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The Right to Access to Justice and Public Responsibilities

National Report: Germany

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I. Introduction

As part of the Florence Access-to-Justice Project, *Rolf Bender* and *Christoph Strecker* have given a comprehensive report on the situation in Germany in 1978.¹ The following summary report will focus on recent developments exclusive of financial aspects of access to justice. It has to be noted, however, that the law of civil procedure in Europe is to an increasing extent no longer advanced by the national legislators but rather on the level of the European Union (EU). The report will therefore take EU-legislation into account as well. It will focus on civil procedure in a narrower sense, i.e. disputes between private individuals.

II. Constitutional Guarantee of the Right to Access to Justice

Although the German Constitution (*Grundgesetz* – GG) does not contain a specific provision guaranteeing a comprehensive access to justice, such a right, called *Justizgewähranspruch*, is widely recognized to follow from general constitutional principles.² The recent case law of the Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG) bases this right both on the rule-of-law principle (*Rechtsstaatsprinzip*) under Art. 20(2)/(3) GG and the basic rights (*Grundrechte*) of the parties to the respective dispute.³ This right to access to justice comprises, first, to have disputes heard by independent courts. Second, the constitution grants a right to an effective legal protection, even for small claims.⁴ The details of access to justice are subject to specifications and also to limitations by the legislator, especially to secure legal certainty and expedition of procedures.⁵ However, this must not burden citizens seeking legal protection in a disproportionate way (*Verhältnismäßigkeitsprinzip*).⁶

Against this background, the following characteristics of the constitutional right to access to justice can be noted: The statutory definition of the competent court and of the admissible

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¹ *Bender/Strecker*, Access to Justice in the Federal Republic of Germany, in: Cappelletti/Garth (eds.), Access to Justice, Vol. I: A World Survey, Book II (1978) 527.

² For comprehensive surveys cf. *Dütz*, Rechtsstaatlicher Gerichtsschutz im Privatrecht, 1970; *Lorenz*, Der grundrechtliche Anspruch auf effektiven Rechtsschutz, AöR 105 (1980), 623; *Papier*, § 176: Justizgewähranspruch, in: Isensee/Kirchhof (Hrsg.), Handbuch des Staatsrechts, Bd. VIII, 3. Aufl. 2010.

³ BVerfGE 85, 337 (345); 88, 118 (123); 93, 99 (107); 107, 395 (406 f.).

⁴ *Rosenberg/Schwab/Gottwald*, Zivilprozessrecht, 17. Aufl. 2010, § 3 Rn. 1 with further references.

⁵ BVerfGE 88, 118 (124); *Maunz/Dürig/Grzeszick*, Grundgesetz-Kommentar, 69. Ergänzungslieferung 2013, Art. 20 Rn. 134.

⁶ BVerfGE 88, 118 (124).

form of proceedings has to be sufficiently transparent.⁷ Art. 101(1)(2) GG specifically provides that no one may be removed from the jurisdiction of the “lawful judge” (*gesetzlicher Richter*) which requires the competent court and the judge(s) to be determined in advance according to abstract criteria.⁸ The competent court has to hear the alleged claims on a factual and legal basis. Every party shall be entitled to a hearing in accordance with the law (Art. 103(1) GG). This also requires the court to make clear in advance which factual and legal aspects will be relevant for its decision (prohibition of so-called surprise decisions).⁹ Generally, there exists a tendency to strengthen the duty of the judge to advise and assist the parties even in civil proceedings following the idea of party disposition.¹⁰ This enhanced duty of the court to structure the proceedings follows from the constitutional principles of material equality in legal protection (Art. 3(1) GG) and from the social state principle (Art. 20(1) GG).¹¹ Furthermore, the proceedings need to be fair on a general level.¹² In particular, the principle of equality of arms (*Waffengleichheit*) between the parties has to be adhered to¹³ and the judge has to be neutral and disinterested in the respective case¹⁴. Finally, the dispute must be decided in due course.¹⁵ In that respect, the legislator has enacted specific provisions on objections against inadequate lengths of court proceedings and possible compensation for delays in 2011.¹⁶

The constitutional right to access to justice in Germany does not entail a general right to appeal.¹⁷ Therefore, the legislator is rather free in structuring the appeals system for civil cases. However, following a ruling of the BVerfG from 2003¹⁸ a special legal redress in cases of a violation of the right to a hearing in accordance with the law (Art. 103(1) GG) has been implemented in § 321a of the Code of Civil Procedure (*Zivilprozessordnung* – ZPO). It is still disputed whether this legal redress may also cover violations of other procedural rights.¹⁹ Notwithstanding this controversy, an alleged violation of the constitutional right to access to justice may be asserted by a constitutional complaint (*Verfassungsbeschwerde*) with the BVerfG after exhaustion of all ordinary appeals.

III. National Policy Regarding Access to Justice

The most comprehensive reform with relevance for the practical level of access to justice in recent times was the reform of the ZPO in 2002 (*Zivilprozessreform 2002*). The general pur-

⁷ BVerfGE 49, 148 (164); 57, 9 (22); 87, 48 (65); 107, 395 (416 f.).

⁸ For details cf. Roth, *Das Grundrecht auf den gesetzlichen Richter*, 2000.

⁹ BVerfGE 66, 116 (146); 86, 133 (144 f.); 108, 341 (345 f.).

¹⁰ Murray/Stürmer, *German Civil Justice* (2004) 166-177 with further references.

¹¹ Gaier, *Der moderne liberale Zivilprozess*, NJW 2013, 2871 f.

¹² BVerfGE 69, 381 (385 f.); 91, 176 (181); 101, 397 (404). For controversies about the extent of this constitutional fair trial guarantee cf. Rosenberg/Schwab/Gottwald (note 4), § 1 Rn. 30.

¹³ BVerfGE 35, 263 (279); 52, 131 (144).

