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Antitrust Litigation 2021

Germany: Law & Practice
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GERMANY

Law and Practice

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CONTENTS

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1. OVERVIEW

1.1 Recent Developments in Antitrust Litigation

Germany has a vibrant private antitrust litigation culture. Recent years have seen a massive surge in multimillion-euro lawsuits for cartel damages. In the trucks case alone numerous actions for damages in an amount of several billion euros have been filed and are currently pending in courts across Germany.

Private antitrust litigation in Germany comes in many different forms – proceedings are not limited to follow-on damages claims; rather, there is a high proportion of standalone litigation, often closely related to contract disputes or to the abusive behaviour of dominant companies.

Due to the high relevance of cartel damages claims across Europe, the following survey, however, mainly focuses on damages claims.

Legislation

With the 7th Amendment to the Act against Restraints of Competition (ARC) in 2005, the German legislator introduced a set of rules that significantly improved the conditions for bringing damages claims in Germany and this led from 2006 onwards to a series of damages actions.

In 2017, Germany implemented the EU Commission's Directive on cartel damages actions in the form of the 9th Amendment to the ARC, resulting once again in comprehensive changes, particularly to German antitrust damages law. The 9th ARC Amendment further facilitated the assertion of cartel damages claims. For instance:

- the limitation period for damages claims under competition law was further extended;
- entitlement to disclosure of evidence (for both plaintiffs and defendants), which previously did not exist under German law, was created; and
- a statutory presumption that damage/harm has occurred in cases involving hardcore cartels was introduced.

The 10th Amendment to the ARC, which entered into force in January 2021, made additional adjustments further facilitating private damages claims.

- In response to the Federal Court of Justice (FCJ)'s second railway cartel decision, the legislature further strengthened the position of potential victims of anti-competitive behaviour by introducing a rebuttable assumption of cartel exposure for products or services purchased from one of the infringers within the scope of the cartel; this rule applies for claims for damages arising after January 2021.
- In reaction to a contrary judgment by the Higher Regional Court of Düsseldorf, the legislature explicitly clarified that the new right for access to information according to Section 33g of the ARC also applies to claims that originated before 26 December 2016 (see **5.1 Disclosure/Discovery Procedure**).
- While highly discussed, the legislature did not introduce a provision that presumes the amount of damages but leaves it to the judge to assess the amount of damages according to Section 287 of the German Code of Civil Procedure (CCP), mostly with the help of economic experts (see **7.1 Assessment of Damages**).

New Judgments by the Federal Court of Justice

In 2020/2021, the FCJ issued seven landmark judgments concerning private enforcement, five further judgments in the railway tracks case and three in the trucks case.

The railway tracks case concerned a hardcore cartel between several manufacturers and distributers of rails in the form of price, quota and customer allocation agreements. In its five decisions the FCJ dealt with the burden and standard of proof (see **2.4 Burden and Standard of Proof**), the pass-on defence, umbrella effects, lump-sum damage clauses, etc (see **7. Damages**).

In its trucks decisions of 23 September 2020 (KZR 35/19) and of 13 April 2021 (KZR 19/20 and KZR 20/20), the FCJ stressed the binding effect of the factual and legal findings of the European Commission decision. The FCJ also confirmed the existence of a factual presumption for damages in cartel follow-on cases. Nevertheless, in its first trucks decision the FCJ referred the case back to the Stuttgart Court as the lower instance court had not sufficiently taken into account all factual circumstances in its assessment of the present case. In its second and third trucks decision, the FCJ referred the case back to the Higher Regional Court of Schleswig as the court had not sufficiently taken into account the defendants' economic expert opinions (see **2.4 Burden and Standard of Proof**).

As the disputed damages occurred before 26 December 2016, these cases all concern previous law, prior to the changes made by the 9th and 10th Amendment to the ARC (see above). Nevertheless, these decisions are both relevant for most of the hundreds of private damages actions pending before the German regional courts (see **Germany as a Jurisdiction of Choice** below) as well as for cases to be assessed under recent law because the FCJ clarified several questions which are still relevant under recent law (such as umbrella damages).

Germany as a Jurisdiction of Choice

As a result of the new rules and increased marketing efforts of litigation firms, the number of private cartel damages claims in Germany has increased substantially in recent years, with hundreds of private damages actions pending in consequence of prominent cartel cases at EU and German level, such as the trucks case, the sugar case, the airfreight case, the railway tracks case and the auto glass case. From 2012, the number of new private damage claims in Germany increased by 160–185 per year. In the years 2017/2018, the number even increased by over 300 per year, mainly due to the trucks cases. An even higher number of cases do not make their way to the courts, but are settled in out-of-court negotiations.

Due to the comparatively short duration of proceedings and usually moderate costs involved, Germany has become one of the jurisdictions of choice for plaintiffs in Europe and is probably the closest runner-up to England and the Netherlands in this regard. It is fair to state that the importance of Germany as a forum for follow-on claims further increased after Brexit, the plaintiff-friendly reforms to the ARC and several recent judgments by the FCJ, which enhanced legal certainty.

1.2 Other Developments

As illustrated by the significant number of private cartel damages cases brought before German courts each year, Germany is a very attractive jurisdiction for plaintiffs. However, even though German courts have issued numerous decisions – including several in which damages were awarded – there are still a number of open issues to be decided, either by the courts or the German legislature.

