**Coming of Age: Private Enforcement in Germany**

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Arbitration; Civil evidence; Damages; EU law; Germany; Passing on; Private enforcement

**Introduction: Follow-on Claims in Europe**

In today’s world, private enforcement of competition law is dominated by claims for damages resulting from the defendants’ participation in a hardcore cartel. These follow-on claims are invariably based on a decision of the European Commission or a national competition authority which has sanctioned the cartel; this decision subsequently serves as the basis for establishing the defendants’ liability.

**Favored Jurisdictions**

Litigation over such claims takes place in almost all jurisdictions in which the respective cartel was active. Where the cartel spans several EU countries, the plaintiff usually has the choice between various jurisdictions in which to file his claim. Early on, the UK, the Netherlands and Germany established themselves as those jurisdictions where a disproportionate number of lawsuits are filed.

In fact, a considerable number of German companies have brought suits in the UK while other German claimants prefer the Netherlands as forum. Factors tipping the balance in favour of the UK traditionally were the availability of disclosure, the outstanding reputation of the British legal system and the widespread knowledge of the English language among members of the corporate and legal community. These advantages seemed to outweigh the high costs of litigating in the UK; in addition, until a few years ago the UK was the only jurisdiction in the EU where litigation finance was readily available to claimants.

**Effects of Brexit**

Recently the uncertainties surrounding the outcome of Brexit have also entered into the equation: under the Draft EU Withdrawal Agreement judgments of UK courts would benefit from the (Recast) Brussels I Regulation for all law suits that are filed prior to the end of the transitory period (to last until the end of 2020), regardless of when the judgment is rendered. However, a no-deal Brexit has been a realistic scenario for some time and is a realistic scenario whose likelihood has been increasing over time. In this case there is great uncertainty as to the eventual regimes concerning jurisdiction and choice of law that will apply post-Brexit.

In light of this fact, the appetite of German claimants for litigation in the UK seems to have somewhat diminished: almost all German claimants in the truck cartel have filed suit in Germany. In the air cargo cartel, which has fostered many lawsuits in the UK, a large group of claimants led by Deutsche Bahn, has decided to sue in Germany.

**Cartels Based on Decisions by the German Federal Cartel Office**

As regards cartels sanctioned by the German Federal Cartel Office, litigation is usually limited to Germany: an example is the sugar cartel where a number of German courts are dealing with claims brought by purchasers of sugar. And the cartel among suppliers of railroad track superstructure (rails, switches and sleepers) directed at local and regional public transport companies is currently generating a large number of judgments of German courts.

As a result, there is today a growing body of jurisprudence from German courts. With an emphasis on private follow-on claims for damages this article will summarise the situation in Germany with respect to private enforcement of competition law as it presents itself during the first half of 2019.

**Implementation of the Directive**

The Damages Directive 2014/104/EU which had been due to be implemented by Member States no later than 26 December 2016 was finally implemented by Germany on 1 June 2017 by way of the 9th Amendment to the Act against Restraints of Competition (ARC). While this amendment included numerous additional revisions to the law, the transposition into German law of the

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4 Commission Decision (readopted) of 17 March 2017 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (AT.39258 – Airfreight) [2017] OJ C108/14. The initial Commission Decision of 9 November 2010 was annulled by the General Court vis-à-vis all plaintiffs on 16 December 2015.
5 This law suit, however, was filed in 2014, well before the threat of Brexit came onto the radar screen.
6 Fines totalling €280 million against the three major German manufacturers of sugar, Decision by the German Federal Cartel Office of 18 February 2014, see press release of the same day (no case number or case report publicly available).
7 See press release of 23 July 2013, cases B 12-16/12 and B 12-19/12, to be found (in English) on the website of the German Federal Cartel Office.
8 For a comprehensive summary of developments in 2018 see Andreas Weitbrecht, Neue Zeitschrift für Kartellrecht 2019, 70.
Directive was clearly the most important feature. The delay in implementation of approximately six months so far appears not to have caused major issues in practice.

In line with art.22 of the Directive, substantive provisions of the law were not made applicable to cartels that ended before 27 December 2016, while procedural norms were made applicable for lawsuits filed after 26 December 2016. Special intertemporal rules apply to limitation periods so that limitation periods that had run prior to 27 December 2016 would not be revived.