¹⁴ BVerfGE 14, 56 (69); 37, 57 (65).

¹⁵ BVerfGE 82, 126 (155); 88, 118 (124); 93, 99 (107 f.).

¹⁶ §§ 198-202 GVG. This legislation has been induced by the judicature of the European Court of Human Rights on legal protection within a reasonable time under Art. 6(1) ECHR; cf. EGMR (Rumpf/Deutschland), NJW 2010, 3355.

¹⁷ BVerfGE 83, 24 (31); 87, 48 (65); 89, 381 (390); 107, 395 (401 f.).

¹⁸ BVerfGE 107, 395; for details cf. Vollkommer, *Bundesverfassungsgericht, Justizgewährleistung durch das Grundgesetz, Verfahrensgrundrechte und Zivilprozess*, FS Gerhardt, 2004, 1023.

¹⁹ Cf. Musielak, in: MünchKomm. ZPO, 4. Aufl. 2013, § 321a Rn. 14 with further references.

pose of this reform was to make the civil process “more citizen-friendly, efficient and transparent”.²⁰ To achieve this aim, the function of the different levels of jurisdiction was restructured. Prior to the reform, the first level of appeals (*Berufungsinstanz*) was shaped as a *de-novo* trial, often reducing the first instance proceedings to a mere “transit instance” and thereby making civil justice more expensive and time consuming. Therefore, the reform aimed at limiting the first level of appeals to an error-correcting function while at the same time strengthening and enhancing the quality and citizen-friendliness of law-finding in the courts of first instance.²¹ In addition, the access to the second level of appeals (*Revision*) was reformed by granting this access in all cases of fundamental importance (*grundsätzliche Bedeutung*) or necessity of judicial law-making (*Rechtsfortbildung*) or assurance of uniform application of the law (*Sicherung einer einheitlichen Rechtsprechung*).²² In this context, the formerly available access to the second level of appeals due to a high amount in controversy (*Streitwertrevision*), which made a structural difference between larger and smaller claims, was abolished.²³

Regarding the strengthening of the courts of first instance, the approach of the reform was twofold:

First, the duty of the court to substantive process control (*materielle Prozessleitungspflicht*) was increased. According to § 139 ZPO the court has, in particular, to discuss the factual and legal issues of the case with the parties, to effect timely statements and motions by the parties, to give hints and feedback on unclear or misapprehended points and to document these hints in the record.²⁴ This increased responsibility of the court for a transparent and fair proceeding can also be interpreted as a concretion of the constitutional guarantee of access to justice.²⁵

Second, the reform aimed at strengthening ADR mechanisms. A statute from 1999 had already introduced a so-called conciliation attempt at a conciliation authority (*Einigungsversuch vor Gütestelle*). According to the pertinent provision,²⁶ the German states may require such an attempt as a prerequisite for filing a lawsuit in certain cases. These cases cover proprietary disputes with an amount in controversy up to 750 Euro, disputes concerning the respective interests of neighbors (*Nachbarrecht*), defamation disputes and civil disputes under non-discrimination law (*Allgemeines Gleichbehandlungsgesetz*). To date, ten of the sixteen German states have, comprehensively or partially, made use of this authorization and require a pre-trial conciliation attempt. In continuation of this approach, the reform of 2002 facilitated alternative forms of dispute resolution in first-instance procedures itself and introduced the so-called conciliation hearing (*Güteverhandlung*) in § 278(2) ZPO. Such a conciliation hearing had already been a central and successful feature in the solution of labor disputes²⁷ and was therefore extended to civil cases in general. According to § 278(2)(1) ZPO, the formal oral hearing of a case is, in principle, to be preceded by a conciliation hearing which aims at

²⁰ BT-Drucks. 14/4722, 58 (translation by the author).

²¹ BT-Drucks. 14/4722, 60 ff.

²² § 543(2)(1) ZPO.

²³ BT-Drucks. 14/4722, 65 ff.; for a survey of the discussion about the validity of this approach cf. *Maultzsch, Streitentscheidung und Normbildung durch den Zivilprozess*, 2010, 336 ff.

²⁴ For details cf. *Murray/Stürner* (note 10), 166-177.

²⁵ *Supra* II.

²⁶ § 15a EGZPO.

²⁷ Cf. § 54 ArbGG with a settlement rate of 39,6 % in 1997 (BT-Drucks. 14/4722, 62).

an amicable solution of the case (cf. § 278(1) ZPO). The court will discuss the legal and factual issues of the case with the parties in free evaluation of all circumstances, which means that no formal taking of evidence is necessary at this stage so as not to overload the conciliation hearing.²⁸ The conciliation hearing is dispensable if there was already a pre-trial conciliation attempt or if such a hearing seems to be visibly futile (§ 278(2)(1) ZPO).

The success of the reforms outlined above has been ambivalent.²⁹ The aim of limiting the first level of appeals to a mere error-correcting function and conversely strengthening first instance proceedings as a cost-efficient and citizen-friendly way of final dispute resolution has been relativized since the provisions allowing for new factual findings on the appeals level (§§ 529, 531 ZPO) have been constructed rather broadly in practice.³⁰ In line with this fact, the rate of first level appeals in relation to completed first instance cases has dropped only marginally between 2001, the year before the reform, and 2012.³¹ Furthermore, the reform's approaches of fostering ADR have been of limited effectiveness, too. The pre-trial conciliation attempt under § 15a EGZPO is not very successful in practice. Some of the German States who formerly required such an attempt have, therefore, abandoned or severely curtailed this instrument later. As a consequence, the number of cases tried in this procedure is in decline and the rate of successful conciliation attempts is only short of 20 %.³² With regard to the conciliation hearing under § 278(2) ZPO, one can notice a certain increase in settlement rates in first-instance proceedings since the implementation of this instrument (from 9,4 % in 1998 to 15,3 % in 2012 for local courts (*Amtsgerichte*) and from 16,4 % in 1998 to 24,5 % in 2012 for regional courts (*Landgerichte*)).³³ It is, however, not certain whether this change is effected by the introduction of § 278(2) ZPO or by other causes.³⁴ In addition, the obligatory nature of the conciliation hearing and the tendency of judges to prompt settlements on the basis of a not yet adequately developed case is often perceived by the parties not as a means of an appropriate dispute resolution but as a problematic attempt to reduce the judicial workload.³⁵ Therefore, the reforms of the year 2002 have not yet been completely successful in strengthening a culture of ADR. The further pursuit of this aim, especially with regard to mediation procedures, is mainly advanced by the EU.³⁶

²⁸ *Prütting*, in: MünchKomm. ZPO, 4. Aufl. 2013, § 278 Rn. 25.