Standing-In Cases

One of these open issues with major impact on litigation strategies is the question whether collective actions are admissible: this concerns the question of whether and how individual customers may assign their damages claims to espe-

cially created trial vehicles in return for financial participation if the assigned claims are successfully asserted in court (see **3. Class/Collective Actions**). As US-style class actions do not exist in Germany, these models are intended to facilitate the collective assertion of antitrust damages claims. In early 2020, the Regional Court of Munich I dismissed such a claim in the value of roughly EUR600 million in the trucks case due to breach of the German Legal Services Act (RDG) by the plaintiffs. The plaintiffs have appealed this decision and it is currently under review by the Higher Regional Court of Munich. Also, the Regional Court of Hanover dismissed two antitrust damage claims concerning the sugar cartel for similar reasons. As yet, it remains unclear whether and under what conditions such models are admissible under German law.

2. THE BASIS FOR A CLAIM

2.1 Legal Basis for a Claim

In Germany, both standalone and follow-on claims are available. Cartel damages claims are predominantly follow-on cases, since the infringement decisions of national competition authorities and the European Commission (EC) are binding for the courts in any subsequent private antitrust litigation, which facilitates bringing such claims. There is also a high proportion of standalone claims, which are available for any kind of breach of competition law.

The legal basis for such claims is established by statute, mainly the ARC. Claims for injunctive relief are usually based on Section 33 of the ARC, and claims for damages on Section 33a to 33h of the ARC. General tort law, especially Section 823 of the German Civil Code (GCC), can also serve as a legal basis for private antitrust claims.

2.2 Specialist Courts

Designated Regional Courts

In Germany, no specialist competition courts exist. Cases concerning a breach of German or European antitrust law are heard before civil courts. The exclusive jurisdiction lies with the regional courts (*Landgerichte*), regardless of the value of the matter in dispute (Section 87, ARC). In most of the German federal states, competition matters are concentrated in one to three regional courts (Section 89, ARC). These courts usually establish special antitrust chambers which hear all antitrust law cases brought to the court. The judges dealing with antitrust litigation cases are therefore experts in their field. This also applies to the courts of appellation (see **11. Appeals**).

German Code of Civil Procedure

As German law provides for the special jurisdiction of certain courts, parties cannot diverge from their jurisdiction and agree to negotiate their disputes on antitrust law in other courts of law.

If an antitrust claim is brought in an inconvenient forum (forum non conveniens), it will not automatically be referred to the court of competent jurisdiction in antitrust matters for the relevant judicial district. Instead, Section 281 of the CCP requires the plaintiff to petition the court to refer the claim to the proper legal venue.

2.3 Decisions of National Competition Authorities

According to Section 33b of the ARC, the court is bound by a finding that an infringement has occurred, as made in a final decision by the National Competition Authority (NCA), the EC, or the competition authority in another member state of the European Union. The specific scope of this binding effect is still in dispute.

The German Federal Cartel Office

The German Federal Cartel Office (FCO) can intervene in private antitrust litigation according to Section 90 of the ARC. In all legal actions in which the decision depends in whole or in part on the application of the provisions of the ARC or on Articles 101 or 102 of the Treaty on the Functioning of the European Union (TFEU), the court has to inform the FCO about the action. If the FCO considers it to be appropriate to protect the public interest, it may appoint from among its members a representative authorised to submit written statements to the court, to point out facts and evidence, attend hearings, present arguments and address questions to parties, witnesses and experts in such hearings. Written statements by the FCO's representative are to be communicated to the parties by the court. So far, the FCO has not intervened on a regular basis in private antitrust actions but has participated on a regular basis in the oral hearings at the FCJ.

2.4 Burden and Standard of Proof

Burden of Proof

Each party has to prove the premises justifying its claim. Regarding cartel damages claims, however, there are some important exceptions to this general rule.

According to Section 33b of the ARC, the plaintiff does not need to show and prove the infringement of antitrust law, if a final decision of an NCA or the EC finds that an infringement has occurred. The court is bound by such a decision (see **2.3 Decisions of National Competition Authorities**).

Standing as a Party "Being Affected" by the Infringement

The plaintiff must be affected by the infringement (*Kartellbetroffenheit/Anspruchsberechtigung*) showing that there is a causation between the violation of competition law and the damage. The "being affected" test has been widely softened by the FCJ. In its second and third railway cartel decisions, the FCJ found that the "being affected" test is easily fulfilled. It is sufficient to show that the plaintiff has acquired goods that generally fall within the product, temporal and geographical scope of the infringement. According to the FCJ, it is not necessary to establish a causal link between the infringement and each specific procurement. In its trucks decisions the FCJ held that the "being affected" test is not a question of causality giving rise to liability and is easily fulfilled in cases in which the plaintiffs purchased products covered by the cartel infringement. The "being affected" has nevertheless to be assessed for each separate damage claim.

Causation of Damages

According to Section 33a (2) of the ARC, there is a rebuttable presumption that a cartel causes damages. This rebuttable presumption does, however, only apply to infringements after 26 December 2016.

For all cartel damages prior to this date, the injured party bears the burden of proof for the causation of damages by the cartel. According to the FCJ in its first railway cartel decision and confirmed in its trucks decisions there is no legal presumption or prima facie proof (*Anscheinsbeweis*) for the causation of damage by a cartel. The FCJ, however, also ruled that a factual assumption (*tatsächliche Vermutung*) exists, based on economic experience, that a cartel causes damages. Due to the variety and complexity of anti-competitive behaviour, this is but one of all the different aspects of each case that have to be taken into account by the court.

Pass-On Defence

The defendant, on their part, can raise the pass-on defence, claiming that the damages that occurred have been passed on by the direct purchaser to the next market level. In an action

for damages raised by a direct purchaser, the defendant bears the burden of proof for the pass-on defence. If, however, an indirect purchaser claims damages, the rebuttable presumption of Section 33c (2) of the ARC presumes in their favour that the damages have been passed on to the next market level (see **2.5 Direct and Indirect Purchasers**). This inverse burden of proof regarding the pass-on defence in actions for damages by direct or respectively indirect purchasers, causes a risk of multiple liability for the defendant, which can only partially be averted by third-party notices.

