Introduction

This chapter is part of the ICC Compendium of Antitrust Damages Actions (the "Compendium") which can be read in full on the ICC website at www.iccwbo.org.

Designed to provide decision-makers with a comparative overview of the issues most frequently arising in private antitrust litigation in key jurisdictions, the Compendium reflects contributions from leading antitrust law specialists around the world. It does not try to explore the complexity of each legal system but strives to capture a comprehensive picture of the matter, organised around nine topics, and completed in some jurisdictions by an additional chapter highlighting key issues. A collection of decisions issued in the same jurisdictions is also available on the ICC website. This database is the essential complement to the overviews for a comparative approach and will allow a better understanding of the rules presented in the compendium.

With this publication, ICC hopes to help in-house counsels, antitrust practitioners and enforcers, but also judges of the courts and academics, navigate through a new, fast-changing legal environment.
**Glossary**

**Appeal:** a proceeding undertaken to have a decision reviewed by a higher authority whose jurisdiction may include (i) an entirely new assessment of the case, (ii) a limited review of manifest errors of law and facts, or (iii) a specific review limited to legal issues.

**Article 101 TFEU:** This provision prohibits as anti-competitive all agreements, decisions, and practices between undertakings and concerted practices which may affect trade between EU Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

**Article 102 TFEU:** This provision prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it. Those behaviours are incompatible within the internal market in so far as it may affect trade between EU Member States.

**Award:** a final judgment or decision, especially one by an arbitrator or by a jury assessing damages.

**Burden of proof:** The responsibility for a party during legal proceedings to prove the facts it asserts; the burden of proof may be shifted to the opposing party once the standard of proof has been met.

**Cartel:** Any horizontal collusion between competitors whose purpose is to fix prices or quantities, allocate markets, while sharing sensitive commercial information.

**Cease-and-desist order:** a court’s or agency’s order prohibiting a person from continuing a particular course of conduct which is deemed harmful. In competition law proceedings, these orders also include a prohibition from adopting future conducts likely to have the same effects as the one which is prohibited.

**Claimant:** the party who brings a civil suit in a court of law.

**Class action:** a lawsuit where a person or a group seeks damages for a larger group of claimants. Class action proceedings typically include a preliminary stage to define the characteristics of the group, which needs to gather persons with identical cases and who have suffered a prejudice from the same tort.

**Competition authority:** Any public authority, whether independent of forming part of a government administration, whose role is to enforce rules which prohibit unilateral and coordinated behaviours that restrict competition.

**Damages:** money claimed by, or ordered to be paid to, a person as compensation for loss or injury.

**Defendant:** a person sued in a civil proceeding.

**Discovery:** Proceeding whereby a party has to disclose information and documents relating to the litigation upon the request of the opposing party. This procedure is usually implemented during the pre-trial phase of the lawsuit.
**Directive 2014/104/EU:** European Union Directive issued on 5 December 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the EU. The purpose of this text is to set forth common rules among EU Member States in order to enhance private enforcement of Articles 101 and 102 TFEU and full compensation for victims of anti-competitive conducts. The text also provides for specific rules on the interplay between civil lawsuits and enforcement proceedings before competition authorities.

**Follow-on:** A competition law claim for damages where the alleged infringement has previously been found by a final decision of a competition authority.

**Immunity:** Total exemption of fine for a company that is the first to reveal the existence of a competition law infringement to a competition authority.

**Infringer:** Any company that has implemented unilateral or coordinated behaviours infringing competition law, where a competition authority has found such infringement in a decision.

**Joint-and-several liability:** liability that may be apportioned either among two or more parties or to only one or a few select members of a group of Infringers upon the decision of a competition authority or a civil court.

**Leniency:** A competition law procedure that rewards companies that adopt anti-competitive conducts with Immunity or reduction of fine, if they inform the competition authority of an infringement that it did not previously have knowledge of.

**Limitation period:** a statutory period after which a lawsuit or prosecution cannot be brought in court.

**Passing-on defence:** a competition law defence that relies on the civil law principle of unjust enrichment. During civil proceedings, a defendant may argue that the plaintiff’s claim for compensation should be totally or partially denied as it passed the alleged overcharge resulting from a competition law infringement on its own customers.

**SME (Small—and Medium-sized Enterprise):** categories of micro, small and medium enterprises defined based on their staff headcount, and either their turnover or balance sheet total.

**Stand-alone action:** A competition law claim for damages where the alleged infringement has not previously been found by a final decision of a competition authority.