²⁹ For a general evaluation cf. the reports given by *Huber, Selbherr, Debusmann, Hirtz, Ball, Büttner* and *Gottwald*, in: Verhandlungen des 65. Deutschen Juristentages Bonn 2004, Bd. I, 2004, A 1-129 and *Bahlmann*, ZPO-Reform 2002: Stärkung der ersten Instanz?, 2006.

³⁰ *Rimmelspacher*, in: MünchKomm. ZPO, 4. Aufl. 2012, § 529 Rn. 15 ff. with further references to case law and, generally, *Murray/Stürner* (note 10), 381-383.

³¹ Appendix I.

³² *Deckenbrock/Jordans*, Die obligatorische Streitschlichtung nach § 15a EGZPO, MDR 2013, 945 with further references.

³³ Source: Statistisches Bundesamt, Rechtspflege: Zivilgerichte, 1998/2012.

³⁴ For a sceptical view cf. *Albin*, Güteverhandlung und Mediation, 2006, 125 ff.; *Bahlmann* (note 29), 194 ff.

³⁵ Cf., exemplarily, the critique of *Knauss*, Der „Zwang“ zur gütlichen Einigung – Für eine Reform des § 278 ZPO, ZRP 2009, 206.

³⁶ *Infra* V. 2. a).

IV. Infrastructure of the Civil Justice System

1. Courts

Regarding the number of judges employed in Germany and its development, one has to keep in mind that Germany has a system of split jurisdictions. Besides the so-called ordinary courts (*ordentliche Gerichte*), which deal with civil and criminal matters, there exist labor courts (*Arbeitsgerichte*), social courts (*Sozialgerichte*), administrative courts (*Verwaltungsgerichte*) and fiscal courts (*Finanzgerichte*). The overall number of judges in all branches of jurisdiction has been 20.382 in 2012 and is therefore almost unchanged since 2000, when the number amounted to 20.880.³⁷ This yields about 2.5 judges per 10.000 inhabitants. The share of female judges has increased from 27 % to 40 % between 2000 and 2012.

Focusing on the ordinary courts, which deal with civil and criminal cases, the number of judges has been reduced slightly from 15.480 in 1995 to 14.904 in 2012.³⁸ The non-judicial legal personnel, e.g. judicial officers (*Rechtspfleger*) or research associates (*Wissenschaftliche Mitarbeiter*), has remained stable between 1995 and 2012 at about 12.000, while the administrative personnel, e.g. typists, has been reduced from 37.395 in 1995 to 30.388 in 2012.³⁹ In addition, one has to take into account law clerks (*Rechtsreferendare*) who still receive post-graduate judicial training but who also assist the judges in their work, primarily at courts of first instance. However, the number of law clerks has declined from 22.742 in 2002 to 14.796 in 2013.⁴⁰ This change is due to the fact that the number of students pursuing training as a fully qualified lawyer (*Volljurist*) is somewhat in decline.

Turning to the judges' caseload and limiting the inquiry to first instance proceedings in civil cases, the following observations can be made for the period from 1995 to 2012:⁴¹

In civil cases exclusive of family matters, the number of new pending cases per year has been in decline in local courts (-33 %) and in regional courts (-15 %). The number of judges deployed to handle these cases was also reduced, albeit to a somewhat smaller extent. Therefore the caseload per judge and year was reduced from 690 to 584 in local courts (-15 %) and from 182 to 167 in regional courts (-8 %). It has to be noted, however, that the legal issues posed by the cases tend to become more complex in recent times for which reason a mere numerical comparison may be misleading in estimating the judges' workload. Nonetheless, the German judges were able to keep the relation between new pending cases and completed cases in balance in recent times. The average length of proceedings is rather stable on a modest level and ranges around four months in local courts and between six and eight months in regional courts.

In family cases, the situation is a little more volatile. The number of pending cases has increased significantly between 1995 and 2011 (+46 %) with some stabilization now becoming apparent. The number of judges handling these cases has also been raised but not fully

³⁷ The same is true for the population of Germany which remained stable at about 82 million inhabitants.

³⁸ Cf. Appendix II for more details. The year of 1995 is used as a starting point since the special situation following from the German reunification in 1990 can be considered as being completed in this year.

³⁹ Cf. Appendix III for more details.

⁴⁰ Source: Bundesamt für Justiz, *Juristenausbildung*, 2001/2012.

⁴¹ For more details cf. Appendix IV and V.

proportionally. Therefore, the caseload per judge and year has increased from 376 to 434 (+15 %). This also leads to larger fluctuations of the ratio between new pending cases and completed cases than in general civil matters. However, the average length of proceedings was reduced in recent times from about 10 months in 1995 to 7 months in 2011. A reason for this could be the increasing utilization of in-court ADR mechanisms in family cases.