Despite the fact that punitive damages do not exist and the concept of compensation applies, in its fourth railway cartel decision the FCJ increased the requirements of a successful pass-on defence by clarifying that the injured party has no secondary burden of proof and is, in particular, not obliged to provide details of its price-calculation, if:

- a passing-on of damages is difficult to determine even for a court-appointed expert and only concerns a marginal amount of price difference; and
- the customers of the injured party are highly unlikely to pursue their damages and this may cause an unfair relief for the injuring party – this applies in particular to stray damages on an end-consumer level.

In its third trucks decision, the FCJ rejected the inadmissibility of the pass-on defence for reasons of general policy (eg, because it is highly unlikely that end customers would pursue their claims). The FCJ emphasised that the pass-on defence must be analysed for each specific downstream market for which the pass-on has been alleged by the defendant and it is the defendant's obligation to submit plausible facts showing the likelihood of a pass-on for each relevant downstream market.

Standard of Proof

Regarding the standard of proof, the court has to be convinced that the facts as presented by the plaintiff are true. However, conviction in this regard does not require absolute certainty. Rather, a high level of plausibility is sufficient (ie, beyond reasonable doubt).

The standard of proof is significantly reduced with regard to the amount of damages suffered by the plaintiff. The court can rule on this issue at its discretion and conviction, based on its evaluation of all the circumstances (Section 33a (3), ARC; Section 287 CCP).

In its second railway cartel decision in 2020 the FCJ further elaborated on the various standards of proof in a follow-on action for damages and indicated that the reduced standard of proof of Section 287 of the CCP might have a wider scope of application than it had previously.

2.5 Direct and Indirect Purchasers

Claims can be brought by direct and indirect purchasers. According to Sections 33 (1), (3) and 33a (1) of the ARC "the person affected" has the right of action. Section 33 (3) of the ARC defines affected persons as competitors or other market participants impaired by the infringement. This means that anyone who was overcharged somewhere along the distribution chain can pursue their claim in court. As a consequence, cartel members are not only exposed to the risk of damages claims being brought by their direct customers but also by indirect purchasers. The legal basis of any such claim is the same.

As already outlined (see **2.4 Burden and Standard of Proof**), there is a rebuttable presumption that a hard-core cartel has caused harm at the direct customer level. Under certain circumstances, a rebuttable presumption also exists in favour of the indirect purchaser. According to Section 33c (2) of the ARC, there is a presump-

tion in the indirect purchaser's favour that the overcharge was passed on, if an infringement resulted in an overcharge for the direct purchaser and the indirect purchaser paid for goods or services that were:

- the object of the infringement;
- derived from goods or services that were the object of the infringement; or
- contained goods or services that were the object of the infringement.

In many cases, this facilitates the assertion of damages claims for indirect purchasers.

On the other hand, the defendant can raise the pass-on defence vis-à-vis the direct purchaser (see **2.4 Burden and Standard of Proof**). According to Section 33c (1) of the ARC, the pass-on defence does not exclude the occurrence of harm, but the harm incurred by the purchaser is deemed to be remedied to the extent that the purchaser has passed on the overcharge resulting from an infringement to its customers.

2.6 Timetable

It is difficult to indicate the typical duration of court proceedings. The duration from issuing a claim until judgment is reached depends to a large extent on the complexity of the case and the workload of the competent court. On average, proceedings in the first instance take approximately one to two years. However, in very complex matters, the duration of the proceedings may be significantly longer, especially if the court needs to obtain the opinion of a court-appointed economic expert and/or refers questions related to European competition law to the European Court of Justice resulting in a stay of the proceedings. The implementation of a confidentiality regime in the case of a data exchange between the parties can further delay the proceedings. The timeframe for an appeal is also usually one to two years. The same applies for a further appeal on a question of law to the FCJ.

Stay of Proceedings

The court can stay proceedings, ex officio, in accordance with Section 148 of the CCP if the decision in the lawsuit is dependent on a preliminary question that is the subject matter of another pending legal action, or is yet to be determined by an administrative authority. For example, if the NCA is conducting further or parallel investigations that are also of relevance to the pending lawsuit, the court proceedings may be stayed. The parties can only propose such a stay. The final decision will be made by the court ex officio at its reasonable discretion.

In 2021, several regional courts in trucks cases have stayed the proceedings until the European Court of Justice rules on the Regional Court of Hanover's question regarding whether the EC's trucks decision also covers special purpose vehicles (such as firefighting vehicles or vehicles for street cleaning).

3. CLASS/COLLECTIVE ACTIONS

3.1 Availability

In Germany, class actions in which a representative requests a remedy on behalf of an anonymous group of individuals are not formally provided for breaches of antitrust law.

Representative Actions by Consumer Organisations

As an exception to this general rule, representative actions regarding injunctive relief against infringements of antitrust law are admissible by business or consumer associations according to Section 33 (4) of the ARC. So far, this option has, however, been of hardly any practical relevance.

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Claims Assigned to Litigation Vehicles

With regard to actions for damages, it is highly controversial whether a means of collective redress can be created by assigning the claims of various injured parties to a litigation vehicle, backed by a litigation financier. Early attempts by litigation vehicles to bring bundled claims were dismissed (see **10.1 Litigation Funding**). More recently, the model of creating a means of collective redress has been widely used in the trucks case, but was deemed to be inadmissible in early 2020 by the Regional Court of Munich due to an infringement of the German Legal Services Act and a conflict of interest between the assignors and the litigation financier. This ruling is currently under review by the Higher Regional Court of Munich. Also, the Regional Court of Hanover in two cases dismissed the claims of non-affiliated supermarket chain companies and a litigation vehicle against participants in the sugar cartel for similar reasons. These cases are on appeal as well.

