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EUROPE, MIDDLE EAST AND AFRICA

ANTITRUST REVIEW 2021

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Preface

Global Competition Review is a leading source of news and insight on competition law, economics, policy and practice, allowing subscribers to stay apprised of the most important developments around the world.

GCR's Europe, Middle East and Africa Antitrust Review 2021 is one of a series of regional reviews that deliver specialist intelligence and research to our readers – general counsel, government agencies and private practitioners – who must navigate the world's increasingly complex competition regimes.

Like its sister reports covering the Americas and the Asia-Pacific region, this book provides an unparalleled annual update from competition enforcers and leading practitioners on key developments in both public enforcement and private litigation. In this edition, Sweden is a new jurisdiction alongside updates from the European Commission (including a new article on the abuse of dominance), Cyprus, Denmark, France, Germany, Greece, Norway, Portugal, Russia, Spain, Switzerland, Turkey, the United Kingdom, Ukraine, COMESA, Angola, Israel, Mauritius and Mozambique.

In preparing this report, Global Competition Review has worked with leading competition lawyers and government officials. Their knowledge and experience – and above all their ability to put law and policy into context – give the report special value. We are grateful to all the contributors and their firms for their time and commitment to the publication.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws during the coming year.

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Germany: Private Antitrust Litigation

Albrecht Bach and Christoph Wolf
Oppenländer Rechtsanwälte

In summary

It is clear why Germany is one of three European jurisdictions in which private antitrust litigation has become a significant factor of competition law enforcement. Significant changes in national competition legislation introduced rules relevant for damage claims, especially a system of disclosure of evidence, and implemented the rules of the European Damages Directive of 2014. According to the German Federal Supreme Court, there is a factual presumption that long-lasting cartels lead to inflated prices and thus to damage to those purchasing the cartelised product. The claimant in principle does not have to prove that the cartel affected a specific transaction. The German rules on pretrial interest, limitation periods and costs are reasonable. The court system offers significant advantages, because cartel damage cases are decided by specialist chambers in a limited number of first instance courts.

Discussion points

- Standard of proof: factual presumption for harm from long-lasting cartels
- New rules on disclosure of evidence
- Direct and indirect plaintiffs
- Binding effect of infringement decisions
- Specialised German courts
- Joint and several liability

Referenced in this article

- German Act against Restraints of Competition (ARC)
- European Damages Directive of 2014
- 9th Amendment to ARC, especially disclosure rules
- Judgments of German Federal Supreme Court on the *rail track* (2018 and 2020) and *gray cement* (2018) cartels
- Judgment of German Federal Supreme Court, 28 June 2011, *ORWI*

Why litigate in Germany?

There are obvious reasons why Germany is one of three European jurisdictions in which private antitrust litigation – particularly private damage claims – has become a significant factor in competition law enforcement. Following significant changes introduced to its national competition legislation in 2005, German courts were building up a body of case law step by step, addressing issues that needed clarification. In 2017, Germany introduced a legislative package, referred to as the 9th Amendment to the German Act against Restraints of Competition (ARC), to implement the rules of the European Damages Directive of 2014[1] in German law. These changes partly confirmed the body of case law that has been built up since 2005. But the package also introduced significant changes to German law, especially a system of disclosure of evidence relevant for damage claims.

Under German law, before the 9th Amendment to the ARC, civil courts were already bound by a national authority's decision establishing an infringement of competition law (provided that this decision has become final and unappealable).[2] In addition, there is, according to the Federal Supreme Court, a factual presumption that at least long-lasting cartels lead to inflated prices and thus to damage sustained by those purchasing the cartelised product.[3] Whereas German law only allows for mere compensation of damages sustained and thus ignores multiple or punitive damages, German law grants pretrial interest as of the moment in which the damage occurred.[4] Although interest payment only compensates for lapse in time, it adds substantial value to damage claims in long-lasting cartels. There are a number of cases in which interest due exceeds the nominal damage amount.

Germany also offers reasonable rules on limitation periods. The typical five-year limitation period will not start prior to the claimant knowing (or reasonably being expected to know) of the infringement and its damage. Even more importantly, limitation periods are suspended during the proceedings of a competition authority, subsequent appeal proceedings and for an additional 12 months. Finally, the German court system continues to offer some significant advantages. Cartel damage cases are decided by specialist chambers in a limited number of first instance courts. Some of these courts have acquired considerable expertise.

