GCR INSIGHT

PRIVATE LITIGATION GUIDE

Editors
Nicholas Heaton and Benjamin Holt

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This article was first published in December 2019
For further information please contact Natalie.Clarke@lbresearch.com

Publisher
Clare Bolton

Business development manager
Natalie Hacker

Editorial coordinator
Hannah Higgins

Production editor
Katrina McKenzie

Subeditor
Rakesh Rajani

Editor-in-chief
David Samuels

Published in the United Kingdom by Global Competition Review

Law Business Research Ltd
Meridian House, 34-35 Farringdon Street, London, EC2A 4HL, UK

www.globalcompetitionreview.com

First edition

To subscribe contact subscriptions@globalcompetitionreview.com

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – clare.bolton@globalcompetitionreview.com

ISBN 978-1-83862-216-9

Printed in Great Britain by Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following contributors for their learned assistance throughout the preparation of this book:

ADVOKATFIRMAN VINGE

ALLEN & OVERY LLP

BAKER MCKENZIE

CDC CARTEL DAMAGE CLAIMS CONSULTING SCRL

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COMPARISON ACROSS JURISDICTIONS

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Kim Lars Mehrbrey, Lisa Hofmeister and Sophia Jaeger[1]

Effect of public proceedings[2]

1 What is your country's primary competition authority?

The Bundeskartellamt (the Federal Cartel Office, (FCO))in Bonn.

2 Does your competition authority have investigatory power? Can it bring criminal proceedings based on competition violations?

The FCO has investigatory powers. For instance, it can carry out inspections and seize evidence. The criminal proceedings that the FCO can bring are limited to administrative offences. The public prosecutor can bring proceedings based on bid-rigging. Some competition law violations may also be prosecuted as fraud.

1 Dr Kim Lars Mehrbrey is a partner, Dr Lisa Hofmeister is counsel and Sophia Jaeger is a senior associate at Hogan Lovells International LLP.

2 With effect as of 9 June 2017 the EU Directive 2014/104/EU of 26 November 2014 on antitrust damages actions (EU Cartel Damages Directive) was implemented into German law by the 9th Amendment to the GWB (Act against Restraints of Competition). This substantially changed the legal framework for the pursuit of cartel damages claims in Germany. However, many of the provisions of the former legal regime will remain applicable for many years. This is in particular the case for cartel damages claims in relation to cartelised products or services purchased or obtained by the respective claimant before 26 December 2016. Therefore, in our answers to the questions, the legal situation under the new rules as well as – to the extent applicable – under the former legal regime will be explained.

3 Can private antitrust claims proceed parallel to investigations and proceedings brought by competition authorities and criminal prosecutors and appeals from them?

Yes, private antitrust claims can be brought in parallel. However, these stand-alone private claims are rather uncommon as most claimants prefer to base their litigation on the fining decision, which is binding for the courts (see question 5). Also, the competition authorities' proceedings suspend the limitation period of antitrust damage claims (see question 22), which allows claimants to wait for the fining decision in order to base their claims on its binding effect.

4 Is there any mechanism for staying a stand-alone private claim while a related public investigation or proceeding (or an appeal) is pending?

It lies in the discretion of the court to stay the proceedings while a related public investigation or proceeding (or an appeal) is pending. Some commentators take the view that Article 16 of the Regulation 1/2003 requires the court to stay the proceedings while there are pending investigations by the EU Commission, following the Court of Justice of the European Union's (ECJ) *Masterfood* decision (Paragraph 57). There is no such obligation with regard to proceedings initiated by the FCO, Section 33b (previously Section 33(4)) GWB (Act against Restraints of Competition).

5 Are the findings of competition authorities and court decisions binding or persuasive in follow-on private antitrust cases? Do they have an evidentiary value or create a rebuttable presumption that the competition laws were violated? Are foreign enforcers' decisions taken into account? Can decisions by sector-specific regulators be used by private claimants?

Findings by the EU Commission in decisions are binding in follow-on private antitrust cases, according to Article 16 of the Regulation 1/2003. According to Section 33b GWB, final decisions by German and other EU Member States' competition authorities (including final decisions of competent courts of such EU Member States acting as such competition authority) are binding in follow-on private antitrust cases only with regard to damages claims. This extends to appeal judgments by the courts. Fining decisions of non-EU competition authorities are not binding, but might nevertheless have a persuasive effect in follow-on damages proceedings.

The binding effect means that in the follow-on proceedings it is irrefutably established that the addressees of the fining decision violated antitrust law. However, the binding effect does not comprise the existence of harm and its causal relationship to the competition law infringement (see question 23).

Moreover, where a final decision is taken by other EU Member States' competition authorities or competent courts regarding violations of the EU Member States' national competition rules, which pursue (mainly) the same purpose as Articles 101 or 102 Treaty on the Functioning of the European Union (TFEU), the competent German courts can qualify this decision as prima facie evidence for a violation of these rules.

The Energy Industry Act provides for a similar binding effect of decisions by the German Federal Network Agency for private damages claims.

6 Do immunity or leniency applicants in competition investigations receive any beneficial treatment in follow-on private antitrust cases?

First, access to leniency applications or settlement submissions will not be granted to claimants (see question 7) – however, pre-existing information (i.e., evidence that exists irrespective of the proceedings of a competition authority) can be disclosed.

