THE PRIVATE COMPETITION ENFORCEMENT REVIEW

Fifteenth Edition

Editors
Ilene Knable Gotts and Kevin S Schwartz

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PREFACE

Private competition litigation can be an important complement to public enforcement in the achievement of compliance with the competition laws. Antitrust litigation has been a key component of the antitrust regime for decades in the United States. The US litigation system is highly developed, using extensive discovery, pleadings and motions, use of experts and, in a small number of matters, trials, to resolve the rights of the parties. The process imposes high litigation costs (both in terms of time and money) on all participants, but promises great rewards for prevailing plaintiffs. The usual rule that each party bears its own attorneys' fees is amended for private antitrust cases such that a prevailing plaintiff is entitled to its fees as well as treble damages. The costs and potential rewards to plaintiffs create an environment in which a large percentage of cases settle on the eve of trial. Arbitration and mediation are still rare, but not unheard of, in antitrust disputes. Congress and the US Supreme Court have attempted to curtail some of the more frivolous litigation and class actions by adopting tougher standards and ensuring that follow-on litigation exposure does not discourage wrongdoers from seeking amnesty. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high levels of litigation activity, particularly involving intellectual property rights and cartels.

Until the last decade or so, the United States was one of the few outliers in providing an antitrust regime that encouraged private enforcement of the antitrust laws. Only Australia had been more receptive than the United States to suits being filed by a broad range of plaintiffs – including class action representatives and indirect purchasers – and to increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Brazil provided another, albeit more limited, example: it has had private litigation arise involving non-compete clauses since the beginning of the twentieth century, and monopoly or market closure claims since the 1950s. In the past decade, we have seen other regimes begin to provide for private competition litigation in their courts, typically, as discussed below, only after (i.e., as a 'follow on' to) public enforcement. In some jurisdictions (e.g., Argentina, Lithuania, Mexico, Romania, Switzerland and Venezuela), however, private actions remain very rare, or non-existent (e.g., Nigeria), and there is little, if any, precedent establishing the basis for compensatory damages or discovery, much less for arbitration or mediation. In addition, other jurisdictions (e.g., Switzerland) still have very rigid requirements for standing, which limit the types of cases that can be initiated.

The tide is clearly turning, however, with important legislation either recently having been adopted or currently pending in many jurisdictions throughout the world to provide a greater role for private enforcement. In Australia, for example, the government has undertaken a comprehensive review and has implemented significant changes to its private enforcement

law. The most significant developments, however, are in Europe as the EU Member States implement the EU's directive on private enforcement into their national laws. The most significant areas standardised in most EU jurisdictions involve access to the competition authority's file, the tolling of the statute of limitations period and privilege. Member States continue to differ on issues relating to the evidentiary effect of an EU judgment and whether fines should be factored into damages calculations. Even without the directive, many of the Member States throughout the European Union have increased their private antitrust enforcement rights.

The development of case law in jurisdictions also has an impact on the number of private enforcement cases that are brought. In China, for instance, the number of published decisions has increased and the use of private litigation is growing rapidly, particularly in cutting-edge industries such as telecommunications, the internet and standard essential patents. In South Korea, private actions have been brought against an alleged oil refinery cartel, sugar cartel, school uniform cartel and credit card VAN cartel. In addition, the court awarded damages to a local confectionery company against a cartel of wheat flour companies. In contrast, in Japan, over a decade passed from the adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; it is also only recently that a derivative shareholder action has been filed. Moreover, in many other jurisdictions as well, there remain very limited litigated cases. For example, there has been a growing number of private antitrust class actions commenced in Canada; none of them have proceeded to a trial on the merits.

The English and German courts are emerging as major venues for private enforcement actions. The Netherlands has also become a preferred jurisdiction for commencing private competition claims. Collective actions are now recognised in countries such as Sweden, Finland and Denmark. Italy also recently approved legislation allowing for collective damages actions and providing standing to sue to representative consumers and consumer associations, and France and England have taken steps to facilitate collective action or class action legislation. In addition, in France, third-party funding of class actions is permissible and becoming more common. In China, consumer associations are likely to become more active in the future in bringing actions to serve the public interest.

Differences will continue to exist from jurisdiction to jurisdiction regarding whether claimants must opt out of collective redress proposals to have their claims survive a settlement (as in the UK), or instead must opt in to share in the settlement benefits. Even in the absence of class action procedures, the trend in Europe is towards the creation and use of consumer collective redress mechanisms. For instance, the Netherlands permits claim vehicles to aggregate into one court case the claims of multiple parties. Similarly, in one recent case in Austria, several parties filed a claim by assigning it to a collective plaintiff. Some jurisdictions have not to date had any private damages awarded in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its participants; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages or injunctive litigation. Some jurisdictions base the statute of limitations upon the point at which a final determination of the competition authorities is rendered (e.g., India, Romania, South Africa and Austria) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions, such as Australia and Chile, it is not as clear when the statutory period will be tolled. In a few jurisdictions, it is only after the competition authority

acts that a private action will be decided by the court. Of course, in the UK – a jurisdiction that has been one of the most active and private-enforcement-friendly global forums – it will take time to determine what impact, if any, Brexit will have.

The greatest impetus for private competition cases is the follow-up litigation potential after the competition authority has discovered – and challenged – cartel activity. In India, for instance, as the Competition Commission becomes more active in enforcement investigations involving e-commerce and other high-technology areas, the groundwork is being laid for future private antitrust cases. The interface between leniency programmes (and cartel investigations) and private litigation is still evolving in many jurisdictions, and in some jurisdictions it remains unclear what weight to give competition agency decisions in follow-on private litigation cases and whether documents in the hands of the competition agency are discoverable (see, for example, Sweden). Some jurisdictions seek to provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants. In contrast, other jurisdictions, such as the Netherlands, do not bestow any benefit or immunity in a follow-on damages action. These issues are unlikely to be completely resolved in many jurisdictions in the near term.

There is one point on which there is almost universal agreement among jurisdictions: almost all have adopted an extraterritorial approach premised on effects within their borders. Canadian courts may also decline jurisdiction for a foreign defendant based on the doctrine of *forum non conveniens* as well as comity considerations. A few jurisdictions, such as the UK, however, are prepared to allow claims in their jurisdictions when there is a relatively limited connection, such as when only one of a large number of defendants is located there. In contrast, in South Africa, the courts will also consider spillover effects from antitrust cartel conduct as providing a sufficient jurisdictional basis.

