically suffered by society as a whole and cannot be matched with one person of group of people ([34]). Since third parties cannot file suit, the state, acting in public interest, has to claim the damages. For example in environmental liability law, the responsible authority is in charge of providing measures to avoid further damage and to restore the environment ([35]).

II. 1. In the US, the impaired party has to prove the facts on which the claim is based. The mechanisms differ among the kinds of trials; they all are meant to help the plaintiff's pursuing his claim. The US-American principle of pre-trial discovery allows the party to access relevant evidence which is in the other or a third party's possession. It includes the option of presenting written interrogatories, requesting the production and evaluation of documents as well as obtaining party and witness testimonies outside of court (depositions) ([36]). Since, in US, law discovery only lasts throughout the pre-trial phase and ends with its opening ([37]), large-scale access is granted, which is only naturally limited by a company's justified interest in confidentiality or the protection of sensible data. All information is discoverable if it serves as a basis of the claim or its rejection.

([32]) On the basics of "rational apathy" and the associated *free-rider* problem, see J. C. Coffee, *Regulating the market for corporate control: A critical assessment of the tender offer´s role in corporate governance*, 84 Columbia Law Review (Colum. L. Rev.), 1984, 1145, at 1190; similarly S. J. Choi – J. E. Fish, *How to fix wall street: A voucher financing proposal for securities intermediaries*, 113 Yale Law Journal, 2003, 269, at 278; J. C. Coffee, *Class action accountability: Reconciling exit, voice, and loyalty in representative litigation*, 100 Colum. L. Rev., 2010, 370, at 422.
([33]) In agreement: Federal Bar Association (Bundesrechtsanwaltskammer), *Stellungnahme zur öffentlichen Anhörung der Europäischen Kommission zum kollektiven Rechtschutz in Europa*, 2011, at 3.
([34]) G. Wagner, *Kollektiver Rechtsschutz – Regelungsbedarf bei Massen- und Streuschäden*, in Auf dem Weg zu einer europäischen Sammelklage?, M. Casper et al. (eds.) (Munich 2009), 41, at 50 et seqq. refers to the injury's „subjectlessness" (*Subjektlosigkeit*).
([35]) S. sec. 7 Environmental Damage Act (Gesetz über die Vermeidung und Sanierung von Umweltschäden, USchadG), based on art. 5 of the Directive on environmental liability with regard to the prevention and remedying of environmental damage 2004/35/CE (21.04.2004), Official Journal L 143/56 (30.04.2004); for more details see G. Wagner, *Die gemeinschaftsrechtliche Umwelthaftung aus der Sicht des Zivilrechts*, in Umwelthaftung nach neuem EG-Recht, R. Hendler – P. Marburger – M. Reinhardt – M. Schröder (eds.) (Berlin 2005), 73, at 84 et seqq.
([36]) A closer examination of the importance of pre-trial-discovery is offered by C. A. Wright – A. R. Miller, *Federal Practice and Procedure* (Eagan 2011)[3], § 2001 et seqq.; A. Junker, *Discovery im deutsch-amerikanischen Rechtsverkehr* (Frankfurt/Main 1987); O. Knöfel, *Kommentar zu: United States District Court for the District of Utah, Urteil vom 21.01.2010 – 2:08cv569; AccessData Corp. V. ALSTE Technologies*, Recht der Internationalen Wirtschaft (RIW), 2010, 403 et seqq.; H. Schack, *Einführung in das US-amerikanische Zivilprozessrecht* (Munich 2003)[3], 44 et seqq.; P. Hay, *US-Amerikanisches Recht* (Munich 2008)[4], 67.
([37]) P. Hay, *US-Amerikanisches Recht*, supra (Fn. 36), 67.

Over all, the right to request and access information is much more comprehensive than in German law.

2. a) Neither European nor German laws know any form of pre-trial discovery. For private plaintiffs, however, it can be highly beneficial to use the findings of government agencies. In order to do this, the impaired party must obtain knowledge of the decisions made by competition authorities.

Germany's Federal Competition Authority (*Bundeskartellamt*) publishes its decisions online but does not specifically point out the possibility of private law suits for damages ([38]). However, it offers general information on successful prosecution of cartelizing, including a description of potential pursuance of private damages claims ([39]).

On the European level, art. 30 Council Regulation EC no. 1/2003 on the Implementation of the Rules of Competition (Implementation Regulation) ([40]) requires the Commission to publish closed antitrust decisions, such as penalties imposed to stop infringement. This procedure is intended to inform third parties for whom the Official Journal's publication often constitutes the first source of information about antitrust measures ([41]). The publication is, however, also intended to have a general deterring effect, raising the awareness of market participants, and to help prevent similar behavior in the future ([42]). The publication includes the names of the parties and the decision's basic content, including the imposed sanctions, art. 30 sec. 2 Implementation Regulation. The competition commission's website provides detailed information, including the names of concerned companies and the amount of penalties imposed ([43]). European agencies take a step further than the German competition authority: Publications by the Commission explicitly point out that private damage actions are possible ([44]). For many impaired parties, this is the incentive to file

([38]) S. http://www.bundeskartellamt.de/wDeutsch/archiv/EntschKartArchiv/EntschKartell.php.
([39]) S. Bundeskartellamt, *Erfolgreiche Kartellverfolgung – Nutzen für Wirtschaft und Verbraucher* (Munich 2010), at 26, available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Infobroschuere/1009Kartellverfolgung_web_bf.pdf.
([40]) S. COUNCIL REGULATION on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (EC) No 1/2003 (16.12.2002), Official Journal L 1/1 (04.01.2003).
([41]) K. L. Ritter, *Art. 30 VerfVO*, in Wettbewerbsrecht, U. Immenga – E. Mestmäcker (eds.)[4] (München 2007), no. 1.
([42]) EuGH, 15.07.1970, 41/69, 1970, 661, at 695, ACF Chemiefarma NV v. Commission of the European Communities; EuGH, 13.02.1979, 85/76, 1979, 461, at 553 et seqq., Hoffmann-La Roche & Co. AG v. Commission of the European Communities.
([43]) For a comparison, see the decisions listed at http://ec.europa.eu/competition/cartels/cases/cases.html. The complete non-confidential version in all procedural languages can be found at the Directorate General for Competition's website, s. K. L. Ritter, *Art. 30 VerfVO*, in Wettbewerbsrecht, U. Immenga – E. Mestmäcker (eds.)[4] (München 2007), 1364 no. 7.
([44]) S. the Commission's statement on the occasion of publishing the fine decision of 19.10.2011, IP/11/1214, CRT-Glas: "Any person or firm affected by anti-competitive behavior as described in this case may bring the matter before the courts of the Member States and seek damages. The case law of the Court and Council Regulation 1/2003 both confirm that in cases before national courts, a Commission decision is binding proof that the behavior took place and was illegal. Even though the Commission has fined the companies concerned, damages may be awarded without these being reduced on account of the Commission fine. The Commission considers that meritorious claims for damages should be aimed at compensating, in a fair way, the victims of an infringement for the harm done." Additionally, general information on damage actions is given. See also http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1214&format=HTML&aged=0&language=DE&guiLanguage=en.

a claim. Since the publication infringes the companies' rights to confidentiality, they must be consulted before publication, art. 39 sec. 2-2 Implementation Regulation ([45]).

b) If a Commission decision leads an impaired person to file suit, he or she can request access to Commission documents based on Regulation 1049/2001 ([46]). The documents must have been written or received by the Commission and be in its possession. However, art. 4 of Regulation 1049/2001 provides numerous exceptions and circumstances under which the request can be denied ([47]). The ECJ considers inadmissible the general denial of access and requires the Commission to "carry out a concrete, individual assessment of the content of the documents referred to in the request" ([48]). If the Commission considers such an assessment excessive, it must not simply deny the request, but must consult with the applicant to consider his or her specific interest. Also, the Commission must consider alternatives to the concrete, individual assessment ([49]).

c) The facts and documents named in the Commission's penalty decision constitute a major simplification for the plaintiff's presentation of evidence, since the Commission facts are binding for national courts. Therefore, the impairing measure and its illegality no longer need to be proven ([50]). The impaired party can base its own national damage action on the Commission's decision ([51]). The binding implications of a competition authority's decision (sec. 33 § 4 of the German Act against Restraints in Competition, GWB) are of particular importance in this context. According to this principle, the court is bound by the legally valid assessment of unfair competition when an impaired person files a damages suit. This is valid whether the breach of competition rules has been found by the Commission, the *Bundeskartellamt* or another member state's competition authority ([52]) and for both legal and factual findings ([53]). The plaintiff seeking damages benefits greatly from the publication but must still prove causality and the injury suffered ([54]).

([45]) Some therefore believe that corporate confidentiality therefore has priority over publication interests, s. W. Weiß, *Art. 30 VerfVO*, in Kartellrecht, U. Loewenheim – K. M. Meessen – A. Riesenkampff (eds.)[2] (München 2009), 1235 no. 7; similarly, K. L. Ritter, *Art. 30 VerfVO*, in Wettbewerbsrecht, U. Immenga – E. Mestmäcker (eds.)[4] (München 2007), 1364 no. 6.
([46]) Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, O.J. No. L 145, 43.
([47]) Access can be denied if necessary for the protection of public interest, privacy or an individual's integrity. The protection of legal procedures and corporate interests can also justify a denial, art. 4 § 2.
([48]) EuGH, 13.04.2005, T-2/03, 2005, II-01121, *Verein für Konsumenteninformation v. Kommission der Europäischen Gemeinschaften*, no. 74.
([49]) EuGH, 13.04.2005, T-2/03, 2005, II-01121, *Verein für Konsumenteninformation v. Kommission der Europäischen Gemeinschaften*, no. 114.
([50]) S. the Commission's statement on the occasion of publishing the fine decision of 19.10.2011, IP/11/1214, CRT-Glas, available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1214&format=HTML&aged=0&language=DE&guiLanguage=en.
([51]) In agreement: K. L. Ritter, *Art. 30 VerfVO*, in Wettbewerbsrecht, U. Immenga – E. Mestmäcker (eds.)[4] (München 2007), 1364 no. 1.
([52]) E. Rehbinder, *§ 33 GWB*, in Kartellrecht, U. Loewenheim – K. M. Meessen – A. Riesenkampff (eds.) (München 2009), 2181 no. 54.

d) The impaired also benefit from the suspending effects on legal limitation of an antitrust action by the *Bundeskartellamt*, Commission or another member state's competition authority, sec. 33 § 5-1 GWB. Without fearing disadvantages, she can await the authority's investigation before going to trial ([55]). From her point of view, this presents a great simplification for filing follow-on suits and immensely strengthens the degree of legal protection in antitrust law. This is true especially since limitation only begins to elapse again six months after the antitrust action is terminated, sec. 33 § 5-2 GWB and sec. 204 § 2 German Civil Code (*Bürgerliches Gesetzbuch*, or *BGB*) ([56]).