The funding and the workload of the court system remains a matter of discussion in Germany. The public expenditures of the Federation and of the German States for the judicial system have remained steady in the recent past. In 2007, the overall expenditures for the judicial system amounted to 12.5 billion Euro.⁴² This represents 1.2 % of the total national expenditures of this year. However, in times of austerity, it is foreseeable that the budgets will be cut and that this will also lead to a reduction of judicial personnel which is observable already in some of the German states.⁴³ Therefore, approaches must be explored which allow for a reduction of the costs of the judicial system while at the same time not compromising its quality. One option to make the German judicial system more flexible and more efficient that has long been discussed but which has no imminent chance of implementation is the consolidation of the five specialized jurisdictions into two, namely ordinary courts and administrative courts.⁴⁴ Other options are an increased utilization of mechanisms of ADR and collective litigation⁴⁵ as well as the increased computerization of judicial procedures⁴⁶.

2. Attorneys

The number of attorneys admitted to practice in Germany has increased constantly with some flattening in recent years. From 1995 to 2013, the increase amounts to 117 % with 160.894 attorneys now being admitted.⁴⁷ This equals approximately two attorneys per 1.000 inhabitants. The share of female attorneys increased from 19 % in 1995 to 33 % in 2013. The bar is rather diversified in Germany ranging from highly specialized attorneys being in strong demand to a rather large number of not very well employed attorneys in general practice. It has also to be noted that a considerable number of the admitted persons is actually not practicing as an attorney but pursues other occupations and holds the admission in the first place to participate in the beneficial pension system offered by the German bar.

V. Reform of Civil Proceedings and Utilization of ADR for Various Types of Disputes

1. Special Courts and Small Claims Proceedings

As has been mentioned already, there are special courts in Germany for labor law disputes (*Arbeitsgerichte*), general administrative cases (*Verwaltungsgerichte*), social law cases (*Sozi-*

⁴² Source: Statistisches Bundesamt, Justiz auf einen Blick, 2011.

⁴³ Cf. *Gaier* (note 11), 2872 f.

⁴⁴ For recent perspectives on this topic cf. *Bamberger*, Zur Vereinheitlichung der Fachgerichtsbarkeiten, in: Mer-ten (Hrsg.), Justizreform und Rechtsstaatlichkeit, 2009, 9 and *Hirsch*, Brauchen wir fünf Gerichtsbarkeiten?, NJW 2005, Sonderheft BayObLG, 50.

⁴⁵ *Infra* V. 2.

⁴⁶ *Infra* VII.

⁴⁷ For further details cf. Appendix VI.

algerichte) and tax law cases (*Finanzgerichte*) which allow for procedures adapted to the characteristics of these conflicts.⁴⁸

In civil cases with an amount in controversy of no more than 600 Euro, the local courts (*Amtsgerichte*) may structure the proceedings in equitable discretion. This allows for a less formalized, accelerated procedure, e.g. without an oral hearing if no party requires it (§ 495a ZPO).⁴⁹ The EU has adopted special proceedings for cross border dunning procedures⁵⁰ and for cross border claims up to 2000 Euro⁵¹ that shall make the international enforcement of small claims easier by using streamlined procedures.⁵²

2. Facilitation of ADR and Protection of Diffused Interests

a) ADR

Mechanisms of ADR have been extended, besides the national procedural reform of 2002,⁵³ mainly by the EU.

aa) General

First of all, the so-called Mediation Directive has required the EU member states to facilitate mediation in civil cases.⁵⁴ It starts from the premise that mediation is a time- and cost-saving procedure which strengthens the acceptance of conflict solutions by the citizens and thereby enhances access to justice for them.⁵⁵ Germany has taken several measures to implement this directive.

First of all, it is part of the attorneys' duties to advise their clients on suitable ADR-solutions for the respective conflict and, in case a lawsuit is filed with a court, the statement of claim shall indicate whether mediation or another ADR mechanism was utilized (§ 253(3) no. 1 ZPO).

A more controversial readjustment is the so-called *Güterichterverfahren* which has been introduced into the ZPO in 2012.⁵⁶ Under § 278(5) ZPO, the court may relegate the parties to a conciliation judge (*Güterichter*) who is not competent for an authoritative solution of the case but who may explore an amicable solution by all appropriate means including mediation.⁵⁷ While this type of in-court mediation has been lauded by some commentators as a

⁴⁸ Supra IV. 1.

⁴⁹ For details cf. *Deubner*, in: MünchKomm. ZPO, 4. Aufl. 2012, § 495a Rn. 11 ff.

⁵⁰ Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ EU 30.12.2006, L 399/1.

⁵¹ Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ EU 31.7.2007, L 199/1.

⁵² For details of these instruments see *Hess/Bittmann*, Die Verordnungen zur Einführung eines Europäischen Mahnverfahrens und eines Europäischen Verfahrens für geringfügige Forderungen, IPRax 2008, 305.

⁵³ Supra III.

⁵⁴ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ EU 24.5.2008, L 136/3.

⁵⁵ Cf. recitals 2-6 of the Mediation Directive.

⁵⁶ For pilot projects of in-court mediation in the forefront of the new statutory provision cf. *Hess/Pelzer*, Regulation of Dispute Resolution in Germany, in: *Steffek/Unberath* (eds.), *Regulating Dispute Resolution* (2013), 209, 228-230.

⁵⁷ It is disputed whether such a relegation requires the consent of the parties; cf. *Steffek*, *Rechtsfragen der Mediation und des Güterichterverfahrens*, ZEuP 2013, 528 (540) with further references.

means of redirecting court-pending cases to a more flexible and amicable solution,⁵⁸ it has also been criticized by other commentators as blurring the lines between voluntary mediation and sovereign conflict solution by courts⁵⁹. Furthermore, the practical success of in-court mediation depends on the efforts made by the courts with regard to the quality of the procedures and the training of the conciliation judges conducting mediation.⁶⁰ To date, the ordinary courts are ascribed a rather bearish attitude towards in-court mediation. In contrast, mediation procedures are already in use by the courts with considerable success in family matters, e.g. in divorce and custody proceedings.⁶¹