The litigation system in each jurisdiction to some extent reflects the respective perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Austria, Canada, France, Israel, Japan, the Netherlands, Norway, South Korea and the UK), with liability arising for participants who negligently or knowingly engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will, in certain circumstances, award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway and the Netherlands); others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, with some (e.g., Russia) focusing on the potential for unjust enrichment by the defendant. In Brazil, there is a mechanism by which a court can assess a fine to be paid by the defendant to the Fund for the Defence of Collective Rights if the court determines the amount claimed as damages is too low compared with the estimated size and gravity of the antitrust violation. Still others are concerned that private antitrust litigation might thwart public enforcement and may require what is, in essence, consent of the regulators before allowing the litigation or permitting the enforcement officials to participate in a case (e.g., in Brazil, as well as in Germany, where the competition authorities may act as amicus curiae).

Some jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, India, Turkey and Venezuela). Interestingly, no other jurisdiction has chosen to replicate the United States' system of routinely awarding treble damages for competition claims; instead, the overwhelming majority of jurisdictions take the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for

punitive damages for common law conspiracy and tort claims, as does Turkey). In Venezuela, however, the plaintiff can obtain unforeseen damages if the defendant has engaged in gross negligence or wilful misconduct, and in Israel, a court recently recognised the right to obtain additional damages on the basis of unjust enrichment law. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Cultural views also clearly affect litigation models. Outside the EU and North America, the availability of group or class actions varies extensively. A growing minority of jurisdictions embrace the use of class actions, particularly following a cartel ruling by the competition authority (e.g., Israel). Some jurisdictions (e.g., Turkey) permit group actions by associations and other legal entities for injunctive (rather than damages) relief. Jurisdictions such as Germany and South Korea generally do not permit representative or class actions, but instead have as a founding principle the use of courts for pursuing individual claims. In some jurisdictions (e.g., China, South Korea and Switzerland), several claimants may lodge a collective suit against the same defendant if the claims are based on similar facts or a similar legal basis, or even permit courts to join similar lawsuits (e.g., Romania and Switzerland). In Japan, class actions were not available except to organisations formed to represent consumer members; however, a new class action law came into effect in 2016. In contrast, in Switzerland, consumers and consumer organisations do not currently have legal standing and cannot recuperate damages they have incurred as a result of an infringement of the Competition Act. In Poland, only entrepreneurs, not individuals, have standing to bring claims under the Unfair Competition Act, but the Group Proceedings Act is available if no administrative procedure has been undertaken concerning the same case.

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Japan, the Netherlands, South Korea, Spain and Switzerland) also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In South Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA Court. Other jurisdictions believe that discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes that 'laying your cards on the table' and broad discovery are important). Views towards protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney–client, attorney–work product or joint work product privileges exist in Japan; pre-existing documents are not protected in Portugal; there is limited recognition of privilege in Germany and Turkey; and extensive legal advice, litigation and common interest privilege exist in the UK and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents by the Portuguese Competition Authority.

Some jurisdictions view settlement as a private matter (e.g., France, Japan and the Netherlands); others view it as subject to judicial intervention (e.g., Israel and Switzerland). The culture in some jurisdictions, such as Germany, so strongly favours settlement that judges will require parties to attend hearings and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pretrial settlement conference is mandatory.

As suggested above, private antitrust litigation is largely a work in progress in many parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction is favourable to the recognition that private antitrust enforcement has a role to play. Many of the issues raised in this book, such as the pass-on defence and the standing of indirect purchasers, remain unresolved by the courts in many countries, and our authors have provided their views regarding how these issues are likely to be clarified. Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues, such as privilege, are subject to change through both proposed legislative changes and court determinations. The one constant across almost all jurisdictions is the upward trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

Ilene Knable Gotts and Kevin S Schwartz
Wachtell, Lipton, Rosen & Katz
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Chapter 9

GERMANY

Sebastian Jungermann[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Private competition enforcement has a long tradition in Germany, and the country continues to grow as a leading jurisdiction for private competition litigation in Europe. Germany is among the three preferred jurisdictions for private cartel damages actions in Europe, along with the UK and the Netherlands. Because of Brexit and the end of the transition period on 31 December 2020, the UK may become less attractive for new cases going forward.[2] In Germany, the level of private cartel enforcement is relatively high. 2021 was an active year again, even though the coronavirus pandemic slowed down activities, and hearings had to be postponed in some cases.

There are various reasons why Germany is an attractive location and a favourable forum for cartel damages claims. First, significant changes have been introduced to Germany's competition legislation over the years. In light of the decision of the European Court of Justice (ECJ) in *Courage v. Crehan* in 2001,[3] the German legislator has amended the German Act against Restraints of Competition (GWB) with the aim of further facilitating private damages actions. Following these important amendments in 2005, referred to as the Seventh Amendment to the GWB,[4] hundreds of cases have been initiated in Germany, and the courts have steadily built up relevant case law. Parties and courts have had numerous opportunities to address multiple issues that needed clarification, and many of these have been recently ruled on by the German Federal Court of Justice (BGH).

In June 2017, Germany introduced another important legislative package, the Ninth Amendment to the GWB,[5] to implement the rules of the EU Damages Directive[6] in German law, among other changes. The majority of the provisions contained in the Damages Directive have been incorporated in German competition law for some time. Over the

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2 If an infringement decision is reached by the European Commission or another EU Member State authority after 31 December 2020, claimants wishing to pursue follow-on private damages claims in the UK courts will no longer be able to rely on that decision as a binding finding of a competition infringement under the UK Competition Act 1998. However, existing EU-based claims pending in the UK will proceed through the system.

3 Judgment of the European Court of Justice (ECJ) of 20 September 2001, C-453/99 (*Courage Ltd v. Bernard Crehan* and *Bernard Crehan v. Courage Ltd and Others*).

