
THE PRIVATE
COMPETITION
ENFORCEMENT
REVIEW

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Chapter 6

GERMANY

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I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY IN GERMANY

The basis for private cartel enforcement in Germany is the Act against Restraints of Competition ('ARC').¹ Currently the ARC is enforced primarily by the Bundeskartellamt (Federal Cartel Office, 'FCO'). However, the number of civil proceedings related to antitrust cases, especially cartel cases, has increased in recent years. Also, the number of cases based on the abuse of a dominant position, especially refusal-to-supply cases, has been relatively high for a number of years. In 2005, the German legislature encouraged the practice of private competition enforcement by a seventh amendment of the ARC.

The changes to the ARC came into effect on 1 July 2005 after a lengthy debate of more than two years. Before this it was very difficult for customers of cartel members to sue their suppliers before the German courts successfully. Therefore, the German legislature introduced the new rules to enforce private litigation, especially in cartel cases, to protect competition on the markets and as an additional means of compensating losses suffered as a consequence of the cartel conduct besides the administrative proceedings by the FCO.

The vitamin cartel cases in 2003/2004² (which took place before the coming into effect of the seventh amendment of the ARC) and the ongoing cement cartel case – claims

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1 For a complete English version of the ARC, see: www.bundeskartellamt.de/wEnglisch/download/pdf/06_GWB_7__Novelle_e.pdf.

2 In favour of the defendants: LG Mannheim, judgment of July 11, 2003 (7 O 326/02), GRUR 2004, 182, 184; confirmed by OLG Karlsruhe, judgment of January 28, 2004 (6 U 183/03), WuW DE-R 1229, 1232; LG Mainz, judgment of January 15, 2004 (12 KH O 56/02), not published; in favour of the claimant: LG Dortmund, judgment of 1 April 2004 (13 O 55/02), WuW DE-R 1352, 1354.

enforced by Cartel Damage Claims Holding SA (“CDC”) – are prominent examples of the increase of private competition enforcement. In the cement case, CDC has brought an action for damages of at least €114 million against six cement producers before the Regional Court of Dusseldorf.³ Also, CDC has announced that it will also claim for damages against the seven members of the hydrogen peroxide cartel⁴ after joining the claims of 20 paper manufacturers and pulp mills. CDC reportedly has a preference for filing with a German court; however, as the effects of the cartel were widespread over Europe, in principle it can choose where to sue the cartel members.

II GENERAL DESCRIPTION OF THE GERMAN LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

In Germany, private competition actions can be brought before the courts seeking an injunction, removal of the infringement or damages. These claims can be based on cartel infringements or abusive behaviour by dominant (or market-strong) undertakings under either German cartel law (in particular, Sections 1 and 19 of the ARC) or EC competition law (Articles 81 and 82 of the EC Treaty). The legal basis for private competition enforcement is Sections 33 *et seq.* of the ARC.

Section 33(1) of the ARC provides that whoever infringes a provision of the ARC, Article 81 or 82 of the EC Treaty, or a decision taken by the cartel authority shall be obliged to compensate the affected person and, where there is a chance of the conduct reoccurring, to refrain from so doing. Therefore, a claim for an injunction will already exist if an infringement is foreseeable. Especially in cases of refusals to supply based on allegations of an abuse of a dominant⁵ or market-strong⁶ position, it is common practice in Germany to seek a preliminary injunction to prevent such behaviour.

Section 33(3) of the ARC further provides that whoever intentionally or negligently commits an infringement of competition law shall be liable for the damages arising therefrom. Therefore, the assessment of damages pursuant to Section 287 of the German Code of Civil Procedure (“ZPO”) may take into account, in particular, the proportion of the profit which the infringing party has derived from the infringement.

In April 2008, the European Commission published its White Paper on damages actions for breach of the EC antitrust rules.⁷ The White Paper proposed several measures to facilitate private competition enforcement as, in the Commission’s opinion, damages actions for infringement of EC and national competition law have been extremely limited in the majority of Member States. However, most of the measures proposed by the Commission are in principle already available in German law, including:

3 In May 2008, the Higher Regional Court in Dusseldorf ruled that the bundled claim was admissible, allowing proceedings on the substance of the case to proceed; this, however, was not a judgment about the legality of the claims bundling model as such.

4 See European Commission, Press Release of May 3, 2006, IP/06/560.

5 ARC, Sections 19 and 20(1).

6 ARC, Section 20(2).

7 COM (2008) 165.

- a* the general ability of associations for the promotion of commercial or independent professional interests with legal capacity taking legal action;⁸
- b* a provision regarding passing-on;⁹
- c* the requirement that the infringing party pay interest on its financial obligations from the occurrence of the damage;¹⁰
- d* the binding effect of final decisions by the European Commission, the FCO or any other national competition authority of a Member State;¹¹
- e* the suspension of the limitation period where proceedings are initiated by the FCO for infringement within the meaning of Section 33(1) of the ARC, or by the European Commission or a national competition authority of another Member State for infringement of Article 81 or 82 of the EC Treaty.¹²

The limitation period of three years for damages actions pursuant to Section 33(3) of the ARC is consistent with Sections 195 and 199 of the German Civil Code ('BGB'). Pursuant to Section 33(5) of the ARC and Section 204(2) of the BGB, the suspension of the limitation period due to current investigations by the European Commission or a national competition authority ends six months after the final adjudication. However, if more than one competition authority has initiated such proceedings, the suspension might endure until all of the authorities have finished their investigations.