Second, the immunity recipient is jointly and severally liable only for damages suffered by his or her customers or suppliers (as well as their respective customers or suppliers), Section 33e(1) sentence 1 Act, GWB. The immunity recipient is jointly and severally liable to other injured parties only where full compensation cannot be obtained from the other cartel members and where claims against the other cartel members are not time-barred, Section 33e (1) sentence 2, (2) GWB.

To secure their privileged position, immunity recipients are also privileged in the internal recourse between the jointly and severally liable cartel members. The internal recourse is limited to the amount of damages the immunity recipient is liable for with regard to his own direct customers and suppliers, Section 33e (3) sentence 1 GWB. This privilege vis-à-vis the other cartel members does not apply to damages claims of injured parties other than the direct or indirect purchasers or providers of the infringers, namely primarily in the case of an umbrella pricing, Section 33e (3) sentence 2 GWB.

These privileges are only applicable to damages claims that have arisen after 26 December 2016 (see Section 186 (3) GWB).

7 Can plaintiffs obtain access to competition authority or prosecutors' files or the documents the authorities collected during their investigations? How accessible is information prepared for or during public proceedings by the authority or commissioned by third parties?

Prior to the 9th Amendment to the GWB in June 2017, access to the FCO's file was generally granted pursuant to Section 406e and 475 Criminal Procedure Code (StPO) – with the exception of leniency applications, the documents submitted with them and business secrets.

The FCO usually tries to persuade the claimant to limit his or her request to the final decision. Access to file is usually granted only after the decision has been handed down. Before access is granted, the defendant has a right to be heard.

Also, third-party interests are taken into account. For example, if a third party was requested by the FCO to submit information, it will also be heard (and should request to be heard) and may identify business secrets it wishes to be excluded from access.

In appeals against FCO decisions, persons and associations of persons whose interests are substantially affected by the decision and who, upon their application, have been admitted by the cartel authority to the proceedings may inspect the court files. The FCO can prevent inspection of its records if this is necessary for important reasons, in particular to protect leniency applications and business secrets.

The 9th Amendment to the GWB introduced a discovery procedure to the GWB (see Sections 33g, 89b and 89c GWB, see question 26). According to most scholars, these provisions should be applicable to claims that were filed after 26 December 2016 (see Section 186 (4) GWB) irrespective of when they arose. This view has been adopted by some district courts as well. However, the Higher Regional Court of Dusseldorf (Case VI-W (*Kart*) 2/18, judgment of 3 April 2019)

recently held that Sections 33g and 89b (5) GWB (as stand-alone discovery claims, i.e. absent a claim for cartel damages) are only applicable to claims that arose after 26 December 2016. It is, therefore, not yet clear which temporal scope the new discovery rules have.

According to Section 89b (5) GWB, the claimant can request access to the final decision of the competition authority from the defendant itself by way of a preliminary injunction. Other than usually required for preliminary injunctions the claimant does generally not need to plead that the matter is particularly urgent – this is presumed by law. However, according to the decision of the Higher Regional Court of Dusseldorf of 3 April 2019 (Case VI-W (*Kart*) 2/18)), claimants must act swiftly. If a claimant files a motion for preliminary injunction one year after it became public that the competition authority issued a fining decision, the general presumption that the matter is particularly urgent is rebutted. As a consequence, no preliminary relief is to be granted.

Pursuant to Section 33g (1), (2) GWB, parties to (potential) cartel damages proceedings (as well as third parties) are – if requested – obliged to disclose evidence that is necessary to substantiate a cartel damages claim or to defend oneself against such a claim. The claimant has to present a reasoned request that contains reasonably available facts and evidence that is sufficient to support the plausibility of its claim for damages (usually the decision of a competition authority). The evidence that he or she requests has to be described as precisely and as narrowly as possible on the basis of all reasonably available facts. In accordance with Section 33g (4) GWB, documents containing leniency applications or settlement submissions are shielded from disclosure. While in ongoing cartel proceedings, information that was prepared specifically for the proceedings, correspondence from the competition authority to the parties of the procedure and settlement submissions that have been withdrawn are also shielded from disclosure (see Section 33g (5) GWB).

Pursuant to Section 89c (1) GWB, claimants can also request the court to disclose documents and objects included in the competition authority's file. The claimant has to substantiate his claim and that it is not possible for him or her to obtain the information from the other party or from a third person with reasonable effort. As stated above, some categories of evidence are shielded from disclosure.

To prevent the claimant from bypassing the disclosure procedure, the claimant cannot access the competition authority's files based on Sections 406e and 475 StPO – except for the (final) fining decision, Section 89c (5) sentence 2 GWB.

8 Is information submitted by leniency applicants shielded from subsequent disclosure to private claimants?

Leniency applications are shielded from subsequent disclosure (Section 33g (4), 89c (4) GWB). However, this does not apply to pre-existing information that exists irrespective of the proceedings of a competition authority (see question 7).

9 Is information submitted in a cartel settlement protected from disclosure?

Prior to the 9th Amendment to the GWB, information submitted in a cartel settlement was only protected from disclosure as far as it contained business secrets; see questions 7 and 8.

Under the new regime, settlement submissions are protected from disclosure, Sections 33g (4), 89c (4) GWB (see questions 7 and 8).

10 How is confidential information or commercially sensitive information submitted by third parties in an investigation treated in private antitrust damages claims?