4 Federal Law Gazette (BGBl), 2005, Part I, No. 42, 12 July 2005, p. 1954.

5 BGBl, 2017, Part I, No. 33, 8 June 2017, p. 1416.

6 Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, dated 5 December 2014, pp. 1–19.

years, the number of civil follow-on actions for damages following competition proceedings by the German Federal Cartel Office (FCO) or the European Commission has increased significantly, and private damage litigation in Germany has affected products as diverse as steel, rails, sugar, bathroom fixtures, electronic cash, chipboard, detergents, picture tubes for computers or televisions, packaging, cement, steel blasting agents, wallpaper, gas-insulated sound systems, drugstore items, flour, confectionery and trucks, among others.

The legislative package of June 2017 introduced significant changes to German law, including, in particular:

a a system of disclosure of evidence relevant for damages claims;

b the extension of the knowledge-dependent limitation period from three years to five years; and

c the introduction of a legal presumption that a proven cartel has caused damages, among other changes for the benefit of cartel victims.

Another legislative update, the 10th Amendment to the GWB, came into effect in January 2021. This amendment will also benefit cartel victims.

Second, the German rules on pretrial interest and on costs are quite reasonable. The German court system also offers significant advantages because cartel damages cases are decided by specialist chambers in a limited number of first instance courts.

Third, the BGH and the ECJ both handed down important case law judgments and clarifications recently. In January 2020, the BGH, with its fundamental ruling in *Rail Cartel II*,[7] recalibrated the rules for entitlement and attribution of damages in cartel infringements, taking into account the requirements of EU law, and lowered the standard of proof for plaintiffs. Following this ruling, it is not necessary to prove that the cartel agreement actually had an effect on the procurement transaction in question. This was, as the BGH freely admits in its ruling from January 2020, a significant correction of the view the BGH held in its first *Rail Cartel* judgment in December 2018.[8] This readjustment must also be seen against the backdrop of the important ECJ *Otis* ruling in December 2019,[9] in which the ECJ extended the attribution of damages beyond upstream and downstream product markets. In its *Rail Cartel II* judgment, the BGH also ruled that a factual presumption exists that long-lasting cartels lead to inflated prices and thus to damage to those purchasing the cartelised product. Moreover, the BGH provided some guidance on the use of economic expert opinions; for example, that it is not mandatory to appoint a court-appointed expert.

Another interesting ruling was issued by the Dortmund Regional Court in September 2020.[10] The Court is relatively active in competition cases and well known among competition litigation experts. In its judgment, the Court made use of the possibility to estimate the amount of damages without obtaining a court expert opinion. This possibility is generally available under German law[11] but has not been used in competition damages cases to date. In the specific rail cartel case at hand, the Court estimated the minimum damages

7 Judgment of the Federal Court of Justice (BGH) of 28 January 2020, KZR 24/17 (*Rail Cartel II*).

8 Judgment of the BGH of 11 December 2018, KZR 26/17 (*Rail Cartel*).

9 Judgment of the ECJ (Fifth Chamber) of 12 December 2019, C-435/18 (*Otis Gesellschaft m.b.H. and Others v. Land Oberösterreich and Others*), request for a preliminary ruling from the Austrian Supreme Court of Justice.

10 Judgment of the Dortmund Regional Court of 30 September 2020, 8 O 115/14 (*Kart*).

11 The possibility to estimate the damages is provided for in Section 287(1) of the German Code of Civil Procedure (ZPO): 'If it is disputed between the parties whether damage has been suffered and the amount

at 15 per cent and subsequently issued two further estimation rulings in September 2020 and February 2021.[12] The Higher Regional Court of Celle independently estimated damages caused by the particle board cartel in August 2021.[13]

In addition, the BGH has issued several groundbreaking rulings lately. In a September 2020 judgment on damages relating to the *Trucks* cartel,[14] the BGH made clear, among other things, that the suspension of the statute of limitations for the claims begins as soon as the preliminary proceedings are conducted (for example, the dawn raids), and not when the proceedings are formally opened by the competition authority, which can be years later. And referring to its earlier case law, the BGH confirmed that the fact that the injured party was affected by the cartel was not a question of causality giving rise to liability and that it did not otherwise pose 'a major problem' in this case. If the injured parties obtained the trucks concerned from the defendant cartelists, cartel concern would be present. For this, it was sufficient that the purchased concrete mixers and dump trucks were equipped with the cartelised chassis. Other judgments with similar important guidance include the *Rail Cartel IV* judgment, dated 19 May 2020,[15] the *Rail Cartel V* judgment, dated 23 September 2020,[16] the *Rail Cartel VI* judgment, dated 10 February 2021,[17] and the *Trucks Cartel II* judgment, dated 13 April 2021.[18]

Finally, the ECJ has also recently issued important rulings with far-reaching implications. On 14 March 2019, the Court ruled in *Vantaan kaupunki v. Skanska*[19] that the single economic unit principle also applies in the context of damages claims. On 6 October 2021, the ECJ issued its judgment in *Sumal v. Mercedes Benz Trucks Espana*,[20] ruling that a company harmed by an antitrust infringement can bring an action for damages against the subsidiary of a company responsible for the infringement.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Private competition claims must be brought in the national courts of an EU Member State. The proceedings are governed by the national law of the Member State. In Germany, private competition actions regarding injunctive relief or damages are available in any type of cartel matter. Such claims can be made against members of a cartel, as well as against companies that abuse a dominant position or any party to a potentially anticompetitive agreement. In

of the damage or interest to be compensated, the court shall decide on this at its own discretion, taking into account all the circumstances. Whether and to what extent a requested taking of evidence or an *ex officio* expert opinion is to be ordered shall be left to the discretion of the court.'.

12 Judgments of the Dortmund Regional Court of 4 November 2020, 8 O 26/16 (*Kart*), and of 3 February 2021, 8 O 116/14 (*Kart*).

13 Judgment of the Higher Regional Court of Celle of 12 August 2021, 13 U 120/16 (*Kart*).

14 Judgment of the BGH of 23 September 2020, KZR 35/19.

15 Judgment of the BGH of 19 May 2020, KZR 8/18 (*Rail Cartel IV*).

16 Judgment of the BGH of 23 September 2020, KZR 4/19 (*Rail Cartel V*).

17 Judgment of the BGH of 10 February 2021, KZR 63/18 (*Rail Cartel VI*).

18 Judgment of the BGH of 13 April 2021, KZR 19/20 (*Trucks Cartel II*).

19 Judgment of the ECJ of 14 March 2019, C-724/17 (*Vantaan kaupunki v. Skanska*).

20 Judgment of the ECJ of 6 October 2021, C-882/19 (*Sumal v. Mercedes Benz Trucks Espana*).

private competition cases, the regional courts have exclusive jurisdiction.[21] The German states have the option to assign civil disputes to one or more specific regional courts in cartel cases in their state,[22] which is the case in most of Germany's 16 states.