III EXTRATERRITORIALITY

The enforcement of an antitrust suit in accordance with German law requires the applicability of the ARC, which, pursuant to Section 130(2), is applicable to all restraints of competition having an effect within Germany, even if they take place outside Germany ('effects doctrine').

However, Section 130(2) of the ARC is only one-sided: it regulates whether and under which conditions German antitrust law is applicable, but does not dictate whether foreign antitrust law has to be adopted.¹³

The term 'restraints of competition' in Section 130(2) of the ARC sums up the restraints of competition regulated in the relevant ARC provisions. To interpret the term 'domestic effect', the protective purpose of the relevant provision of the ARC to be applied in each case must be considered.¹⁴

8 ARC, Section 33(2).

9 ARC, Section 33(3), sentence 2.

10 ARC, Section 33(3), sentence 4.

11 ARC, Section 33(4).

12 ARC, Section 33(5).

13 Loewenheim, Meessen and Riesenkampff, *Kartellrecht Kommentar*, Section 130, Rn.40

14 Federal Supreme Court (BGH) decision of 12 July 1973, WuW/E *Ölfeldrohre*, Section 98(2) of the old ARC; see also FCO leaflet on domestic effects (January 1999): www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_englisch/99_Inlandsauswirkung_e.pdf.

From 1 January 2009, Article 6(3) of Regulation (EC) No. 864/2007 (‘the Rome II Regulation’) regulates the applicability of German cartel law in cases of private enforcement. This provision will be valid in all EU Member States, and provides that the applicable law depends on the geographic effects of the infringement (i.e., the Member States concerned). The ARC will also be applicable if the market is, or is likely to be, affected in more than one Member State, including Germany, and the defendant has its seat in Germany. The same applies in situations where there are several defendants, provided that the restriction of competition on which the claim against each defendant is based directly and substantially affects the market in Germany.

In practice, the coming into force of the Rome II Regulation should not lead to a difference in the applicability of German cartel law for private enforcement matters, compared with the situation under Section 130(2) of the ARC. The criterion for the extraterritorial application of German law remains the presence of domestic effect within Germany.

The general jurisdiction of German cartel authorities is therefore only questionable in exceptional cases whereby foreign states participated in the restriction of competition. According to Articles 4 to 10 of the 1972 European Convention on State Immunity, which has been applicable in Germany since 1990, the principle of ‘restricted immunity’ applies. Immunity for foreign states exists only if the action of the foreign state is of a sovereign nature. Should the state, however, act like a private person or propose restrictions of competition, the German jurisdiction shall apply. Nevertheless, there remains controversy over the issue of whether a foreign state carrying out sovereign tasks via a controlled legal person under private law is able to rely on the state immunity.

IV STANDING

The claiming of relief in the civil court is governed by Section 33 of the ARC. This provision states that a ‘person concerned’ can claim for injunctions, removal of the infringement or damages because of the infringement of a provision of the ARC, Article 81 or 82 of the EC Treaty or a decision taken by the cartel authority. The affected person can be either a competitor or another market participant impaired by the infringement.

With regard to damages claims, according to Section 33(3) of the ARC, in principle the same applies: the affected persons have standing. This is indisputable for those persons who are directly affected by the infringing behaviour, i.e., the direct suppliers and direct purchasers or in some cases the competitors of the infringing parties.

Today this principle also should apply to indirectly affected persons, such as retailers or end-consumers, as long as they are able to prove that their losses were caused by the infringing behaviour.

Prior to the seventh ARC amendment in 2005, the question of standing had to be answered by following normal civil law principles. A claim for damages was only possible when the infringed provision was intended to protect the claimant. The provision in question, therefore, had to serve the protection of individual interests beyond the protection of general competition concerns. This change was also a result

of the European Court of Justice's ('ECJ') judgment *Courage/Crehan*.¹⁵ In this case the ECJ stated that the intended prohibition in Article 81(1) EC would be undermined if it were not possible for anybody who has suffered a damage due to anti-competitive behaviour to claim damages.¹⁶

As a result, it is to be expected that German courts are willing to interpret the term 'person affected' within the meaning of Section 33(1) and (3) of the ARC very widely. However, in fact it will prove to be rather difficult for an indirect purchaser to claim damages successfully due to the evidential burden, e.g., having to prove that the intermediary has passed on the excessive prices. Not only are there difficulties regarding proof of evidence but also the damage suffered by an indirect purchaser is relatively minor compared to the cost risk and thus the practical relevance of such cases is reduced. In this respect, it is also important to note that the possibility of class actions does not exist in Germany.¹⁷

V DISCOVERY

Discovery is a US legal term that does not have a real equivalent in the German legal system. In the German legal system, the issue is therefore whether parties are entitled to obtain documents, written responses and testimony from opposing and third parties. In a nutshell, there are fairly limited circumstances in which one can oblige an opposing or third party to produce documents or to give statements; in practice, these options do not play any significant role in the German legal process.

i Options to obtain documents from opposing party in legal proceedings

The German understanding of fair legal proceedings is that no party should be obliged to provide the opposition with material that the requesting party requires to win the case: nobody is under an obligation to act against his own legitimate interests. It is accepted that this restrictive attitude might be seen to subvert pure conceptions of justice and equity in favour of the practical realities rendered by the courts in regular proceedings.

