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Germany: Private Antitrust Litigation

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Private antitrust litigation has a long and widespread tradition in Germany. According to a discussion paper published by the German Federal Cartel Office (FCO) in 2005,[1] German courts register several hundred private antitrust cases each year; there were approximately 900 cases between 2002 and 2005. 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 stand-alone litigation, often closely related to contract disputes.

With the seventh amendment of the Act against Restraints of Competition (ARC) in 2005, the German legislator introduced a set of rules that significantly improved the conditions for private enforcement in Germany. The reform was aimed at facilitating access to damages actions brought by those who have suffered a loss from breaches of German or European antitrust law. As a result of the new plaintiff-friendly rules, the number of private damages claims in Germany has increased substantially in recent years. Inter alia, due to the comparatively short duration of proceedings and usually moderate costs involved, Germany has become one of the jurisdictions of choice for claimants in Europe and is probably the closest runner-up to England and Wales in this regard.

Jurisdiction and applicable law

Antitrust law cases are frequently multi-jurisdictional. Cartel arrangements often cover various countries and the parties involved in private antitrust litigation in many cases are domiciled in different countries. However, to establish the jurisdiction of German courts there must be a link between the antitrust law infringement and Germany.

In the European Union, the question of which national jurisdiction a claim may be brought in is dealt with by the Jurisdiction Regulation.[2] Under this Regulation, the default position is that any defendant may be sued before the court of his domicile or 'seat'.[3] 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.[4] This can be the place of the event giving rise to the damage or the place where the damage occurred.[5] For example, if a German car manufacturer purchased windscreens from a French car glass cartel member, the car manufacturer could bring an action before French courts (ie, at the seat of the cartel member). However, the manufacturer may also choose to sue in the jurisdiction where the damages were incurred. This would likely be Germany, as the seat of the car manufacturer.

In cases involving multiple defendants, the Jurisdiction Regulation provides a basis for jurisdiction for one court to hear claims against all defendants irrespective of where these defendants are domiciled. Such joint jurisdiction may be established in any member state where one of the defendants has its seat, provided the claims are so closely connected that it is expedient to hear and determine them together (at the venue of the anchor defendant). Thus, on the basis of this provision, our hypothetical German car manufacturer could bring its claims before an English court if it sued the French cartel member together with a cartel member domiciled in England.

As a second step in a multi-jurisdictional case, the competent court has to determine the applicable substantive law; an issue that is dealt with by the Rome II Regulation.[6] According to the general rule laid down in the Rome II Regulation, the law applicable to claims based on non-contractual obligations arising from restrictions of competition is the one of the country in which the market is or is likely to be affected.[7] 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 his or her claim on the law of the court seized, provided that the court of the member state is amongst those directly and significantly affected by the restriction of competition'.[8] The Rome II Regulation does not provide any assistance as to the question of which law is applicable in cases where more than one member state is affected and the plaintiff does not sue in the defendant's country of domicile. Uncertainties resulting from this legal loophole will need to be addressed by the national courts of the member states.

Competent courts

While Germany has not established any courts or tribunals dealing exclusively with antitrust matters, such as the Competition Appeal Tribunal in England, there are courts specialised in dealing with antitrust litigation cases and these courts possess significant experience. The exclusive jurisdiction for civil actions concerning a breach of German or European antitrust law lies with the regional courts. This exclusive jurisdiction applies regardless of the value of the matter in dispute.

According to section 89(1) ARC, the governments of the German federal states are authorised to designate one regional court as the competent court for the districts of several regional courts. With the exception of those federal states with only one regional court, and Thuringia, all federal states have exercised their right in this regard. Thus, civil actions concerning antitrust law matters are dealt with by a limited number of designated regional courts.

Appeals against the decisions of the regional courts are made before the Higher Regional Courts, which have established special antitrust law panels. Decisions of the Higher Regional Courts may be appealed on points of law before the German Federal Supreme Court, which has also established a special antitrust law panel.

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

Private action procedure

Standing

According to section 33(1) ARC, actions for the violation of German or European antitrust law can be brought by 'the person affected'. This can be other market participants, such as customers or suppliers, as well as competitors. In a recent judgment, the German Federal Supreme Court also explicitly confirmed the standing of indirect purchasers in private damages claims.[9] Such broad standard of who has the right to bring an action is in line with the decision of the European Court of Justice in the *Courage* case.[10]

Class actions in which the representative requests a remedy on behalf of an anonymous group of individuals are not available for breaches of antitrust law in Germany. However, with the eighth amendment of the ARC which came into force on 30 June 2013, the German legislator introduced the possibility of representative actions brought by certain consumer organisations registered in the list of 'qualified institutions' pursuant to section 4 of the German Act on Injunctions or in the list of the European Commission to be published every six months pursuant to article 4 of the Directive 2009/22/EC of 23 April 2009 on injunctions for the protection of consumers' interests[11] (section 33(2) ARC), provided the alleged infringement of antitrust law affected the interests of the respective members.