With respect to costs, the German system, despite some uncertainties, continues to offer advantages too. Although there is a 'loser pays' rule, compensation of the adversary's fees is limited to statutory attorneys' fees.

1 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5 December 2014, p. 1.

2 Act on Restraints of Competition (ARC), section 33b.

3 Judgment of 11 December 2018, KZR 26/17 and Judgment of 28 January 2020, KZR 24/17.

4 ARC, section 33a(4).

Growing importance of private antitrust litigation

Germany has a long-standing tradition of private antitrust litigation. In the past, these cases predominantly dealt with refusals to supply, challenges to the validity of agreements and discrimination by dominant or near-dominant undertakings. In addition, following liberalisation of the electricity and gas markets, network access litigation had initially been based on antitrust rules. While these more traditional cases continue to be litigated, the landscape changed significantly with the emergence of cartel damage cases; there are currently several hundred cases before the German courts. With respect to the German *rail track* cartel alone, Oppenländer is handling more than 50 court cases. The European *truck* cartel fined by the European Commission is expected to create an even larger wave of lawsuits.

This change in numbers is primarily due to a change in German corporate culture, in which there is a growing awareness that long-lasting cartel infringements typically create damage and thus harm to those purchasing cartelised products or services. As this damage typically reduces profits, it is generally considered that the management of a corporation has a legal duty to evaluate the possibilities to recover damages from those inflicting the harm. In many cases, this evaluation will lead to the conclusion that it is in the company's interest (and in the interests of its shareholders) to seek compensation. This is in sharp contrast to an attitude prevailing perhaps a decade ago, according to which antitrust damage claims should be avoided as the claimant itself could also become subject to antitrust charges. The change in culture is probably best illustrated by Deutsche Bahn AG, the state-owned railway company. Although being itself charged with antitrust infringements, Deutsche Bahn started to enforce cartel damage claims vigorously. A number of large corporations have followed the example of Deutsche Bahn in creating their own in-house departments dealing with cartel damage claims. The result of this development is an increased number of claims, many of which are dealt with in private settlements, although an increasing number of them end up in court.

Damages Directive leads to significant changes

With the 9th Amendment to the ARC, the German legislator introduced a significant number of changes to the substantive and procedural rules governing private antitrust litigation in Germany to implement the Damages Directive. Unlike in other European jurisdictions, implementation of the Directive did not establish a system of private antitrust enforcement but improved an existing system.

Significant changes to procedural rules were introduced to comply with the Directive's provisions on the disclosure of evidence. Previously, there were no specific rules on evidence for private antitrust litigation. Plaintiffs therefore had to rely on a couple of rarely used provisions that, in theory, allow courts to order defendants or third parties to produce specific documents.[5] As the German judicial culture, like in most continental European countries, is rather opposed to disclosure, these rules have been sparsely used to date. Implementation of the Directive with respect to disclosure of evidence will bring about fundamental changes, if not a small revolution. Regarding

5 eg, German Code of Civil Procedure, section 142.

disclosure, the German legislator did not merely copy the approach in article 5 of the Damages Directive. To the surprise of many, the first informal draft opted for a substantive claim to have certain documents disclosed. This follows a similar approach chosen when implementing the Intellectual Property Rights Enforcement Directive into German law. Apparently, this served as a kind of road map to the disclosure rules in the modified ARC. According to the general opinion in legal literature and a judgment of the regional court in Hanover, the new rules on disclosure of evidence are applicable to litigation that has commenced after 26 December 2016, regardless of whether the asserted claims pertain to infringements that ended prior to the 9th Amendment taking effect. However, the Higher Regional Court in Düsseldorf has contested this position, ruling that the new provisions on disclosure are only applicable to claims regarding infringements that took place since the 9th Amendment came into force. We are sceptical whether this position will prevail and expect further disputes regarding the temporal applicability of the standalone disclosure rules in the near future. In any case, the German legislator plans to clarify in its 10th Amendment to the ARC (ARC Digitalisation Act), that the new rules on disclosure are applicable regardless of when the asserted claims arose.

To implement the Damages Directive, the German legislator also introduced changes to substantive rules. This includes rules that presume cartel infringements result in harm and that an overcharge paid by a direct purchaser has been passed on to indirect purchasers under specific circumstances, as well as extensions of limitation periods. With respect to substantive issues, however, private antitrust litigation will be governed by the rules currently in place for quite a long time. As a matter of fact, Germany could serve as an example for the long time span needed to have private damage claim cases decided under new substantive rules. This type of litigation being essentially formed by follow-on cases investigated by the authorities for years, the rules applicable during the time of the infringement will remain, for a long time, those currently in force.