There are, however, a few exceptions to the general rule:

- a* if a party bearing the burden of proof argues that its opponent is in possession of a relevant document, and the burden of proof may be satisfied by the party's application for that document, then the court shall order that the opponent has to produce the document;¹⁸
- b* the opposing party is obliged to produce any documents in its possession to which it has made reference in the course of the proceedings and in its written submissions.¹⁹

15 ECJ, judgment of 20 September 2001, C-453/99 – *Courage*.

16 *Id.*, rec. 26; comp. Reasoning of the seventh amendment of the ARC (Regierungsbegründung) of 26 May 2004, BT-Drucks. 15/3640, p. 53 to Section 33.

17 See Section VII, *infra*.

18 ZPO, Section 421.

19 ZPO, Section 423.

- c* the opposing party is obliged to produce any documents that the party bearing the burden of proof is entitled to request on the basis of existing substantive law;²⁰ and
- d* the court may order *ex officio* a party to submit documents in its possession.²¹ The enactment of this provision gave rise to some fervent discussions amongst German scholars relating to perceived Americanisation of German civil procedure. Those fears were largely exaggerated as, compared to the wide-reaching possibilities of US-style discovery, the powers of the tribunal under Section 142 of the ZPO are subject to considerable limitations: the tribunal may only order a party or a third party to produce a document if that document is in that party's possession and if one of the parties to the proceedings has referred to it. Moreover, the German Federal Supreme Court ('BGH') has clarified²² that, in order not to come into conflict with the principle of party presentation, an order to submit documents may not lead to investigation into elements of the facts of the case that have yet to be presented to the court. Thus, Section 142 of the ZPO does not authorise a party to conduct 'fishing expeditions' whose sole purpose would be to gain access to documents that may lead to further evidence. Moreover, the requesting party's interests in production of the documents must be balanced against the interests of the other party not to produce the documents.

ii *Grounds to refuse the production of documents*

The ZPO does not explicitly state under which circumstances the opposing party may refuse to produce the requested documents. Rather, it is for the tribunal to assess the details of each individual case carefully in order to balance the requesting party's right to efficient legal protection and the opposing party's right to privacy. It seems to be widely accepted that interest or rights protected by the German Constitution may be invoked to refuse production. Thus, the production of personal documents (e.g., personal letters, diaries and photographs) may be refused. Furthermore, the protection of trade secrets may justify refusal.

The tribunal does not have the power to enforce an order, e.g., by way of subpoena. Where, however, the opposing party disobeys and does not produce the ordered documents, the tribunal may draw its own inferences and take this refusal into consideration when assessing the facts of the case. In this context, Section 427 of the ZPO explicitly provides that if the opposing party refuses to produce a document, the allegations made by the requesting party may be considered proven as far as they could have been proven by the requested document.

iii *Options to obtain statements from opposing party in legal proceedings*

Allegations can also be proven by way of oral statements made by witnesses or by the parties. Accordingly, a statement by the opposing party may be admissible evidence. To

20 ZPO, Section 422.

21 ZPO, Section 142.

22 BGH NJW 2000, p. 3488.

clarify this point: in German civil procedure, it is up to the parties to state the evidence that they rely on in their written submissions for the allegation to be evidenced. Admissible evidence comprises the following five categories: documents, statements by third-party witnesses, statements by the parties themselves, expert opinion and visual inspection. The distinction between statements by third-party witnesses and statements by the actual parties to the proceedings is unusual in the international context but justified by the consideration that, while a party statement may be useful for establishing the facts, such statement may be less reliable as a party to the process has a vested interest in the outcome of the case. Given that a company's legal representative, i.e., its CEO, would be considered a party to the proceedings, the practical significance of this distinction is evident.

Under German civil procedure law, it is at the tribunal's discretion whether or not it hears witnesses or parties. The nominating party has no power to force the tribunal to hear a specific person. The tribunal is not necessarily limited to the evidence as presented by the parties. If it sees fit, it might also decide to hear any of the parties, even if this party's statement was not presented as evidence.²³

Against this backdrop, a party may produce the opposing party's statement as evidence to substantiate its allegations, provided that this party cannot otherwise prove its allegations.²⁴ Evidence by way of statement by the opposing party is therefore a last resort.

Finally, the interview of the party or witness will be carried out by the presiding judge; there is no cross-examination. If the opposing party refuses to make a statement, the tribunal may take this behaviour into consideration when assessing the facts²⁵ and draw an adverse inference.

iv Right to obtain documents or statements from third parties

Upon request by one of the parties to the proceeding, the tribunal may order a third party to produce documents, provided that the relevant documents are in the third party's possession.²⁶ Any third party may be nominated as a witness and thus be called by the tribunal if it believes that the statement might be relevant to the outcome of the case.

The third party may refuse to produce the documents on the same grounds that would entitle a witness to refuse giving a witness statement, i.e., the grounds stated in Sections 383 to 385 of the ZPO (specific personal reasons, including family ties, danger of self-incrimination or of a close relative and the risk of subsequent public prosecution). According to Section 142(2) of the ZPO, there is no obligation to produce documents if such obligation would be 'unreasonable'. Considering the rather broad

23 In this context it might be of interest that the ZPO does not provide for the possibility or the need to submit written statements by the persons nominated to be interviewed by the tribunal.