Ultimately, the FCJ will have to decide whether such a model of collective redress is admissible in Germany. In July 2021, the FCJ found that a collective redress of claims against the bankrupt airline Air Berlin is in line with the German Legal Services Act. While this case significantly differs from the current antitrust damages cases, plaintiffs might still use it as a general indication for the admissibility of certain collective redress models.

Consolidation of Claims

Apart from that, Section 60 of the CCP allows claimants to sue jointly, if similar claims or obligations form the subject matter in dispute and if such claims are based on an essentially similar factual and legal cause. This gives victims of anti-competitive conduct an opportunity to consolidate their actions. However, according to Section 61 of the CCP, joined parties shall deal with their opponent as individuals in such a way that the actions of one of the joined parties will neither benefit the other joined party nor place it at a disadvantage, unless stipulated otherwise by civil law or the CCP.

Unless the assignment of claims to a litigation vehicle is deemed admissible by the FCJ, the means for collective redress in Germany are thus rather limited.

3.2 Procedure

Class actions are not available for breaches of antitrust law in Germany (see **3.1 Availability**).

3.3 Settlement

Class actions are not available for breaches of antitrust law in Germany. However, out-of-court settlements of de facto bundled claims are viable, but much less likely than out-of-court settlements of individual claims. This is particularly true for cases where the circle of assigners and the type of procurements are heterogeneous in many respects, resulting in different interests and different chances of success of the individual claims (see **3.1 Availability**).

4. CHALLENGING A CLAIM AT AN EARLY STAGE

4.1 Strikeout/Summary Judgment

There are no equivalents in Germany for the English strike-out rules or summary judgment to challenge a claim at an early stage. However, a court may reject an action as being inadmissible if, for example, the jurisdiction or other requirements for the admissibility of a lawsuit are not fulfilled.

4.2 Jurisdiction/Applicable Law

Jurisdiction

Antitrust law cases are frequently multi-jurisdictional. Cartel arrangements often cover various countries and the parties involved in private anti-

trust litigation are, in many cases, domiciled in different countries. However, in order to establish the jurisdiction of German courts there must be a link between the antitrust law infringement and Germany.

German courts must have jurisdiction to hear the claims against foreign defendants. Establishing jurisdiction for the relevant claims is often a major pillar for determining the case prospects.

- For claims against defendants that are domiciled in an EU member state, the EU law on international jurisdiction, namely the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation) is applicable.
- For claims against defendants that are not domiciled in an EU member state, international jurisdiction is determined according to the principles laid down in the CCP.

Claims against Defendants Domiciled in an EU Member State

Under the Recast Brussels Regulation, the default position is that any defendant may be sued before the court of their:

- domicile or "seat";
- central administration – ie, where the company policy is determined, which is usually where the managing board is located; or
- principal place of business – ie, where material resources and human resources are concentrated.

However, given the tortious character of antitrust infringements, the victim is also entitled to bring such an action in a jurisdiction where the harmful event (tort) occurred. This can be the place of the event giving rise to the damage or the place where the damage occurred. The plaintiff can sue the defendant in the courts of either of those places. In a recent judgment, the European Court of Justice (ECJ) (ECJ, decision dated 15 July 2021, C-30/20 – Volvo and Others) found that if the infringement giving rise to the alleged damage covers the entire EEA market (as in the trucks case), the place where the damage occurred can be in every member state. The plaintiff may bring an action before the court in the district in which they purchased the goods affected by the collusive arrangement. If the purchases have been made in several places, the plaintiff may bring an action before the court where it has its registered office.

Pursuant to the Recast Brussels Regulation and in line with the ECJ's decision in the Hydrogen Peroxide case (ECJ, decision dated 21 May 2015, C-352/13 – CDC Hydrogen Peroxide SA), German courts have jurisdiction to hear claims against defendants domiciled within the EU but outside of Germany if each of the claims is directed against at least one anchor defendant (*Ankerbeklagter*) domiciled in Germany.

However, claimants should also take into account that it might not be possible to establish jurisdiction in Germany if the relevant transaction documents (eg, a purchase or lease agreement) contain choice of forum clauses (*Gerichtsstandsklausel*) for damages claims, which explicitly establish jurisdiction in a country or jurisdiction other than Germany. If the choice of forum clause is broadly formulated and does not explicitly refer to cartel damage claims, it is disputed whether the clause can establish exclusive jurisdiction (due to the non-contractual character of cartel infringements).

Claims against Defendants Not Domiciled in an EU Member State

The principles for determining international jurisdiction under the CCP are broadly similar

to those that apply under the Recast Brussels Regulation.

Pursuant to Section 17 of the CCP, the general place of jurisdiction of legal persons is determined by their domicile (ie, the location of their registered office).

According to Section 32 of the CCP, for complaints arising from tort, the court in the jurisdiction where the tortious act was committed has jurisdiction. This can also be the place of the event giving rise to the tort (*Handlungsort*) or the place where the harm resulted (*Erfolgsort*).

Applicable Law

To the extent that claims may relate to transactions made outside of Germany, the question becomes relevant whether the German courts can apply German substantive law.

Since damages claims usually result from anti-competitive, ie, tortious and non-contractual behaviour, the question of the applicable law is governed by the Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II Regulation).

For claims that arose after 11 January 2009, the applicable law is determined pursuant to Article 6 of the Rome II Regulation. According to Article 6 (3) (a) of the Rome II Regulation, the applicable law shall in principle be the law of the country where the market is – or is likely to be – affected.