In addition, there are certain options to bring an action on behalf of another party or to 'bundle' damages claims.

Under certain conditions, it is possible to bring an action in one's own name but on another's behalf. The right to do this can be based on either law or agreement. However, it must be noted that authorisation for a third party to bring an action on behalf of another party is possible only if there is a legitimate interest to let the third party bring such action and if the interests of the defendant will not be unreasonably impaired as a result of such authorisation.

Pursuant to section 60 of the German Code of Civil Procedure (CCP), a plurality of persons may jointly sue 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 (joinder of parties). Thus, the victims of anti-competitive conduct could consolidate their actions if they concern the same subject matter. As regards the effect of such joinder of parties, it should be noted that, unless stipulated otherwise by civil law or the CCP, joined parties shall deal with their opponent as individuals in such a form that the actions of one of the joined parties will neither benefit the other joined party nor place it at a disadvantage (section 61 CCP).

An interesting model for bundling damages claims has been developed by Belgian company Cartel Damages Claims (CDC). CDC acquired the damages claims of various companies affected by the German cement cartel by way of purchase and assignment. Then CDC brought an action for damages based on the accumulated claims. While the admissibility of CDC's approach has been confirmed by the German Federal Supreme Court in principle,[12] the Regional Court of Düsseldorf recently dismissed the action stating that the claims' assignment to CDC was ineffective. The court inter alia argued that the assignment immorally transferred the cost risk to the defendants since CDC did not possess sufficient assets to actually pay all thet costs that would have been incurred in case of the action's dismissal.[13] CDC has appealed that decision and the case is currently pending at the Higher Regional Court in Düsseldorf.

Finally, section 33(2) ARC provides for the right of associations with legal capacity for the promotion of commercial or independent professional interests to bring an action on behalf of the groups they represent. Such right for professional organisations to bring actions is, however, only available under certain conditions:

- the professional organisation must have a significant number of member undertakings selling goods or services of a similar or related type on the same market;
- the association must be able, particularly with regard to their human, material and financial resources, to actually exercise their statutory functions of pursuing commercial or independent professional interests; and
- the alleged infringement of antitrust law must affect the interests of their members.

The remedies available to professional organisations are limited to injunctions (section 33(1)(2) ARC) and the skimming off of benefits (section 34a ARC). As regards the latter, profits that have been skimmed off must be passed on to the federal budget less the enforcement costs incurred by the association. Against this background, such claims have not been of any practical relevance, insofar as they do not provide sufficient incentives to bear the risks of litigation.

Standard and burden of proof

As regards the standard of proof, the court must 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).

When it comes to the burden of proof, the principle applies that the party that wishes to assert a right in court must demonstrate and provide evidence for the facts justifying its claim. For example, as regards private damages claims, the plaintiff must prove the infringement of antitrust law and the individual damages suffered, as well as the causal link between the two.

The ARC provides for certain exceptions and alleviations as regards this general rule for the allocation of the burden of proof. The most important exception concerns follow-on private damages claims. According to section 33(4) ARC, if an infringement of antitrust law has already been established by a final decision of the FCO, a competition authority of one of the German federal states, the European Commission or the competition authority – or a court acting as such – of another EU member state, the court shall be bound by such finding that an infringement has occurred. Thus, the plaintiff does not have to present further evidence as regards the infringement itself. The binding effect, however, only applies to the fact that an infringement has taken place;[14] it does not cover questions of loss and causation. By contrast, in a stand-alone action alleging a breach of antitrust law, the plaintiff must prove the existence of the infringement before the question of damages will be addressed by the court.

Moreover, the ARC provides for certain presumptions that alleviate the burden of proof. For example, the ARC includes a statutory presumption that a single undertaking with a market share of at least one-third holds a dominant market position. Thus, if this market share threshold is met, it is for the defendant to rebut the presumption and prove that it is not market dominant.

Evidence

Under the CCP, the following five forms of evidence, which may be used separately or in combination, are permissible:

- evidence by inspection (section 371 et seq CCP);
- proof by witnesses (section 373 et seq CCP);
- expert evidence (section 402 et seq CCP);
- documentary evidence (section 415 et seq CCP); and
- evidence by interrogation of a party (section 445 et seq CCP).