Direct and indirect plaintiffs

For all practical purposes, private damage cases in Germany are brought by direct plaintiffs (ie, those who purchased the cartelised goods or services directly from the cartelists or their competitors). In its landmark case *ORWI*,[6] the German Federal Supreme Court clearly established that under German and European competition law rules, direct purchasers, and all those harmed by the infringement, are entitled to compensation. With respect to substantive rules, it is thus clearly established that indirect purchasers are entitled to bring compensation claims.

For indirect purchases, however, it is extremely difficult to substantiate damage caused by the cartel. The new German rules on disclosure of evidence will enable indirect purchasers at least in theory to access means of evidence available to both the cartelists and direct purchasers. As set out in the Damages Directive, it is presumed that an overcharge paid by a direct purchaser has been passed on to indirect purchasers under specific circumstances.

6 Judgment of 28 June 2011, KZR 75/10.

The issues linked to claims of indirect customers are frequently dealt with in the context of attempts to counter a possible passing-on defence. Similar to the Damages Directive, another aspect of indirect customers being entitled to damages is the ability of cartelists to argue that damage sustained by direct customers had been passed on, wholly or in part, to subsequent levels of the supply chain. Although accepted in principle, many details of a passing-on defence under German law are still unclear. The German legislator introduced an explicit clause on passing-on to implement the Damages Directive, but pointed out that substantive changes in the application of the passing-on defence in court proceedings could not be expected. In the context of indirect claims, we would limit ourselves to pointing out attempts to counter a possible passing-on defence by having damage claims of indirect purchasers assigned to direct purchasers.

There are no restrictions *per se* regarding the assignment of damage claims under German law. Some restrictions apply with respect to assignments to special purpose vehicles, the financial means of which might be regarded as insufficient to cover subsequent cost compensation claims in court proceedings. Other restrictions apply with respect to the German Legal Services Act, which regulates the authorisation to provide out-of-court legal services. A major difficulty with respect to the assignment of damage claims by indirect purchasers to direct purchasers is the need to agree on a ratio for the distribution of proceeds. Claims of indirect purchasers will depend on the degree to which damages have been passed on by the direct purchaser. Direct purchasers are generally reluctant to give their customers too detailed information on calculation and cost structures that might be used to their detriment in subsequent commercial negotiations. This favours distribution ratios applying rules of thumb or determined by a jointly appointed expert after collection of the damages. The assignment mechanism, however, only works in relation to a distinct number of indirect customers. It is most likely no solution in relation to widely disbursed private end-customers. In the absence of collective redress mechanisms, they continue to lack meaningful mechanisms to claim for damages under German law.

‘Binding effect’ of infringement decisions and standard of proof

Under general standards, the burden of proving a competition law infringement and the damage caused by this infringement is on the plaintiff. This burden, however, is alleviated by a number of mechanisms. We already mentioned the statutory provision in section 33b of the ARC, according to which the court shall be bound by a finding of the European Commission or a national European competition authority that an infringement has occurred. Although there is still some debate around the precise reach of this binding effect, it is established that a civil court deciding on a damage claim is bound by a final and unappealable decision that a competition law infringement as described in this decision took place. This necessarily includes the participants in the cartel (or more generally in the infringement), the type of competition law infringement and the facts on which the authority relied to establish the infringement. This binding effect considerably reduces the difficulties of any plaintiff to prove what generally is a secret infringement, the details of which are normally hidden to the outside world. On the other hand, the binding effect increases the need to obtain access to the decision of the relevant authority. The European Commission is obliged to publish a non-confidential version of its fining decisions. The Federal Cartel Office (FCO), according to a rule introduced in 2017, is now

obliged to provide information about the relevant details of every fining decision on its website. We address possible difficulties to assess the FCO's fining decisions in the context of access to evidence below.