The Claim for Damages

The concept according to which breach of a statutory duty will trigger a right to damages against the tortfeasor, provided the statute that has been infringed was enacted to benefit the injured party, has long been and continues to be part of German law obligations. And from the enactment of the ARC in 1958 a specific statutory provision had provided for damages in the case of the infringement of substantive norms of the ARC. However, for many years German courts took the view that infringing the prohibition against hardcore cartels would expose the cartel participants exclusively to damage claims from companies that were excluded from the cartel. Therefore, for many years there was no right of action for customers or consumers harmed by a hardcore cartel.

After the judgment of the Court of Justice in Courage and Crehan and under the regime of Regulation 1/2003, this position was no longer tenable and the seventh Amendment to the ARC, which came into force on 1 July 2005, considerably strengthened the position of private claimants. As the substantive provisions implementing the Directive are not yet applicable to claims based on cartels that ended prior to 27 December 2016, currently claims are still based on §33(3) of the ARC 2005 and in some cases on the predecessors of this provision.

Prima Facie Evidence

Given that the (rebuttable) presumption of the Directive and its implementation in German law, according to which a cartel (as defined in art.2(14) of the Directive) creates damage will only apply to claims that arose after 26 December 2016, almost all German courts have instead relied on the concept of prima facie evidence; they have used this concept in two distinct respects:

- Purchase affected by cartel.
- Existence of overcharge.

Whether the price at which the claimant purchased certain goods was affected by the cartel is determined on the basis of prima facie evidence: where these purchases in terms of products, geographic area and time fall into the areas in which the cartel was implemented, there is prima evidence that the purchase at issue was affected by the cartel.

A corollary application of the prima facie evidence concept assumes that the price at which the cartelised good was bought was inflated due to the effect of the cartel (overcharge).

To date hardly any defendant has been able to successfully attack the prima facie evidence of liability in principle emanating from the defendant’s participation in a hardcore cartel.

However, in a recent judgment the Federal Supreme Court (Bundesgerichtshof) has severely criticised this approach. In this case the defendant had argued and offered evidence that the particular purchases at issue were not affected by the cartel; this argument found some support in the binding decision of the German Federal Cartel Office according to which the cartel had not been implemented uniformly and had been practiced with varying intensity as to time and region. In this situation the Federal Supreme Court reversed the judgment of the Higher Regional Court in Karlsruhe and sent the case back to that court. The ultimate effects of this judgment on future case law are currently not clear.

Interlocutory Judgments on Liability in Favour of Plaintiff

On the basis of the prima facie evidence and without any trial, so far almost all German courts dealing with follow-on claims have rendered interlocutory judgments on liability in favour of the claimant. These judgments leave the difficult question of quantum for a later stage; they are subject to the usual appeal procedures. Where defendants have not settled these claims following the interlocutory judgment in favour of the plaintiff, they

10 §186(3) first sentence of the ARC. An English language translation of the ARC can be found at www.gesetze-im-internet.de/englisch_gwb [Accessed 12 April 2019].
11 §186(4) of the ARC.
12 §186(3) sentences 2 and 3 of the ARC.
13 §823(2) of the Civil Code.
18 See press release of 23 July 2013, cases B 12–16/12 and B 12–19/12, to be found (in English) on the website of the German Federal Cartel Office.
have invariably appealed. The Higher Regional Courts (Oberlandesgerichte) almost uniformly have affirmed these interim judgements.

**Indirect Purchasers**

There is so far very sparse practical experience with claims by indirect purchasers. Whether this is due to the fact that the presumption of art.14(2) of the Directive in favour of indirect purchasers, according to which an overcharge was passed on to the downstream customer, does not apply to claims that arose before 27 December 2016, is not clear. It seems at any rate likely that the practical difficulties of bringing such a claim and the comparatively lower amount of potential recovery play a significant role.

**Quantum of Damages**

Article 12(5) of the Directive requires Member States to allow courts to estimate the amount of damages and German law, in s.287 of the Code of Civil Procedure, has always allowed courts to estimate the amount of damage where the exact amount of damages is impossible to ascertain. However, there is so far no single judgment in recent years awarding a specific amount as compensation for the overcharge resulting from the operation of the cartel. This is due to the fact that the interim judgements on the merits, rendered by the regional courts (Landgerichte), are open to appeal; where defendants did not settle the case following such judgment, they invariably appealed and most of these appeals have not yet run their course.