3. Appraisal Proceedings deal with measures within a company which change its structure ([57]), resulting in shareholders' receiving financial compensations or shares of other companies and challenging their appropriateness in court ([58]). This procedure seeks to protect the rights of minority shareholders but also to ensure that important structure-changing measures cannot be prevented by actions of voidance. The procedure offers several simplifications for the plaintiff when trying to prove his claim. First, sec. 7 § 3 of the German Act on Appraisal Proceedings requires the defendant to hand in the institutional and external testing reports relevant to the structure-changing measure ([59]). Often, however, the appraisal proceedings judges lack the necessary expertise to identify the relevant facts before the oral argument ([60]). Therefore, judges can schedule a pre-trial hearing with expert support. This is meant to answer certain prerequisite questions or to request a written expert opinion ([61]). The goal-oriented inclusion of experts helps the court to answer prerequisite questions and therefore keep short the time for writing the order for evidence ([62]).

([53]) M. Schütt, *Individualrechtsschutz nach der 7. GWB-Novelle*, Wirtschaft und Wettbewerb (WuW), 2004, 1124 at 1131; M. Meyer, *Die Bindung der Zivilgericht an Entscheidungen im Kartellverwaltungsrechtsweg – der neue § 33 IV GWB auf dem Prüfstand*, Gewerblicher Rechtsschutz und Urheberrecht (GRUR), 2006, 27 at 32.
([54]) E. Rehbinder, *§ 33 GWB*, in Kartellrecht, U. Loewenheim – K. M. Meessen – A. Riesenkampff (eds.) (München 2009), 2181 no. 54.
([55]) S. Parliamentary Printing Matter, BT-Drucks. 15/3640, at 55. The introduction of sec. 33 § 5 GWB was seen as important measure to strengthen private follow-on actions, see R. Hempel, *Private Follow-on-Klagen im Kartellrecht*, Wirtschaft und Wettbewerb (WuW), 2005, 137 at 142, 145 et seqq.; M. Schütt, *Individualrechtsschutz nach der 7. GWB-Novelle*, supra, 1132 et seqq.
([56]) In agreement, R. Hempel, *Private Follow-on-Klagen im Kartellrecht*, supra, 142, 145 et seqq.; M. Schütt, *Individualrechtsschutz nach der 7. GWB-Novelle*, supra, 1132 et seqq.
([57]) These include the formation of company contracts, the affiliation of corporations and the transformation of legal entities, s. C. Tomson – S. Hammerschmitt, *Aus alt mach neu? Betrachtungen zum Spruchverfahrensneuordnungsgesetz*, Neue Juristische Wochenschrift (NJW) 2003, 2572 at 2572.
([58]) The cases in which the appraisal procedure is applicable are enumerated in sec. 1 SpruchG.
([59]) The relevant reports are the report on company contract (sec. 293a Corporations Act (*Aktiengesetz*, or AktG)), the main shareholders' report in case of squeeze-out (sec. 327c § 2 AktG) and the transformation report according to sec. 8, 127, 192 Transformation Act (*Umwandlungsgesetz*, or UmwG).
([60]) See W. Meilicke – T. Heidel, *Das neue Spruchverfahren in der gerichtlichen Praxis*, Der Betrieb (DB), 2003, 2267 at 2274.
([61]) See D. Kubis, *§ 7 SpruchG*, in Münchener Kommentar Aktiengesetz, W. Goette – M. Habersack – S. Kalss (eds.)[3] (München 2010), 1345 at 1395 no. 18; V. Emmerich, *§ 7 SpruchG*, in Aktien- und GmbH-Konzernrecht, V. Emmerich – M. Habersack (eds.)[6] (München 2010), 839 at 872 no. 7a.
([62]) Parliamentary Printing Matter (BT-Drucks.) 15/371, 15.

4. a) As in antitrust law, a public interest in prosecuting breaches of law can be found in capital markets law. Its purpose is not to protect competition itself ([63]) but the integrity of the capital market. The competent Federal Financial Supervision Authority (*Bundesanstalt für die Finanzdienstleistungsaufsicht*, or *BaFin*) is widely authorized to investigate, sec. 4 Securities Trading Act (*Wertpapierhandelsgesetz*, or WpHG), and monitors, among others, that various publication rules are abided ([64]). Even though the *BaFin* can publish binding measures on its website, it has thus far not used its competence of "shaming" ([65]). It publishes and names individual cases in its annual report and therefore informs investors in some cases. This information, however, does not stand equal to the Commission's and the Federal Antitrust Agency's decisions. The *BaFin*'s measures are not legally binding and are published with a large delay. The information published is often vague and short, thus not serving as a basis for a private law suit or an explanation of the *BaFin*'s decision ([66]). Where ad hoc publicity is concerned, more information on the individual cases is often missing completely ([67]).

b) Alternatively, it is to be considered whether the *BaFin* might be required to answer inquiries according to the Information Access Act (*Informationsfreiheitsgesetz*, or IFG). The IFG grants access to information to everyone without presuppositions ([68]), in other words, seeking information is possible without reference to a specific trial or a qualified need for information ([69]). All federal agencies, among them the *BaFin*, are subject to the duty of disclosure.

([63]) On antitrust law's regulatory purpose, U. Immenga – E. Mestmäcker, *Einleitung*, in Wettbewerbsrecht, U. Immenga – E. Mestmäcker (eds.)[4] (München 2007), 29 et seqq.; V. Emmerich, *Kartellrecht*, (München 2008)[11], 20 et seqq. The ECJ as well considers it to be the purpose of competition law to ensure competition's integrity and protect the internal market from limitations on behalf of economic actors, s. EuGH, 21.02.1973, 6/72, 1973, 215 at 244 et seqq., *Europemballage Corporation und Continental Can Company Inc. v. Kommission der Europäischen Gemeinschaften.*

([64]) In 2010, in addition to 42 pending procedures, the *BaFin* opened 23 new fine procedures against various companies who allegedly had not published certain pieces of insider information timely, correctly, completely or at all, s. Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin), *Jahresbericht 2010* (Bonn and Frankfurt a.M. 2011), 207 et seqq.

([65]) Sec. 40b WpHG's shaming option was not at all made use of in 2011.

([66]) The *BaFin* does state the number of complete insider investigations and market manipulation procedures in its Annual Report. More details, such as the name of the companies, however, is only published occasionally if a procedure was ended by a court ruling or if the *BaFin* reported the case to the prosecution, as happened in the insider cases of *IMW Immobilien AG, die Heliad Equity Partners GmbH & Co. KGaA* and *Schmack Biogas AG*. The same holds true for the *BaFin*'s closed procedures for market manipulation, s. Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin), *Jahresbericht 2010*, supra, 197 et seqq., 202 et seqq.

([67]) For instance, the Annual Report 2010 points out that fines up to 120 000 Euros were imposed in nine cases, but does not state who was subject to these procedures for wrongful ad-hoc, s. Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin), *Jahresbericht 2010*, supra (Fn.64), 207.

([68]) „§ 1 Abs. 1 [IFG] is the Information Access Act's basic rule guaranteeing free (unconditional) access to information", see Parliamentary Printing Matter (BT-Drucks.) 15/4493, 7 (translation not authorized). On the IFG's provisions in capital markets law, see T.M.J. Möllers – T. Wenninger, sec. 8 in H. Hirte – T.M.J. Möllers (eds.)[2], Kölner Kommentar zum WpHG (forthcoming), IV.4.b.

([69]) See E. Gurlit, *Gläserne Banken- und Kapitalmarktaufsicht? – Zur Bedeutung des Informationsfreiheitsgesetzes des Bundes für die Aufsichtspraxis*, Zeitschrift für Wirtschafts- und Bankrecht (WM), 2009, 773 at 774.

However, the *BaFin* can deny information under the circumstances of sec. 3 IFG ([70]). In many cases, the *BaFin* seeks to protect its good relationship with banks and companies and denies information claiming if it has the legal right to do so ([71]). Mostly, it is argued that only a denial of information can protect specific public interests. For example, the Administrative Court (*Verwaltungsgericht*, or VG) Frankfurt relied on sec. 3 Nr. 1 g IFG to deny access to *BaFin* supervision files due to a potentially negative impact on a criminal prosecution ([72]). An information request is also denied if the piece of information in question is subject to a legal duty of confidentiality protecting company and business secrets ([73]) or personal data, sec. 3 No. 4 IFG ([74]). Access is to be denied also if the information provided allows insights into concrete business activities and investing strategies ([75]). The *BaFin* has successfully denied access to information relying on its legal duty of confidentiality ([76]) or disproportion of the effort ([77]).

In other cases, access to public information is provided without further requirements ([78]). It is not admissible, for instance, to generally exclude certain kinds of documents with reference to their typical characteristics ([79]). The agency has to give individual reasons for every holding-back of information ([80]). Information to be provided according to the IFG also includes expert opinions

([70]) This is true, for example, if the requested piece of information is subject to confidentiality or secrecy due to a regulation (sec. 3 Nr. 4 IFG), such as sec. 10 § 2-4 WpHG (protection of anonymity of whistle blowers), sec. 9 KWG, sec. 8 WpHG oder sec. 9 WpÜG (protection of company and business secrets). See T.M.J. Möllers – T. Wenninger, *Informationsansprüche gegen die Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) und das neue Informationsfreiheitsgesetz (IFG)*, 170 Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR), 2006, 455 at 467; in agreement E. Gurlit, *Gläserne Banken- und Kapitalmarktaufsicht? – Zur Bedeutung des Informationsfreiheitsgesetzes des Bundes für die Aufsichtspraxis –*, supra, 776; for the opposite opinion, see M. Rossi, *Informationsfreiheitsgesetz: Handkommentar* (Baden-Baden 2006), § 3 No. 20; F. Schoch, *IFG* (München 2009), § 3 No. 48.

([71]) The request was denied in numerous cases, s. VGH Kassel, 28.04.2010, 6 A 1767/08, BeckRS, 2010, 49021; VG Frankfurt, 28.07.2009, 7 L 1553/09, Juris; VG Frankfurt a.M., 07.05.2009, 7 L 676/09.F, Zeitschrift für Wirtschafts- und Bankrecht (WM), 2009, 1843 at 1845; VG Frankfurt, 18.2.2009, 7 K 4170/07.F, Juris; VG Frankfurt, 19.03.2008, 7 E 4067/06.

([72]) VG Frankfurt a. M., 28.07.2009, 7 L 1553/09.F, Juris, Tz. 11.

([73]) S. BVerfG, 14.03.2006, 1 BvR 2087/03, 1 BvR 2111/03, BVerfGE 115, 205 at 230.

([74]) Parliamentary Printing Matter (BT-Drucks.) 15/4493, at 11.

([75]) Protection is necessary if the piece of information contains details on securities trades performed by a fund, a gain and expense calculation or information on the development of funds, s. VG Frankfurt, 18.02.2009, 7 K 4170/07.F, juris database no.43.

([76]) See sec 9 KWG, sec. 8 WpHG; Hess. VGH, 28.04.2010, 6 A 1767/08, juris database no. 46 et seqq.; VG Frankfurt a.M., 07.05.2009, 7 L 676/09.F, supra, 1945.