The binding effect of decisions by competition authorities is limited to the infringement and does not include damages, even in cases in which the FCO had to estimate the proceeds of the cartel to determine the fines imposed. However, there are several approaches by the German jurisprudence intended to facilitate the plaintiff's burden of proof in cartel damage cases. Until 2018, lower and higher regional courts established *prima facie* evidence that long-lasting cartels lead to increased prices as this is considered to be the very reason why they are concluded. The plaintiff's reliance on this *prima facie* evidence normally enabled a court to hand down a declaratory judgment according to which the defendant cartelist was obliged to compensate damage caused by the cartel to the plaintiff. However, in December 2018, the Federal Supreme Court held in its first ruling on the German *rail track* cartel that the doctrine of *prima facie* evidence does not apply.[7] Instead, the Court adopted a different albeit similar approach to the assessment of evidence, namely the German doctrine of factual presumptions. According to the Court, there is a factual presumption that cartel prices are higher than prices without collusion. This factual presumption gains in persuasion the longer and more sustainable the cartel is. The Higher Regional Court of Düsseldorf criticised the Federal Supreme Court for weakening the presumption contrary to previous rulings by referring only to 'many cases' with cartel proceeds instead of a high probability for cartel inflated prices.[8] In its second ruling on the German *rail track* cartel, the Federal Supreme Court clarified that there is a high probability that cartel prices are higher than prices without collusion.[9] The courts seem to arrive at the same conclusion of anticompetitive harm, regardless of whether they apply the doctrine of *prima facie* evidence or the doctrine of factual presumptions. For example, the Higher Regional Court of Stuttgart applied a factual presumption for anticompetitive harm in a case of information exchange of gross price lists (*truck* cartel).[10]

In any event, the new law introduces a rule of presumption that a cartel causes harm. Hence the ramifications of the Federal Supreme Court judgment in the German *rail track* cartel are confined to cartel claims that arose prior to the new law coming into effect.

Depending on the competition authority's decision, it may be less apparent that a given cartel affected not only many customers but also the purchases made by a given plaintiff. In many cases, decisions by competition authorities will not include a detailed description of transactions or customers affected by the cartel. Competition authorities will typically refer to specific examples but, for their own purposes, are only interested in setting out the infringement, its participants and the duration that will affect the level of the fine. Based on this approach, decisions by competition authorities will normally not set out that a given cartel did affect purchases made by a given plaintiff. Typically, descriptions of the infringement will be of a more generic nature. This will in

7 Judgment of 11 December 2018, KZR 26/11.

8 Judgment of 11 December 2018, KZR 26/11.

9 Judgment of 28 January 2020, KZR 24/17.

10 Judgment of 4 April 2019, 2 U 101/18.

part reflect a generally cautious approach by the authorities. In settlement decisions in particular, it might also be the result of attempts by the addressees to mitigate negative effects by increasing uncertainty for potential plaintiffs.

At least some German courts have helped plaintiffs overcome difficulties linked to generic descriptions of infringement in the authority's decision. According to several judgments of lower and higher regional courts, long-lasting cartel arrangements, including quota and preferred supply arrangements, lead to a *prima facie* evidence for a generally increased price level for these products during the cartel period. This generally increased price level in turn creates *prima facie* evidence for purchases of cartelised products made during the cartel period being affected by cartel-inflated prices. The Federal Supreme Court, in its first ruling on the German *rail track* cartel, held that instead of *prima facie* evidence, the German doctrine of factual presumptions applies. In its second ruling on the *rail track* cartel, it held that, in principle, the claimant does not have to prove that the cartel affected a specific transaction. Regardless of the applicable doctrine, this is indicative of a certain reluctance by German courts to allow cartelists to benefit from more generic descriptions of the infringement to escape liability for claims made by specific customers.

There is another important element that reduces the plaintiff's burden of proof. It is a general feature of German procedural rules that courts are allowed to estimate whether an infringement caused damage and, in particular, to estimate the amount of damages. Under this general provision,[11] the court is under an obligation to estimate at least minimum damages to the extent the person harmed did provide a suitable basis for estimation. Unfortunately, there is currently no clarity as to the minimum requirements for this basis to be provided by the plaintiff. There are indications that a court might estimate cartel damages based on a comparison of average product prices during and after the cartel period.[12] Courts could also rely on econometric evidence introduced by plaintiffs to estimate damages. However, there seems to be a certain reluctance by German courts to venture into estimation without the help of a court-appointed expert. At this stage, we are still lacking decisions on the use of econometric evidence and the standard to be applied by court-appointed experts to allow for an estimation by the court.