24 ZPO, Section 425.

25 ZPO, Section 446.

26 ZPO, Section 428, sentence 2, and Section 142.

scope of Sections 383 to 385 of the ZPO, the unreasonableness limitation does not have much scope.

If the third party refuses to comply with an order, the tribunal may enforce the order and execute the measures provided for in Section 142(2)(2) of the ZPO, in particular to impose a monetary fine or subpoena a witness.

VI USE OF EXPERTS

In the context of cartel damages claims, expert opinions might be necessary to prove all the various facts that justify the claims substantially, such as market definitions, injury and the amount of damages suffered. The focus is likely to be on economic issues. German procedural law permits the use of experts, but there are particular characteristics that may be uncommon to users from foreign jurisdictions.

An expert opinion can be used to prove or ascertain facts. Experts can describe facts that people without such expertise would not see or the importance of which they could not assess. Unlike a witness, the expert does not report about personal perception, but rather he draws conclusions from facts and elaborates on his hypothesis.

German procedural law distinguishes between two different types of experts: party-appointed and tribunal-appointed experts.

i Tribunal-appointed experts

The ZPO only deals with tribunal-appointed experts who, unlike party-appointed experts, give admissible evidence.²⁷ Accordingly, the tribunal selects and appoints one or more experts as the case may be, possibly after consultation with the parties. The tribunal instructs and supervises the experts and may give directions. The parties may challenge the appointment of a particular expert if they doubt his or her impartiality or independence. Depending on the instructions given by the tribunal, the expert usually delivers an opinion in writing. Upon delivery of the report, the expert may be examined by the parties and by the tribunal at the court hearing. He or she is supposed to confirm the accuracy of the report and his impartiality. The expert effectively acts as an ‘assistant’ to the tribunal.

ii Party-appointed experts

The parties are free to submit opinions rendered by experts that they have appointed. Such opinions will be considered as part of that party’s written submissions. Such opinions do not carry any particular evidentiary value. Nonetheless, their submission may be useful to help the tribunal better understand the case and to form an educated opinion as to what questions need to be elaborated on by a tribunal-appointed expert. Hence, while it often may be advisable to submit a report prepared by a party-appointed expert, there may also be some risks associated with such approach: the more specialised the question that needs to be answered by an expert, the fewer experts likely to be skilled in that particular field of expertise. ‘Wasting’ one or more of these experts for preparation

27 ZPO, Section 402 *et seq.*

of a ‘partisan’ expert report might be a bad choice as the pool for potential qualified tribunal-appointed experts thus would be reduced and possibly no other suitable expert might be available to be appointed by the tribunal. Obviously, an expert who already has prepared an opinion for one of the parties cannot then be appointed by the tribunal as an independent expert.

iii The President of the Federal Cartel Office

Pursuant to Section 90(2) of the ARC, the President of the FCO may act as *amicus curiae* in pending proceedings. He may hand in submissions and statements, point to facts and give evidence. While the *amicus* certainly does not qualify as an expert in a procedural sense, the FCO disposes of superior knowledge and therefore, in a functional sense, may be considered an expert in the area of its legally assigned scope of work. Furthermore, considering the FCO’s authority, its President’s statements may have considerable impact on the opinion of the tribunal.

Section 90a(2) of the ARC deals with the European Commission’s right to act as *amicus curiae* in legal proceedings. In essence, the Commission’s position is comparable to that of the President of the FCO and thus the above considerations apply accordingly.

VII CLASS ACTION

German civil procedure law is based on the individual filing of an action. Thus, apart from the contractual possibility of agreeing on a model suit clause, German procedural law does not provide for a representative action by one member of a group of potential claimants with a binding effect of *res judicata* towards and against all the other members of the group.²⁸ However, it is possible for potential claimants to agree to settle the dispute following the outcome of a suit, which therefore may be considered a ‘model suit’. Such settlement however is not tantamount to the extension of the *res iudicata* effect to all possible claimants.

Section 33(2) of the ARC provides for associations with legal capacity for the promotion of commercial or independent professional interests to seek an injunction. Additionally, there is a subsidiary claim providing for the disgorgement of benefits under Section 34a of the ARC, whereby the economic benefit is to be surrendered to the federal budget.

German law allows for the transfer of damages claims to a third party, who may then enforce them collectively.

²⁸ The exception is a limited set of cases dealt with in the Capital Markets Model Case Act (‘KapMuG’), which relates to claims in the area of capital investments and thus is highly unlikely to gain any significance in the context of cartel damage claims.

VIII CALCULATION OF DAMAGES

A claimant is entitled to damages pursuant to Section 33(3)(1) of the ARC, provided that the infringement of German or European antitrust rules was committed negligently or deliberately. However, based on established principles of German civil law, a claimant is only entitled to compensation for the loss suffered from the anti-competitive behaviour of the defendant. Essentially, this means that the financial and commercial situation of the claimant at the time of judgment is compared to its hypothetical situation were it not for the defendant's infringing conduct. The difference between the two scenarios reflects the amount of damages to which the claimant may be entitled. If, and to what extent, the courts are willing to hear the passing-on defence invoked by defendants is as yet unclear (see Section IX, *infra*).

