

Chambers

A decorative pattern of stylized, dark green leaves is scattered across the page, primarily on the right side and bottom. The leaves vary in size and orientation, creating a natural, organic feel against the solid teal background.

GLOBAL PRACTICE GUIDE

Definitive global law guides offering
comparative analysis from top ranked lawyers

Antitrust Litigation

Germany

BUNTSHECK Rechtsanwälts-gesellschaft mbH

[chambers.com](https://www.chambers.com)

2019

Law and Practice

Contributed by BUNTSHECK Rechtsanwälts-gesellschaft mbH

Contents

| | | | |
|---|------------|---------------------------------------|-------------|
| 1. Overview | p.4 | 6. Witness and Expert Evidence | p.9 |
| 1.1 Recent Developments in Antitrust Litigation | p.4 | 6.1 Witnesses of Fact | p.9 |
| 1.2 Other Developments | p.4 | 6.2 Expert Evidence | p.9 |
| 2. The Basis for a Claim | p.4 | 7. Damages | p.10 |
| 2.1 Legal Basis for a Claim | p.4 | 7.1 Assessment of Damages | p.10 |
| 2.2 Specialist Courts | p.4 | 7.2 'Passing-on' Defences | p.10 |
| 2.3 Decisions of National Competition Authorities | p.5 | 7.3 Interest | p.10 |
| 2.4 Burden and Standard of Proof | p.5 | 8. Liability and Contribution | p.10 |
| 2.5 Direct and Indirect Purchasers | p.5 | 8.1 Joint and Several Liability | p.10 |
| 2.6 Timetable | p.6 | 8.2 Contribution | p.11 |
| 3. Class/Collective Actions | p.6 | 9. Other Remedies | p.11 |
| 3.1 Availability | p.6 | 9.1 Injunctions | p.11 |
| 3.2 Procedure | p.6 | 9.2 Alternative Dispute Resolution | p.11 |
| 3.3 Settlement | p.6 | 10. Funding and Costs | p.11 |
| 4. Challenging a Claim at an Early Stage | p.6 | 10.1 Litigation Funding | p.11 |
| 4.1 Strikeout/Summary Judgment | p.6 | 10.2 Costs | p.11 |
| 4.2 Jurisdiction/Applicable Law | p.7 | 11. Appeals | p.12 |
| 4.3 Limitation Periods | p.8 | 11.1 Basis of Appeal | p.12 |
| 5. Disclosure/Discovery | p.8 | | |
| 5.1 Disclosure/Discovery Procedure | p.8 | | |
| 5.2 Legal Professional Privilege | p.9 | | |
| 5.3 Leniency Materials/Settlement Agreements | p.9 | | |

BUNTSHECK Rechtsanwalts-gesellschaft mbH is an independent, Munich-based law firm specialising in German and European competition law. It offers a combination of personalised service from highly specialised lawyers who have accumulated years of experience working in large international commercial law firms. Founded in 2008, it has grown to become one of Germany's leading competition law firms (three partners, five associates), with a reputation built on quality work, responsiveness, diligence and

commitment, while the firm's lean and efficient structure delivers cost-effective results for its clients. The practice offers expertise in the following aspects of competition law: representation of defendants in cartel investigations; enforcement of and defence against damages claims under competition law; representation in merger control proceedings; structuring of distribution systems and commercial co-operation agreements; and advice on competition law compliance.

Authors



Martin Buntscheck advises corporate clients on all aspects of German and European competition law and related regulatory issues. His in-depth competition law experience and his international reputation make him one of the leading competition lawyers in Germany. Martin has many years of experience in advising plaintiffs and defendants in cartel damages proceedings and in defending clients in the context of cartel litigation before the European Commission, the German Federal Cartel Office, and German and European courts. He regularly advises clients in German and multinational merger control cases, and on all other aspects of competition law.