Besides in-court mediation, the court can also propose to the parties to conduct mediation or other ADR procedures out-of-court; the pending litigation will be suspended if the parties agree to do so (§ 278a ZPO). A further statute enacted in implementing the Mediation Directive (*Mediationsgesetz* – *MediationsG*) has regulated some fundamentals of mediation procedures including the cornerstones of such proceedings (§ 2 *MediationsG*), the mediator's duty to neutrality (§ 3 *MediationsG*) and to confidentiality (§ 4 *MediationsG*) and the standards of an appropriate education and continuing training of mediators (§ 5 *MediationsG*).⁶²

bb) Consumer ADR

The traditional means of an amicable solution of B2C-disputes in Germany are the so-called ombudsmen (*Ombudsmänner*), e.g. in cases of disputes about financial services and insurance claims. These ombudsmen are appointed by the respective industries and their proposals for a solution of the dispute are, subject to certain amounts in controversy, binding on the financial institution and the insurance company, respectively, while they do not curtail the right of the consumers to pursue their claims in court.

In recent years, the EU has started a comprehensive initiative to promote ADR in consumer disputes. The most important results of this initiative are the EU Directive on Consumer ADR (ADR Directive)⁶³ and the EU Regulation on Online Dispute Resolution for Consumer Disputes (ODR Regulation)⁶⁴. These two instruments will be in force in 2015 and 2016, respectively, and have to be seen as coordinated measures.⁶⁵ They are meant to balance the problem that consumers often abstain from enforcing small claims in formal court proceedings which may be costly and complicated from their point of view, especially in cross border transactions. The ADR Directive requires the EU member states to establish within their jurisdictions sufficient institutions for alternative resolution of consumer disputes if such institutions do not yet exist. The ODR Regulation does not introduce a separate mechanism for online-ADR but

⁵⁸ Cf. *Hess*, Perspektiven der gerichtlichen Mediation in Deutschland, ZJP 124 (2011), 137.

⁵⁹ Cf. *Prütting*, Ein Plädoyer gegen Gerichtsmediation, ZJP 124 (2011), 163.

⁶⁰ A detailed analysis using the example of social courts can be found at *Schreiber*, Konsensuale Streitbehandlung im sozialgerichtlichen Verfahren, 2013.

⁶¹ In detail *Greger*, Mediation und Gerichtsverfahren in Sorge- und Umgangsrechtskonflikten, 2010.

⁶² For details cf. *Ahrens*, Mediationsgesetz und Güterichter, NJW 2012, 2465.

⁶³ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes, OJ EU 18.6.2013, L 165/63.

⁶⁴ Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes, OJ EU 18.6.2013, L 165/1.

⁶⁵ For an instructive overview on the content of the two instruments see *Meller-Hannich/Höland/Krausbeck*, „ADR“ und „ODR“: Kreationen der europäischen Rechtspolitik. Eine kritische Würdigung, ZEuP 2013, 8 (17 ff.) and *Roth*, Bedeutungsverluste der Zivilgerichtsbarkeit durch Verbrauchermediation, JZ 2013, 637 (639 f.).

merely creates a platform enabling consumers to identify the suitable national ADR institution that is competent for the respective dispute.

The ADR Directive is applicable to sales contracts and service contracts between consumers and traders (Art. 2(1) ADR Directive) and requires the EU member states to ensure that consumers and traders have, on a voluntary basis, access to ADR entities which are competent to handle disputes arising under such contracts. The EU member states can, in fulfilling their duties under the ADR Directive, resort to private ADR entities but have to ensure that these entities meet certain standards of efficiency and quality. Among these standards are the requisite qualification and impartiality of the persons handling the complaints (Art. 6 ADR Directive), the transparency of the ADR services offered by the respective entities (Art. 7 ADR Directive) as well as the effectiveness and the fairness of the proceedings (Art. 8, 9 ADR Directive). In case that the outcome of the ADR procedure shall be binding on the consumer, which is possible by a respective agreement made between the consumer and the trader after the occurrence of the dispute only (Art. 10 ADR Directive), the member states need to guarantee that the mandatory rights of the consumer are not compromised by the solution (Art. 11 ADR Directive).

For contracts that are concluded online, the ODR Regulation supplements the ADR Directive by helping the parties to the dispute (especially the consumer) to identify a competent ADR entity. For these purposes, a European ODR platform will be established by the EU Commission that lists all national ADR entities reported by the EU member states (Art. 5 ODR Regulation). The consumer will have the possibility to file a complaint by entering the particulars of the dispute in an interactive website (Art. 8 ODR Regulation). On the basis of this complaint, the opponent of the dispute will be notified and a suitable ADR entity will be identified on which the parties then still will have to agree (Art. 9(6) ODR Regulation). If no agreement is reached, a so-called ODR advisor may assist in finding a solution (Art. 9(8) ODR Regulation).

Although the ADR Directive and the ODR Regulation aim at providing consumers and traders with a comprehensive infrastructure to solve their disputes faster and cheaper than in standard court procedures,⁶⁶ this approach has also been criticized severely from a German perspective. The major objections are that the EU member states will be required to develop and monitor a complex ADR system which is not suitable to enforce mandatory consumer rights and which, as a partial privatization of the justice system, may impair legal protection by public courts in this area.⁶⁷ Therefore, several alternatives for efficient enforcement of consumer rights have been suggested. These suggestions range from the introduction of streamlined small stakes proceedings at local courts⁶⁸ to the introduction of consumer class actions⁶⁹.

⁶⁶ For positive views on the two instruments cf. *Hirsch*, *Außergerichtliche Beilegung von Verbraucherstreitigkeiten – ein alternativer Zugang zum Recht entsteht*, NJW 2013, 2088 and *Isermann/Berlin*, *Außergerichtliche Streitbeilegung in Verbraucherangelegenheiten – Bestandsaufnahme und Maßnahmenpaket der EU für 2014/15*, VuR 2012, 47.