Access to the competition authority's files with regard to claims that were filed before 26 December 2016 is granted to claimants in accordance with Sections 406e and 475 StPO (see question 7). When granting access to files, the FCO, the public prosecutor or the courts will consider third-party interests where their business secrets are affected (see question 7). Generally, confidential information or commercially sensitive information submitted by third parties may be brought forward in private antitrust claims. Third parties can best prevent sensitive information from being submitted in private antitrust damages claims by requesting the FCO not to grant access to this information, by refusing to testify with regard to this information and by refusing to submit documents containing this information (see question 27).

Under the new regime (see question 7 with regard to the temporal scope of the new regime), the disclosure of evidence has to meet the standards of Sections 33g (1), 89c (1) GWB. A party can refuse to disclose evidence to the extent it would have a right to refuse testimony in a private action for (antitrust) damages, Section 33g (6) GWB. The courts can, nonetheless, order a party to disclose evidence containing confidential information where they consider it relevant to the action for damages, Section 89b (6) GWB. However, the courts have to take effective measures in order to protect such information during the proceedings, Section 89b (7) GWB.

Commencing a private antitrust action

11 On what grounds does a private antitrust cause of action arise?

The legal grounds are Section 33a (1) GWB, Section 823 (2) Civil Code (BGB) in conjunction with the respective German or EU antitrust provision and Section 826 BGB.

12 What forms of monetary relief may private claimants seek?

Claimants may seek compensation for damages, interest on those damages and reimbursement for legal fees as provided by statutory law (see question 40). Treble or other sorts of punitive damages are not available. In accordance with general principles of German civil law, cartel damages claims are to put the claimant in a position to recover the damage the claimant actually suffered, neither less nor more.

13 What forms of non-monetary relief may private claimants seek?

Claimants may seek a cease-and-desist order and *in rem* restitution, for example, supply and delivery or access obligations.

14 Who has standing to bring claims?

Generally, everyone who has suffered damage may bring claims. In 2011, the Federal Supreme Court held that both direct and indirect customers may bring claims. This has been confirmed in several decisions by lower courts. The same should be true for direct and indirect suppliers. Competitors that suffered from the infringement may also bring claims.

According to a judgment of the ECJ, it is also conceivable for claimants to claim damages from cartel members on the grounds that their suppliers outside the cartel raised their prices due to the cartel ('umbrella pricing'). To this end the German Federal Supreme Court[3] held that in cases where a cartel existed for a longer period and affected a considerable market share, umbrella pricing can generally be presumed (see question 23).

Furthermore, the ECJ[4] recently held that the concept of 'undertaking' within the meaning of Article 101 TFEU also applies to damages for infringement of EU competition rules. The court ruled that if companies took part in a cartel prohibited by Article 101 TFEU; all shares in these companies were acquired by other companies; and these acquiring companies dissolved the former companies and have continued their commercial activities, these acquiring companies can be held liable for the damage caused by the cartel.

15 In what forums can private antitrust claims be brought in your country?

Claims can be brought before regional courts. Generally, every regional court at the place where the harmful event occurred or where a cartel victim has its registered seat, has jurisdiction to hear a private antitrust claim. However, most German states have issued legislation concentrating private antitrust claims in certain regional courts.

16 What are the jurisdictional rules? If more than one forum has jurisdiction, what is the process for determining where the claims are heard?

The international jurisdiction of German courts is determined by Regulation (EC) No 1215/2012 (Brussels Ia), international treaties regarding jurisdiction and German procedural law.

The ECJ[5] held in the *Hydrogen peroxide* case that according to Article 6 (1) of the Regulation (EC) No. 44/2001 (since 10 January 2015: Article 8 (1) of the Regulation (EU) No. 1215/2012) cartel members who are situated in different Member States, committed a single and continuous infringement of EU antitrust law, and are held jointly and severally liable for the damages resulting from this infringement can jointly be sued before a court where only one of them is domiciled (anchor defendant). This has been confirmed in several judgments by German courts since then.

Furthermore, this judgment of the ECJ has clarified the requirements to establish jurisdiction under Article 5 (3) of Regulation (EC) No. 44/2001 (since 10 January 2015: Article 7 (2) of the Regulation (EU) No. 1215/2012). The court held that according to this provision the courts have jurisdiction where the cartel was definitively conclude; or if applicable, a particular agreement was made that was the sole cause for the damages claimed by this claimant; or where this claimant's registered office is located. The ECJ also held in this judgment that jurisdiction clauses in supply contracts may only be taken into account in this context, if they refer to disputes regarding liability for infringement of competition law (regarding the applicability of arbitration clauses see question 57).

3 Case KZR 56/16; judgment of 12 June 2018.

4 Case C-724/17, judgment of 14 March 2019 – *Skanska*.

5 Case C-352/13, judgment of 21 May 2015.

If the regulations provide for jurisdiction of German courts, the claimant may choose a German court within the limits described in question 15.

17 Can claims be brought based on foreign law? If so how does the court determine what law applies to the claim?

Claims can be brought based on foreign law. The applicable competition law is determined by Article 6 (3) of the Regulation (EC) No. 864/2007 (Rome II) and domestic international private law.

18 Give details of any preliminary requirement for starting a claim. Must plaintiffs post security or pay a filing fee? How is service of claim affected?