Andreas Boos is one of the leading competition lawyers in Germany, with more than 15 years of experience in all areas of German and European competition law. He has defended numerous clients in cartel investigations by the German Federal Cartel Office and the European Commission, as well as representing clients before the German and European courts. In the field of merger control, Andreas has expertise in strategically challenging transactions, complex private equity structures and joint ventures. He also has extensive experience in competition law damages claims (on both the claimant and the defence sides), distribution law, abuse proceedings and preventative compliance consultation.



Tatjana Mühlbach draws on more than a decade's experience in advising German and international clients in matters of German and EU competition law. She is equally well versed in merger control, cartel damages claims, abuse-of-dominance and cartel procedures, compliance, and competition law considerations in day-to-day commercial dealings. In the area of cartel damages claims, she has represented clients from Germany and other countries in notable cases, both in and out of court. Tatjana has particular insight into healthcare competition law and is regularly consulted by companies from the pharmaceuticals and healthcare sectors.



Eva Vennewald advises clients on all issues regarding German and European competition law, with particular focus on antitrust damages actions.

1. Overview

1.1 Recent Developments in Antitrust Litigation

Private antitrust litigation has a long and widespread tradition in Germany. According to a discussion paper published by the German Federal Cartel Office (FCO) as early as 2005, German courts registered several hundred private antitrust cases each year, and there were approximately 900 cases between 2002 and 2005. Private antitrust litigation in Germany comes in many different forms – proceedings are not limited to follow-on damages claims; rather, there is a high proportion of standalone litigation, often closely related to contract disputes.

Given the high practical relevance of cartel damages claims across Europe, the following survey focuses on this specific type of private antitrust litigation.

With the 7th Amendment of the Act against Restraints of Competition (ARC) in 2005, the German legislator introduced a set of rules that significantly improved the conditions for bringing damages claims in Germany. The reform was aimed at facilitating access to damages actions by those who had suffered a loss as a result of breaches of German or European antitrust law. In 2017, Germany implemented the EU Commission's Directive on cartel damages actions in the form of the 9th Amendment of the ARC, resulting once again in comprehensive changes, particularly to German antitrust damages law, and intended to further facilitate the assertion of cartel damages claims. For instance, the limitation period for damages claims under competition law was further extended; entitlement to disclosure of evidence (for both plaintiffs and defendants), which previously did not exist under German law, was created; and a statutory presumption that damage/harm has occurred in cases involving hard-core cartels was introduced.

As a result of the new rules and increased marketing efforts of litigation firms, the number of private cartel damages claims in Germany has increased substantially in recent years, with hundreds of private damages actions pending in consequence of prominent cartel cases at EU and German level, such as the Trucks cartel, the Sugar cartel, the Airfreight cartel, the Autoglas, cartel etc. Inter alia, due to the comparatively short duration of proceedings and usually moderate costs involved, Germany has become one of the jurisdictions of choice for plaintiffs in Europe and is probably the closest runner-up to England in this regard. It is fair to assume that the importance of Germany as a forum for follow-on claims will further increase following Brexit.

1.2 Other Developments

As illustrated by the significant number of private cartel damages cases brought before German courts each year, Germany is a very attractive jurisdiction for plaintiffs. However, even though German courts have issued numerous decisions

– including several in which damages were awarded – there are still a number of open issues to be decided, either by the courts or the German legislator.

One of these open issues is the question of standing-in cases where providers purchase antitrust damages claims from direct or indirect customers of the cartel members, and then pursue these bundled claims in court in their own name and for their own account, in return for the respective customers' financial participation if the assigned claims are successfully asserted in court (see **3. Class/Collective Actions**, below). As US-style class actions do not exist in Germany, these models are intended to facilitate the collective assertion of antitrust damages claims. However, whether – and under what conditions – such models are admissible under German law has not yet been conclusively decided.