**Liquidated Damages**

German municipalities and companies offering a public service such as public transport routinely require suppliers to agree to pay liquidated damages of between 5 and 15 per cent of the purchase price in case the purchase is influenced by anti-competitive practices. Where the anti-competitive practice consists of participation in a hardcore cartel, German courts have tended to consider these agreements as valid up to a percentage of 15 per cent of the purchase price, provided that it remains open to the other party to prove that the actual damage was lower. In addition, the claimant carries the burden of proving that the purchase price was indeed affected by the cartel.

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21 Where indirect customers have bought goods in which the cartelised good constituted an input, their total purchases of cartelised goods will usually have involved much lower amounts than the purchases of the direct customer which sells not only to one but to a large number of downstream customers.


23 Article 14(2) of the Directive.


26 E.g. Landgericht Hannover, judgment of 18 December 2017 – 18 O 8/17, Neue Zeitschrift für Kartellrecht 2018, 100.

• **Passing-on by freight forwarders.**

In the trucks cartel, the Landgericht Dortmund has ruled that a passing-on from the freight forwarders to their customers would not qualify under the existing jurisprudence from the Federal Supreme Court and therefore could not be considered relevant as a matter of law as the freight forwarders use the truck to render a service rather than selling it onward or using it as input to make a new product.\(^{27}\) Whether this line of reasoning will survive is questionable, since as a matter of economics it makes no difference whether the direct purchaser uses the cartelised product to produce a new product or whether she uses it to render a service: in both instances the economic reality that an input cost is cartelised is the same.

**Civil Liability Within a Corporate Group**

Under EU law liability for infringements of arts 101 and 102 TFEU attaches to the “undertaking”. This term has consistently been interpreted to refer not to a particular legal entity such as a corporation but to the economic entity, in particular to a group of companies that is run as a single enterprise, with functions distributed among various subsidiaries.\(^{28}\) As a consequence, the Commission consistently addresses its fining decisions not only to the particular subsidiary within which the infringement has occurred but to the parent company of the corporate group.

Many Member States without further ado extend this concept to the issue of civil liability; as a result, the parent company is also liable for civil damage claims resulting from infringements of art.101 TFEU committed in a subsidiary. In Germany it has been argued that such a result would constitute a piercing-of-the-corporate-veil, which is permitted under German law only under very limited circumstances not present here.\(^{29}\) The German legislator, when implementing the Directive, bowing to pressure from German industry, left the issue open.

The Finnish asphalt case\(^ {30}\) technically raised the issue of successor liability which is somewhat different from the question of which legal entity within a corporate group is liable for compensation. However, the Court’s reasoning went well beyond the specifics of the case and made it abundantly clear that the determination of the entity which is required to provide compensation for damage caused by an infringement of art.101 TFEU is directly governed by EU law rather than national law. As a result, German law will have little choice but to fall in line with the rest of Member States.

**Payment of Interest**

In light of the long duration of cartels and given the subsequent duration of proceedings of the competition authority and possible appeals, the awarding of interest is of high commercial relevance. German law in general fixes the interest due by way of statute rather than leaving it to the discretion of the court. For infringements of competition law that occurred after 1 July 2005 interest of 5 per cent over the base rate of the German Federal Reserve Bank\(^ {31}\) is due. As this interest is calculated from the time of the infringement, it is highly relevant for the ultimate recovery of the claimant.

**Disclosure**

While discovery (US) and disclosure of documents (England and Wales, Ireland) have long been part of common law jurisdictions, continental legal orders traditionally provide very limited means for a plaintiff to gather information necessary and helpful to bolster and prove his claim.

**The Directive**

The Directive in arts 5–8 requires Member States to introduce a system which has clearly taken its inspiration from the Common Law while at the same time ensuring that leniency statements and settlement submissions are immune from disclosure. This system benefits not only claimants but defendants as well as it enables them to gather information concerning the passing-on defense. Where disclosure is not voluntary, the decision by the court whether to order disclosure is to be informed by the general principle of proportionality and the factors enumerated in art.5(3) of the Directive.

**Implementation in the ARC**

Disclosure of information among the parties under the supervision of a judge is something that is not part of the German rules of civil procedure and in fact it runs against the philosophy underlying civil suits in Germany, according to which it is incumbent on the parties to bring forward evidence in their hands and for the judge to decide on that basis. §142 of the Code of Civil Procedure, which empowers the court to order a party to produce evidence, is rarely if ever used.


\(^{28}\) Alco Nobel v Commission (C-97/08 P) EU:C:2009:536.