Claimants must pay a filing fee in order to initiate court proceedings. The filing fee is determined by the amount in dispute, which is capped by legal statute at an amount of €30 million. Assuming the value in dispute is €30 million or higher, the filing fee would amount to approximately €330,000 for the first instance. If the claim is raised by a non-EU citizen or company, the claimant, on the defendant's request, would have to post security for the legal fees to be reimbursed to the defendants if the damages claim is dismissed (see question 40). Depending on the number of defendants, those costs can amount to more than €1 million.

19 What is the limitation period for private antitrust claims?

Under German law two limitation periods are relevant: the regular limitation period and the maximum limitation period. Both limitation periods run in parallel and independently from each other. As soon as either the regular limitation period or the maximum limitation period lapses, the claim becomes time-barred.

Prior to the 9th Amendment to the GWB, the regular limitation period for private antitrust claims was three years commencing at the end of the year in which the claim arose and the claimant obtained or ought to have obtained the relevant knowledge.[6] Under the new regime, the regular limitation period for private antitrust claims is five years commencing at the end of the year in which the claim has arisen, the claimant obtained or ought to have obtained the relevant knowledge and the competition violation has ended.[7] This five-year regular limitation period is applicable to claims that have not become time-barred by 9 June 2017.[8]

Therefore, in practice it is crucial to determine when the claimant obtained the required level of knowledge and when the claimant became aware of the circumstances giving rise to the claim. So far, case law provides for different approaches as to which event triggers the relevant knowledge for cartel damages claims. If no other evidence is available, German courts tend to assume that claimants should – at the earliest – have obtained knowledge on the day when the press reported on the relevant fining decision.[9] In addition to this, in its decision of 12 June 2018,[10] the German Federal Supreme Court adopted a more claimant-friendly view. It

6 Sections 195, 199 (1) BGB.

7 Section 33h (1), (2) GWB.

8 See Section 186 (3) sentence 2 GWB.

9 Higher Regional Court of Dusseldorf, Case VI-U (*Kart*) 3/14, judgment of 18 February 2015.

10 Case No. KZR 56/16.

held that the limitation is not already triggered on the day when the press reports were issued on the fining decision. As the preparation of a legal action usually requires more information than what is published in press articles, the limitation period is only triggered as soon as the claimant obtained or could have obtained access to the competition authority's files. Therefore, the limitation period is triggered on the day of the press release plus a period of time a diligent claimant would need to inspect and to analyse the file (e.g., in the case decided this additional time period was estimated as 10 months).

The maximum limitation period runs 10 years from the day the claim arose – irrespective of whether the claimant had or should have had knowledge of the claim or not.[11] Under the new regime this maximum 10-year limitation period only starts to run once the competition violation has ended.[12]

20 Are those time limits procedural or part of the substantive law? What is the effect of their expiry?

Time limitations are objections and part of the substantive law. When expired, they bar the claim. They are only taken into account if asserted by the defendant.

21 When does the limitation period start to run?

See question 19.

22 What, if anything, can suspend the running of the limitation period?

Prior to the 9th Amendment to the GWB, private antitrust claims were usually first suspended by the initiation of antitrust proceedings by a competition authority.[13] The suspension period ended six months after the final and binding decision in the antitrust proceedings had been issued. German courts took different views whether this rule applied to claims that had arisen before 1 July 2015 (i.e., before the suspension rules came into force). The German Federal Supreme Court[14] has now held that this suspension rule applies irrespective of whether the claims arose before or after 1 July 2015.

Now, after implementation of the 9th Amendment to the GWB, the suspension period ends one year after the final and binding decision in the antitrust proceedings has been issued or the antitrust proceedings have ended otherwise (Section 33h GWB). This period of one year ensures that the claimant has enough time to gather evidence and to assert the damages claims. Section 33h GWB is applicable to claims that were not time-barred on 9 June 2017; see Section 186 (3) sentence 2 GWB.

Moreover, an action for disclosure based on Section 33g GWB suspends the limitation period of a private antitrust damages claim if it is filed from 9 June 2017 onwards (Section 33h (6) GWB). The limitation period is also suspended by bringing an action for damages or bringing an action for discovery. In the period between the conclusion of the antitrust proceedings plus a year and bringing an action the claims may become time-barred.

11 See Section 199 (3) No. 1 BGB.

12 Sections 195, 199 (1) BGB and Section 33h (3) GWB..

13 Section 33 (5) GWB, Section 204 (1), (2) BGB..

14 Case KZR 56/16, judgment of 12 June 2018.

Claimants have various options to avoid that their claims become time-barred. Most common is the agreement of a waiver of the defence of limitation for a limited period of time. Alternatives are, for instance, arranging for notice to be given of an application for conciliation filed with a conciliation body[15] or the service of a demand for payment in summary proceedings for recovery of debt or of the European order for payment in the European order for payment procedure.[16] Suspension is a 'stop-the-clock' rule. After the suspension ends, the clock starts ticking from where it has stopped. The suspension also applies to the maximum limitation period.

23 What pleading standards must the plaintiff meet to start a stand-alone or follow-on claim?

The claimant has to substantiate all the requirements for the damages claim, namely that the defendants infringed antitrust law, the defendant acted negligently and that, as a result of this antitrust violation, the claimant suffered damages in a certain amount. As to the requirement of an antitrust infringement the claimant can rely on a competition authority's decision, which has a binding effect (see question 5). Usually the biggest challenge for a claimant is to substantiate the damage suffered due to the cartel.