⁶⁷ *Eidenmüller/Engel*, *Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe*, 2013 (available at: <http://ssrn.com/abstract=2290654>); *Meller-Hannich/Höland/Krausbeck* (note 65), 30 ff.; *Roth* (note 65), 640 ff.; *Wagner*, *Private Law Enforcement through ADR: Wonder Drug or Snake Oil?*, CML Rev. 51 (2014) 165.

⁶⁸ *Eidenmüller/Engel* (note 67).

⁶⁹ *Wagner* (note 67).

b) Protection of Diffused Interests

In protecting so-called diffused interests, the German model favors institutionalized representative actions by competent organizations (*Verbandsklage*) rather than case-specific class actions which are organized ad hoc by attorneys.⁷⁰ The most important example of representative actions in the field of private law are actions for injunctive relief under the Act on Cease and Desist Actions (*Unterlassungsklagengesetz – UKlaG*)⁷¹ in case of business practices that violate consumer rights. Procedural standing in such actions is given to entities which are registered as consumer protection organizations in a register of the German Federal Office for Justice or of the EU (§§ 3, 4 UKlaG). In contrast, representative actions for monetary relief are much less common in Germany.⁷² However, consumer protection associations and boards of trade may file actions for disgorgement of excess profits to the benefit of the treasury in cases of unfair competition⁷³ and in antitrust law⁷⁴.

A special kind of representative action has been introduced for collective actions by investors in 2005 (*Kapitalanleger-Musterverfahren*).⁷⁵ This type of proceedings shall allow for a uniform and binding determination of factual or legal issues which are relevant for a multiplicity of disputes.⁷⁶ Therefore, the plaintiff or the defendant in any of the disputes may file an application for an exemplary proceeding (*Musterverfahren*) which will be announced in an electronic register.⁷⁷ The exemplary proceeding will be instituted in the competent higher regional court (*Oberlandesgericht*) if at least nine parallel applications are filed within four months.⁷⁸ The higher regional court will select an exemplary case for determining the relevant factual and legal issues. All parallel cases will be suspended regardless of whether an application for exemplary proceedings was made in them.⁷⁹ The parties to the parallel proceedings suspended will participate in the exemplary proceeding as summoned parties (*Beigeladene*).⁸⁰ The final exemplary order (*Musterbescheid*) is binding on the parties and all summoned parties.⁸¹ The costs of the exemplary proceeding will be distributed between all disputes that are covered by it.⁸² The experience with the device of investors' collective actions has been mixed since the procedure is rather complex and because the coordination of the respective interests of the plaintiff in the exemplary case and the summoned parties is not without frictions.

In 2008, a so-called white paper of the EC Commission recommended the implementation of opt-in class actions in the member states as an effective means of enforcing EC competition and antitrust law.⁸³ However, the current proposal for an EU directive in this field does not

⁷⁰ Cf. *Bruns*, Einheitlicher kollektiver Rechtsschutz in Europa?, ZJP 125 (2012), 399 (409 ff.).

⁷¹ This act is based on the Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ EC 11.6.1998, L 166/51.

⁷² *Bruns* (note 70), 412 f. with further references.

⁷³ § 10 UWG.

⁷⁴ § 34 GWB.

⁷⁵ Overview on these proceedings at *Bruns* (note 70), 414 f.

⁷⁶ § 1(1) KapMuG.

⁷⁷ §§ 2, 4 KapMuG.

⁷⁸ § 6(1) KapMuG.

⁷⁹ § 8(1) KapMuG.

⁸⁰ §§ 9, 14 KapMuG.

⁸¹ § 22 KapMuG.

⁸² § 24 KapMuG.

⁸³ White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, 4.

take up this procedural device but is limited to the strengthening of consumer claims for damages on the level of substantive law and to enhancing the opportunities to prove abusive practices.⁸⁴ In a recommendation from June 2013, the EU Commission has proposed that all EU member states should allow for opt-in class actions for monetary relief in mass harm situations.⁸⁵ However, such class actions do not yet exist in Germany and are not imminently discussed in the national political process.

VI. Law Reform to Improve Access to Justice for Minorities/Migrants/Foreigners

There have been no comprehensive law reforms to improve access to civil justice for special minority groups, migrants or foreigners in Germany.

The transparency of proceedings for foreign-language litigants and for people with impaired abilities of hearing, speaking or vision is secured by the usual means (translators, sign language interpreters etc.).⁸⁶ The costs of these measures are, in principle, added to the legal expenses of the proceedings and are to be borne by the losing party.⁸⁷ The Sorbian population group enjoys the right of using the Sorbian language in courts located in their home areas in the south-eastern part of Germany.⁸⁸

Incidentally, the enhancement of factual access to justice for ethnic or racial minorities, which may be unaccustomed to deal with public authorities, is primarily considered to be a task of the civil society. Attorneys rooted into the respective population group, non-profit organizations or church institutions may assist in facilitating access to justice. In contrast, central initiatives by the state are not common in this field.

The pending legislative initiative to introduce special chambers for anglophone proceedings in international business cases at the regional courts (*Landgerichte*) has a somewhat different purpose.⁸⁹ It is not meant to improve access to justice for foreign-speaking individuals in general but rather to enhance the attractiveness of the German courts and thereby also the attractiveness of German law for international business disputes. If the proposal was implemented, it would be possible to conduct the entire proceedings – including written submissions, oral hearings and the judgment – in English in the respective chambers. While this initiative receives strong support as a means to modernize the German courts in a globalizing world,⁹⁰ it is also subject to severe criticism. On the one hand, this criticism focuses on the problem of the connectivity of English-speaking proceedings to a, for the rest, German-speaking legal system, e.g. with respect to appeals against decisions made in an English-speaking procedure.

⁸⁴ Cf. Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404 final, in particular recital 11(4).

⁸⁵ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), OJ EU 26.7.2013, L 201/60, 64-65.

⁸⁶ §§ 184-191a GVG.