2. The Basis for a Claim

2.1 Legal Basis for a Claim

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

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

2.2 Specialist Courts

In Germany, no specialist competition courts exist. Cases concerning a breach of German or European antitrust law are heard before civil courts. The exclusive jurisdiction lies with the regional courts (*Landgerichte*), regardless of the value of the matter in dispute, according to section 87 of the ARC. In most of the German federal states, however, one to three regional courts are designated by the respective governments as the competent court(s) for the districts of several regional courts, according to section 89 of the ARC. All civil actions concerning antitrust law matters are dealt with by these specially designated regional courts. These courts usually establish special antitrust law chambers which hear all antitrust law cases brought to the court. Therefore, the judges dealing with antitrust litigation cases are experts in this field of law. This also applies to the higher courts that decide on any appeals (see **11. Appeals**, below).

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

If an antitrust claim is brought in an inconvenient forum (*forum non conveniens*), such an action will not automatically be referred to the court of competent jurisdiction in antitrust matters for the relevant judicial district. Instead, section 281 of the German Code of Civil Procedure (CCP) requires the plaintiff to petition the court to have the claim referred to the proper legal venue.

2.3 Decisions of National Competition Authorities

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

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

2.4 Burden and Standard of Proof

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

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

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

However, the ARC provides for some exceptions and alleviations:

- the plaintiff does not need to show and prove the infringement of antitrust law itself, if a final decision of an NCA or the European Union finds that an infringement has occurred (section 33b ARC; see **2.3 Decisions of National Competition Authorities**, above).
- there is a rebuttable presumption that a cartel results in harm (section 33a (2) ARC).

On the other hand, the defendant can raise the pass-on defence. According to the Federal Supreme Court, the defendant has the right to show that the claimant has successfully passed on its damages (either completely or partially) to the next market level. This approach is in line with a fundamental principle of German damages law, according to which compensation shall only be awarded to recover actual losses. While the defendant has the burden of proof for the pass-on defence, ie, that, and to what extent, the overcharge has been passed on to the next market level, the indirect purchaser can benefit from a presumption established in section 33c (2) of the ARC when bringing a cartel damages claim (see below, **2.5 Direct and Indirect Purchasers**).

2.5 Direct and Indirect Purchasers

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

As already outlined above (see **2.4 Burden and Standard of Proof**), there is a rebuttable presumption that a hard-core cartel has caused some harm at the direct customer level. Moreover, under certain circumstances, a rebuttable presumption also exists in favour of the indirect purchaser. According to section 33c (2) of the ARC, there is a presumption in the indirect purchaser's favour that the overcharge would be passed on to it, if an infringement resulted in an overcharge for the direct purchaser and the indirect purchaser purchased goods or services that were:

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

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

On the other hand, the infringing party can raise the pass-on defence vis-à-vis the direct purchaser (see **2.4 Burden and Standard of Proof**). While the fact that the goods or service were sold on does not, in itself, preclude the occurrence of damages or harm, it will be deemed to have been compensated, pursuant to section 33c (1) of the ARC, to the extent that the direct purchaser has in turn passed on the overcharge caused by the infringing party's breach to the direct purchaser's own buyers, ie, the indirect purchasers, thus passing on the damages or harm.

2.6 Timetable

It is difficult to identify the typical duration of court proceedings. The duration from issuing a claim until a judgment is reached depends to a large extent on the complexity of the case and the workload of the competent court. On average, proceedings in the first instance take approximately one to two years. However, in very complex matters, the duration of the proceedings may be significantly longer, especially if the court needs to obtain the opinion of a court-appointed economic expert. The timeframe for an appeal is also usually one to two years. The same applies for a further appeal on a question of law to the German Federal Supreme Court.

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

3. Class/Collective Actions

3.1 Availability

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

However, in 2013 the German legislator introduced the possibility of representative actions brought by certain consumer organisations registered in the list of 'qualified institutions' pursuant to section 4 of the German Act on Injunctions or in the list of the EC to be published every six months pursuant to Article 4 of Directive 2009/22/EC of 23 April 2009 on injunctions for the protection of consumers' interests (section 33 (4) ARC), provided the alleged infringement of antitrust law affected the interests of the respective mem-

bers. Section 33 (4) of the ARC also provides for the right of associations with legal capacity for the promotion of commercial or independent professional interests to bring an action on behalf of the groups they represent. Such right for professional organisations to bring actions is, however, only available under certain conditions and has, so far, not been of any practical relevance.