For claims that arose before 26 December 2016, claimants generally bear the burden of proof as to the question whether the cartel caused a price increase. However, German courts have lowered this burden of proof to the benefit of cartel damages claimants. In its most recent judgment of 11 December 2018,[17] the German Federal Supreme Court held that – even though a prima facie evidence does not apply – it can generally be presumed that a cartel caused a price increase. Thus, even though it is generally likely that a price increase occurred, courts must assess this question on a case-by-case-basis.

For claims that arose after 26 December 2016, the newly implemented Section 33a (2) GWB establishes the rebuttable presumption that cartel infringements generally cause harm to customers (see question 23).

However, it is important to note that neither the rebuttable presumption nor the prima facie evidence extend to the question in which amount the claimant suffered damages. The calculation of damages is typically rather complicated and requires advice by economical experts.

24 Is interim relief available? What must plaintiffs show for the court to grant interim relief?

Interim relief is granted if the claimant presents prima facie evidence proving the urgency of the matter and shows that interim relief is required to avoid hardly reversible or irreversible damage. This is in practice only conceivable for cease-and-desist orders and *in rem* restitution (see question 13).

15 Section 204 (1) No. 4 BGB.

16 Section 204 (1) No. 3 BGB.

17 Case KZR 26/17.

25 What options does the defendant have in responding to the claims and seeking early resolution of the case?

The defendant can submit a statement of defence requesting partial or full dismissal of the claim and it may file counterclaims. Options to seek early resolution of the claim are limited. One option is to suggest to the court to issue a judgment on the non-admissibility of the claim in advance. However, the court can stay the proceedings on the merits until a judgment on the appeal (and possibly a further appeal) of the admissibility judgment is handed down.

Disclosure or discovery

26 What types of disclosure or discovery are available? Describe any limitations and the courts' usual practice in ordering disclosure or discovery.

In German court proceedings each party has to produce the evidence supporting its line of reasoning. The court does not investigate evidence *ex officio*. However, the court may order a party or a third person to present a specified document. It lies within the court's sole discretion to issue such an order.

Only under strict requirements can the opposing party can be compelled to produce a document. Only if a document to be produced is specified in detail and if the requesting party establishes that it is entitled to request the production of this document under German civil law, would German courts would issue a production order.

The 9th Amendment to the GWB implemented a substantial change to these general standards in relation to cartel damages claims. In Sections 33g, 89b and 89c GWB the new law introduces a broader disclosure regime. Now both claimants and defendants can request documents that are necessary to substantiate a claim for cartel damages or to defend against such a claim respectively.

The party seeking disclosure has to identify the requested documents as precisely as possible.[18] Such a disclosure is not allowed to the extent it is unreasonable taking into account the legitimate interests of the parties.[19] This balancing of interests, among other things, has to take into account the likely costs and scope of the requested disclosure as well as the interests of the other party to protect its business secrets. Furthermore, certain documents are excluded from disclosure; in particular documents containing applications for leniency (see question 7).

The claimant can commence a legal action to pursue its claim for the production of documents even before a claim for damages has been brought. Upon request of one of the parties the court can also ask competition authorities to disclose evidence to a certain extent (Section 89c GWB, see question 7).

It is disputed among German courts whether the new disclosure regime applies only to claims that arose after 9 June 2016[20] or whether it also applies to older claims as long as the respective lawsuits have been filed after 26 December 2016.[21]

18 Section 33g (1), (2) GWB.

19 Section 33g (3) GWB.

20 Higher Regional Court of Dusseldorf, Case VI-W (*Kart*) 2/18, judgment of 3 April 2018.

21 Regional Court of Hannover, Case 18 O 8/17, judgment of 18 December 2017. Section 186 (4) GWB

27 How do the courts treat confidential information that might be required to be disclosed or that is responsive to a discovery proceeding? Is such information treated differently for trial?

All information that is submitted in the court proceedings is disclosed to the other party. The public can be excluded if business secrets are discussed. Witnesses may refuse to testify if and to the extent their answers would reveal business secrets.

In the context of the new disclosure regime the court has to determine whether disclosure would be proportionate and therefore especially to consider the protection of business secrets (see question 26). Likewise, there are exceptions to the right of disclosure regarding, for example, documents containing applications for leniency (see question 26).

28 What protection, if any, do your courts grant attorney–client communications or attorney materials? Are any other forms of privilege recognised?

Attorney–client communications are granted protection. If the attorney is named as a witness he or she may refuse to testify insofar as the attorney–client relationship is affected.

Trial

29 Describe the trial process.

The usual course of the process is (1) statement of claim; (2) statement of defence; (3) usually, several additional statements by the parties; (4) hearing and taking of evidence; and (5) judgment. In case of complex cartel damages claims the hearing may be split into several hearings extending over months.

30 How is evidence given or admitted at trial?

Witnesses and expert witnesses generally have to appear before the court to testify. Representatives of the parties, such as the managing directors, are not allowed to testify as a witness. Documents may be produced at the parties' discretion. Expert opinions on factual issues (e.g., regarding the calculation of damage) are rendered by experts commissioned by the court.