It is also possible under German law to object to a merger. If a customer, competitor or another affected market participant takes the position that the respective merger should have been blocked by the FCO, this claim falls within the exclusive jurisdiction of the Higher Regional Court of Düsseldorf.[23]

Concerning the substantive basis for a competition damages claim, German law applies in general. Since 2017, claims for removal and injunctive relief have been based on Section 33 of the GWB, and damages claims are based on Section 33(a) of the GWB. The invalidity of agreements for competition law reasons is based on Section 134 of the German Civil Code (BGB) in connection with Section 1 of the GWB.

Prior to 2005, the GWB did not provide for specific antitrust damages claims; these were based on general tort law. In the event of a culpable, intentional or negligent violation of protected rights and legal interests, the German tort system regulated in Section 823 et seq. of the BGB offers those affected by violations the possibility of asserting a claim for damages against the tortfeasor or tortfeasors.[24] In 2005, the German legislator also introduced Section 33(3) of the GWB 2005, a specific basis for antitrust damages claims. This basis was not changed, but renumbered in June 2017, when the Ninth Amendment to the GWB[25] was introduced. Section 33a(1) of the GWB applies to claims for damages that arose after 26 December 2016.[26]

Generally, it is up to the plaintiff to state and prove all facts that substantiate his or her claim. The claim for compensation for cartel damages is justified if the defendant has culpably violated cartel law, the plaintiff has suffered damage because of the cartel violation and the damage exists in the amount claimed.[27] Therefore, the cartel victim would have to present and prove the cartel violation, the fault and the occurrence and amount of damage. However, the GWB and the applicable case law make some exceptions to this general rule of burden of proof. Pursuant to Section 33b of the GWB, final decisions of the European Commission or a national competition authority have a binding effect. Although a finding of infringement by a competition authority is not required to initiate a private antitrust action under German law, it is advisable in practice to await a finding because of the binding effect.[28]

21 Section 87, Act against Restraints of Competition (GWB).

22 id., Section 89.

23 id., Section 63 et seq.

24 In addition to tort law, general laws of enrichment (Sections 812 et seq. and 826, German Civil Code (BGB)) and contractual claims (Section 280(1), BGB) are available.

25 See footnote 5.

26 Pursuant to Section 186(3) of the GWB, new Section 33a of the GWB is only applicable to claims for damages that arose after 26 December 2016 (i.e., after the expiry of the transposition period pursuant to Article 21 of the Damages Directive). For claims that arose before then, Section 33(3) of the GWB 2005 continues to apply, and Section 823 of the BGB applies for older claims.

27 Sections 33a(1) and 33(1), GWB.

28 Section 33b of the GWB corresponds to old Section 33(4) of the GWB 2005, which introduced a factual effect for follow-on actions in 2005. However, pursuant to Section 186(3) of the GWB, new Section 33b of the GWB is only applicable to claims for damages that arose after 26 December 2016 (i.e., after the expiry of the transposition period pursuant to Article 21 of the Damages Directive). Section 33(4) of the GWB 2005 continues to apply to claims that arose before then.

Regarding the amount of damage caused to the injured party by the cartel, the standard of proof under German law is reduced. Pursuant to Section 33a(2) of the GWB, there is a (rebuttable) presumption that cartels lead to harm, and pursuant to Section 33a(3) of the GWB and Section 287 of the German Code of Civil Procedure (ZPO), the court may estimate the amount of harm suffered by the plaintiff. The plaintiff is not obliged to precisely calculate the damage caused by the cartel. It is only necessary that the plaintiff provides a reliable factual basis for the estimate (see Section VIII regarding calculation of damages by the court). In cartel damages cases, when estimating the amount of damages, the court may additionally consider the profits made by the defendants through illegal cartel activities.[29]

The statute of limitations follows complex rules under German law. The legislative package from June 2017 implemented Article 10 of the Damages Directive in Section 33h of the GWB. The most important change compared to the previous regulation is the increase of the limitation period from three years to five years. Cartel damages claims that arose after 26 December 2016 become time-barred five years after the end of the year in which the injured party became aware of the cartel infringement and of the identity of the damaging party (or would have to become aware of them without gross negligence), or 10 years after the damage arose and the infringement ended. In all other respects, the claims shall become time-barred 30 years after the infringement that caused the damage.

Most damages cases in dispute today relate to infringements that arose before 26 December 2016. These are 'old cases' that must be assessed under the application of the new law, but from the perspective of the old law. The limitation rules of the GWB are subject to a complex transitional provision pursuant to Section 186(3) of the GWB. Because this rule provides for different time ranges of application of the rules on the commencement of the limitation period and the end of the limitation period, and the details on the limitation period are disputed in literature and case law, one will currently have to assume as a precautionary measure that the 'old' (stricter) rules apply to the commencement of the limitation period. The commencement of the limitation period for the period prior to the entry into force of Section 33h of the GWB is assessed according to the provisions of the BGB. For the knowledge-based limitation period, there are no differences to Section 33h of the GWB, as this period also begins at the end of the year in which the aggrieved party becomes aware of the infringement and of the identity of the wrongdoer, according to Section 199(1) of the BGB.[30]

29 Section 33a(3), GWB.

30 Concerning the *Trucks* cartel cases based on the Commission decision dated 19 July 2016 (Case AT.39824), for instance, the violations all arose before 26 December 2016. All civil damages cases based on these claims are considered 'old cases', for which Section 186 of the GWB applies. It is therefore necessary to examine whether potential claims were time-barred by 9 June 2017, the date on which the June 2017 legislative package came into force. The start of the statute of limitations for the period before Section 33h of the GWB came into force in June 2017 must be assessed according to the provisions of the BGB. For the knowledge-dependent limitation period, there are no differences to the new regulation in Section 33h of the GWB. According to Section 199(1) of the BGB, claims for cartel damages (which arose before 26 December 2016) were originally subject to a limitation period of three years after the end of the year in which the claim arose and the injured party became aware of the cartel infringement and the identity of the injuring party, or would have to become aware of them without gross negligence. If a cartel victim did not have any such knowledge before 19 July 2016 (when the EC published its Trucks decision), the three-year period had not elapsed by 9 June 2017, and the five-year limitation period of the new law (Section 33h, GWB) applies accordingly.