([77]) Sec. 7 § 2-1 IFG. The *BaFin* must blacken out all confidential information in case of publication. According to case law, the task is disproportional if the paperwork in question is several thousand pages large and contains a significant amount of protectable information, s. VG Frankfurt a. M., 07.05.2009, 7 L 676/09.F, juris database no.. 20 (10.000 pages); VG Frankfurt a. M., 19.03.2008, 7 E 4067/06, Juris, Tz. 55 (7.500 pages); VG Frankfurt a. M., 05.12.2008, 7 E 1780/07, juris database no. 71 (9.520 pages); VG Frankfurt, 28.01.2009, 7 K 4037/07.F, juris database no. 70 (5.000 pages). The request was considered adequate by VG Frankfurt a.M., 23.01.2008, 7 E 3280/06 (V), Neue Zeitschrift für Verwaltungsrecht (NVwZ), 2008, 1384 at 1387 (200 pages); VG Frankfurt, 12.03.2008, 7 E 5426/06, juris database no. 59, 74 (98 pages). As "disproportionality" is a very vague term, some believe sec. 7 § 1-2 IFG to be an instrument against (politically) undesired access to information, s. F. Schoch, *IFG*, supra (Fn. 70), § 7 No. 64.

([78]) BVerwG, 24.05.2011, 7 C 6/10, Neue Zeitschrift für Verwaltungsrecht (NVwZ), 2011, 1012; see T. M. J. Möllers – C. Niedorf, *Auskunftspflicht der BaFin hinsichtlich der Überschreitung meldepflichtiger Beteiligungen an Drittstaatemittenten - § 3 IFG*, Entscheidungen zum Wirtschaftsrecht (EWiR), 2011, 569 et seqq.; VG Frankfurt a.M., 23.01.2008, 7 E 3280/06 (V), supra, 1384; VG Frankfurt/M., 12.03.2008, 7 E 5426/06, Zeitschrift für Wirtschaftsrecht (ZIP), 2008, 2138, „Phoenix"; VG Frankfurt, 11.11.2008, 7 E 1675/07; VG Berlin, 21.10.2010, 2 K 89.09.

([79]) VG Berlin, 21.10.2010, 2 K 89.09, juris database no. 22. Access to auditors' reports and to *BaFin* comments, reports and correspondence is to be granted particularly if the corporation's purpose is to continuously violate major criminal laws. Then, invoking potential company secrets is impossible in want of protectable interests since the corporation or the issuer injures customers and investors, see VG Frankfurt/M., 12.03.2008, 7 E 5426/06, supra, 2142; VG Frankfurt a.M., 23.01.2008, 7 E 3280/06, supra 1387.

([80]) VG Frankfurt/M., 12.03.2008, 7 E 5426/06, supra, 2141; VG Berlin, 21.10.2010, 2 K 89.09, Juris, Tz. 22; VG Frankfurt, 18.02.2009, 7 K 4170/07.F, juris database no. 40.

initiated by the *BaFin*, unless the requesting party can access this information from publicly available sources ([81]).

On the whole, the access to information's scope does not differ greatly from the respective right towards the European agencies. The latter always need to consult the requesting party to find out or be explained in depth the reason why he or she is interested in the documents. They have to consider which alternatives exist to the concrete, individual assertion. In Germany, however, authorities consider similar questions when discussing a request's reasonableness. As the *BaFin* investigations in the *Porsche/VW* case showed, the supervision authority's investigative results are an important source of information for the impaired investor anyhow ([82]).

c_1) The right to information is useless if the impaired investor does not gain knowledge of the *BaFin*'s investigation or the measures undertaken by the supervision agency ([83]). As seen in antitrust practice, it might be worth considering requiring the *BaFin* to publish all measures undertaken and to explicitly point out to private investors that they have the option of privately pursuing their claim. This might jeopardize the good relationships between the *BaFin* and the businesses and would breach the duty of confidentiality laid out in sec. 8 WpHG. Indeed, the *BaFin* relies on hints and information from the business's periphery. An efficient supervision can often only be ensured by voluntary cooperation of market participants or third parties ([84]). The interests are distributed similarly in antitrust law. Here, too, the agency relies on a member of a cartel to present confidential documents and thus point to illegal cartels. These "whistle-blowers" are protected in antitrust law by the principle witness leniency notice, providing immunity to fines and excluding the witness's testimony from the load of information accessible according to Regulation 1049/2001 ([85]).

Over all, the duty of confidentiality shall not serve as an excuse to protect the perpetrators and leave the investors to suffer. Also, the IFG does not actually codify an exception for the *BaFin* ([86]). On the contrary, the legislature emphasized that the general duty to confidentiality in agencies does

([81]) VG Frankfurt/M., 12.03.2008, 7 E 5426/06, supra, 2143.
([82]) The *BaFin* was in part ordered to inform, see VG Frankfurt a.M., 23.01.2008, 7 E 3280/06, supra, 1387.
([83]) No information is obtained, for instance, if the *BaFin* did not publish its measures in the Annual Report or if the information published does not suffice as a basis for an interest to information. See, in detail, II.4.a.
([84]) As the Federal Government states in its draft to the Second Act to Promote Financial Markets, it considers the BaFin's general duty to confidentiality as non-rebuttable in order to ensure the necessary confidence into integrity and willingness to cooperate in finding breaches against the insider prohibition, see Parliamentary Printing Matter, (BT-Drucks.) 12/6679, 42; VG Frankfurt/M., 12.03.2008, 7 E 5426/06, supra, 2139.
([85]) K. L. Ritter, *Art. 30 VerfVO*, in Wettbewerbsrecht, U. Immenga – E. Mestmäcker (eds.)[4] (München 2007), 1364 No. 13. However, the ECJ only recently stated that the EU's antitrust rules do not per se prohibit access to the principle witness trial documents even when concerning the initiator of the breach. On the contrary, it is the judge's duty to consider the interests protected by EU law and to decide under which circumstances access is to be granted or denied, see ECJ, 14.06.2011, C-360/09, Europäische Zeitschrift für Wirtschaftsrecht (EuZW), 2011, 598 at 599, *Pfleiderer-AG/Bundeskartellamt*.
([86]) Only recently, BVerwG, 24.05.2011, 7 C 6/10, supra, 1013; VG Frankfurt/M., 12.03.2008, 7 E 5426/06, supra, 2139; VG Frankfurt a.M., 23.01.2008, 7 E 3280/06, supra, 1386; Hess. VGH, 28.04.2010, 6 A 1767/08, Juris, Tz.15.

not automatically and non-refutably lead to secrecy – this would leave no scope of action to the IFG ([87]). The publicity duty would only use the transparency which is typical for efficient capital markets to help investors to successfully claim their damages ([88]).

c_2)The argument that a general publicity duty would no longer ensure a balance of interests as required by sec. 40b WpHG does not prevail. It is true that major dangers for the financial markets arising from the publication must be prevented ([89]) and that the concerned parties must not suffer disproportional damage, either. However, this could be achieved by limiting the general duty of disclosure by means of blacking-out passages with confidential content. The same is true for personal data to be protected ([90]). The fundamental right to privacy of personal data can be respected by only publishing non-appealable measures ([91]). De lege ferenda, the publication duty must be based on a system of rule and exception, allowing to forego publication only in absolutely exceptional circumstances. If a publication duty exists, the *BaFin* has no choice as to "if", but it could still decide "how" to publish. A standardized publication could have an important positive effect on the extinction of grievances according to sec. 4 § 1-2 WpHG. It would also have a general deterring effect. Finally, arguments in favor of a publication by the *BaFin* prevail due to the significantly increased transparency and the level of protection for the relatively young capital markets law.

5. a) Comparing the different procedures leads to the insight that legal remedies are particularly efficient when public and private law remedies are combined. Antitrust law's individual plaintiff benefits greatly from referencing the competition authority's decision instead of having to prove, individually and privately, a behavior's unfairness.

Positive experiences in antitrust law encourage copying the agency's transparency for capital markets law, simplifying collective redress. Then, the *BaFin* would have to generally publish all measures undertaken and point out the possibility of private damage claims to all potential

([87]) See Parliamentary Printing Matter (BT-Drucks.) 15/4493, 13. The supervision authority is only subject to the duty to secrecy according to sec. 9 KWG and sec. 8 WpHG if a protectable interest is concerned.
([88]) Explicitly, VG Frankfurt/M., 12.03.2008, 7 E 5426/06. supra, 2139.
([89]) Irrational and panicking reactions to a *BaFin* publication as feared by J. Vogel, *§ 40b WpHG*, in Wertpapierhandelsgesetz, H. Assmann – U. H. Schneider (eds.)[6] (Köln 2012), 2173 No. 7 seem to be a problem in theory only.
([90]) The same is true already for sec. 40b WpHG. Accordingly, the *BaFin* needs to consider if an anonymous publication is appropriate or if the concrete case requires the involved names to be given. For example, naming only the legal entities to whom the BaFin measure is addressed, but omitting the active persons' names is an option, s. K. Altenhain, *§ 40b WpHG*, in Kölner Kommentar zum WpHG, H. Hirte – T. M. J. Möllers (eds.) (München 2007), 2557 No. 13.
([91]) On this rule's economic efficiency, s. e.g. T.M.J. Möllers, *Effizienz als Maßstab des Kapitalmarktrechts – Die Verwendung empirischer und ökonomischer Argumente zur Begründung zivil-, straf-, und öffentlich-rechtlicher Sanktionen*, 208 Archiv für die civilistische Praxis (AcP), 2008, 1 at 16 et seqq.

plaintiffs. Dual remedies could then, in part, compensate the "fishing" prohibition of German civil procedure ([92]). This duty of publication should be incorporated into the WpHG ([93]).

For the appraisal procedure, in turn, including experts greatly lowers the burden of proof for the impaired party. Since the expert is by law authorized to view all documents relevant to the decision, he or she can access information which would not have been available to the impaired investor otherwise.

b) In many cases, pursuing the claim fails due to rigid limitation rules. In capital markets law, for example, mistakes or incompleteness of a prospectus often do not become apparent until years later. Even the short limitation period of one year, starting with the actual knowledge of wrongfulness, results into an unnecessary limitation of investors' rights, see sec. 46 of the German Stock Exchange Act (*Börsengesetz*, or BörsG) ([94]) and sec. 13a § 5 Securities Prospectus Act (*Wertpapier-Verkaufsprospektgesetz*, or VerkProspG) ([95]). If, for instance, an expert opinion is requested after finding out about the prospectus's inaccuracy, twelve months are often too short to adequately prepare a lawsuit. Absolute limitation periods such as sec. 46 BörsG or sec. 13a § 5 VerkProspG constitute the largest obstacle for pursuing a claim. The threat of limitation was also the reason for 17 000 impaired investors to file suit with the regional court (*Landgericht*) Frankfurt/Main in the *Telekom* trial ([96]).