31 Are experts used in private antitrust litigation in your country? If so, what types of experts, how are they used, and by whom are they chosen or appointed?

Experts are commonly used in private antitrust damages claim trials. As such trials are usually follow-on trials, experts are involved to identify the amount of damages and their causal relation to the competition law infringement. Parties may submit reports by their own experts. Such reports do not constitute formal proof, but substantiate the parties' arguments. The court also can (and often does) appoint an expert to make a report. Usually, experts are economists who undertake to identify damages and causal relationships by economic models and empirical data. Experts appointed by the court usually render their opinion in writing and also appear in oral hearings to be interviewed on their report. The court may appoint the expert witness *ex officio* or following an application by a party.

32 What must private claimants prove to obtain a final judgment in their favour?

The material requirements according to German law are that the defendant has negligently or intentionally infringed antitrust law and that the claimant has suffered damages due to this infringement. As to the first requirement a final decision by the EU Commission, the FCO or the competition authorities of other EU Member States assess the infringement with binding effect (see question 5). Regarding claims arising after 26 December 2016, the new law provides for a refutable presumption that a cartel caused damage (see question 23). Consequently, in the case of a follow-on claim the claimant only has to prove the amount of damage the claimant suffered due to the cartel. Typically, the damages result from the artificial cartel price and a loss of profits. As a first step, the claimant has to substantiate his or her allegations. If contested by the defendant, the claimant needs to provide evidence for the allegations (see questions 30 and 31).

33 Are there any defences unique to private antitrust litigation? If so, which party bears the burden of proving these defences?

The defendant has to demonstrate at least a likely passing-on scenario and that the passing-on was a result of the cartel and not of the claimant's sales efforts. In 2011, the Federal Supreme Court specified the relevant requirements in its *ORWI* judgment. Now, Section 33c GWB states the requirements of the passing-on defence and, accordingly, the presumption of the indirect purchaser's passing-on offence.

34 How long do private antitrust cases usually last (not counting appeals)?

As German courts have become more familiar with private antitrust litigation matters in recent years, the duration of court proceedings has decreased significantly, in particular in cases where a court only decides on the merits. In these cases a first instance judgment can often be obtained in less than a year. However, very complex court proceedings in private antitrust litigation matters, in particular if they involve multiple international parties, usually take much longer.

35 Who is the decision-maker at trial?

The case will either be decided by one professional judge or by a panel of three judges. There are no jury trials.

Damages, costs and funding

36 What is the evidentiary burden on plaintiffs to quantify the damages?

According to Section 33a (3) GWB in conjunction with Section 287 Code of Civil Procedure (ZPO) the court may estimate the damage. However, the claimant has to submit the facts on which the court can base its estimate of the damage. As the calculation of damage in cartel damages cases is often very complicated in practice, claimants typically submit comprehensive economic expert reports in order to substantiate the amount of damage.

37 How are damages calculated?

Damages are calculated by assessing the difference between the actual, cartelised price and the hypothetical price that would have been charged without the cartel agreement. Usually evidence needs to be taken in order to determine the hypothetical price in a cartel free market (the

'but for' analysis). To this effect the Federal Supreme Court prefers methods comparing other markets to the cartelised market. Those markets may be the same product market in another geographic region, another product market with comparable features, the same market in another time period, or a combination of these markets. Courts often deduct a safety margin to take account of uncertainties in the comparison. Usually both the parties and the court instruct expert witnesses to conduct this analysis.

38 Does your country recognise joint and several liabilities for private antitrust claims?

Yes, defendants who took part in the same infringement are jointly and severally liable towards the cartel victims, irrespective of whether this cartel victim purchased a cartelised product from them or not. Under the old regime (i.e., regarding claims that arose before 26 December 2016) immunity recipients are not privileged.

In connection with claims that arose after 26 December 2016 the immunity recipient's joint and several liability is limited to damage suffered by its own direct and indirect customers (see question 6).

39 Can a defendant seek contribution or indemnity from other defendants, including leniency applicants, or third parties? Does the law make a clear distinction between contribution and indemnity in antitrust cases?

A defendant can seek contribution from other cartel members, including those who are not defendants in the same legal action. Furthermore, for cartel damages claims that arose before 26 December 2016 immunity recipients are liable for contribution as well and do not benefit from any privileges.

The provisions under the former legal regime did not specify to what extent joint and several debtors are liable in relation to one another. There is also little guidance from case law. Thus, for claims that arose before 26 December 2016 it is highly disputed among scholars how the liability should be attributed between the jointly and severally liable co-cartelists (e.g., by market share, by share of commerce with the respective claimant, according to the co-cartelists' contribution to the antitrust infringement (eg, ringleader), or in equal shares).

For damages that arose after 26 December 2016, Section 33d (2) GWB provides that the liability shall be attributed according to each co-cartelist's contribution to the antitrust infringement. This is a general rule from which courts may deviate if they find appropriate. Thus, the cartelist's share of liability is to be determined on a case-by-case basis.

According to the newly introduced Section 33e (3) GWB, the immunity recipient is privileged. This applies to claims that arose after 26 December 2016. To this end co-cartelists can generally only seek contribution from immunity recipients to the extent that they compensated the immunity recipients' direct or indirect customers. Only regarding damages that arose due to an umbrella pricing by non-cartelists, immunity recipients are not privileged.