The notion of 'damage' in the German law of damages does not include the concept of 'punitive' damages. The sole purpose of damages payments is to provide compensation for damages actually suffered. By the same token, the injured (natural or legal) person should not profit from the illegal act, as would be the case if punitive damages were awarded. Likewise, the costs of bringing the legal action are not taken into consideration when determining the amount of the damages to be awarded. However, the successful party to legal proceedings is entitled to reimbursement of its costs from the losing party. Against this background, there is no need or justification to include legal costs into the notion of damages.

In complex antitrust litigation it is often a complex task to determine the economic loss caused to the claimant. Whilst it is difficult even in price-fixing cartels to determine the hypothetical marginal (i.e., competitive) price for a product or service, it is considerably more difficult to assess the economic impact of other forms of restrictive behaviour. Generally, anti-competitive agreements imply the existence of inefficiencies that lead to higher costs on the demand side. However, it is very complicated to quantify the loss suffered by a particular claimant. Therefore, Section 33(3)(3) of the ARC gives courts discretion to assess the size of damages in the case at hand. Furthermore, the same provision allows a court, in determining the amount of damages, to consider the *pro rata* profit generated by the defendant through the competition law infringement.

However, even if a cartel member can demonstrate that the anti-competitive scheme was an unprofitable venture, this would not excuse the payment of damages to a claimant who can demonstrate that he has actually suffered a loss. In addition, claimants are not entitled to ask for the (potentially high) profits on the defendant's part if they exceed the economic disadvantages suffered by the claimant.

According to Section 33(3)(4) of the ARC, monetary debts accrue interest from the date that the damage occurred. The interest rate is dictated by Section 33(3)(5) of the ARC and Section 288 of the BGB (i.e., 5 per cent above the basic interest rate fixed twice a year by the German Central Bank). However, claimants may argue that they are entitled to demand higher interest payments on other legal grounds.

No additional interest payments will be incurred by the defendant for late payment of damages, but the claimant is free to demonstrate that, as a result of the late payment, the damages he or she incurred have increased.

IX PASSING-ON DEFENCES

Currently, it is unclear and subject to legal debate whether or not passing-on defences are permitted under the ARC. Therefore, we cannot provide a conclusive answer yet whether and to what extent this defence could be invoked successfully in court proceedings.

An amendment to the ARC made on 1 July 2005 at Section 33(3)(2) prevents defendants in private enforcement litigation from arguing that claimants did not suffer a loss because they were able to sell on the products or services at a price that, owing to the restrictive practices of a cartel, exceeded the marginal price (i.e., the competitive price). At first glance, this section could be construed as a total ban on cartel members from invoking the passing-on defence in the sense that their conduct cannot be excused on the ground that the direct and indirect purchasers have been able to pass on the damage to their respective customers. However, when examined in greater detail, it appears that aspects of the provision are not entirely clear, namely:

- a* the provision refers to the ‘resale of the goods or services’ only. This means that the defendant is not barred from asserting passing-on defences against direct or indirect purchasers if the claimant has further processed the goods before reselling them;
- b* we believe that the passing-on defence should be permitted even if the claimant has not processed the goods before reselling them – a view commonly held by legal commentators. It is based on the consideration that German law disapproves of the idea of punitive/treble damages and thus, in principle, damages can only be awarded to recover actual loss. If, as Section 33(3)(1) of the ARC sets forth,²⁹ both direct and indirect purchaser are entitled to claim damages, barring antitrust defendants from invoking the passing-on defence may lead to an unjustified enrichment of the claimant who was able to pass on the increased prices. This would be contrary to the principle that actual loss shall be recovered but awards should not unduly benefit the plaintiff to the detriment of the defendant. Therefore, the passing-on defence should arguably be allowed if the direct purchaser’s actual loss has been compensated by the profit gained from reselling, unless it was entirely due to the claimant’s superior marketing efforts that he – unlike other resellers – managed to sell the products or services even at a superior competitive price; and
- c* it is still unclear whether the burden of proving the passing-on is on the claimant or the defendant. The only court decisions referring to this aspect were taken in 2003/2004 and thus might not be considered good law following the 2005 amendment. Two courts held that, in line with common practice, the claimant has to prove that he actually suffered a loss, i.e., that the alleged damage has not been compensated through the profit gained from reselling the product or service to the end-customers.³⁰ However, in another case the court declined to consider whether or not the claimant’s loss had been compensated since the

²⁹ See Section IV, *supra*.

³⁰ LG Mannheim, judgment of July 11, 2003 (7 O 326/02), GRUR 2004, 182, 184; OLG Karlsruhe, judgment of January 28, 2004 (6 U 183/03), WuW DE-R 1229, 1232.

defendant did not invoke the passing-on defence.³¹ We take the view that Section 33(3)(2) of the ARC should be interpreted as imposing the burden of proof on the antitrust defendant: its wording clearly indicates that a loss shall not be excluded due to the resale of the products or services that were part of an anti-competitive agreement. Further, taking into account the conduct that gave rise to the litigation, on balance it seems fair to conclude that the burden of proving the conditions for invoking the passing-on defence remains with the defendant.

At this point, none of these aspects has been resolved by court decisions since the latest amendment of the ARC. In particular, it remains to be seen in which cases defendants and members of a cartel may invoke the passing-on defence and who will bear the burden of proof.