Compared with common law jurisdictions such as the United States or England and Wales, the German legal system does not provide for a pretrial discovery. The CCP is restrictive as regards the disclosure of documents between the parties; while there are certain possibilities to gain access to documents in the possession of the defendant or third parties, the hurdles for such access are comparatively high.

According to section 142 CCP, the court may direct one of the parties or a third party to produce records or documents as well as any other materials that are in their possession provided that the party asking for the production can identify such document. However, this option is limited to documents or other materials to which one of the parties has made reference.

Moreover, section 422 CCP provides for the right to request the production of a document if the other party is under an obligation to do so pursuant to the stipulations of German civil law. Such obligation does inter alia exist if the party can show a legal interest in inspecting a certain document and if:

- the document was drawn up in his interests;
- the document certifies a legal relationship between himself and another; or
- the document contains negotiations on a legal transaction (section 810 German Civil Code (CC).

In the case of follow-on claims, another often valuable source of evidence can be the file of the competent competition authority. In Germany, under the CCP, an aggrieved person may have the right to gain access to the files of the FCO provided the legitimate interests of the aggrieved person outweigh the legitimate interests of the wrongdoer or third parties in non-disclosure, and that granting access does not imperil the FCO's investigation (section 406e CCP). Such right to inspect the file pursuant to section 406e CCP is only available to qualified German lawyers. It must be noted, however, that the FCO is quite restrictive as regards granting such access to the file. In particular, the FCO regularly denies third-party access to the leniency applications of cartel participants and so far such denial has been upheld by the courts.[15]

However, the Higher Regional Court of Hamm recently issued a decision holding that the request of access to the FCO's files by a civil court follows less restrictive rules than a request by the plaintiff. [16]

In addition, plaintiffs have the right, pursuant to section 242 CC, to ask the defendant to disclose certain items of information required for the estimation of damages, if the plaintiff can prove that his claim is justified on the merits of the case and that he is unable, through no fault of his own, to prove the amount of loss suffered where the defendant can easily provide this information. In practice, such a claim for disclosure will frequently be combined with the actual claim for performance, particularly in antitrust damages actions.

Available remedies

In general, a plaintiff alleging a breach of antitrust law may request that the defendant ends a certain behaviour; or that the defendant has to perform a certain activity (eg, supply the plaintiff); or else seek compensation.

If the plaintiff asks for monetary relief, he could, depending on the circumstances, either claim damages or bring an unjust enrichment action. Such unjust enrichment claim can be made under section 812 CC if the defendant has obtained something as the result of the performance of the claimant without legal grounds. As a general rule, a contract provides the legal ground for a financial transfer. However, if such contract is null and void due to an antitrust violation, the party concerned may ask for repayment.

Damages claims under German civil law are limited to compensatory damages basically comprising the suffered loss including foregone profits. No punitive or exemplary damages are available.

The calculation of the damages suffered by the plaintiff is based on section 249 et seq CC. As a general rule, damage claims are restricted to the compensation of actual loss; in other words, the plaintiff must be put in the (hypothetical) situation he would be in 'but for' the illegal conduct (the counterfactual). Loss suffered includes the actual loss incurred (eg, due to a price increase), as well as the loss of profit (eg, resulting from a reduction in sales (section 252 CC)). According to section 33(3) ARC, the defendant is also liable for interest payments from the date the damage occurred.

In practice, the calculation of damages can be very difficult. Such difficulties are eased under section 287 CPC, which provides for the possibility of the court to estimate the amount of damages if the exact calculation is too difficult or the costs are disproportionate compared to the claimed loss.

Pass-on defence

According to section 33(3) ARC, if the good or service is purchased at an excessive price, damages shall not be excluded on account of the resale of the good or service. However, this provision does not exclude the pass-on defence by a defendant. Rather, the German Federal Supreme Court recently confirmed that the pass-on defence is generally permissible. In its decision of 28 June 2011, the German Federal Supreme Court explicitly clarified that indirect purchasers are entitled to antitrust damages.[17] However, on the flipside of confirming the standing of indirect purchasers, the court allowed the pass-on defence. According to the Federal Supreme Court, the defendant has the right to show that the claimant has successfully passed on its damage (either completely or part of it) to the next market level. This approach is in line with a fundamental principle of German damages law according to which compensation shall only be awarded to recover actual losses.

Limitation periods

Pursuant to section 195 CC, the standard limitation period for bringing a claim is three years. This limitation period commences upon expiry of the year in which the claim arises and in which the claimant becomes aware of the circumstances giving rise to the claim, and of the identity of the defendant, or ought to have become aware of those matters but for his gross negligence (section 199(1) CC).