The reform of German obligations law in 2002 led to generally longer limitation periods and the elimination of numerous limitation rules particular to capital markets law. Sec. 127 § 5 of the former Investment Act (*Investmentgesetz*, or InvG) ([97]) as well as the old sec. 37a WpHG ([98]) expired. In stock corporations law, the limitation period for board liability in listed companies was raised from five to now ten years ([99]). This was intended to allow claims for compensation even if their existence only was found out late or their pursuance only possible after the company's body

([92]) The advantages of US discovery are distinctly pointed out by A. F. Peter, *Warum die Initiative "Law – Made in Germany" bislang zum Scheitern verurteilt ist*, supra, 940; O. Knöfel, *Kommentar zu: United States District Court for the District of Utah, Urteil vom 21.01.2010 – 2:08cv569; AccessData Corp. V. ALSTE Technologies*, supra (Fn. 8).
([93]) Incorporating it into the IFG, on the other hand, would be incoherent as the IFG offers a claim but does not provide a general duty of publication. Sec. 40b WpHG should be amended to read: "The Federal Agency publishes legally valid measures which it undertook for breaches of prohibitions or duties laid out in this Act. The publication includes the parties' names and the decision's main content as well as the sanctions imposed. Publications have to consider the companies' legitimate interests in keeping business secrets."
([94]) Sec. 46 BörsG: "Sec. 44 claims are subject to a limitation period of one year. The period begins when the purchaser becomes aware of the prospectus's being incomplete or faulty, but no later than three years after the prospectus's publication." (Translation not authorized).
([95]) Sec. 13a § 5 VerkProspG: "§§ 1-3 claims are subject to a limitation period of one year. The period begins when the purchaser becomes aware of the duty to publish a prospectus, but no later than three years after the completion of the sale." (Translation not authorized).
([96]) T.M.J. Möllers – T. Weichert, *Das Kapitalanleger-Musterverfahrensgesetz*, supra, 2737; F. Bergmeister, *Kapitalanleger-Musterverfahrensgesetz (KapMuG)* (Tübingen 2009), 330.
([97]) Sec. 127 § 5 InvG, repealed on 1.7.2011 by law of 22. 6. 2011, Bundesgesetzblatt (BGBl.) I, 2011, 1126.
([98]) Sec. 37a repealed on 5.8.2009 by law of 31. 7. 2009, Bundesgesetzblatt (BGBl.) I, 2009, 2512.
([99]) S. Restructuring Law (Restrukturierungsgesetz) (9.12.2010), Bundesgesetzblatt (BGBl.) I, 2010, 1900, 1929 et seqq.

changed ([100]). Finally, the special limitation periods of sec. 46 BörsG and sec. 13 § 5 VerkProspG expired on June 1, 2012 ([101]). This adaption must be welcomed, just like the fact that prospectus liability in the Prospectus Act is now coherent ([102]). However, the legislature stopped short of the ideal solution: There is no reason why the absolute limitation periods of sec. 37b § 4 and 37c § 4 WpHG remain in force.

Therefore, these limitation periods are to be voided. Just as sec. 33 § 5-1 GWB regulates for antitrust law, *BaFin* investigations should suspend limitation in capital markets law. Consequently, dual remedy of private parties and public agencies would become more efficient, since the private investor could await the supervision agency's investigative results before filing a claim without fearing legal disadvantages ([103]).

III. 1. a) Collective redress is characterized by an exemplary plaintiff actively filing a motion while the majority of impaired plays only a passive role. In class actions, however, all those who are impaired shall benefit from the trial's result if they opted into the action or refrained from opting out of it.

If those who are impaired and remain passive carry neither a financial burden nor the risk of losing the case, the free-rider problem evolves ([104]). The lack of risk is a high incentive not to raise a potentially risky and costly claim if another impaired investor's action will be valid erga omnes and this other investor is the only one to bear the costs. Consequently, the willingness to file a law suit decreases as the majority of potential plaintiffs hopes for someone else to go to trial. In

([100]) See Parliamentary Printing Matter (BT-Drucks.) 17/3024, at 4.
([101]) Sec. 46 BörsG and Sec. 13a VerkProspG were abolished by Artt. 2 and 7 No. 3 Amendment Act on Investment Agent and Asset Investment Law (Gesetzes zur Novellierung des Finanzanlagenvermittler- und Vermögensanlagerechts) (06.12.2011), Bundesgesetzblatt (BGBl.) I, 2011, 2481.
([102]) From now on, prospectus liability is laid out in sec. 21 et seq. WpPG. In turn, sec. 44 et seq. BörsG (regulating liability for faulty prospectuses at the stock market), and the Sales Prospectus Act are abolished.
([103]) These same reasons were given for the introduction of sec. 33 § 5 GWB (7th GWB Amendment).The lawmaker specified: "The enforceability of damage claims in antitrust law is to be ensured. Limitation is suspended if the antitrust agency […], the Commission or another member state's competition authority […] take action. Thus, the individually impaired party shall actually benefit from the binding implications […]. Civil damage claims shall not be limited, for instance, after the completion of a long penalty procedure", see Parliamentary Printing Matter (BT-Drucks.) 15/3640, 55 (translation not authorized). Introducing sec. 33 § 5 GWB was considered an important step to further private follow-on actions, see R. Hempel, *Private Follow-on-Klagen im Kartellrecht*, supra, 142, 145 et seqq.; M. Schütt, *Individualrechtsschutz nach der 7. GWB-Novelle*, supra, 1132 f.
([104]) For more details on the free-rider problem in class action cases, s. D. N. Dewees – J. R. S. Prichard – M. J. Trebilcock, *An Economics Analysis of Cost and Fee Rules for Class Actions*, 10 Journal of Legal Studies 155, 1981, at 158; T. Eisenberg - G. P. Miller, *Incentive awards to class action plaintiffs: An empirical study*, 53 UCLA Law Review (UCLALR), 2006, 1303 at 1306; B. H. Kobayashi - L. E. Ribstein, *The hypocrisy of the Milberg indictment: The need for a coherent framework on paying for cooperation in litigation*, 2 Journal of Business & Technology Law (JBUSTL), 2007, 369 at 378; M. Olsen, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge 1971)[2], 2 et seqq.; R. Cooter – T. Ulen, *Law & Economics* (New Jersey 2007)[5], 45 et seqq.; N. G. Mankiw – M. P. Taylor, *Grundzüge der Volkswirtschaftslehre* (Stuttgart 2008)[4], 256 et seqq.

particular in cases of low value or mass damages, this results into the risk of no law suit at all, as no one is willing to file it ([105]).

The appropriate answer to such a behavior of free riding is to create sufficient incentives for raising a claim ([106]). At the same time, the law needs to strive to avoid that one plaintiff bears all the costs even though many benefit from a successful action ([107]).

b) US law addresses this problem in several ways and makes it more attractive for the individual to file a motion. Procedural cost bearing rules play an important role. Filing an action is simplified by the rule that each party bears its own procedural and attorney fees, no matter who wins the case (*American Rule*) ([108]). This strict rule allows a better estimation and potential limitation of procedural risks even before trial. The comparably low costs also promote willingness to sue ([109]). The plaintiff can further lower these costs by agreeing to contingency fees, paying a share of the gained sum to the attorney. The contingency fee partially or completely takes the place of the attorney's regular fees, putting the lawyer into a position of providing finances for the trial ([110]).

c) The absent class members are considered passive parties ([111]). If the representative plaintiff loses the trial, he or she cannot claim attorney and procedural fees from them ([112]). This is consistent within the system since the absent members, being passive parties, might never be informed about the pending case and never commissioned the representative to file a suit ([113]). If the action is successful, on the other hand, the awarded damages will be paid into a common fund. It is used to finance procedural and attorney costs of those initiating the class action. The class' attorneys cannot claim their fees directly from the class, but must apply with the court. The court has to take into consideration the monetary benefit as well as other trial circumstances when

([105]) T. Eisenberg – G. P. Miller, *Incentive awards to class action plaintiffs: An empirical study*, supra, 1306; B. H. Kobayashi – L. E. Ribstein, *The hypocrisy of the Milberg indictment: The need for a coherent framework on paying for cooperation in litigation*, supra, 378; M. Olsen, *The Logic of Collective Action: Public Goods and the Theory of Groups*, supra, 2 et seqq.
([106]) H. Kobayashi – L. E. Ribstein, *The hypocrisy of the Milberg indictment: The need for a coherent framework on paying for cooperation in litigation*, supra, 378; T. Eisenberg – G. P. Miller, *Incentive awards to class action plaintiffs: An empirical study*, supra, 1307.
([107]) With the same conclusion H. Kobayashi – L. E. Ribstein, *The hypocrisy of the Milberg indictment: The need for a coherent framework on paying for cooperation in litigation*, supra, 378; F. Bergmeister, *Kapitalanleger-Musterverfahrensgesetz (KapMuG)*, supra (Fn. 96), 35.
([108]) This is true for class action as well, s. Supreme Court of the United States, 12.05.1975, 412 U.S. 240, 95 S.Ct. 1612, at 247, Alyeska Pipeline Service Company v. The Wilderness Society et al.
([109]) For more detail, see P. Hay, *US-Amerikanisches Recht*, supra (Fn. 36), 67.
([110]) It is common for the attorney to receive twenty-five to thirty per cent of the awarded sums, see P. Hay, *US-Amerikanisches Recht*, supra (Fn. 35), 59.
([111]) Thus the conclusion of the Supreme Court of the United States, 16.01.1974, 414 U.S. 538, 94 S.Ct. 756, at 552, American Pipe and Construction Co. et al. v. State of Utah et al.; s. above at II.1.
([112]) See W. Rubenstein - A. Conte - H. B. Newberg, *Newberg on Class Actions*, supra (Fn. 5), § 14:2 with further references.
([113]) The courts emphasize that a reimboursement by class members is only possible if they were aware of potentially being required to pay the class representatives, see United States District Court, 04.06.21997, 94MDL400, 968 F.Supp. 1116, 1997, at 1132, In re Combustion, Inc.

deciding about the amount payable to the attorneys ([114]). On average, about a third of the fund goes to the lawyers, this number often being significantly lower for mega funds ([115]).

2. Contrary to the United States, collective interests are not only implemented in class or exemplary actions in Germany and Europe. Rather, in Germany, syndicate action is another alternative to effectively address breaches of law.

a) The Unfair Competition Act (*Gesetz gegen den unlauteren* Wettbewerb, or UWG) not only provides damage claims of the other contestants, but also rights to abatement and to injunctive relief. These rights can be exercised by qualified institutions as well as by competitors, by syndicates with the objective to further professional interests and by the chambers of industry and commerce (*Industrie- und Handelskammern*, or IHK), sec. 8 § 3 UWG.