In addition, according to Section 199(3)(1) of the BGB, a knowledge-independent period of 10 years from the date of the claim for damages comes into existence, to the exact day. In contrast to the new regulation of Section 33h(3) of the GWB, the beginning of this period does not depend on the termination of the cartel. In this context, it must be taken into account that the investigation of the European Commission or a competition authority of an EU Member State suspends the limitation period[31] until one year after the conclusion of the investigation proceedings. On 23 September 2020, the BGH ruled in the *Trucks* cartel matter[32] that the start of the suspension of the statute of limitations is not based on the formal initiation of the competition authorities' proceedings, but on the first externally visible investigative measures (i.e., searches (dawn raids)).[33] In accordance with general opinion in Germany, claims for antitrust damages arise upon conclusion of the respective purchase agreement.

III EXTRATERRITORIALITY

Generally, German and EU competition law applies to any anticompetitive conduct that has either taken place in Germany or caused any harm in Germany. Competition damages claims can be brought before German courts if the defendant is located in Germany, if the cartel activities have taken place in Germany or if the harm has been suffered in Germany. If a cartel consists of cartel participants domiciled in Germany and abroad, which are jointly and severally liable, international jurisdiction for compensation actions against the foreign cartel participants in Germany will result from Article 8(1) of the Brussels Regulation. Accordingly, a foreign defendant can also be sued in Germany, as the cartel provides the necessary connection. In international cartel cases, actions can be brought against all defendants; if one defendant can be sued in Germany, this 'anchor defendant' is sufficient to establish jurisdiction. Jurisdiction remains for the remaining foreign defendants even if the only anchor defendant ends its case by settlement.[34]

IV STANDING

Any person or company having suffered harm can bring a private damages case in Germany. In addition to direct customers who purchased the cartelised goods or services directly from the cartelists or their competitors, indirect customers can also generally sue. In its landmark judgment in the *ORWI* case in 2011,[35] the BGH stated that, under the German and European competition law rules, indirect purchasers and all those harmed by the infringement are entitled to claim damages. Regarding substantive law, it is now also clear from Section 33c

31 Pursuant to Section 33h(6) of the GWB, which corresponds to old Section 33(5) of the GWB 2005.

32 See footnote 14.

33 For German *Trucks* cartel damages cases following the decision from June 2016 (Case AT.39824), this means that the start of the suspension of the statute of limitations is not based on the formal initiation of the Commission proceedings, which occurred on 20 November 2014, but on the first externally visible investigative measures (i.e., the searches) on 18 January 2011.

34 Judgment of the ECJ (Fourth Chamber) of 21 May 2015, C-352/13 (*Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Evonik Degussa GmbH and Others*); request for a preliminary ruling from the Dortmund Regional Court.

35 Judgment of the BGH of 28 June 2011, KZR 75/10 (*ORWI*).

of the GWB that indirect purchasers are entitled to claim damages. In its decision in January 2020,[36] the BGH expanded the group of claimants that is entitled to seek damages, including by reference to the ECJ.[37] The Court made it clear that it applies the European law requirements specified by the ECJ in the case at hand by way of an adjusted interpretation of the 'affected persons' criterion. This criterion is fulfilled if the claimant proves that it has purchased goods that were covered by the cartel. However, for indirect purchases it is more difficult to substantiate damage caused by the cartel in practice. But, as set out in Section 33c of the GWB, it is presumed that an overcharge paid by a direct purchaser has been passed on to indirect purchasers under specific circumstances.

With regard to the question of which party may be sued, in its 14 March 2019 *Vantaan kaupunki v. Skanska*[38] decision, the ECJ ruled that the single economic unit principle also applies in the context of damages claims and that economic successors can be held liable for damages resulting from antitrust infringements, even if the party responsible for the infringement has been dissolved with its assets having been transferred to another company, which can be liable as the economic successor. And on 6 October 2021, the ECJ issued its judgment in *Sumal v. Mercedes Benz Trucks Espana*,[39] ruling that a company harmed by an antitrust infringement can bring an action for damages against the subsidiary of a company responsible for the infringement.

V THE PROCESS OF DISCOVERY

In German civil procedure there is no discovery procedure comparable to common law jurisdictions. Therefore, the concept of legal privilege is rather of little relevance in German civil procedure (see Section XI). According to German civil procedure law, generally each party must present and prove the facts favourable to its legal position; in particular, by means of submitting documents, witnesses or expert opinions. Until 2017, there were no specific rules on evidence in private antitrust disputes. Claimants therefore had to rely on a set of rarely used provisions[40] that theoretically allowed courts to order defendants or third parties to produce certain documents. The German judicial culture, however, is rather averse to disclosure, and these provisions have been used sparingly.

In 2017, however, significant changes to the procedural rules on the disclosure of evidence were introduced with Section 33g of the GWB.[41] In general, both plaintiffs and defendants can demand access to information held by others.[42] Restrictions only apply

36 Judgment of the BGH of 28 January 2020, KZR 24/17.

37 Reference was made to *Manfredi* (C-295/04), *Skanska* (C-724/17) and *Otis* (C-435/18).

38 See footnote 19.

39 See footnote 20.

40 Such as Sections 142 and 421 et seq. of the ZPO.

41 Section 33g of the GWB implements Articles 5(1), 5(2) and 14 of the Damages Directive. Pursuant to Section 186(4) of the GWB, Section 33g of the GWB is applicable to claims for damages for which an action was brought after 26 December 2016 (i.e., after the expiry of the transposition period pursuant to Article 21 of the Damages Directive). The old law applies to claims for which an action was brought prior to this date.