**Standard of proof:** In any legal procedure, the level of evidence that is required to establish with certainty a fact or a liability.

**Tort:** A civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on persons who stand in a particular relation to one another.
Germany has a dedicated set of rules that govern the recovery of (and defence against) antitrust damages claims. Equally, German courts have been dealing with respective cases for years and can rely on a breadth of experience and case law. In recent years, the number of antitrust damages actions has increased with the result that several cases have now also reached Germany’s highest civil court—the Bundesgerichtshof (the Federal Court of Justice or “FCJ”). The resulting judgments continue to provide clarity for both claimants and defendants. Combined with Germany’s relatively low court fees, efficient court proceedings and Germany’s internationally well-respected Bundeskartellamt (the Federal Cartel Office or “FCO”), Germany is among the preferred jurisdictions for antitrust damages actions in Europe.

1. **Jurisdiction**

The FCO is competent to issue administrative decisions in relation to infringements of competition law. Private enforcement, however, is in the hands of the individual victims affected by the infringement.

Germany’s competent civil courts of first instance for private antitrust damages actions are the Landgerichte (Regional Courts) as per Section 87 of the German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen—“GWB”). In Germany, there is a total of 115 Regional Courts, but the legislator encouraged individual federal states to designate one or more centrally and exclusively competent courts per state to hear private antitrust cases (Section 89 GWB). Several states have made use of this opportunity. Claimants must consider such centrally competent courts when determining jurisdiction.

Specialised antitrust chambers within these individual courts often deal with these cases. The existence of such expert judicial bodies has contributed to the high quality of judgments in Germany regarding antitrust damages actions over the years.

2. **Relevant legislation and legal grounds**

The key legal provision granting individuals a claim for damages as the consequence of an intentional or negligent violation of European Union (“EU”) and/or German competition law is Section 33a (1) GWB. In its current form, this provision was adopted through the 9th amendment to the GWB in June 2017, which implemented the EU Antitrust Damages Directive (“Damages Directive”) of 2014 and transposed it into German law. Whereas previously there were only basic rules on antitrust damages to be found in the GWB, now there are extensive and detailed provisions (Section 33—Section 33h GWB).
In principle, antitrust damages claims are governed by the substantive law applicable at the time when the damage occurred, such as at the time of delivery of cartelised goods—unless otherwise determined by transitional provisions. For example, the Damages Directive and its German implementation in the GWB are generally applicable to claims that have arisen after 26 December 2016.

While Section 33a GWB is the basis for antitrust damages claims in Germany, Section 33 (1) GWB also grants affected parties a claim for injunction and rectification—i.e. they can request that the infringer ceases the current infringement and desists from future infringements.

**Right to bring an action**

Any affected person—competitor or other market participant—who is impaired by the infringement can seek compensation under German law. This is in line with the Court of Justice of the European Union (“CJEU”) according to which the principle of effectiveness (effet utile) requires that any individual must be able to claim compensation for any damages caused by competition law infringements.¹

This includes not only direct, but also indirect victims who purchased cartelised goods from direct customers of the infringers (Section 33c GWB). In addition to this, even customers who did not purchase goods or services from cartel participants, may be considered affected by a cartel where it can be demonstrated that the general market price level has increased as a result of a cartel (also known as “umbrella pricing”).

Even more, according to a CJEU ruling, even those who are not part of a supply chain trading the cartelised product in question can, nevertheless, claim damages.² This CJEU ruling brought about a change in German case law: previously courts required claimants to demonstrate that a cartel infringement had an impact on specific transactions. However, a recent judgment issued by the German Federal Court of Justice in January 2020 (Schienenkartell II) revisited this consideration. The Court clarified that this previous hurdle, named “cartel impact” (Kartellbetroffenheit), has been lowered to a rather abstract standard: in pre-Damages Directive cases it is now sufficient that the claimant demonstrates that the infringement is generally suitable to cause direct or indirect harm to the claimant.

Under the new rules implementing the Damages Directive (Section 33a (2) GWB) a reversal of the burden of proof is, in fact, already put in place on this point—i.e. the claimant will be able to rely on a rebuttable presumption that a cartel causes harm.

**Proof of a competition law infringement and binding effect of authority decisions**

Generally, the claimant bears the burden of proof regarding the existence of a competition law infringement.

In case the claimant bases its action on facts that have not previously been the subject of a competition authority’s decision or facts outside the scope of such decision (a “Stand-alone action”), this burden of proof may be particularly burdensome.