Finally, if a co-cartelist has settled with the claimant, this co-cartelist may not be held liable for contribution claims by the other co-cartelists, namely, not only in the amount that this co-cartelist paid under the settlement agreement but in the amount that corresponds with his actual share of liability.[22]

40 Can prevailing parties recover attorneys' and court fees and other costs? How are costs calculated?

Prevailing parties can recover attorneys' fee and court costs. However, the refundable costs are capped by legal statute. The costs are calculated according to the German Attorneys' Fees Act on the basis of the amount in dispute (see question 18). However, most attorneys specialised in competition law and/or litigation do not charge fees on that basis but on an hourly basis. The refundable costs are, therefore, usually lower than what an attorney specialised in competition law or litigation will charge.

41 Are there circumstances where a party's liability to pay costs or ability to recover costs may be limited?

The refundable legal costs that the prevailing party can demand are limited by legal statute (see question 40).

42 May attorneys act for claimants on a contingency or conditional fee basis? How are such fees calculated?

Most attorneys specialised in competition law and/or litigation charge fees on an hourly basis (see question 40). Generally, attorneys may not act for claimants on a conditional fee basis except for contingency fees under exceptional circumstances. The fee has to be appropriate and may be, inter alia, a fixed fee, a multiple of the Attorneys' Fees Act fee or a percentage of the recovered damages. The limitations are more rigorous with regard to the lower end of the appropriate range than with regard to the upper end.

43 Is litigation funding lawful in your country? May plaintiffs sell their claims to third parties?

Yes, litigation funding is lawful and has become increasingly popular in the past few years. In particular litigation funding companies from common law jurisdictions have recently entered the German market.

The present case law accepts third-party prosecution of damage claims with minor restrictions. The Federal Supreme Court ruled that actions by claim vehicles such as Cartel Damage Claims SA (CDC) are admissible. However, the Higher Regional Court of Dusseldorf[23] held that a lawsuit brought by the claim vehicle CDC was unfounded since the scheme used by CDC violated public policy: the claims vehicle acting as claimant was found to be under-funded, thus shifting the litigation risks to the defendants. Furthermore, there are formal requirements for the assignment of claims under the German Legal Services Act.

22 Section 33f GWB.

23 Case VI-U (Kart) 3/14, judgment of 18 February 2015.

44 May defendants insure themselves against the risk of private antitrust claims? Is after-the-event insurance available for antitrust claims?

After-the-event insurance for private antitrust claims has to date not been offered in Germany.

Appeal

45 Is there a right to appeal or is permission required?

There is a right to appeal. Permission is not required

46 Who hears appeals? Is further appeal possible?

Appeals in cartel damages claims litigation are heard by the higher regional courts. The possibility of a further appeal to the Federal Supreme Court is limited. The further appeal is only possible if the higher regional court that heard the appeal grants leave to further appeal in its judgment or – if the higher regional court refuses to do so – the Federal Supreme Court grants leave to further appeal. A further appeal is only allowed on points of law and if the case is of fundamental legal importance.

47 What are the grounds for appeal against a decision of a private enforcement action?

The first appeal may be based on errors in the finding of the facts and the legal assessment. The further appeal to the Federal Supreme Court is limited to errors in the legal assessment.

Collective, representative and class actions

48 Does your country have a collective, representative or class action process in private antitrust cases? How common are they?

A joinder of actions is available if there is a sufficient nexus. Representative actions can be brought by certain organisations (see question 49). So far, these have been practically irrelevant. Class actions are still not available, even after the 9th Amendment to the GWB.

49 Who can bring these claims? Can consumer associations bring claims on behalf of consumers? Can trade or professional associations bring claims on behalf of their members?

Pursuant to Section 33 (4) GWB, professional or trade associations whose members are affected by the cartel and consumer associations can bring actions for cease-and-desist orders and for skimming off cartel revenues (to the benefit of the government – probably a reason why such actions are practically irrelevant).

Claim vehicles have established various models to bundle claims. The persons presumably damaged by a cartel assign their claim to the claim vehicle and the claim vehicle collectively brings those claims in court (also see question 43).

50 What is the standard for establishing a class or group?

Class actions are not available.

51 Are there any other threshold criteria that have to be met?

Class actions are not available.

52 How are damages assessed in these types of actions?

Class actions are not available.

53 Describe the process for settling these claims, including how damages or settlement amounts are apportioned and distributed.

Class actions are not available.

54 Does your country recognise any form of collective settlement in the absence of such claims being made? If so, how are such settlements given force and can such arrangements cover parties from outside the jurisdiction?

Collective settlement in the absence of such claims being made is not available.

55 Can a competition authority impose mandatory redress schemes or allow voluntary redress schemes?

No. But if the FCO provides a substantiated assessment of the cartel's margin, that would be a strong argument in private damages claims actions. Currently, it appears rather unlikely that the FCO will make such substantiated assessment under the current fining guidelines. A finding by the EU Commission on damages would be binding but is equally unlikely.

Arbitration and ADR

56 Are private antitrust disputes arbitrable under the laws of your country?

Yes.