To decrease deficits when enforcing rights after low-value damages, the UWG reform of 2004 ([116]) introduced a claim to skim off profits according to sec. 10 UWG. This section is intended as a general deterrence since it allows skimming off a contractor's profits at any time if gained illegally. To avoid that this claim is raised only for the sake of making money, the skimmed-off profit must be paid to the federal treasury ([117]). The result is disillusioning: In the past two years, only one skimming motion according to sec. 10 UWG was filed successfully ([118]).

b) According to sec. 10 § 4-2 UWG, the consumer syndicates filing an action can only request to be reimbursed by the Federal Office of Administration for the fees necessary to raise the claim. A complete reimbursement is only possible after winning the action. If the syndicate loses, it not only has to pay the preparatory costs, court and attorney fees but is also required to pay the opponent party's attorney fee. These procedural risks lead to the syndicate's rare use of skimming actions ([119]). As an incentive for syndicates and other qualified institutions to raise a claim and to ensure sufficient re-financing, they should in the future benefit from the skimmed-off profits as well. A relative participation, measured by a certain per cent number, would be an appropriate solution,

([114]) Supreme Court of the United States, 19.02.1980, 78-1327, 444 U.S. 472, 100 S.Ct. 745, 1980, *Boeing Co. v. Van Gemert*.
([115]) In the ENRON case, therefore, „only" 9.52% of the 7.23 billion US dollars settlement were passed to the plaintiff attorneys. An interesting account of further "mega-funds" is given by W. Rubenstein - A. Conte - H. B. Newberg, *Newberg on Class Actions*, supra (Fn. 5), § 14:6.
([116]) Sec. 10 UWG, introduced by the Unfair Competition Act (UWG) (03.07.2004), Bundesgesetzblatt (BGBl.) I, 2004, 1414; Parliamentary Printing Matter (BT-Drucks.) 15/1487, at 23, 34.
([117]) See Parliamentary Printing Matter, BT-Drucks. 15/1487, at 25.
([118]) OLG Frankfurt, 20.05.2010, 6 U 33/09, MultiMedia und Recht (MMR), 2010, 614 et seqq.
([119]) P. Rott, *Kollektive Klagen von Verbraucherorganisationen in Deutschland*, in Auf dem Weg zu einer europäischen Sammelklage?, M. Casper et al. (eds.) (Munich 2009), 259, at 273 et seqq.

adding an absolute cap ([120]). The high potential for abuse and the evolvement of a "trial industry" can be met efficiently by limiting the number of institutions with standing and determining pre-set criteria for awarding it.

c) German antitrust law has long been understood mostly as economic law to be enforced primarily by publicly organized economic regulators ([121]). Civil law claims by concerned parties are rare ([122]). In the United States, by contrast, 90 per cent of antitrust procedures are initiated by private parties ([123]). One reason for the German deficit is the lack of incentives for collective redress in the German Act against Restraints in Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, or GWB). Just like UWG, sec. 34 GWB offers no financial incentives for syndicates to file a law suit, as the skimmed-off profits are to be paid entirely to the federal treasury ([124]).

Again, financial participation in the gained sum could be considered for the syndicate which successfully claims the sec. 34a GWB surrender of economic assets to the treasury. A financial benefit for the syndicates would not only serve as incentive but also as important support in financing the syndicate's actions in general. The potential for abuse is probably low if the term "syndicate" is defined narrowly and the syndicates' standing depends on the same factors as in sec. 4 § 2 Injunctions Act (*Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen*, or UKlaG). Abuse potential is further minimized by the fact that the syndicate benefits only in case of success. The relative financial share needs to be high enough, though, to not only compensate the syndicate's costs, but also serve as incentive for raising a claim ([125]).

3. The appraisal procedure in company law uses mostly fee bearing rules as incentives for the impaired shareholders' legal remedy. In order to avoid that a law suit fails for financial reasons, sec. 15 § 2 Act on Appraisal Proceedings (*Spruchverfahrensgesetz*, or SpruchG) provides that the

([120]) Wagner suggests a 50% quota with an absolute cap at 10 million Euros, requiring the successful syndicate to share the skimmed profit with a non-profit organization or the treasury, s. G. Wagner, *Neue Perspektiven im Schadensersatzrecht – Kommerzialisierung, Strafschadensersatz, Kollektivschaden*, supra, 112.
([121]) See W. Roth, *Sammelklagen im Bereich des Kartellrechts*, in Auf dem Weg zu einer europäischen Sammelklage?, M. Casper et al. (eds.) (Munich 2009), 109.
([122]) Thus the conclusion of a comparative study by D. Waelbroeck – D. Slater – G. Even-Shoshan, *Study on the conditions of claims for damages in case of infringement of EC competition rules – Comparative Report* (Brussels 2004), 42 et seqq. (so-called Ashurst Study); see also T.M.J. Möllers – A. Heinemann (eds.), *The Enforcement of Competition Law in Europe*, supra (Fn. 10), 637 et seqq.
([123]) T. L. Russel, *Exporting class actions to the European Union*, 28 Boston University International Law Journal (BUILJ) 141, 2010 at 162.
([124]) The option to reclaim the costs for prosecution according to sec. 34a § 4-2 GWB, at any rate, does not offer sufficient incentives for the syndicates to file action.
([125]) Roth, for example, suggests a 25% participation for the syndicates, s. W. Roth, *Sammelklagen im Bereich des Kartellrechts*, in Auf dem Weg zu einer europäischen Sammelklage?, M. Casper et al. (eds.) (Munich 2009), 109, at 130. Wagner, on the other hand, favors a 50% participation, s. G. Wagner, *Kollektiver Rechtsschutz – Regelungsbedarf bei Massen- und Streuschäden*, in Auf dem Weg zu einer europäischen Sammelklage?, M. Casper et al. (eds.) (Munich 2009), 41, at 79. At the end of the day, the legislature will have to decide on a quota; this might have to include a definite cap as to avoid negative incentives.

defendant bears the court fees unless the procedure is obviously abused ([126]) and the plaintiff's cost bearing is necessary for reasons of fairness. Sharing costs is impossible as it would potentially limit or spoil access to appraisal proceedings ([127]). Expert opinions are central to appraisal proceedings as they are necessary to review whether the financial compensation is appropriate. These kinds of expert opinion are usually costly and need to be paid in the beginning of the procedure. Therefore, sec. 15 § 3 SpruchG requires the defendant to make an advance payment if an expert opinion is necessary ([128]).

To appropriately meet a potential flood of complaints, the appraisal procedure reform amended sec. 15 § 4 SpruchG as to provide that each party generally bears its own costs arising outside of court ([129]). This particularly includes attorney fees and any other expenses necessary to pursue the action ([130]). The court is authorized, however, to order the opponent to bear these fees if a reimbursement is appropriate.

4. At close scrutiny, the Act on Exemplary Proceedings in Capital Market Disputes (KapMuG) offers too few incentives to eliminate the enforcement deficit. This is mainly the case because the German-style exemplary procedure is no true instrument of collective redress but requires every participant to file his or her own action before being included into the exemplary proceedings. Thus, the individual risk of fee bearing in first instance has remained unchanged even since the KapMuG was introduced, resulting in a low number of investors' claiming of their low value damages ([131]).

a) Furthermore, there are no special financial incentives making an exemplary procedure attractive to attorneys. To avoid abuse, a specific fee for exemplary proceedings has purposely not

([126]) The same is true for an obviously inadmissible or unfounded claim, i.e. motions after expiration of the three-month period in sec. 4 § 1 SpruchG or motions which do not meet the minimum requirements of sec. 4 § 2 SpruchG, s. M. Winter, *§ 15 SpruchG*, in Spruchverfahrensgesetz: SpruchG, S. Simon (ed.) (Munich 2007), No. 65.
([127]) See Parliamentary Printing Matter (BT-Drucks.) 15/371, at 17.
([128]) See Parliamentary Printing Matter (BT-Drucks.) 15/371, at 17. Expenses for private expert opinions requested by a party without sufficient knowledge cannot be reimbursed under all circumstances. An exceptional duty for reimbursement exists if the opponent party offered an expert opinion or if the expert opinion is deemed necessary to rebut an expert opinion initiated by the court, see D. Kubis, *§ 15 SpruchG*, in Münchener Kommentar Aktiengesetz, W. Goette – M. Habersack – S. Kalss (eds.)[3] (München 2010), No. No.22;also G. Roßkopf, *§ 15 SpruchG*, in Kölner Kommentar zum SpruchG, K. P. Puszkajler et al. (eds.) (Köln 2005), No. 51; previously OLG Zweibrücken, 21.07.2008, 4 W 63/08, Die Aktiengesellschaft (AG), 1997, 182 at 182; OLG Düsseldorf, 14.01.1992, 19 W 14/91, Die Aktiengesellschaft (AG), 1992, 234, at 234.
([129]) Cost-bearing rules were used to encourage potential claimants to only initiate an appraisal procedure in promising cases, thus effectively reducing the large number and long duration of proceedings, s. V. Emmerich, *§ 15 SpruchG*, in Aktien- und GmbH-Konzernrecht, V. Emmerich – M. Habersack (eds.)[6] (München 2010), No.No. 20.
([130]) D. Kubis, *§ 15 SpruchG*, in Münchener Kommentar Aktiengesetz, W. Goette – M. Habersack – S. Kalss (eds.)[3] (München 2010), No. 22; also V. Emmerich, *§ 15 SpruchG*, in Aktien- und GmbH-Konzernrecht, V. Emmerich – M. Habersack (eds.)[6] (München 2010), No. 21a.
([131]) See A. Halfmeier – P. Rott – E. Feess, *Kollektiver Rechtsschutz im Kapitalmarktrecht*, (Frankfurt am Main 2010), 81.

been introduced. It stands uncontested, however, that the representation of an exemplary plaintiff presents a larger work-load ([132]), which is not compensated financially ([133]).