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¹ CJEU, Case C-199/11, 6 November 2012, Otis, para. 41.
² JEU, Case C-199/11, 6 November 2012, Otis, para. 41.
However German law also allows for so-called “Follow-on actions”. Pursuant to Section 33b GWB, courts shall be bound by a finding of an infringement as established in a final decision by (i) the FCO, (ii) the European Commission, or (iii) another national competition authority in another EU Member State. “Decision” also covers fining decisions following a settlement procedure with the European Commission or the FCO. The binding effect covers not only the operative part of the decision, but also the factual and legal grounds on which the finding of the cartel infringement is based.

Commitment decisions by the FCO (Section 32b GWB), the European Commission (Article 9 VO 1/2003) or other relevant competition authorities do not have the same binding effect pursuant to Section 33b GWB. This does not mean, however, that a court faced with an antitrust damages action will ignore such commitment decisions. In the context of actions following a commitment decision, the findings of the respective competition authority regarding the infringement may be considered by courts as an indication, or even prima facie evidence (Anscheinsbeweis), of an infringement.

Proof of causation

Generally, the claimant also bears the burden of proof regarding causation and quantum of the damages claimed.

Regarding causation, claimants can rely on certain easements of the burden of proof. Previously claimants could rely on the concept of prima facie evidence, which can be considered the “next best thing” after a full reversal of the burden of proof. While the German Federal Court of Justice abrogated this practice through its judgment dated 11 December 2018 (Schienenkartell I), it did emphasise that there is a strong factual presumption regarding causation on individual transactions where they fall within the scope of the cartel agreement in terms of content, time and geographical scope.

Similarly, the Higher Regional Court of Frankfurt am Main ruled in a recent judgment that prima facie evidence does not apply in cases of exchange of information between competitors.

In any event, courts may rely on Section 287 German Code of Civil Procedure (Zivilprozessordnung—“ZPO”) when assessing causation and quantum, which allows courts to estimate damages (Section 33a (3) GWB).

Economists are regularly employed in German antitrust damages cases. Parties will often submit party expert opinions in order to assert and defend against damage theories. Court-appointed experts may additionally serve in assisting the court in forming its opinion. The German Federal Court of Justice in its Schienenkartell II judgment however clarified that an expert opinion, whether by a party or court-appointed expert, does not replace the court’s own judicial assessment of evidence.

3 CJEU, Case C-547/16, 23 November 2017, Gasorba, para. 29.
4 Higher Regional Court of Frankfurt a. M., Case 11 U 98/18, 12 May 2020, Drogeriekartell.
**Defendant and concept of an undertaking**

Antitrust damages claims can be directed against any company responsible for the anti-competitive conduct that infringed competition law. Several infringers acting together may be held jointly and severally liable (Section 33d (1) GWB). There are certain limitations regarding this joint and severable liability for leniency applicants (Section 33e GWB), small— and medium-sized enterprises (Section 33d (3), (4) GWB) and infringers who have reached a settlement with an injured party (Section 33f GWB).

In accordance with EU competition law the concept of an “undertaking” covers any entity engaged in an economic activity, irrespective of its legal status and financing. However, pursuant to general principles of German corporate law, only the acting legal entity is generally liable for a breach of law. In its recent ruling in Skanska, the CJEU however confirmed that the concept of “undertaking” with regard to the imposition of fines should be similarly applied to antitrust damages actions. This broad interpretation in certain cases at least leads to liability of legal successors. Whether the case law will lead to an even more extensive liability of companies for infringements of competition law by any affiliated entity is the subject of ongoing discussion, especially in Germany.

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<tr>
<th>3. What types of anti-competitive conduct are damages actions available for?</th>
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<td>In Germany, antitrust damages actions are available for all infringements of EU and German competition law. This includes:</td>
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<td>▶ multilateral anti-competitive conduct, such as cartel agreements and illicit exchange of competitively sensitive information (Article 101 TFEU and Section 1 GWB); and</td>
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<td>▶ unilateral conduct, such as the abuse of a dominant position (Article 102 TFEU and Section 18, 19 GWB) as well as—specifically in Germany—abuse of a strong market position with regard to undertakings with relative or superior market power (Section 20 GWB).</td>
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Damages actions are also available following violations of decisions taken by a competition authority (Section 33 (1) GWB). A violation of the prohibition on gun-jumping under merger control law may also be considered as relevant anti-competitive conduct. In this context, a decision taken by a “competition authority” refers in general to German authorities, in particular to the FCo, the Federal Ministry of Economics and the German federal state cartel authorities. Although decisions of the European Commission may not be covered by the mere wording, they can be argued to be equivalent in order to ensure that the effectiveness of civil enforcement of decisions of the European Commission does not fall behind the German cartel authorities. Furthermore, it is essential that the decision of the competent competition authority is binding.