57 Will courts generally enforce an agreement to arbitrate an antitrust dispute? What are the exceptions?

The existence of a compulsory agreement to arbitrate renders litigation before regular courts inadmissible (if a corresponding objection is made by a party). If a purchase agreement provides for an arbitration clause, it should be checked if it covers cartel damages claims based on tort. Recently, the Regional Court of Dortmund has held that an arbitration clause in a supply contract that generally referred to 'all disputes in connection with this contract' also encompasses cartel damages claims, namely the court rendered the legal action inadmissible and dismissed it for this reason.[24]

24 Case 8 O 30/16 (*Kart*), judgment of 13 September 2017.

58 Will courts compel or recommend mediation or other forms of alternative dispute resolution before proceeding with a trial? What role do courts have in ADR procedures?

Courts do not compel ADR. A conciliation hearing is a mandatory element of the court proceedings, but usually it is a mere technicality. It is to be expected that courts will increasingly recommend ADR and they may stay the court proceedings for the duration of ADR.

Advocacy

59 Describe any notable attempts by policy-makers to increase knowledge of private competition law and to facilitate the pursuit of private antitrust claims?

Prior to the 9th Amendment to the GWB, the FCO left such efforts mostly to the EU Commission. Unlike the EU Commission, the FCO was especially not obliged to refer to the possibility of private antitrust claims in its press releases. However, pursuant to the newly implemented Section 53(5) GWB, the FCO is now obliged to inform about the goods or services affected by a cartel and to refer to the possibility of private antitrust claims in its public online notifications on cases where it has imposed fines.

Other

60 Give details of any notable features of your country's private antitrust enforcement regime not covered above.

Germany has been an attractive forum for cartel damages claimants for many years. However, it has been often criticised that claimants only had very limited possibilities to obtain information helping them to substantiate their claim. Other than in common law jurisdictions claimants were generally not entitled to request the opposing party to disclose information. Due to the implementation of the EU Cartel Damages Directive by the 9th Amendment to the GWB, German law now provides for a far more extensive disclosure regime. Even though the German disclosure regime will stay behind the scope of disclosure rights in common law jurisdictions, many experts expect that these developments will attract more claimants to Germany.

Appendix 1

About the Authors

Kim Lars Mehrbrey
Hogan Lovells

Kim Lars Mehrbrey is specialised in the area of litigation before state courts and arbitral tribunals and also in the area of out-of-court dispute settlement. He has numerous years of experience in the preparation, implementation and co-ordination of enforcement and defence strategies. Kim regularly deals with multi-party proceedings and complex claims for damages in cross-border litigation. He is experienced in antitrust-related litigation and represents national and international companies in relation to private enforcement claims in Germany.

Kim is not only admitted as a German *Rechtsanwalt* but also as a solicitor of England and Wales. He regularly publishes on litigation matters and acts as a speaker at conferences. He participated in the committee of the Association of German Chambers of Commerce and Industry, which prepared proposals to transpose the EU directive on cartel damages claims into German law.

The *Juve Handbook* refers to him as frequently recommended lawyer for litigation and he is included in *Best Lawyers in Germany (Litigation)* 2015–2020.

Lisa Hofmeister
Hogan Lovells

Lisa Hofmeister has in-depth experience in handling complex disputes, especially cross-border cartel damages cases. When dealing with such cases, she works closely with the antitrust and competition team. Lisa's work goes well beyond preparing written statements of the case: it includes systematically assessing possible claims, gathering relevant factual information and dealing with the claims in a suitable procedure – be it out-of-court, by litigation, in arbitral proceedings or through alternative dispute resolution. Clients can trust in her expertise and rely on her high level of commitment. Lisa primarily advises clients in the technology, media and telecommunications and the automotive and mobility sector.

In addition to her daily client work Lisa uses various opportunities for giving talks and publishing articles to present new legal developments in cartel damages claims.

Sophia Jaeger
Hogan Lovells

Advising national and international clients in cartel damages disputes has been Sophia's key focus for many years. She acts for defendants and claimants in a variety of industries, both in and out-of-court. She supports clients on the full range of related disputes and has experience with working together with economic experts. Furthermore, she advises clients on the implementation of standardised processes for the effective handling of antitrust damages cases.

Sophia regularly publishes articles on antitrust disputes and frequently gives lectures on these topics.

Hogan Lovells
Kennedydamm 24
40476 Dusseldorf
Germany
Tel: +49 211 1368 0
kim.mehrbrey@hoganlovells.com
lisa.hofmeister@hoganlovells.com
sophia.jaeger@hoganlovells.com
www.hoganlovells.com/

Private competition litigation has spread across the globe, raising specific, complex questions in each jurisdiction. The implementation of the EU Damages Directive in the Member States has furthered the ability of victims of anticompetitive conduct to seek compensation, even as US courts tighten the standards for forming a class action.

The *Private Litigation Guide* – published by Global Competition Review – includes a section exploring in depth the key themes such as territoriality, causation and proof of damages, that are common to competition litigation around the world. Part 2 contains invaluable summaries of how competition litigation operates in individual jurisdictions, in an accessible question-and-answer manner. Beyond the established sites such as the US, Canada, Germany, the Netherlands and the UK, experts lay out the scene for competition litigation in countries such as China, Mexico and Israel.

As the editors of this publication note, 'litigating antitrust or competition claims has become a global matter, requiring coordination among jurisdictions, and requiring counsel and clients to understand the rules and procedures in many different countries and how the approaches of courts differ as to key issues.'

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ISBN 978-1-83862-216-9