\(^{29}\) Stefan Thomas and Sarah Legner, Neue Zeitschrift für Kartellrecht 2016, 155.

\(^{30}\) Skanska Industrial Solutions and Others (C-724/17) EU:C:2019:204. See the opinion of AG Wahl of 6 February 2019 in Skanska Industrial Solutions and Others (C-724/17) EU:C:2019:100.

\(^{31}\) §33a(4) of the ARC in connection with §§288 and 289 of the Civil Code. The base rate currently stands at -8 per cent p.a.
Against this background, Germany decided to implement arts 5–8 of the Directive not by setting down rules of civil procedure but by giving each party a claim, considered to be grounded in substantive law, against the other party to produce evidence necessary and helpful in litigation over damage claims. 33

**Higher Regional Court of Düsseldorf: Not to be Applied Any Time Soon**

The reaction by German judges to this innovation could not have been more hostile. To date, no case is known where disclosure of documents has been ordered by a German court on the basis of the new law. The Higher Regional Court in Düsseldorf, one of the most influential courts in Germany in the area of competition law, went as far as deciding that as a matter of intertemporal law §33g ARC will not apply to cartels that took place before 27 December 2016, when the Directive had to be implemented in national law. 34 Clearly, all cartels currently and in the near future being litigated in the German courts (and in courts of other countries for that matter) have been ended well before that date.

The reasoning of the Oberlandesgericht Düsseldorf flies in the face of the express pronouncement from the parliamentary committee which prepared the final draft of the law. 35 The decision is likely to determine the practice of German courts for the foreseeable future since under the particular procedural setting in which it arose, the decision was not open to appeal.

**Procedure**

**Jurisdiction**

International jurisdiction in Germany is of course governed by the Recast Brussels I Regulation. With respect to defendants domiciled outside the EU by the rules of the Code of Civil Procedure that relate to venue are used by analogy to determine international jurisdiction.

**Proliferation of Venues**

Contrary to the situation in the UK, where the CAT is competent to decide all cases arising in the UK and where the High Court in London will hear all cases arising from England and Wales, in Germany a huge number of courts are competent to hear cases at a venue where one of the defendants is domiciled or where the damage occurred. Even at the appellate level there are more than 20 courts that will deal with appeals. It is only at the level of the Federal Court of Justice that uniform jurisprudence can be formed.

**Expert Evidence**

The ultimate outcome of follow-on actions for damages resulting from violations of competition law largely depends on economic estimates of the price that would have been charged absent the cartel. Whereas English judges will engage in extensive discussions with the economic experts of the parties, 36 German courts take a vastly different approach: when faced with differing estimates from party-appointed experts (as is the rule in the case of damage assessment in competition cases) German courts will commission their own expert and are likely to be most comfortable following the court-appointed expert in the end. How exactly this practice will play out in cases of damage claims against members of a hardcore cartel remains to be seen as there is so far very little practice by German courts, simply because the cases are not sufficiently advanced.

**Collective Redress**

While the UK has introduced a form of opt-out collective suit, the German government has always been a staunch opponent to any sort of opt-out mechanism; and indeed the fundamental flaw of all of these procedures lies in the fact that the damages awarded to the class of plaintiffs cannot be distributed to the members of the class because the identity of members remains unknown.

**Legislation: Collective Opt-in Proceedings Leading to a Declaratory Judgment**

In response to the Dieselgate matter in which Volkswagen is the primary but not the only target, the German legislature passed a law which entered into force just in time to enable buyers of cars which contained the “defeat device” to opt into a collective action in time to toll the limitation period for claims against Volkswagen and Audi. 37 This proceeding however will at least lead to a declaratory judgment, pronouncing that the defendant’s practice infringed certain norms; it will then still be for the individual claimant to seek payment of damages from the defendant.

In the competition area, this law is largely considered to be without effect since the fact of an infringement on the part of the defendant has already been conclusively established by the decision of the competition authority.

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33 §33g of the ARC. The applicable procedural rules are to be found in §§89b–89d ARC.
35 Final report by the Committee on Economics and Energy, Bundestags-Drucksache 18/11446, p.32.
36 The appeal from judgments of the Regional Courts (Landgerichte) will be heard by the Higher Regional Courts (Oberlandesgerichte).
37 A practice that is now referred to as “hot-tubbing”.
38 Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage of 12 July 2018, BGBl I 1151.
whose decision is binding on the court. A declaratory judgment would therefore not significantly advance the claimants’ case.