Due to the lack of additional fees in KapMuG proceedings, many qualified law firms refrain from representing an exemplary plaintiff or do not do so with appropriate commitment ([134]). The introduction of an additional attorney fee ([135]) in the course of the KapMuG reform will improve the situation. However, this fee is divided among all actions at the basis of the exemplary procedure and has to be paid by the plaintiffs in case of loss ([136]), thus further increasing the costs and procedural risks for them. The exemplary plaintiff ([137]) and the included parties usually are not interested in paying extra for the exemplary plaintiff's attorney. In many cases, additional payments fail not because of a lack of willingness, but in want of means. Additionally, the economic and financial relation of plaintiff and defendant is often out of balance, since large listed companies usually have more financial assets than small investors ([138]).

b) The German Federal Constitutional Court (*Bundesverfassungsgericht*, or BVerfG) regarded a general prohibition of contingency fees for attorneys as a breach of the fundamental right to freely exercise one's profession as laid out in art. 12 Basic Law (*Grundgesetz*, or GG) ([139]). According to the court, contingency fees are a central element to, at least in part, shift risks to the attorney and thus make it easier for the plaintiff to file a law suit ([140]). Following this judgment, the legislature had to newly regulate the legal framework for contingency fees. Even though the Constitutional Court would have tolerated a general liberalization ([141]), agreeing on contingency fees is still only admissible in few exceptional cases. For instance, sec. 49b § 2-1 Federal Lawyer's Act

([132]) Since the exemplary proceedings do not produce any more fees, exemplary attorney fees have so far been calculated based on the regular court's value of a claim. Critically, T.M.J Möllers – T. Weichert, *Das Kapitalanleger-Musterverfahrensgesetz*, Neue Juristische Wochenschrift (NJW) 2005, 2737 at. 2740; in agreement: B. Hess, *Der Regierungsentwurf für ein Kapitalanlegermusterverfahrensgesetz – eine kritische Bestandsaufnahme*, Zeitschrift für Wirtschafts- und Bankrecht (WM), 2004, 2329 at 2332; H. Plaßmeier, *Brauchen wir ein Kapitalanleger-Musterverfahren? – Eine Inventur des KapMuG*, Neue Zeitschrift für Gesellschaftsrecht (NZG), 2005, 609 at 613; F. Braun – K. Rotter, *Der Diskussionsentwurf zum KapMuG – Verbesserter Anlegerschutz?*, Bank- und KapitalmarktR (BKR), 2004, 296 at 300.
([133]) For more detail on this problem, see T.M.J. Möllers – T. Weichert, *Das Kapitalanleger-Musterverfahrensgesetz*, Neue Juristische Wochenschrift (NJW), 2005, 2737 at 2740. Tilp therefore considers the legal supervision of an exemplary procedure with its large workload to be a money-losing business. TILP Rechtsanwälte, *Konsultation zum kollektiven Rechtsschutz: Stellungnahme zum Arbeitsdokument der Kommissionsdienststellen vom 4. Februar 2011 SEK(2011) 173 endg.*, supra, 11.
([134]) F. Bergmeister, *Kapitalanleger-Musterverfahrensgesetz (KapMuG)*, supra (Fn. 96), 272 et seqq. shares this concern.
([135]) See sec. 41a RVG-E.
([136]) S. Bundesministeriums der Justiz, *Referentenentwurf: Gesetz zur Reform des Kapitalanleger-Musterverfahrensgesetz* (21.7.2011), 40.
([137]) Exemplary plaintiffs have often refused to invest additional means into the exemplary proceeding since not only the plaintiff himself, but also all other parties benefit from every cent, whereas these other parties do not share the costs (free-rider problem). See D. N. Dewees – J. R. S. Prichard – M. J. Trebilcock, *An Economics Analysis of Cost and Fee Rules for Class Actions*, supra, 158 et seqq.; H. Schäfer – C. Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (Heidelberg 2005)[4], 105.
([138]) See D. Baetge, *Erfolgshonorare wirtschaftlich betrachtet*, Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ), 73, 2009, 670 at 680.
([139]) BVerfG, 12.12.2006, 1 BvR 2576/04, BVerfGE 117, 163, at 181.
([140]) BVerfG, 12,12,2006, 1 BvR 2576/04, BVerfGE 117, 163, at 195.
([141]) BVerfG, 12.12.2006, 1 BvR 2576/04, BVerfGE 117, 163, at 200.

(*Bundesrechtsanwaltsordnung*, or BRAO) and sec. 4 § 4 Attorney Remuneration Act (*Rechtsanwaltsvergütungsgesetz*, or RVG) allow contingency fees if the plaintiff, due to his financial situation, would be kept from raising his claims without such fee agreement.

Still, contingency fees play an absolutely subsidiary role, since agreeing on them is illegal if the impaired party can apply for legal aid ([142]). The scope of application for contingency fees is therefore reduced to cases in which the impaired person does not qualify for legal aid but is in such bad financial state that he cannot be burdened with the risk of the trial ([143]). Due to the strict legal requirements, however, investors' actions are only awarded legal aid in absolutely exceptional cases ([144]). Consequently, the financial situation of the impaired party always has to be considered and it has to be examined whether the party is at risk to basically lose all its assets upon losing the case ([145]). Thus, baring absolute exceptions, most investors neither qualify for legal aid nor can they agree upon contingency fees. The limited possibility to agree on such a fee shows that the legislature missed its opportunity to create more positive incentives to file an action.

c) As emphasized by the Constitutional Court, contingency fees must be admissible if, due to his financial means, they present the only possibility for the impaired person to pursue his claim and obtain effective legal protection ([146]). Otherwise, the concerned person would refrain from raising his claim only because of the financial risk attached to it ([147]). In order to avoid that extra costs lead to a decreased willingness (or ability) to file an action, contingency fee agreements should be made more widely available when the additional legal fee for exemplary proceedings is introduced. Contrary to the classic, time-based attorney fee, contingency fees are a simple and transparent cost system, making it easier for the plaintiff to estimate the risks ([148]). The coherent use of contingency fees would also eliminate the need for help by trial financers or professional "law suit companies", which, so far, have been very picky in choosing their clients and refrain from taking upon a claim if a certain minimum value is not met ([149]). Since other EU member states, such as the United

([142]) M. Kilian, *Das Gesetz zur Neuregelung des Verbots der Vereinbarung von Erfolgshonoraren*, Neue Juristische Wochenschrift (NJW), 2008, 1905 at 1907.
([143]) M. Kilian, *Das Gesetz zur Neuregelung des Verbots der Vereinbarung von Erfolgshonoraren*, supra, 1907.
([144]) S. Bundesministerium der Justiz, *Referentenentwurf: Gesetz zur Reform des Kapitalanleger-Musterverfahrensgesetz* (21.7.2011), 23.
([145]) Other factors such as the plaintiff's risk-aversion are not taken into account when determining the contingency fee's admissibility, see H. Mayer – L. Kroiß, *Rechtsanwaltsvergütungsgesetz: Handkommentar* (Baden-Baden 2009)[4], § 4a No. 33; differing, M. Kilian, *Das Gesetz zur Neuregelung des Verbots der Vereinbarung von Erfolgshonoraren*, Neue Juristische Wochenschrift (NJW), 2008, 1905 at 1907.
([146]) BVerfG, 12.12.2006, 1 BvR 2576/04, BVerfGE 117, 163, at 200.
([147]) BVerfG, 12.12.2006, 1 BvR 2576/04, BVerfGE 117, 163, at 196.
([148]) See D. Baetge, *Erfolgshonorare wirtschaftlich betrachtet*, supra, 680.
([149]) Foris AG, for instance, only finances proceedings with a value of at least 200 000 Euros, and only if winning prospects are high and the defendant has sufficient means, s. http://foris-prozessfinanzierung.de/Prozessfinanzierung-mit-FORIS/Wann-und-fuer-wen-es-sich-lohnt.

Kingdom ([150]), know contingency fees regardless of the client's financial situation, the introduction of contingency fees in Germany would also reduce disadvantages in international competition ([151]).

However, the objections to contingency fees must also be taken into consideration. Allowing contingency fees in all cases would further promote the increasing commercialization of the attorney's profession ([152]) and make lawyers the driving force behind capital market disputes as can already be observed in the United States ([153]). The lawyer is then in danger of putting his own interests above his client's, losing critical distance and settling faster for his personal benefit, thus infringing the client's interests ([154]).

Introducing contingency fees for the exemplary proceedings in capital markets law is particularly challenging for two reasons: On the one hand, the procedure is so far only intended to resolve certain qualifying conditions of the claim. At the end, therefore, the plaintiffs are not awarded a specific sum which can serve as a basis for a contingency fee. On the other hand, contingency fees as they are understood today need to be agreed upon by all involved parties. However, this does not bar contingency fees completely. Following the US example, a common fund could be a suitable solution, holding all payments made for damages after the exemplary proceedings ([155]). Since all impaired persons benefit from the proceeding's outcome without advance payments, it is necessary and coherent for them to pay a share of the fee as well, in order to avoid free-rider behavior.

The court could decide upon the exact amount payable as contingency fee; similar to US law, twenty-five to thirty per cent of the awarded damages seem realistic, capped at a certain absolute amount ([156]). In order to avoid ruinous competition and at the same time attract competent lawyers to take upon the case, a minimum fee of 10 per cent should be chosen as it is already common for professional trial financers ([157]). If the US system for participation, based on a certain percentage, is

([150]) For more on British Conditional Fee Arrangements (CFA) see H. Beuchler, *Länderbericht Vereinigtes Königreich*, in Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft, H. Micklitz – A. Stadler (eds.) (Münster 2005), 878 et seqq.
([151]) E.g. R. Zuck, *Anmerkung*, JuristenZeitung (JZ), 2007, 684 at 686 and supra, Fn. 30.
([152]) E.g. R. Zuck, *Anmerkung*, supra, 686.
([153]) This can be seen in the US's „*lawyer-driven*" litigation and „*entrepreneurial attorneys*", see J. C. Coffee, *The regulation of entrepreneurial litigation: Balancing fairness and efficiency in the large class action*, 54 University of Chicago Law Review (UCHILR) 877, 1987, at 882 et seqq.; J. Elster, *Solomonic Judgements: Against the best interest of the child*, 54 University of Chicago Law Review (U. Chi. L. Rev.) 1, 1987, at 7 et seqq.; J. C. Coffee, *Understanding the plaintiff´s attorney: The implications of economic theory for private enforcement of law through class and derivative actions*, 86 CLMLR 669, 1986, at 679 et seqq. points out the risks of „overenforcement".
([154]) For more details, see J. Elster, *Solomonic Judgements: Against the best interest of the child*, 54 University of Chicago Law Review (U. Chi. L. Rev.) 1, 1987, at 7 et seqq. and supra, Fn. 9.
([155]) F. Bergmeister, *Kapitalanleger-Musterverfahrensgesetz (KapMuG)*, supra (Fn. 96), 334 criticizes this and regards such a solution as a dramatic "turn from tried and true principles in German lawyer salary".
([156]) For more details on contingency fee figures and its calculation in the US, see D. Baetge – S. Eichholtz, *Die Class Action in den USA*, in Die Bündelung gleichgerichteter Interessen im Prozeß, J. Basedow et. al. (eds.) (Tübingen 1999), 287, at 346 et seqq.
([157]) Foris AG only finances trials with prevailing success expectations with the option of participating in the awarded damages. Depending on the procedure's size, at least ten per cent of the actually awarded damages are paid to the trial financer. More information at http://www.foris.de/prozessfinanzierung.

regarded as too far-reaching and fear of wrong incentives persists, the British system of conditional fees could be copied, allowing a raise of general attorney fees in case of success ([158]). If the attorney loses the trial, the British model does not award her any payments, either ([159]).

5. The German experiences show that effectiveness and efficiency of collective redress are much influenced by the plaintiff's incentives to file class action. Allowing the syndicates to benefit from the skimmed-off profits by a certain percentage could present them with the necessary incentives to file a syndicate action and increase their financial assets. The exemplary proceedings in capital markets law show particularly well the relevance of cost issues. The lack of a separate fee for exemplary proceedings leads to the attorneys' decreased willingness to take upon such a case. Furthermore, the majority of impaired investors avoids agreeing upon voluntary fees, fearing free riders.