X FOLLOW-ON LITIGATION

Section 33(4) of the ARC provides procedural tools for the promotion of follow-on actions. The provision stipulates that where damages are claimed for an infringement of the ARC or of Article 81 or 82 of the EC Treaty, German courts are bound by a finding that an infringement has occurred to the extent that such a finding was made in a final decision by German cartel authorities, the European Commission or competition authorities (or courts acting as such)³² of other EC Member States.

i When are decisions or findings binding in civil enforcement proceedings?

Section 33(4) of the ARC stipulates that findings are binding on the courts that have jurisdiction to adjudicate a civil enforcement action, not only if they are issued by the European Commission or the German cartel authorities, but also if they are issued by competition authorities of other EC Member States. However, the reference to decisions of the European Commission is only meant to clarify the scope of Section 33(4) of the ARC: Article 16(1) of Regulation 1/2003³³ prohibits national courts ruling against decisions of the European Commission when assessing the legality of agreements or practices with respect to Article 81 or 82 of the EC Treaty.

A decision is binding only if it establishes that an infringement of the ARC or of Article 81 or 82 of the EC Treaty has occurred.³⁴ If a decision is appealed, Section 33(4)(2) of the ARC provides for the resulting final judgment to have binding effect.

31 LG Dortmund, judgment of April 1, 2004 (13 O 55/02), WuW DE-R 1352, 1354.

32 This refers to the situation in Austria (OLG Wien) and Ireland (High Court in Ireland).

33 Council Regulation (EC) No. 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty. Council Regulations are directly effective in all EU Member States and do not need special implementation. They automatically prevail over national law.

34 Thus, decisions of the European Commission based on Articles 7, 8, 10 and 29(1) of Regulation 1/2003 are binding just as FCO decisions based on ARC, Sections 32, 32a or 32d. FCO findings based on ARC, Sections 30(3), 32b, 32c and 36(1) have no binding effect.

Whether a competition authority's finding that the objected behaviour does not infringe competition law has binding effect is unclear. With regard to Article 16(1) of Regulation 1/2003, it appears that such acquittals are binding if issued by the European Commission.

ii Limitations

Under Sections 33(4) and 34a(5) of the ARC, the binding effect of competition authorities' findings is limited to claims for damages. Thus, in principle, binding effects cannot be invoked by defendants if they are sued for performance. The same applies for actions for injunctions as well as proceedings for administrative fines. However, this does not apply to findings of the European Commission; rather, it follows from Article 16(1) of Regulation 1/2003 that national courts are at all times prevented from ruling against decisions of the European Commission regardless of the procedural setting in the national court (i.e., the binding effects of the Commission's decisions are not limited to damages claims).

While in principle only final decisions are binding, Article 242 of the EC Treaty provides that findings of the European Commission are binding immediately, in other words, as soon as they have been issued and before they become incontestable.

It is only the operative provisions of a decision that are binding and not the reasons given for the decision. Thus, Section 33(4) of the ARC only relieves the claimant of proving an infringement of competition law. All additional requirements for bringing a successful damages claim (e.g., causation of harm, size of commercial harm inflicted) still have to be demonstrated and, if necessary, proven by the claimant. What is unclear, however, is whether the claimant has to prove the cartel member's bad intention, even if the operative part of a decision already ascertains that the infringement has been committed intentionally.

Section 33(4) of the ARC is criticised for being too broad, as the provision does not limit the binding effect of administrative decisions to claims that are brought against those parties who are the addressees of the infringement decisions, i.e., the members of the cartel. Therefore, Section 33(4) of the ARC may have the effect that a claimant may rely on an infringement decision in a lawsuit against a party that has not been involved in the cartel proceedings at all. In these circumstances, the defendant lacks due process with regard to the infringement decision as he could not defend himself in the (foreign) infringement proceeding or through an appeal of the infringement decision. This seems to be a clear violation of the party's right to a hearing as protected by the German Constitution³⁵ and in the European Convention on Human Rights.³⁶ We therefore expect that the German Constitutional Court, upon review, will limit the binding effects imposed by Section 33(4) of the ARC to defendants in civil proceedings being addressees of the infringement decisions in the first place.

35 Article 103(2) of the German Basic Law ('GG').

36 Article 6(1) of the European Convention of Human Rights.

XI PRIVILEGES

German private competition law enforcement has no tools to force a defendant to disclose information (orally or in written form) to the claimant. In particular, there is no basis in the German rules of civil procedure for the claimant to invoke far reaching pre-trial discovery rights.³⁷ The same applies to the much more limited disclosure of documents which have been supplied voluntarily to the FCO under the German leniency notice either from the authority or from the leniency applicant.³⁸ Thus, the question of granting 'legal professional privilege' does not arise in this context.

Under German law there are two ways of taking action against cartels:

- a initiation of official proceedings by the FCO (possible consequences: invalidity of anti-competitive agreements, prohibition order, fines, skimming of profits and preliminary injunction); and
- b private antitrust litigation claiming damages from the cartel members as a result of the competition law infringement.