This "effects principle" also applies if the plaintiff sues more than one defendant. Thus, according to this principle, German law applies if the effects of the restriction of competition are, or are likely to be, felt in Germany. In cases affecting the markets of more than one country, the Rome II Regulation provides that a plaintiff who sues in the defendant's country of domicile "may instead choose to base their claim on the law of the court seised, provided that the court of the member state is amongst those directly and significantly affected by the restriction of competition" (Article 6 (3) (b), Rome II Regulation). In such a situation, claimants can choose to base their claims on the respective national law of the anchor defendant if a number of conditions are met:

- the German courts must have international jurisdiction for each of the claims of foreign claimants against domestic and/or foreign defendants;
- the defendants have not filed a claim for a negative declaratory judgment (negative *Feststellungsklage*) at the claimants' respective places of general jurisdiction before the claimants' claims are brought (so-called "torpedo", Article 29 of the Recast Brussels Regulation); and
- the anti-competitive behaviour of all the defendants has directly and substantially affected the German market.

However, uncertainties can result in cases where the infringement affected different transactions by different claimants in different jurisdictions. In such cases, it may well be that the right to choose the applicable law under Article 6 (3) (b) of the Rome II Regulation must be assessed individually and separately for different claims, transactions or claimants/assignors.

4.3 Limitation Periods

Five Years

Following the 9th Amendment to the ARC, the regular limitation period for private antitrust damages claims has been extended from three to five years (Section 33h, ARC). The new rules apply to all claims which were not already time-barred as of 27 December 2016.

The five-year limitation period begins at the end of the year in which:

- the claim arose;
- the claimant learned of the circumstances substantiating the claim to an infringement, and of the identity of the infringer, or should have learnt of them had the claimant not acted grossly negligently (*grob fahrlässig*); or
- the infringement on which the claim is based has ceased.

While it is often the case that knowledge of the relevant circumstances may already occur when inspections by a competition authority at the premises of the cartel participant are announced (at least, in cases of press releases by the competition authority and comprehensive media reports), German courts tend to require the publication of the decision by a competition authority to start the limitation period.

Other Limitation Periods

A second (absolute) limitation period of ten years (regardless of any knowledge of the claim) starts when the claim arises and the infringement on which the claim is based has come to an end.

The maximum limitation period, however, is 30 years after the date on which the act causing the injury was committed (Section 33h (4), ARC).

In principle, the shorter limitation period precedes the longer limitation period.

Suspension

The limitation period is suspended during the investigation by the EC or an NCA (Section 33h (6), ARC). The claims will expire no earlier than one year after the final and binding (*rechtskräftig*) decision of the respective authority or court.

It has been disputed whether the suspension of the statute of limitations only starts upon the issuance of a formal decision to initiate cartel proceedings, has or already begun when unannounced inspections (dawn raids) occur. In its trucks decisions, the FCJ clarified that the suspension is already triggered by the unannounced inspection.

In addition, the FCJ clarified in its second and third trucks decisions that the interruption of the running of the limitation period by the Commission's investigation does not end at the time the Commission's decision has been issued but at the time the deadline for an appeal against that decision has ended.

Other popular tools often used by plaintiffs to suspend the limitation period without being required to prepare and submit a (costly and burdensome) lawsuit are applications to start mediation proceedings or limitation waiver agreements with potential defendants.

5. DISCLOSURE/ DISCOVERY

5.1 Disclosure/Discovery Procedure

Following the implementation of the 9th Amendment to the ARC, a limited disclosure procedure in connection with antitrust damages claims has been established. While there were (and still are) general procedural rules which allow specific documents to be disclosed, these rules have very rarely been applied in antitrust cases (since they require the defendant to identify specific documents).

Section 33g of the ARC, introduced in June 2017, includes a new (substantive) right for access to information required to seek damages. According to a 2018 ruling by the Higher Regional Court of Düsseldorf, this right to access to information only applies to claims that originated after 26 December 2016. In reaction, the legislature of the 10th Amendment to the ARC explicitly clarified that Section 33g of the ARC also applies to claims that originated before 26 December 2016

(as long as the action was filed after 26 December 2016; see Section 186 (4) ARC).

Access to Information from Defendants or Other Third Parties

In order to claim (pretrial) access to information from either the potential defendant or another third party, a plaintiff has to demonstrate probable cause that they have a right to seek damages and indicate the information they require as specifically as possible. This right is not limited to the plaintiff. The defendant can also claim the right to access to information from either the plaintiff or a third party, if an action for damages is already pending (ie, not pretrial). In particular, a defendant could request access to data and documents in order to be able to quantify a pass-on by the plaintiff.

In general, a disclosure is excluded if and to the extent that it is disproportionate, taking into account and balancing the interests of the party claiming access to information and the interests of the party that is in (alleged) possession of such information. Factors to be taken into account in this context include:

- the relevance and value of the information;
- the extent to which the available information has been exhausted;
- the effort and cost involved to provide the requested information;
- the confidential nature of the requested information; and
- the effectiveness of public competition law enforcement.

In order to protect the defendant's business secrets the court may commission a publicly appointed expert to provide an expert opinion on the necessary scope of the protection required to protect these (Section 89b (7) sentence 2, ARC).

Many procedural aspects, including the protection of business secrets or the reimbursement of costs associated with the disclosure, are unclear since precedents and an established decision practice do not yet exist.

Access to Records

In addition to requests brought against third parties, the plaintiff can request access to the records of the FCO or other relevant competition authorities according to Section 89c of the ARC. However, pursuant to Section 89c (1), sentence 1, No 1 of the ARC, access to the records of competition authorities is only granted if the requested information cannot be obtained with reasonable effort from another party.