Based on general rules, the defendant cartelist also has to substantiate and prove any pass-on of cartel damage he or she wants to argue. There are apparent difficulties for a cartelist to substantiate and, even more, prove a level of pass-on given his or her ignorance with respect to pricing and market conditions on subsequent levels of the supply chain. The German Federal Supreme Court in its *ORWI* judgment was only prepared to impose a secondary burden of proof on the cartelist's customer claiming damages in very limited circumstances. This secondary burden of proof could only be accepted following a case-by-case balancing of all relevant factors. The court seems more inclined to impose a secondary burden of proof to the extent that a plaintiff claiming pass-on is able to substantiate the mechanisms and conditions that made a pass-on likely. However, the Federal Supreme Court is aware of the possibly sensitive nature of information on pricing to

11 German Code of Civil Procedure, section 287. Since 2017, the ARC has explicitly referred to this clause in section 33a(3).

12 eg, the Regional Court of Dortmund, Judgment of 1 April 2004 regarding the *vitamin* cartel.

be forwarded by the cartelist's customer to discharge the secondary burden of substantiation. According to the new rules on disclosure, the cartelist can request the disclosure of evidence necessary to defend himself or herself against damage claims.

Disclosure of evidence

By their very nature, cartels are secret infringements. Cartelists try to disguise the existence of a cartel and typically go to a lot of trouble to hide the detailed mechanisms of its operation. In addition, data that would allow the estimation overcharges created by the cartel are held by the cartelists. It is therefore obvious that those seeking redress either need access to means of evidence in the possession of the cartelists or, at least, access to information obtained by the cartel authorities during their investigation of the cartel. With the 9th Amendment to the ARC, the German legislator introduced rules on the disclosure of evidence necessary to support the plausibility of claims for damages or to defend such claims.

Under section 33(g) of the ARC, anyone in possession of evidence required to establish a potential damage claim – including the defendant and third parties – is obliged to disclose these pieces of evidence upon request of the claimant. This is clearly more than a procedural provision allowing the court to order production of these documents. A procedural approach most likely constitutes the minimum standard under the Damages Directive. It would have also been closer to the traditional approach under section 142 of the German Code of Civil Procedure. The legislator fully intended to deviate from a merely procedural solution. Those harmed by cartels should be able to rely on the disclosure claim prior to the commencement of court proceedings. This, according to the legislator, could facilitate out-of-court settlements. In addition, the substantive claim allows for enforcement by injunctive relief.

Under the German concept, entitlement to disclosure is not limited to those harmed by cartels. In accordance with the Damages Directive, defendants may also seek disclosure of documents in their favour. Unlike the entitlement of those harmed, however, potential cartelists will only be able to claim access to evidence after a damages claim becomes pending (section 33(g) paragraph 2, ARC).

In establishing a strict proportionality test, the German legislator, in principle, followed article 5 of the Damages Directive. Disclosure of documents is therefore excluded to the extent that it is disproportionate considering the legitimate interests of all parties and the third parties concerned. To determine proportionality, the courts have to operate a balancing test.

The German legislation implements the restrictions with respect to evidence included in the file of a competition authority that follow from article 6 of the Damages Directive. The documents blacklisted in article 6 therefore cannot be disclosed pursuant to section 33(g) of the ARC. This particularly applies to leniency statements and settlement submissions. With respect to other documents in the files of competition authorities, the German legislator further restricted the ability to order disclosure in hybrid cases. Claimants will have to wait until proceedings by competition authorities are closed against all parties before a German court can order disclosure of:

- information prepared specifically for the proceedings of the competition authority;
- information the competition authority has drawn up and sent to parties in the course of its proceedings; or
- settlement submissions that have been withdrawn.

In yet another respect, the German legislator goes beyond the Damages Directive and modifies disclosure rules. Pursuant to section 33(g) paragraph 7 of the ARC, those obliged to produce documents are entitled to be reimbursed for reasonable costs associated with disclosure. For now, however, it is entirely unclear what could constitute these reasonable costs and any standards will therefore have to be developed in future jurisprudence.

Among the most hotly debated provisions of the modified ARC was the initial proposal to allow for disclosure by means of injunctive relief. Originally the courts would have been entitled to order disclosure of means of evidence by way of injunctive relief. During the legislative process, this provision was significantly modified and restricted. Pursuant to section 89(b) paragraph 5 of th ARC, injunctive relief will be limited to production of the respective decision of the competition authority establishing the infringement of German competition rules or articles 101 and 102 of the TFEU.