Disclosure obligations are limited to the first setting, i.e., upon a formal request for information issued by the FCO in criminal³⁹ antitrust proceedings. As a corollary, it is only in this context that the protection of 'legal professional privilege' is granted to the defendants pursuant to the rules of criminal procedure. In a nutshell, it is prohibited to seize and use as evidence in proceedings all documents containing information subject to professional confidentiality of a lawyer admitted in Germany⁴⁰ and related to the defence of a client in ongoing proceedings.⁴¹ Professional legal privilege also protects the client-attorney communication from disclosure *vis-à-vis* the FCO only after the commencement

37 See Section V, *supra*.

38 See http://ec.europa.eu/comm/competition/antitrust/actionsdamages/white_paper_comments/bund_en.pdf), p. 12: 'In the opinion of the commenting departments and the Bundeskartellamt, leniency programmes are of paramount importance for the entire system of antitrust enforcement. For this reason care should be taken that the design of private antitrust enforcement affects the effectiveness of the leniency programmes of the [EU] Member States as little as possible. Accordingly, the protection of confidential data of principle witnesses must be guaranteed.' See also: FCO leniency programme of 7 March 2006 (English version at: www.bundeskartellamt.de/wEnglisch/download/pdf/06_Bonusregelung_e.pdf), p. 4 (22): 'Where an application for immunity or reduction of a fine has been filed the Bundeskartellamt shall use the statutory limits of its discretionary powers to refuse applications by private third parties for file inspection or the supply of information, insofar as the leniency application and the evidence provided by the applicant are concerned.'

39 'Criminal' in fact should be read as a proceeding that may end with the imposition of administrative fines against the parties that are involved in the proceedings. In Germany, save for bid rigging, competition law violations do not constitute criminal offences, but rather can be penalised by financial sanctions.

40 German Code of Criminal Procedure ('StPO'), Section 138(1).

41 LG Bonn, order of September 29, 2005 (37 Qs 27/05); NStZ 2007, 605, 606.

of criminal proceedings.⁴² Furthermore, legal privilege is limited to communications with an external lawyer. It does not apply to internal communications with the legal department, or more generally, between in-house lawyers and their employers, even if the in-house lawyers are admitted to the German Bar.⁴³

XII SETTLEMENT PROCEDURES

Law and lawmakers have a preference for the amicable settlement of disputes. Indeed, German state courts are explicitly called upon to encourage the parties at any stage of the proceedings to settle the dispute.⁴⁴

Until recently, however, the practical impact of this preference was limited. Since 2002, the ZPO therefore provides that formal settlement negotiations are mandatory prior to any first hearing at first instance.⁴⁵ In appeal proceedings, such settlement negotiations are permissible, but not mandatory.

In order to explore the possibility of a settlement, the tribunal will summon the parties to appear in person (as opposed to only their representatives). Upon discussion of the matter with the parties, the tribunal may give a preliminary assessment of the prospects of the case and even make a settlement proposal. If settlement cannot be reached, the litigation proceedings continue immediately. If the parties agree on the terms of a settlement, the tribunal will then review the effectiveness of the settlement agreement including its compatibility with statutory law and public policy.⁴⁶ The settlement agreement may also comprise claims not pending in court.⁴⁷ The parties may reserve the right to revoke the agreement within a specified period. Once the agreement has become irrevocable and binding, the tribunal will issue an order stating the content of the settlement agreement. This order is enforceable.⁴⁸

This mandatory procedure notwithstanding, the parties may at any time, with or without the tribunal's assistance, agree on an amicable settlement. If settlement talks are conducted without the tribunal's involvement, upon application to do so, the tribunal may stay pending proceedings relating to the same matter.⁴⁹ If the parties reach a settlement, the claimant will usually withdraw its claim and thus terminate the proceedings. A settlement agreement reached without the tribunal's assistance is enforceable, provided that it has been drawn up by the parties' attorneys and fulfils certain additional criteria.⁵⁰ If these prerequisites are not met and the defendant does

42 *Id.*

43 *Id.*

44 ZPO, Section 278(1).

45 ZPO, Section 278(2).

46 I.e., BGB, Sections 134 and 138.

47 Kammergericht NJW-RR 2000, p. 1164.

48 ZPO, Section 794(1)(1).

49 ZPO, Sections 278(5) and 251.

50 ZPO, Section 796a.

not honour the settlement agreement, the claimant may bring a new action for breach of the settlement agreement.

XIII ARBITRATION

Cartel damages claims may not only be pursued before state tribunals but may also be pursued with other dispute settlement mechanisms, particularly arbitration.

In German law, it is clear that claims relating to antitrust issues are capable of arbitration. Until 1997, arbitration clauses relating to antitrust claims were null and void unless they reserved to each party the right to file an action with a state court⁵¹ in the particular case.⁵² Being a relic of an antiquated antitrust regime with few international analogies, this rule was abolished. Nowadays, antitrust claims including private enforcement matters are generally considered capable of arbitration. Further, arbitral tribunals are obliged to apply the compulsory provisions of German antitrust statutes⁵³ *ex officio*. The same is true regarding European antitrust law.⁵⁴ Basic principles of the antitrust laws form part of the public order.⁵⁵ Arbitral awards violating the public order may be annulled by the competent state court and their enforcement may be denied.⁵⁶

When applying European antitrust law, arbitrators cannot count on support by the European Court of Justice because an arbitral tribunal, unlike a state court, is not permitted to open a referral procedure pursuant to Article 234 of the EC Treaty.⁵⁷

However, whether arbitration is an appropriate forum for private enforcement matters may be questionable. Arbitration being a consensual process, the parties to such arbitration need to be bound by an agreement to arbitrate, which, considering the normal circumstances in which cartel damage claims arise, is not likely to be the case. Hence, an agreement to arbitrate would need to be concluded after the dispute has emerged. Experience, however, shows that in this situation, parties are unlikely to agree on anything, not even a procedure to resolve the dispute.