Possible Effects of Access to Information

Whether the extended rules on access to information will actually facilitate or hamper damages claims, remains to be seen. Enforcing (pretrial) disclosure will likely result in significant delays and may therefore not always be attractive. This is especially true as Section 89b (3) and (4) of the ARC provide for the possibility of a stay of proceedings and an interlocutory judgment regarding access to information. Furthermore, the implementation of confidentiality protection for business secrets and other confidential information can further delay the proceedings. While the ARC acknowledges such protection, and the EC's notice on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law might give some guidance, it is not clear how to actually ensure the protection of such information (eg, through redaction of the relevant documents or a confidentiality ring similar to what is current practice in English proceedings).

5.2 Legal Professional Privilege

Unlike other jurisdictions, the concept of legal privilege does not exist in Germany. However, under the new Section 33g (6) of the ARC, docu-

ments can be withheld from inspection if they are in the possession of an external lawyer. Whether this also applies to documents in the possession of a client remains unclear.

In general, both (potential) claimants and defendants can request access to information in the possession of others. Restrictions only apply to leniency statements and acknowledgements in connection with settlement discussions with competition authorities.

The same applies to access to the records of a competition authority. Communications between the defendant and its in-house counsel or external lawyers can be found in the FCO's file because the concept of legal privilege does not exist in the event that the FCO conducts cartel investigations and seizes documents. The FCO is entitled to seize all the documents in the possession of the in-house counsel unless they concern "defence correspondence". This is correspondence that is prepared with awareness of, and relating directly to, the actual defence in quasi-criminal cartel investigations or other antitrust proceedings that could lead to the imposition of a fine.

Documents in the possession of the defendant's external lawyer are protected by attorney privilege and cannot be seized. This is confirmed by Section 33g (6) of the ARC.

Trade secrets and other confidential information are generally not privileged under German civil procedural law. However, confidentiality aspects have to be considered in relation to a request for disclosure of information pursuant to Section 33g ARC. If access to the information is granted, the court has to ensure that trade or business secrets will be protected, although there is no established practice in this regard as yet (see **5.1 Disclosure/Discovery Procedure**).

5.3 Leniency Materials/Settlement Agreements

Both the right of access against defendants and third parties, as well as against a competition authority (Section 89c, ARC), does not grant access to leniency statements and acknowledgements in connection with settlement discussions with competition authorities. Such documents are explicitly exempted from the right of access to information. However, information in the possession of leniency applicants, other than leniency statements, can be accessed.

6. WITNESS AND EXPERT EVIDENCE

6.1 Witnesses of Fact

Under German civil procedural law, the following types of evidence are admissible:

- evidence taken by visual inspection (Section 371 et seq, CCP);
- witness evidence (Section 373 et seq, CCP);
- expert evidence (Section 402 et seq, CCP);
- documentary evidence (Section 415 et seq, CCP); and
- evidence by questioning of a party (Section 445 et seq, CCP).

Witnesses of Fact

Evidence gathered by hearing witness testimony (Section 373, CCP) is admissible in private antitrust damages proceedings. The party that wishes to submit the evidence must apply to the court for the witness to be heard. The witness is questioned by the court. Cross-examination does not take place. The legal counsels of the parties are, however, permitted to put questions directly to the witness. If a witness invited to testify before the court fails to appear, they may be fined or – in rare cases – even imprisoned.

In antitrust damages actions, which very often relate to events in the distant past, evidence gathered by hearing witness testimony on individual, specific transactions within an undertaking (eg, on specific procurements) often plays a secondary role, due to the long amount of time that has passed.

6.2 Expert Evidence

In procedural terms, it is necessary to differentiate between expert witnesses commissioned by the parties, and expert witnesses appointed by the court.

Expert Witnesses Commissioned by the Parties

In antitrust damages proceedings, it is common practice for the plaintiff to submit an economic expert opinion on the question of whether, and to what extent, harm has occurred; this practice is not obligatory, however. The defendant then usually submits a countering economic expert opinion, which serves to describe the weaknesses in the plaintiff's expert opinion and/or to undertake its own damages analysis. Expert opinions submitted by the parties are part of the parties' pleadings. Economic experts commissioned by the parties are usually expert witnesses (as per Section 414 CCP), and the rules governing witness testimony are applicable here as well.

Quantification of Damages

To date in Germany, there have been very few cases in which damages had to be quantified, which explains why at present there is only limited experience with the expert assessment of damages resulting from violations of antitrust law. The reason for this is that the vast majority of courts hear claims for damages in the form of actions for performance by way of a basic judgment (*Grundurteil*). For a basic judgment, the court only has to determine whether it is at least likely that the claim does exist in any amount. Thus, at this stage of the proceedings, the court does not need to involve an economic expert. The court has to decide on the exact amount of any damages only in the subsequent quantifications procedure. In the past few years in Germany, a number of damages claims have been granted, but the subsequent quantification proceedings have not taken place as yet.

In October 2020, the Regional Court of Dortmund estimated, in a railway track case, the amount of damages (15% of the net price) based on its free conviction without any help from a court-appointed expert witness. In contrast, the Regional Court of Munich rejected such a free estimate without consulting a court-appointed expert in its trucks cases.

Expert Witnesses Appointed by the Court

In practice, it is evident that those courts which are already dealing with the quantification of damages – in particular, those courts which do not choose the described two-stage procedure but conclusively decide on the claims in a single procedure – do regularly appoint an economic expert witness. The expert witness is selected by the court. The court also gathers the questions to be addressed to the court-appointed expert. The court-appointed expert witness is not cross-examined, but the parties' legal counsel may ask them questions. The opinion of the court-appointed expert is not binding upon the court, but usually the court will follow its opinion.