For the proportionality test to be applied when ordering disclosure, the Damages Directive requires consideration of the extent to which the documents to be disclosed contain confidential information and what arrangements are in place for protecting that confidential information. The German legislator translated this requirement almost literally into its own proportionality test. The responsibility for dealing with confidential information and devising suitable means lies with the courts. Pursuant to section 89(b) paragraph 7 of the ARC, the courts will take all measures required to safeguard protection of business secrets and other confidential information.

In intellectual property matters, German courts have developed solutions that, overall, are practicable. They cannot be transferred directly to competition litigation but can be applied accordingly. The court may well order additional confidentiality obligations for external counsel. However, it is not entirely clear whether there are sufficient sanctions to make these confidentiality undertakings work. There is no clear German equivalent to English rules on contempt of court. But the German Federal Supreme Court stated in a patent case that the disclosure of confidential information about the opposing party in a disclosure proceeding by an external counsel could be a criminal offence.[13] It is apparent that the availability of disclosure in Germany will, to a very substantial degree, depend on the ability of its courts to devise procedural mechanisms similar to those developed by English courts. Unfortunately, this development cannot rely on any guidance by the legislator. Under the strict constitutional rules in Germany, it seems questionable whether the mere entitlement to adopt necessary measures to protect confidential information is sufficiently precise to justify restrictions. The legislator is confident that the courts will develop the necessary rules and techniques themselves to make disclosure work.

It remains to be seen to what extent potential plaintiffs will additionally turn to the competition authorities' files to access information in the future. The German legislator restricted access to the FCO's file, but left open the possibility to obtain the fining decision in this way.

13 Decision of 16 November 2009, X ZB 37/08.

Limitation periods

Many of the fining decisions recently handed down by the European Commission or national authorities have concerned long-lasting infringements. In addition, the authorities' own proceedings often took considerable time. Appropriate rules on statutory limitation are thus important to ensure effective redress for those harmed by cartels. The 9th Amendment to the ARC of 2017 extended the limitation periods for antitrust damage claims. The new rules apply to all claims that were not already time-barred when the 9th Amendment came into force.

As briefly mentioned above, the modifications introduced into the ARC in 2005 already introduced a specific suspension mechanism for proceedings by cartel authorities. According to section 33(h)(6) of the ARC, the limitation period for claims for damages is suspended if proceedings are initiated either by the European Commission or a national competition authority. The suspension period now ends one year after the proceedings are terminated, which may include several levels of court appeals. The standard three-year limitation period was extended to five years by the 9th Amendment of 2017. The five-year limitation period starts to run at the end of the year in which the claim arose and the claimant obtained knowledge of the circumstances giving raise to the claim and of the identity of the infringer (or would have obtained that knowledge if he or she had not shown gross negligence), therefore typically does not constitute a major obstacle to bringing successful antitrust damage claims. In many cases, the required level of knowledge will only be obtained once the non-confidential version of a Commission decision has been published or, in a German proceeding, the plaintiff obtained detailed knowledge about the cartel from FCO publications or access to the fining decision.

The situation is more complex with respect to the maximum limitation period of 10 years. This limitation period starts regardless of knowledge or grossly negligent lack of knowledge on the day the claim has arisen. Particularly in cases of long-lasting cartels and relatively short investigation periods, possible claimants – until the 9th Amendment to the ARC – ran the risk of at least part of the oldest claims becoming time-barred before they were able to enter into meaningful settlement talks or bring court proceedings. Although the suspension rules equally apply to this maximum limitation period, it remains questionable to what extent this period was compatible with the *effet utile* requirements under European Union law. Since the 9th Amendment of 2017, this limitation period does not start before the infringement on which the claim is based has ceased. This modification significantly reduces the risk of claims becoming time-barred before there was any possibility to assert them.

Typically, potential claimants will try to avoid risks of statutory limitation by entering into tolling agreements, in which the infringing party waives the right to invoke statutory limitation of claims.

Pretrial interest

As mentioned above, German law expressly provides for interest to be paid as from the occurrence of the damage. This considerably increases the value of claims, particularly for long-lasting cartels. The Federal Supreme Court, in relation to the German *cement* cartel, held that

there are two periods with different interest rates.[14] For damage that occurred after the entry into force of section 33(3) of the ARC in 2005 (now section 33(a)(4), ARC), the statutory interest rate under section 288(1) of the German Civil Code has to be applied. This interest rate amounts to five percentage points above the basic rate of interest. For damage that occurred prior to the entry into force of section 33(3) of the ARC in 2005, the statutory interest rate under section 849 of the German Civil Code has to be applied. This interest rate is 4 per cent. It is undisputed that, as with any other payment claim, damage claims for cartel infringements carry trial interest as of the date of pendency.