42 Essential for the understanding and enforcement of Section 33g of the GWB are Section 89b and 89c of the GWB, which regulate the details of the enforcement of claims under Section 33g of the GWB. Pursuant to Section 33g of the GWB, the claims for information and production may be asserted by the injured party with an action at any time if the requirements are met, and by the tortfeasor with an

to leniency statements and admissions in connection with settlement discussions with competition authorities. The same applies to access to the files of a competition authority. Communications between the accused and internal or external lawyers can be found in the file of the FCO, as the concept of attorney–client privilege does not exist when the FCO conducts cartel investigations and seizes documents. The FCO is entitled to seize all documents in the possession of the in-house counsel unless they are defence correspondence. Defence correspondence is correspondence that is produced with the knowledge of, and directly relates to the actual defence in, quasi-criminal cartel investigations or other cartel proceedings that may lead to the imposition of a fine. Pursuant to Section 33g(6) of the GWB, documents in the possession of the defendant's outside counsel are protected and cannot be seized.

VI USE OF EXPERTS

Germany is rather a claimant-friendly jurisdiction with respect to the calculation of cartel damages, even though a passing-on defence is generally available (see Section IX). The legislative package of June 2017 also introduced a legal presumption that a proven cartel has caused damages.[43] However, it is quite common in Germany for parties to use experts and economists to establish violations and to prove the amount of an overcharge. This is also true for initial settlement negotiations in larger cases, before litigation is initiated. In court proceedings, the plaintiff can, if there is insufficient time to obtain an expert opinion, make the case pending and sue for a declaratory judgment that the defendant is obliged to pay damages. In the course of the trial, however, there will be sufficient time to obtain an economic regression analysis, which is usually done if the potential damage is large enough and the cost of such an expert opinion is not out of proportion. Provided that the potential damage is of sufficient volume, the plaintiffs usually submit an economic expert opinion to prove the damage. As a rule, the defendants then submit a counter-assessment, which naturally leads to the result that no damage can be ascertained. In some cases, the court then appoints its own expert to determine the amount of damages by an expert who is as independent as possible. However, in January 2020, the BGH decided in its *Rail Cartel II* ruling[44] that it is not mandatory to appoint a court-appointed expert. In its judgment of September 2020,[45] the Dortmund Regional Court made use of the possibility to estimate the amount of damages without obtaining its own expert opinion (see Section VIII).

VII CLASS ACTIONS

Under German civil procedure law, class actions are not (yet) available. However, despite the lack of a class action, it is possible to file bundled claims for damages through third parties and claim vehicles. There are no restrictions per se on the assignment of claims for damages under

action upon the pendency of a claim for damages pursuant to Section 33a(1) of the GWB or a claim for information and production, namely against the injured party, the tortfeasor and against third parties (independent assertion). Alternatively, in pending proceedings for damages, a court order for information and production can be made pursuant to Section 89b(1) of the GWB and Section 142 of the ZPO.

43 Section 33a(2) of the GWB states: 'There is a rebuttable presumption that a cartel results in harm.'

44 See footnote 7.

45 See footnote 10.

German law. Some restrictions apply regarding assignments to special purpose entities whose financial resources might be considered insufficient to cover subsequent claims for costs in court proceedings.[46] Further restrictions may apply regarding the German Legal Services Act (RDG), which regulates the licensing of extrajudicial legal services. In its judgment of February 2020,[47] the Munich Regional Court I dismissed a lawsuit to which 3,266 claimants had assigned their approximately 85,000 claims against members of the *Trucks* cartel. The Court ruled that the assignment model, which involved a litigation financier, was null and void due to violations of the RDG, which rendered the claims vehicle's right to sue invalid. Although the plaintiff was registered as a debt collection service provider under German law, the Court held that its activities had, from the outset, been aimed solely at the judicial enforcement of the individual claims, which did not meet the requirements of the RDG. Although this ruling put a damper on innovative class action models under German law for some time, on 13 July 2021 the BGH ruled in *Airdeal*[48] that this specific class action model based on the assignment model did not violate the RDG. In light of the *Airdeal* ruling, the Higher Regional Court of Munich made a similar ruling in a hearing in November 2021[49] and made clear that, unlike the lower Munich Regional Court I, it did not see a violation of the RDG. Therefore, the wind seems to be shifting somewhat in favour of plaintiffs using the assignment model on this fundamental issue. However, to avoid the litigation risk associated with the assignment model under German law, all parties concerned can also file one lawsuit. It is quite possible under German law to file a lawsuit with more than 100 plaintiffs against one or several cartel members.

Although a certain type of civil class action was introduced in Germany in 2005 with the Capital Investor Model Proceedings Act and, in November 2018, in support of the Dieselgate victims with the model declaratory action,[50] these procedures are not suitable for conducting class antitrust damages actions under German law. However, more than two years after the European Commission presented its first proposal, the Representative Actions Directive 2020/1828 was adopted by the European Parliament on 24 November 2020. This Directive on representative actions for the protection of consumers' collective interests and repealing Directive 2009/22/EC will have a lasting impact on, and will change, the legal protection system in Germany in the coming years. Germany and the other Member States have 24 months to transpose the Directive into national law and another six months to apply them. Therefore, the representative action can be expected to be introduced in Germany by the end of 2022 and to enter into force in summer 2023. The German government will have to introduce a representative action to last until the end of 2022, and this will have to go further than the model declaratory action pursuant to Section 606 of the ZPO, which was introduced in November 2018.

46 Judgment of the Düsseldorf Higher Regional Court of 18 February 2015, Case VI U 3/14 (*Cement* cartel).

47 Judgment of the Munich Regional Court I of 7 February 2020, 37 O 18934/17.

48 Judgment of the BGH of 13 July 2021, II ZR 84/20 (*Airdeal*).

49 Case 21 U 5563/20 (*Financialright*).

50 Section 606 et seq., ZPO.

VIII CALCULATING DAMAGES

Generally, claimants must demonstrate and provide evidence for the facts forming the basis of the loss incurred. However, claimants may benefit from a shift in the burden of proof or from presumptions in certain situations. A point of reference for the estimated amount of damages can be derived from the 'profit and damage potential' in the amount of 10 per cent of the offence-related turnover, which the FCO uses as a basis for the assessment of fines in its Guidelines on Fines of 25 September 2013. The plaintiff is not obliged to precisely calculate the damage caused to him or her by the cartel; it is only necessary that the plaintiff provides a reliable factual basis for the estimate.