⁸⁷ Cf. *Zimmermann*, in: MünchKomm. ZPO, 4. Aufl. 2013, § 185 GVG Rn. 16.

⁸⁸ § 184(2) GVG.

⁸⁹ This initiative had already been started during the 17th legislative period of the German Bundestag (cf. BT-Drucks. 17/2163) but was then canceled by the end of this legislative period. It has now been renewed by the States of Hamburg and North Rine-Westphalia.

⁹⁰ *Armbrüster*, *Englischsprachige Zivilprozesse vor deutschen Gerichten?*, ZRP 2011, 102; *Salger*, *Handelssprache Englisch auch als Gerichtssprache*, AnwBl. 2012, 40.

On the other hand, the critics emphasize the central cultural importance of the native language for a legal system.⁹¹ Therefore, it remains to be seen whether this initiative will be successful. As a kind of precursor, the Regional Courts of Cologne, Bonn and Aachen as well as the Higher Regional Court of Cologne have introduced the possibility of conducting oral hearings in the English language which is already admissible under applicable German law with the consent of the parties.

VII. Computerization of Civil Procedure to Improve Access to Justice

The first important step of computerization of court proceedings in Germany has been the introduction of the automated dunning procedure (*automatisiertes Mahnverfahren*) in the 1980s.⁹² This procedure serves as a means to obtain a writ of execution for presumably undisputed claims without substantive examination of the case. The German states have established central dunning courts for conducting this procedure in their respective territories. The application for such a court order may now be filed in several ways comprising, inter alia, printed versions with encrypted barcodes for electronic data processing or submissions via internet with digital signatures.⁹³ Furthermore, the commercial register (*Handelsregister*) and the business register (*Unternehmensregister*) operate on a fully electronic basis since 2007.⁹⁴

In recent years, steps have been taken to use e-justice (*elektronischer Rechtsverkehr*) in general court procedures as well, although the development has been slower than expected due to the complex infrastructure required and also due to concerns about data protection and the reliability of electronic documents.⁹⁵ One can distinguish between the submission of electronic documents by the parties to the court and the digitalization of court files and procedures themselves.

The parties and their attorneys may, in principle, submit their briefs as electronic documents since 2001 already (§ 130a ZPO). However, this requires the use of a rather complicated technique of digital signature and a special approval of electronic communication with the respective court by a regulation (§ 130a(2) ZPO). Such an approval does exist, to date, on a comprehensive basis only for the federal supreme courts and in a few of the German states, e.g. the State of Hesse, while most of the states have limited electronic submission to pilot schemes with selected courts only.⁹⁶ To advance the idea of e-justice, the legislator has now provided that electronic submission will be available in all courts in 2018 or, at the latest, in 2020.⁹⁷ In that course, the procedure of submitting electronic documents will be much simplified.⁹⁸ There will even be a duty of attorneys and public authorities to make electronic instead

⁹¹ Dreesen/Hoffmann, Sprache als immanenter Teil der Rechtsordnung, KritV 2011, 194; Flessner, Deutscher Zivilprozess auf Englisch, NJOZ 2011, 1913.

⁹² Cf. Bender/Strecker (note 1), 538-539, also with criticism of this procedure.

⁹³ For details cf. Schüler, in: MünchKomm. ZPO, 4. Aufl. 2012, § 690 Rn. 33 ff.

⁹⁴ §§ 8 ff. HGB.

⁹⁵ BT-Drucks. 17/12634, 20 ff. For details see Gilles, Zivilgerichtsverfahren, Teletechnik und „E-Prozessrecht“, ZJP 118 (2005), 399; Radke, Zwischen Wagemut und Angststarre – Elektronischer Rechtsverkehr und elektronische Aktenführung in der Justiz, ZRP 2012, 113; Müller-Teckhoff, Gesetz zur Förderung des elektronischen Rechtsverkehrs mit den Gerichten, MMR 2014, 95.

⁹⁶ Cf. for the current status of implementation http://www.justiz.de/elektronischer_rechtsverkehr/index.php.

⁹⁷ Cf. Gesetz zur Förderung des elektronischen Rechtsverkehrs mit den Gerichten v. 10.10.2013, BGBl. I 3786.

⁹⁸ In particular, it will be possible to use the so-called DE-Mail-Mode which is currently developed in Germany.

of hardcopy submissions from 2022 onwards, since it is believed that e-justice will not become accepted sufficiently on a voluntary basis.

Regarding the court files, the respective administrations of justice will still have the choice whether to utilize a hardcopy form or an electronic file. The option of an electronic court file is already open under current law (§§ 298, 298a ZPO) and the courts may even issue orders as electronic documents with special digital signatures (§ 130b ZPO). However, these means are not used yet by the courts except for some pilot projects.⁹⁹ It is expected that after the introduction of mandatory electronic submissions by attorneys there will be a period of parallel documentation of court files both on a hardcopy and an electronic basis which will ultimately lead to a full adoption of electronic files.¹⁰⁰ To improve the implementation of electronic documents into court proceedings, it is already possible to use scans of public documents as pieces of evidence if the authenticity of the scan has been approved by a competent authority (§ 371b ZPO).

What, in contrast, has not been approached yet systematically is a utilization of data processing to structure the facts of the case by electronically editing the respective assertions of the parties to the dispute. Since the editing of the factual allegations of the parties is very time consuming for judges, an enhanced computerization could raise efficiency significantly in this field.¹⁰¹

The most advanced progress has been made already in the digitalization of the existing German case law and considerable parts of legal literature in databases which are, predominantly, commercially operated.¹⁰² This makes it easier for attorneys and judges to research legal authorities. However, it may also lead to an “overload” of legal disputes with materials which could, on the long run, impair the efficiency of court procedures again.

⁹⁹ These include, e.g., the introduction of a parallel electronic file in the social courts of the State of Hesse which stands besides the traditional hardcopy file.