Courts and procedures

There are courts specifically designated to hear private antitrust litigation, typically between one and three in each of the German states. Each court will typically designate one of its chambers to hear first instance cartel damage claims. These chambers being specifically designated does not automatically mean that they are in a similar way experienced to deal with cartel damage claims or cartel matters in general. A couple of courts turned out to be better versed in antitrust matters and less impressed by the bulky files of cartel damage cases. Others acquired a reputation for letting cases drag on for years.

Unfortunately there is still some uncertainty as to the local jurisdiction of courts in antitrust cases. Cases can easily be brought in the courts of the defendant's domicile and in the courts of the place where the harmful event occurred, which will typically include the place where the purchaser of the cartelised goods is seated. However, German courts are hesitant to consider that damage claims against participants in a nationwide cartel can be brought before any German court based on the harmful effects also occurring in the place of that court. In addition, there is no clear equivalent in German procedural law to article 6 No. 1 of the Brussels Regulation.[15] In cases involving only German defendants, the fact that a defendant is jointly and severally liable for a cartel infringement does not allow him or her to be sued in the courts of the place where another jointly and severally liable cartelist is domiciled. It is possible, however, to have a court designated to be competent to hear a case involving defendants domiciled in various places for which there is no single competent court.

Owing to the joint and several liability of cartelists under German law, any cartel damage claim will most likely lead to court proceedings with either several defendants held jointly and severally liable or cartelists receiving third-party notices, and the court is likely to intervene in support of the defendant cartelist.

These third-party interventions have created additional cost risks for the claimant. According to a strongly criticised judgment of the Higher Regional Court of Düsseldorf,[16] each third-party intervenor prevailing in the litigation is entitled to have his or her legal costs compensated based

14 Judgment of 12 June 2018, KZR 56/16.

15 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 L012, 16/01/2001 pp. 1 to 23 as amended subsequently.

16 OLG Düsseldorf, Judgment of 18 February 2015, VI-U (Kart) 3/14.

on the full amount in dispute. Other courts considered this result to be inappropriate. The German legislator provided certainty and expressly stipulated that the sum of amounts in dispute for all intervenors shall not exceed the full amount in dispute.

Cartel damage claims before German courts tend to be complex and lengthy cases. There is a growing tendency by first instance courts to decide separately on the general entitlement to damages and leave the question of quantum to subsequent proceedings. The Federal Supreme Court, however, held in its second ruling on the German *rail track* cartel that this must not lead to an unjustified delay and increase in the costs of the proceedings.

Joint and several liability

Under general German tort law, cartelists are regarded as joint tortfeasors and thus jointly and severally liable. Implementation of the Damages Directive required the German legislator to limit the liability of immunity applicants for infringements following the entry into force of this legislation. A similar rule was introduced for small and medium-sized enterprises.

Joint and several liability leads to possible compensation claims between cartelists. In principle, a tortfeasor compensating a victim has a compensation claim against other joint tortfeasors. Since 2017, this has been explicitly provided for in the ARC. However, there are a couple of problems attached to these claims. First, before the 9th Amendment to the ARC of 2017, these compensation claims were likely to be time-barred in many cases as the cartelists have knowledge of the infringement and the three-year standard limitation period thus starts running immediately. The 9th Amendment introduced a new clause, according to which the limitation period of the compensation claim between the cartelists does not start to run before the victim that asserted the respective damage claim is compensated. However, it is likely that this new clause only applies to claims that arose after the 9th Amendment came into force. The suspension rules in section 33h(6) of the ARC do not apply to these compensation claims.

Furthermore, there is considerable uncertainty as to the respective shares of liability to be applied to the compensation claims. Section 426(1) of the German Civil Code provides for equal portions of all debtors 'unless otherwise determined'. Since the 9th Amendment to the ARC contains a clause according to which the proportions shall be determined according to the share of responsibility for the harm caused,[17] these shares are far from easy to determine. In many cases, it would seem appropriate to grant contribution claims based on the respective supply shares, but this has not been established in German jurisprudence.

17 ARC, section 33d(2).

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