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<th>4. What forms of relief may a private claimant seek?</th>
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<td>To remedy the immediate effects of an infringement, claimants may enforce their claim for injunction and rectification—i.e. can request that the court orders the infringer to cease</td>
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5. CJEU, Case C-724/17, 14 March 2019, *Skanska Industrial Solutions Oy*, para. 43-47.
the current infringement and desist from future infringements (Section 33 (1) GWB). Such actions may also take the form of interim injunctions.

To remedy damages caused by an infringement, claimants can seek relief in the form of damages (Section 33a (1) GWB).

Pursuant to Section 249 of the German Civil Code, the claim for damages constitutes in rem restitution—i.e. the restoration of the economic situation that would have existed but for the damaging event. If the competition law infringement is, for example, the unjustified refusal to deal (such as the refusal to conclude a contract), the claim for damages can be directed towards the conclusion of such a contract. If in rem restitution is not possible or only possible at disproportionate expense, the claim for damages aims at monetary compensation pursuant to Section 251 of the German Civil Code, including loss of profit.

5. Passing-on defence

German law acknowledges the so-called “passing-on defence”, meaning defendants can argue that, in the event a claimant resold the cartelised products or services (and has passed-on any price-increase induced by the infringer to a third party), the claimant would not, in fact, have suffered any (or at least only partial) damage (Section 33c (1) s. 2 GWB). In German law, the passing-on defence is in line with the general doctrine of setting off any benefits obtained by the claimant—a loss that has been passed on does not need to be compensated.

However, the mere fact that the claimant resold the product or service does not initially preclude the claimant from having a claim (Section 33c (1) s. 1 GWB). Whether and to what extent pass-on occurred will then have to be examined by the court—likely with the help of economists. The burden to substantiate and to prove the existence and extent of any pass-on effects lies with the defendant. To do so, German case law requires defendants to demonstrate that pass-on is particularly plausible under general market conditions with reference to the price elasticity of demand, the price development and the product characteristics. Furthermore, the defendant is required to show that even if the overcharge itself was in fact passed on, the claimant did not incur other disadvantages from the overcharge, such as a decline in demand (so-called volume effects).

The other side of the coin regarding pass-on naturally is the right of indirect customers to sue for antitrust damages (Section 33c (2) and (3) GWB).

6. Pre-trial discovery and disclosure, treatment of confidential information

As there is a typical information asymmetry between claimants and defendants in competition litigation cases, the Damages Directive required Member States to implement rules on disclosure of evidence. Germany has met this by incorporating such rules as part of the 9th amendment to the GWB in 2017.

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6 FCJ, Case KZR 75/10, 28 June 2011, ORWI; Higher Regional Court of Karlsruhe, Case 6 U 204/15 Kart (2), 9 November 2016, Grauzementkartell; District Court of Frankfurt a. M., Case 2-06 O 358/14, 30 March 2016, Schienenfreunde; District Court of Hannover, Case 18 O 418/14, 31 May 2016.
So far there is scant case law on the rules on disclosure of evidence pursuant to the new regime incorporated in Section 33g GWB. Existing case law merely covers the question of intertemporal applicability of the framework implemented by the German legislator in 2017 with the 9th amendment to the GWB. Before the 9th amendment of the GWB entered into force, courts were very reluctant to apply general civil procedural rules ordering a production of documents, such as Section 142 German Civil Code of Procedure (Zivilprozessordnung—“ZPO”), in competition litigation cases.

With the new rules set out in Section 33g GWB, claimants and defendants can seek disclosure of evidence required to establish or defend a claim. Whereas claimants can choose to request such disclosure of evidence already in a pre-trial stage, defendants can only do so once a damage claim is pending against them.

In German law, the party seeking disclosure is obliged to reimburse the other party for the reasonable costs which it incurred in surrendering evidence (Section 33 (7) GWB).