¹⁰⁰ For advantages of an electronic court file see *Köbler*, Vom „Mehrwert“ elektronischer Fallbearbeitung, DRiZ 2013, 76.

¹⁰¹ Cf. *Gaier* (note 11), 2874.

¹⁰² The most successful examples of these are the databases beck-online (www.beck-online.de) and juris (www.juris.de).

Appendix I: Rate of First Level Appeals (*Berufung*) in Civil Cases (Exclusive of Family Matters)

	2001		2012	
Court of First Level Appeals	Regional Court (<i>Landgericht</i>)	Higher Regional Court (<i>Oberlandesgericht</i>)	Regional Court (<i>Landgericht</i>)	Higher Regional Court (<i>Oberlandesgericht</i>)
No. of Cases Completed in First Instance	1.415.132	403.159	1.165.234	356.445
No. of Cases Appealed	88.450	63.781	57.482	52.560
Rate of Appeals	6.3 %	15.8 %	5 %	14.7 %

Source: Bundesamt für Justiz, Geschäftsentwicklung der Zivilsachen – Amts-, Land- und Oberlandesgerichte 1995-2012, 2013.

Appendix II: Judicial Personnel in Ordinary Courts 1995-2012

Court	1995	2000	2005	2010	2012
Local Courts (<i>Amtsgerichte</i>)	8.094	8.105	8.048	8.005	8.014
Regional Courts (<i>Landgerichte</i>)	5.414	5.204	4.949	4.958	4.916
Higher Regional Courts (<i>Oberlandesgerichte</i>)	1.849	1.905	1.818	1.838	1.845
Federal Supreme Court (<i>Bundesgerichtshof</i>)	123	122	127	128	129
Overall No.	15.480	15.336	14.942	14.929	14.904

Source: Bundesamt für Justiz, Personalbestand der Gerichte (Amtsgerichte, Landgerichte, Oberlandesgerichte, Bundesgerichtshof), 2007/2013.

Appendix III: Non-judicial Legal Personnel and Administrative Personnel in Ordinary Courts 1995-2012 (Exclusive of Marshals (*Gerichtsvollzieher*) and Correctional Staff (*Justizvollzugsbeamte*))

Court	Category of Personnel	1995	2000	2005	2010	2012
Local Courts (<i>Amtsgerichte</i>)	Legal Personnel	9.696	10.189	9.597	9.484	9.631
	Administrative Personnel	29.183	27.427	25.232	23.454	23.228
Regional Courts (<i>Landgerichte</i>)	Legal Personnel	1.103	1.197	1.114	1.051	1.058
	Administrative Personnel	5.820	5.457	5.022	4.775	4.670
Higher Regional Courts (<i>Oberlandesgerichte</i>)	Legal Personnel	829	1.022	1225	1.422	1.439
	Administrative Personnel	2.260	2.338	2364	2.292	2.356
Federal Supreme Court (<i>Bundesgerichtshof</i>)	Legal Personnel	87	91	98	108	92
	Administrative Personnel	132	122	134	126	134
Overall No.	Legal Personnel	11.715	12.499	12.034	12.065	12.220
	Administrative Personnel	37.395	35.344	32.752	30.647	30.388

Source: Bundesamt für Justiz, Personalbestand der Gerichte (Amtsgerichte, Landgerichte, Oberlandesgerichte, Bundesgerichtshof), 2007/2013.

Appendix IV: Civil Cases and Judicial Caseload in First Instance Proceedings 1995-2012
(Exclusive of Family Matters)

	Court	1995	2000	2005	2010	2012
New Accrual of Cases	Local Courts (<i>Amtsgerichte</i>)	1.751.448	1.452.245	1.400.724	1.213.093	1.150.663
	Regional Courts (<i>Landgerichte</i>)	418.807	415.036	424.525	372.150	355.623
Cases Completed	Local Courts (<i>Amtsgerichte</i>)	1.671.669	1.475.461	1.449.260	1.217.563	1.165.234
	Regional Courts (<i>Landgerichte</i>)	401.747	392.103	430.236	369.089	356.445
Equivalent of Full Time Judges Deployed for Civil Cases	Local Courts (<i>Amtsgerichte</i>)	2.539	2.338	2.198	1.991	1.970
	Regional Courts (<i>Landgerichte</i>)	2.303	2.213	2.228	2.160	2.127
Caseload per Full Time Judge	Local Courts (<i>Amtsgerichte</i>)	690	621	637	609	584
	Regional Courts (<i>Landgerichte</i>)	182	188	191	172	167
Average Length of Proceedings in Months	Local Courts (<i>Amtsgerichte</i>)	4.5	4.3	4.4	4.7	4.7
	Regional Courts (<i>Landgerichte</i>)	6.3	6.9	7.4	8.1	8.3

Source: Bundesamt für Justiz, Geschäftsentwicklung der Zivilsachen, 2013.

Appendix V: Family Cases and Judicial Caseload in First Instance Proceedings in Local Courts (*Amtsgerichte*) 1995-2011

	1995	2000	2005	2010	2011
New Accrual of Cases	456.649	524.845	521.769	692.298	668.247
Cases Completed	453.748	517.671	553.183	648.498	688.993
Equivalent of Full Time Judges Deployed for Family Cases	1.215	1.293	1.341	1.462	1.539
Caseload per Full Time Judge	376	406	389	474	434
Average Length of Proceedings in Months	10.4	9.7	10.3	6.9	7.0

Source: Bundesamt für Justiz, Geschäftsentwicklung der Familiensachen, 2012.

Appendix VI: Attorneys Admitted in Germany

	1995	2000	2005	2010	2013
No.	74.291	104.067	132.569	153.251	160.894
Change to Previous No.		40 %	27 %	16 %	5 %

Source: Bundesrechtsanwaltskammer, Entwicklung der Gesamtzahlen der zugelassenen Rechtsanwälte, 2013.