Pursuant to Section 33a(2) of the GWB, there is a rebuttable presumption that a cartel causes harm.[51] And, pursuant to Section 33a(3) of the GWB, the court may additionally consider the profits made by the defendants through illegal cartel activities when estimating the amount of the damages incurred. A plaintiff may also claim lost profits. In this respect, the burden of proof is additionally eased by Section 252 of the BGB, according to which lost profit is, for example, that which the plaintiff would probably have achieved in the normal course of events.

If the potential damage is of sufficient volume, the plaintiffs usually submit an economic expert opinion to prove the damage. The defendants then generally submit a counter-assessment, which often leads to the result that no damage can be ascertained. Sometimes, the court then appoints its own expert to determine the amount of damages by an expert who is as independent as possible. However, in January 2020, the BGH decided in its *Rail Cartel II* ruling[52] that it is not mandatory to appoint a court-appointed expert. Following this guidance, in its judgment of September 2020,[53] the Dortmund Regional Court made use of the possibility to estimate the amount of damages without obtaining its own expert opinion. This possibility is generally available under German law,[54] but had not been used in competition damages cases prior to this case. In the specific rail cartel case, the Dortmund Regional Court estimated the minimum damages at 15 per cent. Following this judgment, the Court issued two further estimation rulings in September 2020 and in February 2021,[55] and the Higher Regional Court of Celle independently estimated damages caused by the particle board cartel in August 2021.[56]

German law only provides for actual loss; treble or punitive damages are not available. However, the loss also includes lost profits and statutory interest, which can double the claim after several years. Pursuant to Section 33a(4) of the GWB, the defendant shall pay interest from the occurrence of the damage.[57] The general interest rate is 5 percentage points

51 This rebuttable presumption applies to claims for damages that arose after 26 December 2016 (Section 186, GWB). According to a judgment of the BGH of 11 December 2018 (KZR 26/17), and in contrast to the previous case law of the lower courts in Germany, there is no prima facie evidence but a factual presumption that cartels lead to damages for claims for damages that arose before this date. It remains to be seen whether and how this differentiation will affect the standard applied by the courts.

52 See footnote 7.

53 See footnote 10.

54 See footnote 11.

55 See footnote 12.

56 See footnote 13.

57 Sections 288 and 289(1) of the BGB apply accordingly.

above the European Central Bank base rate.[58] Due to changes to the law, the interest rate for damages incurred before 1 July 2005 is regulated differently and is generally set at 4 per cent or 5 per cent, and is not linked to the base rate.

Under German law, the legal costs are generally borne by the losing party. If there is no complete loss or gain, the court will divide the legal costs between the parties proportionately according to the outcome of the proceedings. Legal costs include both the costs of the court proceedings and the lawyers' fees. However, the legal fees are calculated based on statutory fees, which are usually significantly lower than the actual fees incurred in complex antitrust damages cases. In other words, the cost risk for the injured party is relatively low and can be determined in advance. Moreover, the amount in dispute can be adjusted in cartel cases if certain conditions are met.[59]

IX PASS-ON DEFENCES

The passing-on defence is generally available under German law. Members of a cartel can defend themselves against a claim for damages by pleading that the plaintiffs passed on the price surcharge to their customers (passing-on defence). This principle was introduced by the German legislature in Section 33c of the GWB in June 2017, following the landmark decision of the BGH in the *ORWI* case in 2011.[60] However, the passing-on defence is only possible according to the principle of 'adjusting the damages to the benefits received'. Consequently, the burden of proving that the direct purchaser passed on the damage to the next level of customers lies with the defendant. This means that the defendant must prove, first, that the overcharge was passed on and, second, the extent to which the overcharge was passed on. In cases where an indirect buyer claims that the overcharge was passed on to it by the direct buyer and therefore wants to claim damages, the indirect buyer can benefit from a reversal of the burden of proof, pursuant to Section 33c(2) of the GWB. Passing on is presumed if the defendant has infringed competition law, the infringement of competition law has led to higher prices for the direct customer and the indirect customer has acquired the cartelised products. It is then up to the defendant to prove that no passing on has taken place.

X FOLLOW-ON LITIGATION

Although a finding of infringement by a competition authority is not required to initiate a private antitrust action under German law, it is advisable in practice to await a finding because of the binding effect of a final decision of the European Commission or a national competition authority under Section 33b of the GWB.[61] In consequence, most cartel damages claims in Germany have been brought following a decision of the European Commission or the FCO. Under the rule, the binding effect of the facts should relate solely to the determination of

58 Pursuant to Section 33a(4), GWB and Section 288(1), BGB.

59 Pursuant to Section 89a, GWB.

60 See footnote 35.

61 Section 33b of the GWB was introduced in June 2017; it corresponds to the prior rule of Section 33(4) of the GWB 2005, which introduced a factual effect for follow-on actions in 2005. Pursuant to Section 186(3) of the GWB, new Section 33a of the GWB is only applicable to claims for damages that arose after 26 December 2016. The prior rule of Section 33(4) of the GWB 2005 continues to apply to claims that arose before then.

a violation of antitrust law; all other questions, in particular regarding the causality of the damages and the quantification of the damages, should not be prejudiced by these rules, but should be subject to the free assessment of evidence by the court.

XI PRIVILEGES

The concept of legal privilege, as known in the United Kingdom, the United States and other common law jurisdictions, does not exist in Germany. German law follows a different approach and provides secrecy provisions to protect the attorney–client relationship. In German civil procedure, the concept of legal privilege is less relevant, as there is no discovery procedure comparable to common law. In 2017, however, a limited disclosure procedure for competition cases was introduced under Section 33g of the GWB. In general, both plaintiffs and defendants can demand access to information held by others. Restrictions only apply to leniency statements and admissions in connection with settlement discussions with competition authorities. The same applies to access to the files of a competition authority. Communications between the accused and his or her internal or external lawyers can be found in the FCO's file, as the concept of attorney–client privilege does not exist when the FCO conducts cartel investigations and seizes documents (see Section V).

Business and trade secrets are generally not privileged under German civil procedure law. However, confidentiality aspects must be considered in the context of a request for information under Section 33g of the GWB. If access to the information is granted, the court must ensure that business or trade secrets are protected (e.g., by redactions).