Moreover, there are certain possibilities to bring an action on behalf of another party or to 'bundle' damages claims. The right to bring an action in one's own name but on another's behalf can be based on either law or agreement. However, such authorisation for a third party to bring an action on behalf of another party requires a legitimate interest on the part of the third party, and the interests of the defendant must not be unreasonably impaired as a result of such authorisation. Section 60 CCP allows for joinder of parties, ie, a plurality of persons jointly suing, if similar claims or obligations form the subject matter in dispute, and if these claims are based on essentially similar factual and legal causes. This gives victims of anti-competitive conduct an opportunity to consolidate their actions if they concern the same subject matter. However, according to section 61 CCP, joined parties shall deal with their opponent as individuals in such a form that the actions of one of the joined parties will neither benefit the other joined party nor place it at a disadvantage, unless stipulated otherwise by civil law or the CCP.

In relation to the German Cement cartel, the Belgian company Cartel Damages Claims (CDC) developed an innovative model for bundling damages claims: CDC acquired the damages claims of various companies affected by the German Cement cartel by way of purchase and assignment and subsequently brought an action for damages based on the accumulated claims on its own behalf. Similar models were developed by various law firms and litigation specialists in connection with the European Trucks cartel. It remains to be seen whether – and under what conditions – such models will be regarded as admissible by the German Federal Supreme Court.

3.2 Procedure

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

3.3 Settlement

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

4. Challenging a Claim at an Early Stage

4.1 Strikeout/Summary Judgment

There are no equivalents in Germany for the English strike-out rules or summary judgment to challenge a claim at an early stage. However, a court may reject an action as being

inadmissible if, for example, the jurisdiction or other requirements for the admissibility of a lawsuit are not fulfilled.

4.2 Jurisdiction/Applicable Law

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

Jurisdiction

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

The international jurisdiction of German courts is governed by sections 12 to 37 of the CCP, unless EU law on international jurisdiction, namely the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Recast Brussels Regulation') is applicable, which prevails over sections 12 to 37 of the CCP. For claims against defendants that are not domiciled in an EU member state, international jurisdiction is determined according to the principles laid down in the CCP.

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

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

However, given the tortious character of antitrust infringements, the victim is also entitled to bring such an action in a jurisdiction where the harmful event (tort) occurred. This can be the place of the event giving rise to the damage or the place where the damage occurred. Pursuant to the Recast Brussels Regulation and in line with the European Court of Justice's decision in the Hydrogen Peroxide case (ECJ, decision dated 21 May 2015, C-352/13 – CDC Hydrogen Peroxide SA), German courts have jurisdiction to hear claims against defendants domiciled within the EU but outside of Germany if each of the claims is directed against at least one anchor defendant (*Ankerbeklagter*) domiciled in Germany. However, claimants should also take into account that it might not be possible to establish jurisdiction in Germany if the relevant transaction documents (eg, a purchase or lease agreement) contain choice of forum clauses for damages

claims (*Gerichtsstandsklausel*), which explicitly establish jurisdiction in a country or jurisdiction other than Germany.

The principles for determining international jurisdiction under the CCP are in major aspects similar to those that apply under the Recast Brussels Regulation. Pursuant to section 17 CCP, the general place of jurisdiction of legal persons is determined by their domicile (ie, the location of their registered office). According to section 32 CCP, for complaints arising from tort, the court in the jurisdiction where the tortious act was committed has jurisdiction. This can be the place of the event giving rise to the tort (*Handlungsort*) or the place where the harm resulted (*Erfolgsort*).