In October 2020, the Regional Court of Cologne dismissed a claim in the sugar cartel because it followed the court-appointed expert witness who came to the conclusion that in an oligopolistic market (such as the German sugar market with only three market players) even in the absence of a cartel infringement the prices would not be lower and, thus, no actual damage could be demonstrated.

7. DAMAGES

7.1 Assessment of Damages

Damages are awarded based on the principle of natural restitution – compensatory damages, according to Section 249 of the German Civil Code (GCC). The harm caused to a plaintiff by an antitrust law infringement is calculated by comparing the current situation in which the plaintiff finds itself, given the infringement, and the hypothetical situation in which the plaintiff would have been, but for the infringement, also known as the "counterfactual scenario".

Potential losses also include lost profits (Section 252, GCC). Exemplary or punitive damages are not available.

According to Section 33a (3) of the ARC, the amount of profit procured by the infringement may be taken into account in determining the amount of damage caused. The plaintiff may demand disclosure of the defendant's profits according to Section 33g (1), (10) of the ARC or Section 242 of the CCP.

There is no standing case law yet on the methods to be applied for the quantification of cartel damages. In most cases, expert opinions submitted by the parties adopt a comparison-over-time approach. Section 33a (3) of the ARC allows for reasonable estimates by the court, according to Section 287 of the CCP.

Umbrella Effects

The damages may also include the after-effects of the cartel and the price increases of outsiders caused by the cartel (umbrella pricing), as stressed by the FCJ in its fourth railway cartel decision. There is, however, no automatic assumption that a cartel caused umbrella damages, but rather a comprehensive assessment of the circumstances of the individual case is needed. The likelihood of umbrella effects increases with the market coverage and the duration of the infringement. The extent of an umbrella damage depends on several factors, such as the supply elasticity of the cartel outsiders, the market transparency, the degree of interchangeability of the goods offered, buyer power, etc. Due to the economic complexity of these factors, the FCJ has ruled out prima facie evidence for umbrella damages.

No Rule to Estimate the Amount of Damages

Previously, the legislature had shown no intention to introduce a provision that presumed the amount of damages but left it to the judge to assess the amount of damages according to Section 287 of the CCP, mostly with the help of economic experts.

In October 2020, however, the Regional Court of Dortmund estimated in a railway track case the amount of damages (15% of the net price) based on its free conviction without any help of an expert witness (see **6. Witness and Expert Evidence**).

Lump-Sum Damage Clauses

Provisions in terms and conditions that suppliers who took part in a cartel have to pay a certain sum (eg, 10% of the purchase price) have been considered by the FCJ in its second railway cartel decision to merely modify the burden of proof rather than to determine the amount of damage. In its sixth railway cartel decision in February 2021 the FCJ stated that such a lump-sum damage clause in the amount of up to 15% of the purchase price is not unreasonably high because it is in line with economic studies on cartel overcharges (such as the 2009 Oxera Study prepared for the European Commission) and because it will increase the enforceability of private damage claims.

7.2 "Passing-On" Defences

The pass-on defence is available to defendants in Germany (see **2.4 Burden and Standard of Proof**).

Section 33c (1) sentence 2 of the ARC regulates the pass-on defence for claims arising after 26 December 2016. According to this provision, any harm that occurred to the purchaser is compensated to the extent that the purchaser passed on that cartel-induced price overcharge to its own customers (*Schadensabwälzung*). With regard to claims arising on or prior to 26 December 2016, under the previous legal situation, the pass-on defence was permissible in terms of the adjustment of benefits, but German courts tended to apply this general principle rather restrictively.

The burden of proof regarding passing-on lies with the party that caused the harm – ie, the infringer must demonstrate and prove that its customers passed on any overcharge to the next market level, and to what degree. If, however, an indirect customer claims a cartel-caused damage, Section 33c (2) of the ARC assumes (under certain conditions) that the overcharge was passed on to the indirect customer (see **2.5 Direct and Indirect Purchasers**).

7.3 Interest

Interest is payable on damages. Interest includes pre-judgment interest, which is awarded from the time the damages occurred. In the case of cartel damages brought by a customer, the damages typically occur at the time the customer orders/buys the product at the price affected by the infringement – ie, interest is in principle payable from the time the product was ordered by the customer.

The statutory interest rate is five percentage points above the base rate per annum, as published by the German central bank, for damages that occurred on or after 1 July 2005 (Section 33a (4) of the ARC, in conjunction with Section 288 (1) 2 of the GCC). For damages that occurred before 1 July 2005, the FCJ holds that interest is payable in the amount of 4% per annum.

8. LIABILITY AND CONTRIBUTION

8.1 Joint and Several Liability

The participants in a cartel are jointly and severally liable for the entirety of the harm that was caused by that cartel (Section 33d, ARC). In its third railway cartel decision, the FCJ stressed that all cartel participants are jointly liable for all damages that result from a basic cartel agreement irrespective of their specific involvement in each of the individual agreements that serve to implement the basic cartel agreement.

Defendants may assert claims for all damages in one single action against one or more cartel members. Alternatively, they can bring a number of separate actions asserting the entire sum of damages against various cartel members; if they are successful, however, they can only enforce the damages sum to which they are entitled once.

The internal settlement between joint and several debtors depends on the circumstances of the specific case and, in particular, on the extent to which they caused the damage (Section 33d, ARC); other than this, the general rules for total debt equalisation apply (Section 421 et seq, GCC).