XII SETTLEMENT PROCEDURES

In practice, most private competition damages cases are settled in Germany. Private antitrust damages claims can be settled at any time prior to litigation and during ongoing court proceedings. A settlement generally follows German civil law principles, but specific rules to facilitate cartel damages settlements were introduced in 2017 under Section 33f of the GWB.[62] Settlements are often reached after a lawsuit has been initiated; on the one hand, because of the pressure built up by the lawsuit and the publicity of this process, and on the other hand, because of the ongoing interest, which can double the claim for damages after a number of years. If the parties agree to a settlement, no further court approval is required under German law. For procedural reasons, however, it can be helpful to have a settlement recorded in court. When structuring a settlement, German tax law must be taken into account (out-of-court settlements may be subject to VAT) and, in particular, the effect of the settlement on non-settling co-defendants, which are usually jointly and severally liable. In this respect, Section 33f of the GWB must be observed, under which a limited overall effect of the settlement is essentially to be assumed, among other things. The limitation period is suspended for the duration of a consensual dispute resolution,[63] and German courts may suspend damages proceedings if the parties engage in settlement negotiations.

62 Section 33f of the GWB only applies to claims for damages that arose after 26 December 2016. For claims that arose before then, the old law applies.

63 Section 203, BGB.

XIII ARBITRATION

If the parties have agreed to arbitration in relation to antitrust damages in connection with a contract, or later, private competition cases may be adjudicated in arbitration. There is no restriction on resolving antitrust issues through arbitration or mediation. In principle, the parties are not obliged to pursue alternative dispute resolution before trial. However, there are individual courts that require parties to engage in alternative dispute resolution prior to trial. Although there are cases in which the parties engage in arbitration or other alternative dispute resolution before trial, this is rather rare in Germany.

XIV INDEMNIFICATION AND CONTRIBUTION

If several parties are involved in an antitrust violation, each party is fully responsible for the complete damages,[64] and several responsible parties are jointly and severally liable.[65] Each defendant is liable for the totality of the damages incurred by the claimant, but the claimant is only entitled to claim the totality of the damages once.[66] This self-evident fact of tort law was introduced in 2017 as Section 33d of the GWB. The internal compensation of damages between the tortfeasors is governed by Section 426(1) and (2) of the BGB. Specific provisions and privileges apply to small and medium-sized enterprises with small market shares, limited financial resources and minor participation in the cartel,[67] leniency applicants[68] and cartel members that participated in a settlement.[69] For instance, a leniency applicant that has benefited from full immunity from fines is only liable to compensate the damage suffered by its direct or indirect customers or suppliers as a result of the infringement, and the liability of the leniency applicant towards other cartel victims is only subsidiary and provided for if full compensation could not be obtained from other cartelists.[70]

If parties are jointly and severally liable as cartel members, each member may sue another cartel member in internal recourse, pursuant to Section 426 of the BGB after compensation has been paid to the plaintiff. In cases where plaintiffs seek damages from only selected participants in an infringement, it is common in Germany for defendants to issue third-party notices against the other participants in the infringement, as these notices have the effect of binding the factual findings of the court hearing the main action and on the courts hearing subsequent actions for internal contribution. Settlements are usually limited to damages resulting from deliveries by the settling parties and do not cover damages resulting from deliveries by other cartel members. Pursuant to Section 33f(2) of the GWB, actions for internal contribution in settlement cases are not possible for the settled part of the claim.

Pursuant to Sections 33h(7) and 33d(2) of the GWB, the limitation period according to Section 195 of the BGB for the recourse claim (Section 426(1) of the BGB) only begins with the satisfaction of the injured party (i.e., not from its accrual as an indemnity claim). This is

64 Section 830, BGB in connection with Section 33d(1), GWB.
65 Section 840(1), BGB in connection with Section 33d(1), GWB.
66 Section 421, BGB.
67 Section 33d(3), GWB.
68 id., Section 33e.
69 id., Section 33f.
70 id., Section 33e.

to prevent the previous situation in which claims for compensation under Section 426(1) of the BGB arise along with the claim for damages, but often become time-barred before the claim for damages is even asserted.

XV FUTURE DEVELOPMENTS AND OUTLOOK

The legislative process of enacting the 10th Amendment to the GWB commenced in 2020 and, after certain amendments, the law came into force on 19 January 2021. Because the part of the GWB concerning damages claims was fundamentally reformed in 2017, only minor adjustments have been made in this 10th Amendment. The new law introduced a rebuttable presumption that legal transactions with cartel members falling within the scope of a cartel in terms of subject matter, time and place are affected by the cartel.[71] This presumption also applies in favour of indirect buyers of these goods.[72] However, the new law does not yet provide for the introduction of a provision on the determination or presumption of the amount of damages.

On 8 December 2021, after 16 years, a new Chancellor was elected (Olaf Scholz, Social Democratic Party of Germany (SPD)), and with him a completely new government in Germany. In the coalition agreement of December 2021, the SPD, Alliance 90/The Greens and the Free Democratic Party (the 'traffic light coalition') defined the governing coalition's programme for the current legislative period (2021–2025). The coalition agreement also contains a number of key statements on antitrust law. The agenda includes projects that can be implemented at national level as well as projects aimed at influencing European Union legislative projects in the interests of the coalition. Particular attention is paid to killer acquisitions, non-abuse unbundling, ministerial authorisation and consumer protection. Apparently, the new traffic light coalition wishes to make the full toolbox of the GWB available to the German FCO for significant, persistent or repeated violations of consumer protection law. In concrete terms, this could mean that the FCO will also be given the investigative powers provided for in the GWB in the area of consumer protection. These would include searches, questioning and seizures. In addition, the FCO could be given the power to issue bans and impose fines in these cases. Private antitrust litigation is not yet a main focus for the new government as it appears to function for now.

However, in September 2021, FCO president Andreas Mundt said that the agency was looking into the possibility of further protecting leniency applicants from damages claims to revive Germany's leniency programme. In fact, the number of leniency applications has been declining dramatically for several years, likely due to the costs and problems cartelists face with private damages litigation.

71 id., Section 33a(2).

72 id., Section 33c(3).

Appendix 1

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