If the parties succeed in entering into an agreement to arbitrate, involving all concerned persons and entities, arbitration offers the parties the opportunity of resolving the dispute with binding effect with the important benefit of having the case tried in a non-public forum.

Along with the other well-known advantages, arbitration thus offers a suitable procedure to deal with cartel damages claims.

51 As opposed to an arbitral tribunal.

52 ARC, Section 91 (old version – i.e., as in force before 1997).

53 Particularly ARC, Sections 1 *et seq.*, 19 *et seq.*

54 Particularly Articles 81 and 82 of the EC Treaty.

55 Federal Court of Justice, judgment of 25 October 1966 (BGHZ 46, 365, *Schweissbolzen*); with regard to European law also see WUW/E BGH 1000, *Fruchtsäfte*, WuW/E 1226, *Eiskonfekt*; ECJ, judgment of 1 June 1999, C-126/97, 1999, I 3055 (EuZW 1999, 565, *Eco Smis*).

56 See ZPO, Sections 1059(2)(b) and 1060(2).

57 ECJ, judgment of 23 March 1982, 10/82, 1982, 1095, rec. 10-12, *Nordsee*.

XIV INDEMNIFICATION OR CONTRIBUTION

In private enforcement matters, the claimant may sue either one single company that belongs to a cartel, or all companies constituting the cartel as joint and several debtors. If the claimant(s) opt for the first possibility, the defendant may want to ensure that it can seek reimbursement from the other members of the cartel in case the claimant's action succeeds.

To this end, the defendant has to make sure that the other members of the cartel are barred from challenging the existence of the judgment and its binding effect. In essence, the defendant should seek to expand the binding effect of the judgment. As set out above,⁵⁸ generally under German law it is not possible to expand the *res iudicata* effect beyond the parties. However, the defendant has one option available to it in these circumstances: it may give third party notice to the other members of the cartel.

The recipient of third-party notice does not become a party to the proceedings, but he or she has far-reaching procedural rights, including the right to file submissions. Thus, the judgment on the claim brought against the defendant will have limited legal effect with respect to the recipients of the notice.⁵⁹ However, in relation to the defendant, the recipients will be precluded from arguing that the judgment is wrong or that the defendant's defence was insufficient. On that basis, it is much easier for the defendant to pursue possible indemnification or contribution from the other members of the cartel.

If the claimant initiates proceedings against all alleged wrongdoers as joint and several debtors, a judgment in the claimant's favour will, as a matter of course, have legal force against all defendants. If one of the defendants chooses to pay the due amount in its totality to the claimant on the basis of the judgment, and then unsuccessfully seeks indemnification or contribution from his co-defendants, the defendant may need to bring a separate new claim against his co-defendants.

Whether the defendant finally succeeds in seeking indemnification or contribution from third parties or co-defendants will depend on questions of substantive law and the facts of the case, particularly on the allocation of responsibilities.⁶⁰ Also, a situation may arise where the defendant has accepted a decision of the public cartel authorities (e.g., by cooperating as chief witness) but a third party or co-defendant has appealed the decision and this appeal is pending. Final and binding decisions of public cartel authorities must be respected by the court.⁶¹ The outcome of the claim brought against the defendant and the claim brought by the defendant against the other wrongdoers may therefore differ in these circumstances.

58 See Section VII, *supra*.

59 See ZPO, Sections 74(3) and 68.

60 See ARC, Section 33(3); and *supra*, Section IX.

61 See ARC, Section 33(4); and *supra*, Section X.

XV FUTURE DEVELOPMENTS AND OUTLOOK

The seventh amendment of the ARC in 2005 not only led to a near-complete harmonisation with the material aspects of EC competition law but also encouraged private competition enforcement. While the number of cartel damages claims will probably increase, at least regarding follow-on actions, the number of injunction proceedings, especially in refusal-to-supply cases, will remain high.

However, not all questions regarding private enforcement have been answered by the legislature. Some issues remain unresolved and await a decision of the higher courts, such as the question of the burden of proof regarding the passing-on defence, or of the extent of the binding effect of decisions by competition authorities of other Member States – especially with regard to the leniency policy of the FCO.

From a factual perspective, we will also have to see whether indirectly affected persons, like indirect purchasers such as retailers or end-consumers, find a reasonable means to claim their often less substantial damages. In this respect the question will also have to be answered, possibly during the current cement cartel case before the Regional Court of Dusseldorf (and most probably in the following instances), whether the investment model of the ‘claiming industry’ (e.g., CDC), bundling several claims and suing cartel members for significant damages, will be acceptable under German law. However, this decision will also be relevant to the question of forum shopping by filing an action against members of a Europe-wide cartel.

Nevertheless, the future development of private enforcement in Germany could be most strongly influenced by possible changes to the German system, should the EU Commission’s White Paper become law.

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