The limitation period of a claim for damages is suspended if proceedings are initiated by the FCO, a competition authority of one of the German Federal States, the European Commission or the competition authority of another member state of the European Union (section 33(5) ARC).

It must be noted that, even if a damage claim has become statute-barred, the plaintiff may still base a claim on section 852 CC. On the basis of this provision, the plaintiff cannot bring a fully fledged damage claim but he can claim restitution of everything the defendant has obtained at the expense of the plaintiff by way of the illegal conduct.

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.

In order to somewhat attenuate the cost risks involved with bringing private damages claims to court, the German legislator

introduced section 89a 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, upon the party's request, order the obligation of this party to pay the court fees to be assessed on the basis of a part of the volume dispute that is adjusted to its economic situation.

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 such statutory fee, the excess amount must be borne by the winning party itself.

Time frame

The length of time from issuing a claim for damages until a 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. The time frame for an appeal is also usually one to two years. The same applies for a further appeal on question of law to the German Federal Supreme Court.

Outlook

As is illustrated by the significant number of private antitrust 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 still remain a number of open issues that are yet to be either decided by the courts or dealt with by the German legislator.

Notes

1 Bundeskartellamt, Private Kartellrechtsdurchsetzung – Stand, Probleme, Perspektiven: Diskussionspapier für die Sitzung des Arbeitskreises Kartellrecht am 26 September 2005, available at www.bundeskartellamt.de/wDeutsch/download/pdf/Diskussionsbeitraege/05_Proftag.pdf.
2 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16 December 2001, p1.
3 Article 2(1) of the Jurisdiction Regulation.
4 Article 5(3) of the Jurisdiction Regulation.
5 European Court of Justice, decision of 30 November 1976, Case 21/76, ECR [1976] p1735 – *Handelswerkerij GJ Bier BV v Mines de Potasse d'Alsace SA*, para 15.
6 Regulation (EC) No 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31 July 2007, p40.
7 Article 6(3a) of the Rome II Regulation.
8 Article 6(3b) of the Rome II Regulation.
9 German Federal Supreme Court, decision of 28 June 2011, KZR 75/10 – ORWI.
10 European Court of Justice, decision of 20 September 2001, C-453/99 – *Courage Ltd v Bernard Crehan* and *Bernard Crehan v Courage Ltd and Others*, [2001] ECR I-6297.
11 OJ L 110, 1 May 2009, p30.
12 German Federal Supreme Court, decision of 7 April 2009, KZR 42/08.
13 Regional Court of Düsseldorf, decision of 17 December 2013, 37 O 200/09 [Kart] U.
14 In two recent decisions, the Higher Regional Court of Munich has interpreted the concept of binding effect pursuant to section 33(4) ARC restrictively. In particular, the court did not adhere to the approach to market definition taken by the FCO in its fining decision and rather adopted its own market definition that significantly differed from the FCO's approach. Higher Regional Court of Munich, decisions of 21 February 2013, U 5006/11 Kart and U 711/12 – *TV-Werbezeiten*.
15 Higher Regional Court Düsseldorf, decision of 22 August 2012, V-4 Kart 5 + 6/11 (OWI) – *Kaffeeröster*; District Court (Amstgericht) Bonn, decision of 18 January 2012, 51 Gs 53/09 – *Pfleiderer*.
16 Higher Regional Court of Hamm, decision of 26 November 2013, 1 VAs 116/13 – 120/13 and 122/13 – Einsicht in Strafakten.
17 See footnote 9 above.

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Prior to founding the law firm Buntscheck in 2008, Dr Buntscheck headed the German antitrust practice of Weil, Gotshal & Manges LLP (Frankfurt) and worked as an antitrust partner at leading German-based law firm Gleiss Lutz (Stuttgart).

Dr Buntscheck's recent work has included the representation of Evonik Degussa in its private antitrust litigation with SKW Stahl-Metallurgie (alleged calcium-carbide cartel); German TV broadcaster Tele5 in its private antitrust litigation with RTL group and with ProSiebenSat.1 group (anti-competitive rebate schemes); Drachen-Propangas in its cartel litigation before the German Federal Cartel Office and the Higher Regional Court in Düsseldorf (alleged propane gas cartel); and a former director of ThyssenKrupp in the cartel litigation in front of the German Federal Cartel Office (alleged rail cartel), among many other cases.

Dr Buntscheck is acknowledged as a leading expert in antitrust law in Germany by directories such as *Chambers Europe*, *Who's Who Legal: Competition*, *PLC Which Lawyer?* and *JUVE*, among others.

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