Applicable Law

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

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

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

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

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

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

4.3 Limitation Periods

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

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

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

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

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

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

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

The limitation period is suspended during the investigation by the EC or an NCA (section 33a (6) ARC). The claims will expire no earlier than one year after the final and binding (*rechtskräftig*) decision of the respective authority or court. In case of an investigation by the EC, it can be argued that the suspension only starts upon the issuance of a formal 'Decision to Initiate Proceedings', ie, not by a previous investigation means such as an unannounced inspection (dawn raid). So far, the Federal Supreme Court has not had an opportunity to decide on this question.

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

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure

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

Section 33g of the ARC, introduced in June 2017, includes a new (substantive) right for access to information required to seek damages. It is still unclear whether these new rules apply to litigation initiated after 26 December 2016, but referring to claims that arose before the 9th ARC Amendment came into force.

In order to claim access to information from either the potential defendant or another third party, a plaintiff has to demonstrate probable cause that they have a right to seek damages and indicate the information they require as specifically as possible. This right is not limited to the plaintiff but also the defendant, who can claim the right to access to information from either the plaintiff or a third party, if an action of damages is already pending (ie, not pretrial). In particular, a defendant could request access to data and documents in order to be able to quantify a pass-on by the plaintiff. In general, a disclosure is excluded if and to the extent that it is disproportionate, taking into account and balancing the interests of the party claiming access to information and the interests of the party that is in (alleged) possession of such information. Factors to be taken into account in this context include the relevance and value of the information; the extent to which the available information has been exhausted; the effort and cost involved to provide the requested information; the confidential nature of the requested information; and the effectiveness of public competition law enforcement.

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

In addition to requests brought against third parties, the plaintiff can request access to the records of the FCO or other relevant competition authorities according to section 89c of the ARC. However, pursuant to section 89c (1), sentence

1, No 1 of the ARC, access to the records of competition authorities shall only be granted if the requested information cannot be obtained with reasonable effort from another party.

Whether the extended rules on access to information will actually facilitate or hamper damages claims, remains to be seen. Enforcing (pretrial) disclosure will likely result in significant delays and may therefore not always be attractive. This is especially true as section 89b (3) and (4) of the ARC provide for the possibility of a stay of proceedings and an interlocutory judgment regarding access to information. Furthermore, the implementation of confidentiality protection for business secrets and other confidential information can further delay the proceedings. While the ARC acknowledges such protection, it does not provide any assistance as to how to actually and practically ensure the protection of such information (eg, through redaction of the relevant documents or a confidentiality ring similar to what is current practice in English proceedings).

5.2 Legal Professional Privilege

Unlike other jurisdictions, the concept of legal privilege does not exist in Germany. However, under the new section 33g (6) of the ARC, documents can be withheld from inspection if they are in the possession of an external lawyer. Whether this also applies to documents in the possession of a client remains unclear.

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

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

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

Trade secrets and other confidential information are generally not privileged under German civil procedural law. However, confidentiality aspects have to be considered in relation to a request for disclosure of information pursuant

to section 33g of the ARC. If access to the information is granted, the court has to ensure that trade or business secrets will be protected. However, there is no established practice in this regard as yet (see question 5.1 **Disclosure/Discovery Procedure**).

5.3 Leniency Materials/Settlement Agreements

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

6. Witness and Expert Evidence

6.1 Witnesses of Fact

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

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

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

In antitrust damages actions, which very often relate to events in the distant past, evidence gathered by hearing witness testimony on individual, specific transactions within an undertaking, on specific procurements, for example, often tends to play a secondary role, simply as a practical matter.

6.2 Expert Evidence

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

In antitrust damages proceedings, it is common practice for the plaintiff to submit an economic expert opinion on the question of whether, and if so, to what extent, harm has occurred; this practice is not obligatory, however. The

defendant then usually submits a countering economic expert opinion, which serves to describe the weakness in the plaintiff's expert opinion and/or to undertake its own damages analysis. Expert opinions submitted by the parties are regarded as being part of the parties' pleadings. Economic experts commissioned by the parties are usually expert witnesses (as per section 414 CCP), and the rules governing the taking of evidence by hearing witness testimony is applicable here too.