The farthest fee-bearing by the plaintiff or the defendant as done in appraisal proceedings cannot serve as a general rule, either, but should remain limited to few exceptions. Fee-bearing by the defendant is a consequence of the proceedings' specific purpose: Each appraisal procedure is preceded by the corporation's structural action, negatively affecting or even eliminating the share. The law compensates this detriment ([160]). The appraisal proceeding's objective is to examine whether this compensation was appropriate ([161]). The procedure also aims at preventing blockage of structure-changing measures by action of voidance filed by minority shareholders ([162]). Its objective is to protect minority shareholders' rights who would otherwise suffer financial harm without any wrongdoing. Since the procedure's only result is the determination of an appropriate compensation, burdening the defendant with the fees is reasonable. The corporation's fee-bearing allows for the plaintiff to initiate the appraisal procedure and to enjoy protection of the law ([163]).

IV. 1. Finally, the party's standing needs to be addressed as it also offers ways to optimize the procedure. In cases of low-value damages, especially, the probability of a law suit increases significantly if not only the impaired person, but also third parties, such as syndicates, are awarded standing. The issue of standing is therefore immensely relevant to the probability of efficient legal

([158]) The British model includes a basic fee and a contingency bonus fee. The basic fee is calculated based on the attorney's work hours. The bonus fee, on the other hand, is a pre-defined percentage which can reach up to 100% of the basic fee, depending on the trial risks, see H. Beuchler, *Länderbericht Vereinigtes Königreich*, in Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft, H. Micklitz – A. Stadler (eds.) (Münster 2005), 878 et seqq.; N. Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System* (Oxford 2003), No. 35.02 et seqq.
([159]) H. Beuchler, *Länderbericht Vereinigtes Königreich*, in Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft, H. Micklitz – A. Stadler (eds.) (Münster 2005), 878 et seqq.
([160]) I. Drescher, *§ 1 SpruchG*, in Kommentar zum Aktiengesetz, G. Spindler – E. Stilz (eds.)[2] (Munich 2010), No. 1.
([161]) Parliamentary Printing Matter (BT-Drucks.) 15/371, at 11.
([162]) Parliamentary Printing Matter (BT- Drucks.) 15/371, at 11.
([163]) Parliamentary Printing Matter (BT- Drucks.) 15/371, at 17.

remedy. In terms of legal classifications, the US class action is a representative action with a representative filing the action also on the co-parties' behalf. Only the representatives are parties to the case, at least one of whom has to be a member of the class ([164]). The representative herself has to have individual standing ([165]). Thus, she needs to prove that the defendant's behavior infringed her rights ([166]).

2. a) In antitrust law, sec. 33 § 1 GWB provides an injunctions claim in case of breach of art. 101 or 102 TFEU for any impaired claimant. The code considers all competitors to be impaired, as well as other market participants affected by the breach. If the violation of competition rules was committed willfully or negligently, sec. 33 § 3 GWB additionally grants a damage claim. Thus, it entitles not only a cartel's purchasers and distributors but also the end-consumer. As emphasized by the ECJ in its *Courage/Crehan* judgment, both private prosecution of competition violations and an individual damages claim are necessary to improve the enforcement of EU competition rules ([167]). Whereas sec. 33 GWB's practical importance used to be found mostly in injunctive requests, the ECJ judgment has been followed by an increased willingness to raise damage claims ([168]). The number of follow-on actions succeeding the official finding of an antitrust violation also increased ([169]).

b) In competition law, the syndicates' right of action is mostly set out in the codes. In antitrust law, for instance, sec. 33 § 2 GWB provides the possibility for syndicate actions by all syndicates with legal capacity which are designed to promote business or other professional interests ([170]). This right of action is limited, however, to injunctive actions. There is not yet a right of action for consumer associations comparable to that of the UWG; such a right is to be introduced by the

([164]) See Rule 23 (a) Federal Rules of Civil Procedure (F.R.C.P.)
([165]) W. Rubenstein – A. Conte – H. B. Newberg, *Newberg on Class Actions*, supra (Fn. 5), § 2:5.
([166]) If he is not successful, the motion is denied since a plaintiff without individual standing cannot ensure adequate representation of the class, see Supreme Court of the United States, 15.01.1974, 72-953, 414 U.S. 488, 94 S.Ct. 669, 1974, *O'Shea v. Littleton*; United States Court of Appeals, 07.02.1985, 83-1707, 753 F.2d 1410, 1 Fed.R.Serv.3d 120, 1985, *Davis v. Ball Memorial Hospital Association, Inc.*
([167]) As the ECJ confirmed in *Courage/Crehan*, the full effects of cartel prohibition would be compromised " ***if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition",*** see EuGH, 20.09.2001, C-453/99, 2001, I-6297 No. 26 et seqq., *Courage Ltd. v. Crehan*.
([168]) See E. Rehbinder, *§ 33 GWB*, in Kartellrecht, U. Loewenheim – K. M. Meessen – A. Riesenkampff (eds.)[2] (Munich 2009), No. 4.
([169]) OLG Karlsruhe, 28.01.2004, 6 U 183/03, NJW, 2004, 2243 et seqq.; LG Mannheim, 11.07.2003, 7 O 326/02, GRUR, 2004, 182 et seqq.; LG Mainz, 15.01.2004, 12 HK.O 52/02 kart, NJW-Rechtsprechungsreport (NJW-RR), 2004, 478 et seqq.; LG Dortmund, 01.04.2004, 13 O 55/02 Kart, Europäisches Wirtschafts- und Steuerrecht (EWS), 2004, 434 et seqq.; OLG Düsseldorf, 28.08.1998, U (Kart) 19/98, NJW-RR, 2000, 193 et seqq.
([170]) The association must include a significant number of companies active in the same market, members' interests must be effected by the same breach and the association must be capable in personal, objective and financial means to exercise the tasks provided in the statute, sec. 33 § 2 GWB.

eighth GWB amendment in order to allow their active participation in private antitrust enforcement and to improve sec. 33 § 2 GWB's practical importance ([171]).

For the individual plaintiff, syndicate actions offer the advantage of being able to refrain from filing individual suit and to transfer all risks to the syndicate. The law strictly limits the number of qualified institutions, however, by allowing only syndicates with a certain objective and longevity ([172]). This is intended to avoid ad hoc organizations and to ensure the syndicates' sufficient experience to successfully present consumer interests at trial ([173]). As a consequence of these strict requirements, only larger and relatively powerful institutions can be registered as qualified ([174]).

Allowing syndicate actions certainly is a helpful step in the right direction. However, institutional support of consumer associations has been continuously reduced since 2003 ([175]), leading to reduced personnel, shut-downs of many information centers and even bankruptcy in some cases ([176]). The consumer association's work is further complicated because much institutional financing has been substituted with project-oriented payments ([177]). Being chronically underfinanced, consumer associations rarely file actions ([178]). Reforming syndicate action rights must therefore include new financing rules for the institutions ([179]).

3. The right to make a claim in appraisal proceedings depends on the structure-changing measure which is being contested in it. In any case, only (former) shareholders have standing. Appraisal proceedings know no syndicate's right of action.

([171]) S. Bundesministerium für Wirtschaft und Technologie, *Referentenentwurf: Achtes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen* (10.11.2011), 38.

([172]) Only those syndicates whose statutory purpose is to present consumer interests qualify. However, this presentation does not have to be done commercially nor permanently, sec. 4 § 2 UKlaG.

([173]) This requirement goes beyond the directive, which does not require a minimum practising time for the syndicate, see art. 7§ 2 Council Directive on unfair terms in consumer contracts 93/13/EEC (05.04.1993), Official Journal of the European Communities No. L 95/29 (21.04.93). Some therefore question the rule's relevance and its conformity with EU law, s. H. Micklitz, *§ 4 ZPO*, in Münchener Kommentar zur Zivilprozessordnung: ZPO, T. Tauscher – P. Wax – J. Wenzel (eds.)[3] (Munich 2008), No. 20.

([174]) Namely, 76 institutions in early 2012. A detailed list of qualified institutions is available at http://www.bundesjustizamt.de/cln_115/nn_2037984/DE/Themen/Buergerdienste/Verbraucherschutz/Liste__qualifizierter__Einrichtungen,templateId=raw,property=publicationFile.pdf/Liste_qualifizierter_Einrichtungen.pdf.

([175]) Even though this trend was stopped in 2008 and 2009, the total support in 2009 (33,72 million Euros) was significantly lower than that of 2003 (35,2 million euros), s. Verbraucherzentrale Bundesverband e.V. - vzbv, *Finanzierung der Verbraucherarbeit auf breite, solide, zukunftsfeste Basis stellen* (Berlin 2011), 5.

([176]) For instance, the Consumer Protection Agency of the German state Mecklenburg-Hither Pomerania had to file for bankruptcy, s. Verbraucherzentrale Bundesverband e.V. – vzbv, *Finanzierung der Verbraucherarbeit auf breite, solide, zukunftsfeste Basis stellen*, supra, 5.

([177]) Verbraucherzentrale Bundesverband e.V. – vzbv, *Finanzierung der Verbraucherarbeit auf breite, solide, zukunftsfeste Basis stellen*, supra, 7.

([178]) Verbraucherzentrale Bundesverband e.V. – vzbv, *Finanzierung der Verbraucherarbeit auf breite, solide, zukunftsfeste Basis stellen*, supra, 10.

([179]) Therefore, the social democrat party (Sozialdemokratische Partei Deutschlands, SPD) in the German state of Hesse recently asked the government to dramatically improve the consumer protection agencies' funding, s. Hessischer Landtag, *Antrag der Fraktion der SPD betreffend Finanzierung der Verbraucherarbeit in Hessen sicherstellen*, LT-Drucks. 18/4309. One idea is to decide upon a percentage of state or federal budget laid out for institutional support of consumer protection agencies, see e.g. G. Borchert, *Kein Rückzug der Politik aus der Finanzierung des nicht-staatlichen Verbraucherschutzes!*, Zeitschrift für Rechtspolitik (ZRP), 2008, 118 at 121.

Contrary to the opt-in class action, which requires the impaired party to explicitly opt into the action ([180]), appraisal proceedings initially do not require the shareholders' active behavior. Shareholders who do not raise their own claim materially benefit from the decision since according to sec. 13 § 2 SpruchG, the decided amount of compensation is valid in relation to the passive shareholders as well ([181]). Absent shareholders are formally participating in the proceedings, which satisfies their right to be heard in court ([182]).

4. Contrary to appraisal proceedings, exemplary proceedings in capital markets dispute require shareholders to file an individual action in first instance. This will not be changed by the draft bill reforming the KapMuG. In order to copy the appraisal proceeding's successful mechanisms for KapMuG trials, individual actions by the impaired investor could no longer be required. The shareholder could then join the pending exemplary trial as "simple participant" without filing his own law suit ([183]).