Exceptions

Exceptions to these principles apply to claims which have arisen since 26 December 2016 with respect to leniency applicants, which received full immunity under the applicable leniency programme. Thus, leniency applicants are only liable for compensation for the loss suffered by their

direct and indirect customers or suppliers resulting from the infringement (Section 33e, ARC), and the same applies to the internal equalisation between joint and several debtors. Under certain conditions, with regard to claims arising after 26 December 2016, small and medium-sized enterprises may also only be obliged to compensate for the damages suffered by their direct and indirect customers or suppliers (Section 33d, ARC).

8.2 Contribution

Contribution claims against other infringers can only be brought in separate proceedings that are subsequent to the main proceedings – ie, the initial action for damages. A jointly liable infringer may also bring an indemnification claim against the other infringers, prior to making payment to the successful claimant.

Against this background, it is common practice for the defendants in German antitrust damages actions to issue third-party notices to the other cartel members, asking for those other cartel members to join the proceedings. As a result of these third-party notices, the outcome of the litigation in the main proceedings will be binding for the recipients of the third-party notices in a potential subsequent contribution litigation. Even if the third party decides not to join the proceedings, it has to accept the factual and legal findings of the court and cannot refute them in any subsequent litigation.

9. OTHER REMEDIES

9.1 Injunctions

Injunctive relief is principally available and usually based on Section 33 of the ARC (typically aimed at getting a supply from a dominant supplier).

German procedural law provides for different interim measures pursuant to Sections 935 and 940 of the CCP. In the event of an immediate risk that the financial situation of the defendant will deteriorate, the plaintiff can request that the court seizes assets of the defendant. Furthermore, courts can issue interim measures ordering the defendant to perform a certain action, such as supplying the plaintiff with certain goods, if the plaintiff would otherwise lose important customers. The standard of proof is lower than for the principal claim on the merits. An applicant for interim relief must provide prima facie evidence that they have a claim, and that the realisation of such claim is impossible or severely jeopardised without the interim remedy (urgency). As a general rule, an interim remedy shall not result in the fulfilment of the final remedy.

Under the new rules implemented by the 9th Amendment to the ARC, access to information and documents can also be pursued by seeking an interim measure.

9.2 Alternative Dispute Resolution

In principle, arbitration proceedings are available under German law but are not mandatory before trial. However, such proceedings are only admissible if an arbitration clause in relation to antitrust damages has been validly agreed between the parties.

In practice, however, it is very common that cartel members and their respective customers will reach confidential out-of-court settlement agreements in order to prevent court proceedings or arbitration proceedings.

10. FUNDING AND COSTS

10.1 Litigation Funding

In Germany, external funding of private antitrust cases is legally permissible. While in previous years litigation finance providers usually came from the insurance sector and often made the

funding of antitrust cases dependent on the outcome of extremely thorough analyses of the prospects for success, the range of funding models has noticeably increased since that time. A growing number of litigation finance providers from the private equity sector have entered the German market in recent years, often displaying a greater level of risk tolerance than many traditional litigation finance providers when making funding commitments. Thus, the litigation funding market is also rapidly evolving.

However, it still constitutes a major problem to bundle various claims into one action for damages in a legally viable way. A major action for damages backed by the Belgian Cartel Damage Claims (CDC) in the cement case was lost in 2015 on formal grounds and an improved model backed by a British litigation financier in the trucks case may face a similar fate after a ruling by the Regional Court of Munich in early 2020. A claim by the CDC in the sugar cartel has also been dismissed by the Regional Court of Hanover. Appeals are currently pending (see **3. Class/ Collective Actions**).

10.2 Costs

The costs of private antitrust litigation comprise the court fees and the attorneys' fees. The court fees generally depend on the value of the claim and whether the case ends after the first instance or after an appeal.

Adjusting the Value of the Matter

In order to somewhat attenuate the cost risks involved in bringing private damages claims to court, the German legislature has introduced Section 89a of the ARC, which provides for the possibility of adjusting the value of the matter if certain conditions are met. If a party substantiates that its economic situation would be seriously jeopardised if it had to bear the costs of litigation calculated on the basis of the full value in dispute, the court may, at the party's request, order that the obligation of this party to pay the court fees be assessed on the basis of a reduced value in dispute.

Who Bears the Costs?

As a general rule, the legal costs for private antitrust litigation have to be borne by the losing party. However, it should be noted that there is a statutory limitation as regards the amount of attorneys' fees that are recoverable. Such fees can only be recovered within the limits of the German Lawyers' Fees Act. If the actual fees charged by the attorney of the winning party exceed the statutory fee (which will typically be the case), the excess amount must be borne by the winning party itself.

11. APPEALS

11.1 Basis of Appeal

Appeals against the decisions of the regional courts are made before the competent higher regional court on the facts and on the law. The higher regional courts, which are designated to be competent by the respective German federal states, have specialised antitrust law panels (see **2.2 Specialist Courts**). Decisions of the higher regional courts may be appealed on points of law before the FCJ, which has also established a special antitrust law panel.

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BUNTSCHECK Rechtsanwaltsgesellschaft mbH is an independent, Munich-based law firm specialising in German and European competition law. It offers a combination of personalised services from highly specialised lawyers who have accumulated years of experience working in large international commercial law firms. Founded in 2008, it has grown to become one of Germany's leading competition law firms (three partners, nine associates), with a reputation built on quality work, responsiveness, diligence and commitment, while the firm's lean and efficient structure delivers cost-effective results for its clients. The practice offers expertise in the following aspects of competition law: representation of defendants in cartel investigations; enforcement of, and defence against, damages claims under competition law; representation in merger control proceedings; structuring of distribution systems and commercial co-operation agreements; and advice on competition law compliance.

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