**Bundling of Claims**

While in other jurisdictions including the UK the bundling of claims by various claimants is often accomplished by joint representation of all claimants by a single law firm on the basis of powers of attorney, this model becomes unwieldy where a large number of claims are being consolidated in a single lawsuit. In Germany the majority of bundling of claims occurs on the level of substantive law by way of assignment of the claims from the claimholder to a procedural special purpose vehicle (SPV). In this case only the SPV, usually supported by a litigation funder, will act as plaintiff in the proceeding which has certain practical advantages in reducing paperwork, handling of briefs, etc. Nevertheless, as a result of third-party notices on the defense side, there will usually be a multitude of parties.

From the beginning, German courts have shown considerable hostility towards this model of bundling. They have decided that the contracts of assignment of claims to the SPV were null and void, citing the lack of a permit to conduct legal business on the part of the SPV. In addition, they continue to require the SPV to be fully funded from the beginning of the lawsuit in order to be able to satisfy the awards of costs to all defendants and third-party intervenors for all instances. Thus, the Federal Supreme Court in the case of a totally negative outcome. The companies organising the bundling, in particular Cartel Damage Claims and MyRight, have responded by adapting their financing (usually through litigation funders) to these requirements.

Most recently, defendants have opened a new avenue of arguments, questioning whether the permits under the Rechtsdienstleistungsgesetz (law pertaining to the rendering of legal services), which the SPVs have obtained, are sufficient to cover the activities carried out by the SPVs. This battle is currently being fought very hard by both sides, with numerous legal opinions and articles in the legal press advocating opposing views. The issue is not limited to the bundling of claims for violations of competition law; it is equally relevant where claims by purchasers of Diesel cars containing a “defeat device” are being bundled by SPVs, especially by MyRight.

None of these lawsuits that have recently been filed in Germany using this model have advanced very far. While many procedural issues can be conveniently disposed of with effect for all bundled claims, as regards the substance of the individual claims the assignment of claims no longer provides practical advantages, since each individual claim will require a separate analysis as to the overcharge, if any, resulting from the cartel.

**Arbitration**

Whether an arbitration clause contained in a purchase contract for the cartelised good will include claims for damages based on the defendant’s participation in a hardcore cartel is a question that comes up rather frequently. Where—as is customary—the claimant files suit in the state court not only against his or her supplier but also against other participants in the cartel, the defendant who finds an arbitration clause in the contract with plaintiff will not always invoke the arbitration clause as a procedural defense since having the case referred to arbitration will complicate his own position vis-à-vis the other defendants on whom he cannot serve a third-party notice in the arbitration proceeding, the other defendants not being bound by the arbitration clause.

In a relatively rare instance in which the reach of the arbitration clause became relevant, the District Court of Dortmund considered the arbitration clause to extend to the tortious damage claim and consequently dismissed the action filed in state court. The court took into account the established arbitration-friendly tendency of German courts when it comes to interpreting the reach of an arbitration clause. Ultimately decisive was the fact that there is a concurrent contractual claim for damages based on §280 of the Civil Code as the defendant’s participation in the cartel constitutes a breach of contract. In this case the arbitration clause will include the claim sounding in tort, regardless of whether the contractual claim has been pleaded by the plaintiff or not.

**Conclusion and Outlook**

To date German courts have shown themselves to be rather claimant-friendly in rendering interlocutory judgments on the merits in favour of plaintiffs, while preserving the question of quantum for a later day. The hostility towards the passing-on defense likewise is a factor that cuts in favour of claimants. How German courts will ultimately deal with the crucial issue of assessing the amount of damages will remain an open question for some time to come. With thousands of cases currently pending, German courts in the years to come will have ample opportunities to shape the German law with respect to private follow-on claims.

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40 For a comprehensive overview see Astrid Statler, Wirtschaft und Wettbewerb 2018, 189.
41 Landgericht Dortmund, judgment of 13 Sept. 2017, 8 O 30/16 [Kurt], Wirtschaft und Wettbewerb 2017, 621. The judgment became final when following settlement between the parties the appeal was withdrawn. For a commentary see also Andreas Weinbrecht, [2018] German Arbitration Journal 159.
42 For a similar approach under English law see Microsoft Mobile Oy (Ltd) and Sony Europe [2017] EWHC 374 (Ch); [2018] 1 All E.R. (Comm) 419.