Such an opt-in procedure would be largely beneficial to the courts as well as to the individual shareholder. Eliminating the requirement to file an action would significantly decrease the number of individual law suits, as the majority of small investors would prefer "simple participation" ([184]). Certainly, a strict procedure for joining as simple participant would need to be created. For instance, a written notice to the Higher Regional Court (*Oberlandesgericht*, or OLG), containing certain obligatory information, might be required ([185]). This procedure's workload would, however, be much smaller than that of the large number of individual actions combined. Regardless of the proceeding's result, the courts' workload would be decreased greatly. If the exemplary proceedings come to a negative end for the impaired investors, the absolute majority of "simple participants" will refrain from filing an action which would most likely not be successful either. If the exemplary

([180]) For instance, the Swedish „Grupptalan" is designed as an *opt-in* class action. The class action then only includes those class members who have declared their participation to the court within a time frame laid out by the court. For more detail, see A. Mom, *Länderbericht Schweden*, in Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft, H. Micklitz – A. Stadler (eds.) (Münster 2005), 497, at 562.

([181]) As the absent shareholders' legal representative, the common representative has the same powers as the claimants. He can file motions and file for appeal, but he can also settle the case. Over all, the common representative is not bound when exercising his function and only has to apply due dilligence, see D. Kubis, *§ 6 SpruchG*, in Münchener Kommentar Aktiengesetz, W. Goette – M. Habersack – S. Kalss (eds.)[3] (Munich 2010), No. 13, 15.

([182]) D. Kubis, *§ 6 SpruchG*, in Münchener Kommentar Aktiengesetz, W. Goette – M. Habersack – S. Kalss (eds.)[3] (Munich 2010), No. 1 et seqq.

([183]) Simple participation was recently recommended by the Higher Regional Court (OLG) Frankfurt in its exemplary ruling „Telekom", 16.5.2012, 23 Kap 1/06, Zeitschrift für Wirtschaftsrecht (ZIP) 2012, 1236, now pending at the Federal Court of Justice (BGH), XI ZB 12/12; see also T.M.J. Möllers – E. Steinberger, *Musterentscheid zugunsten der Deutsche Telekom AG. Evaluation des KapMuG*, EWiR 2012 (forthcoming); F. Braun – K. Rotter, *Der Diskussionsentwurf zum KapMuG – Verbesserter Anlegerschutz?*, Bank- und KapitalmarktR (BKR), 2004, 296 at 299 ff. favor a similar procedure; also, F. Bergmeister, *Kapitalanleger-Musterverfahrensgesetz (KapMuG)*, supra (Fn. 96), 330 et seqq. The draft bill for a new KapMuG suggests such possibility in its art. 10 sec. 2-4 , s. also Parliamentary Printing Matter (BT-Drucks.) 17/10160, at 5.

([184]) In agreement F. Bergmeister, *Kapitalanleger-Musterverfahrensgesetz (KapMuG)*, supra (Fn. 96), 331.

([185]) See F. Braun – K. Rotter, *Der Diskussionsentwurf zum KapMuG – Verbesserter Anlegerschutz?*, Bank- und KapitalmarktR (BKR), 2004, 296 at 300.

defendant loses the trial, he will most likely agree on an out-of-court settlement both with the exemplary plaintiff and the "simple participants" ([186]), eliminating the reason for individual actions. The simplified settlement requirements set out in the draft bill therefore harmonize very well with the idea of "simple participation" ([187]). The investors, too, evidently benefit from such a procedure. Formally joining as "simple participant" would suspend limitation and therefore eliminate one of the main reasons for many to file an individual action ([188]). Manageable procedural and cost risks would finally attract impaired small investors, too, resulting into the broad effect of exemplary proceedings ([189]) that has been intended by the legislature.

Joining the trial should not be entirely free of charge, as to not attract free-rider behavior. One possible solution is to impose one half court fee on each "simple participant" ([190]) and to assign him a share of particular costs in case of loss ([191]). The risk of free-riders is further limited by not allowing the "simple participant" to actively participate in the trial. Investors who wish to actively influence the exemplary procedure would be able to do so only if they file an individual action ([192]). Those investors and attorneys who specialize in exemplary proceedings will most probably not be content with "simple participation" as their reputation highly depends on the number of successful trials ([193]). Over all, numerous reasons exist for including a "simple participation" option in the KapMuG and thus strengthen investor protection.

5. When examining standing in all kinds of procedures, it is most striking that a syndicate's right to action exists only in competition law. The draft GWB amendment which offers further syndicate action rights in antitrust law must be appreciated since it will greatly improve the concerned party's position if the syndicate can successfully sue for injunctive measures without the individual's being burdened with the risks. It appears to be much more important to improve the syndicates' financing in order to realistically enable them to go to trial.

Syndicate action rights should not, however, be created for damage claims. Claiming the damages should continue to be within the power of the impaired parties. Injunctive actions and the

([186]) F. Bergmeister, *Kapitalanleger-Musterverfahrensgesetz (KapMuG)*, supra (Fn. 96), 332.
([187]) See sec. 17 § 1 KapMuG Draft Bill (KapMuG-E), for more detail see Bundesministerium der Justiz, *Referentenentwurf: Gesetz zur Reform des Kapitalanleger-Musterverfahrensgesetz* (21.7.2011), 33 et seqq.
([188]) Supra Fn. 96.
([189]) The legislature specifies: „The bill's goal is to allow a consistent and broadly impacting answer to an exemplary question asked in several trials", see Parliamentary Printing Matter (BT-Drucks.) 15/5091, at 1 (translation not authorized)
([190])See e.g. F. Braun – K. Rotter, *Der Diskussionsentwurf zum KapMuG – Verbesserter Anlegerschutz?*, Bank- und KapitalmarktR (BKR), 2004, 296 at 300. The KapMuG amendment now recommends 0.5. court fees, see Parliamentary Printing Matter (BT-Drucks.) 17/10160, at 5 and sec. 34 and Appendix 1, no. 1902 Draft Court Fee Act (*Gerichtskostengesetz*,or GKG)). It does not, however, suggest the coverage of out-of-court fees (e.g. for expert opinions), which will probably weaken its impact and efficiency.
([191]) F. Bergmeister, *Kapitalanleger-Musterverfahrensgesetz (KapMuG)*, supra (Fn. 96), 331.
([192]) See F. Braun – K. Rotter, *Der Diskussionsentwurf zum KapMuG – Verbesserter Anlegerschutz?*, Bank- und KapitalmarktR (BKR), 2004, 296 at 300; F. Bergmeister, *Kapitalanleger-Musterverfahrensgesetz (KapMuG)*, supra (Fn. 96), 332.
([193]) This will particularly be true when admitting contingency fees, see above III.4.c).

option of skimming-off profits are sufficient means for the associations to fight unfair competition ([194]). Exemplary proceedings in capital market disputes, appraisal proceedings and the US class action all require individual injury or the plaintiff's individual standing, making syndicate actions impossible in these kinds of trials.

The KapMuG has only partially succeeded in better enforcing the law. Introducing "simple participation" as an opt-in procedure would improve legal protection and would also decrease the courts' workload ([195]).

V. 1. Class actions as a central procedure make sense for low value damages and mass damages both because of the impaired persons' rational disinterest and for economic reasons. Both the German KapMuG and the ECJ's *Courage/Crehan* and *Manfredi* judgments aimed at ensuring effective legal remedies.

2. a) Legal remedies are particularly successful if they are sought by both public and private parties. In antitrust law, valid penalty decisions are binding for everyone. Additionally, binding penalty decisions are published. Follow-on actions are based on them.

b) This idea can be copied in capital markets law: As in antitrust law, the *BaFin*'s decisions should have binding implications for competition agencies. Generally publishing them and pointing out possibilities for legal actions could strengthen dual remedies and increase the level of protection for investors.

3.a) Additionally, rights to access information exists when dealing with authorities: for European antitrust law, this is Regulation 1049/2001, in Germany, it is the IFG. Even though the IFG provides an unconditional right, the *BaFin* often denies the request in order to protect company secrets or due to pending criminal prosecution. European antitrust law has made its own experiences with "whistle-blowing" and the scope and limits of rights to access information. These experiences should be considered in capital markets law, too.

b) In order to make dual remedies more efficient, *BaFin* investigations shall suspend limitation as does sec. 33 § 5-1 GWB.

4. As an incentive to sue for exemplary plaintiffs, introducing an additional fee for the exemplary plaintiff's attorney does not suffice. Instead, introducing contingency fees to KapMuG proceedings should be considered. Such a contingency fee would strengthen the parallelism of

([194]) The *Bundeskartellamt* is critical toward an extension of collective private antitrust remedies and fears it might result in disadvantages for the public prosecution of cartels, s. Bundeskartellamt, *Stellungnahme des Bundeskartellamts zum Referentenentwurf zur 8. GWB-Novelle* (Bonn 2011), 25.
([195]) See also F. Bergmeister, *Kapitalanleger-Musterverfahrensgesetz (KapMuG)*, supra (Fn. 96), 330; A. Halfmeier – P. Rott – E. Feess, *Kollektiver Rechtsschutz im Kapitalmarktrecht*, supra (FNo. 131), 95.

attorneys' and plaintiffs' interests and reduce the necessity of trial financers. Contingency fees should be introduced only in addition to regular fees, leaving the choice to the plaintiff.

5. Where introducing a general system of collective redress is expected to significantly improve legal remedies, its bases must be created in material law. Such claims exist in company and antitrust law, but rarely in capital markets law ([196]). In this context, existing shortened limitation periods in capital markets law must be eliminated.

6. For low-value damages, syndicate actions are material to improve legal remedies. Therefore, the planned increase in syndicates' rights to action for injunctive and skimming suits in antitrust law is appreciated. However, the syndicates' financial assets must be increased for them to be able to bear procedural risks. Sharing the skimmed-off profits could decrease procedural risks and help financing the associations' work.

7. Allowing "simple participation" would increase the broad effect of exemplary proceedings and the KapMuG. Refraining from an individual action becomes attractive if, in mass injury cases, one injured person's successful law suit effects all. Such a free-rider behavior can be prevented if all "simple participants" share the costs.

8. The authors appreciate both the European Commission's initiative and the German legislature's reform measures. Considering the two approaches taken in Germany, however, it remains questionable if one central system of collective redress on the European level is desirable. This paper showed that only some elements of collective redress, taken for instance from company law's appraisal procedure, can be copied in capital markets law. Therefore, one step needs to be taken at a time ([197]) as to prevent limitless liability. The authors suggest carefully copying tried and true legal mechanisms to other fields, avoiding an increase in liability but yet making legal remedies significantly more efficient.

*Two landmark decisions in European antitrust law, as well as the German Act on Exemplary Proceedings in Capital Markets Disputes (*Kapitalanleger-Musterverfahrensgesetz*, or KapMuG), passed seven years ago, show the legislature's and courts' efforts to strengthen possibilities of private and collective redress. This paper does not argue in favor of a collective redress action applicable for all legal fields, but instead compares essential procedural elements in competition, company, and capital markets laws. Examples to improve future remedies include the publication and bindingness of agencies' final decisions, suspension of limitation rules, stronger financial*

([196]) On the failed attempt of a KapInhG, supra Fn. 11.
([197]) B. Hess, *„Private law enforcement" und Kollektivklagen*, JuristenZeitung (JZ), 2011, 66 demands integrating collective redress into the German Act of Civil Procedure (ZPO).

incentives for syndicates and attorneys, and the introduction of a "simple participant" for KapMuG proceedings.