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

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

7. Damages

7.1 Assessment of Damages

Damages are awarded based on the principle of natural restitution – compensatory damages, section 249 German Civil Code (BGB). The harm caused to a plaintiff by an antitrust law infringement is calculated by comparing the situation in which the plaintiff actually finds itself, given the infringement, and the hypothetical situation in which the plaintiff would have been, but for the infringement, also known as the 'counterfactual scenario'. Potential losses also include lost profits (section 252 BGB). Exemplary or punitive damages are not available.

There is no standing case law yet on the methods to be applied for the quantification of cartel damages. In most

cases, expert opinions submitted by the parties adopt comparison-over-time approaches.

7.2 'Passing-on' Defences

The pass-on defence is available to defendants in Germany.

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

The burden of proof regarding passing-on lies with the party that caused the harm; ie, the defendant must demonstrate and prove that its customers passed on any overcharge to the next market level, and to what degree.

7.3 Interest

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

The statutory interest rate is five percentage points above the base rate per annum, as published by the German central bank, for damages that occurred on or after 1 July 2005 (section 33a (4) ARC 2017, in conjunction with 288 (1) 2 BGB). For damages that occurred before 1 July 2005, the German Federal Supreme Court holds that interest is payable in the amount of 4% per annum.

8. Liability and Contribution

8.1 Joint and Several Liability

The participants in a cartel are jointly and severally liable for the entirety of harm that was caused by that cartel (section 33d GWB 2017). Defendants may assert claims for all damages in one single action against one or more cartel members. Alternatively, they can bring a number of separate actions asserting the entire sum of damages against various cartel members; if they are successful, however, they can only enforce the damages sum to which they are entitled once.

The internal settlement between joint and several debtors depends on the circumstances of the specific case and, in particular, on the extent to which they have caused the damage (section 33d GWB 2017); other than this, the general

rules for total debt equalisation apply (section 421 et seq BGB).

Exceptions to these principles apply to claims which have arisen since 26 December 2016 with respect to leniency applicants, which received full immunity under the applicable leniency programme. Thus, leniency applicants are only liable for compensation of the loss suffered by their direct and indirect customers or suppliers resulting from the infringement (section 33e ARC), and the same applies to the internal equalisation between joint and several debtors. Under certain conditions, with regard to claims arising after 26 November 2016, small and medium-sized enterprises may also only be obliged to compensate for the damages suffered by their direct and indirect customers or suppliers (section 33d ARC).

8.2 Contribution

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

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

9. Other Remedies

9.1 Injunctions

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

German procedural law provides for different interim measures pursuant to sections 935 and 940 of the CCP. In the event of an immediate risk that the financial situation of the defendant will deteriorate, the plaintiff can request that the court seize assets of the defendant. Furthermore, courts can issue interim measures ordering the defendant to perform a certain action, such as supplying the plaintiff with certain goods, if the plaintiff would otherwise lose important customers. The standard of proof is lower than for the principal claim on the merits. An applicant for interim relief must provide prima facie evidence that they have a claim and that

the realisation of such claim is impossible or severely jeopardised without the interim remedy (urgency). As a general rule, an interim remedy shall not result in the fulfilment of the final remedy.

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

9.2 Alternative Dispute Resolution

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

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

10. Funding and Costs

10.1 Litigation Funding

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

10.2 Costs

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

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

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

**BUNTSHECK Rechtsanwalts-gesellschaft
mbH**

Herzog-Wilhelm-Str. 1
D-80331 München



Tel: +49 89 89 08 308-0
Fax: +49 89 89 08 308-99
Web: www.buntscheck.com

11. Appeals

11.1 Basis of Appeal

Appeals against the decisions of the regional courts are made before the competent higher regional court on the facts and on the law. The higher regional courts, which are designated to be competent by the respective German federal states, have specialised antitrust law panels. Decisions of the higher regional courts may be appealed on points of law before the German Federal Supreme Court, which has also established a special antitrust law panel.