As required by the Damages Directive, German law limits the disclosure of evidence on the basis of proportionality (Section 33g (3) GWB). Further, exceptions apply to evidence included in the file of a competition authority—i.e. leniency statements and settlement submissions (Section 33 (4), (5) GWB). If a party intentionally or with gross negligence discloses incorrect or incomplete information, this party is liable for any resulting damages under German law (Section 33g (8) GWB).

The discovery tool set out in Section 33g GWB is partly applicable in injunction proceedings: in case a decision of the competition authority has binding effect pursuant to Section 33b GWB, the defendant can be ordered by way of preliminary injunction to surrender this decision to the claimant (Section 89b (5) GWB).

The issue of protecting confidential information is dealt with under the requirement of proportionality (Section 33g (3) no. 3 GWB). Therefore, courts can dismiss a motion seeking disclosure of evidence if confidentiality issues would lead to a disproportionate outcome. Courts can also take other measures required to safeguard the protection of confidential information (Section 87 (7) GWB). However, the legislator did not further specify which measures can be taken. Practical solutions that were developed in IP law cases might, therefore, be applied accordingly to competition litigation cases in the upcoming years when disclosure of information will be applied more frequently in practice by German courts.

### Limitation Periods

The limitation period of antitrust damage claims is governed by Section 33h GWB which implements the Damages Directive.

According to Section 33h (1), (2) GWB, the basic limitation period is five years and begins at the end of the year during which: (i) the claim arose; (ii) the claimant first obtained or should have obtained knowledge of the facts giving rise to the claim and the identity of the infringer, and (iii) the infringement was brought to an end.

There are two cut-off limitation periods.
First, under Section 33h (3) GWB, claims will be time-barred after ten years, regardless of any knowledge by the claimant, calculated from the year-end of the year during which (i) the claim arose and (ii) the infringement ended.

Second, there is a thirty-year cut-off limitation period beginning at the time of the competition law infringement (Section 33h (4) GWB).

Limitation is suspended during (and one year after) competition authority proceedings (Section 33h (6) No. 1, 2 GWB). Limitation is also suspended by bringing a claim for discovery (Section 33h (6) No. 3 GWB).

The limitation period regime under Section 33h GWB applies to claims arising after 26 December 2016 and to claims having arisen prior to 27 December 2016 unless they were already time-barred on 9 June 2017 (Section 186 (3) s.2 GWB). Where claimants cannot (yet) rely on the new rules on limitation, they will generally face the previously applicable three-year limitation period.

8. Appeal

Judgments by the Landgerichte (Regional Courts) can be appealed before the Oberlandesgerichte (Higher Regional Courts). Again, German federal states have the opportunity to designate one or more centrally and exclusively competent Higher Regional Court per state which will hear private antitrust actions (Section 92 GWB). Within each Higher Regional Court competent to hear antitrust damages cases, there will be a specialised antitrust division (Section 91 GWB). The judgments by the Higher Regional Courts can be appealed on points of law before the German Federal Court of Justice. At the German Federal Court of Justice, there also is a specialist antitrust panel (Section 94 GWB).

9. Class actions and collective representation

Germany does not provide for US—or UK-style class actions. There are, however, several measures under German law that address the need for a large number of potentially affected claimants to bundle their claims and benefit from collective efforts.

Currently, the most common approach in Germany is the assignment model. Individuals assign their claims to entities that will then bring a complaint in their own name. In practice, this will either be an intra-company entity that bundles claims within a group of companies, or the second option is the assignment to an external, special purpose vehicle (“SPV”).

Recent case law has focused extensively on the legal requirements for such an assignment to be valid. Generally, SPVs must have sufficient funding to be able to cover costs in the event the SPV does not prevail in court. They must also be registered in the official registry for legal services as per Section 10 Legal Services Act (Rechtsdienstleistungsgesetz—“RdG”). Courts have also recently dealt with questions of whether, despite such registration, assignments may still be invalid. The Regional Court of Munich decided that assignments were invalid in cases where the SPV’s sole purpose was the realisation of claims through court proceedings, where the SPV ran the risk of a conflict of interest in representing too many different assignors and in also having to
answer to a litigation funder that was involved. Similarly, the Regional Court of Hanover found assignments to be invalid where the SPV did not fully take on the commercial risk of enforcing the assigned claims. It remains to be seen how these cases will be dealt with on appeal and, if necessary, by the German Federal Court of Justice.

With the various assignment models under scrutiny, claimants may consider making use of the still novel Model Declaratory Action (Musterfeststellungsklage) established in 2018. While individual claimants still have to enforce their claims after a successful Model Declaratory Action, it may be a first step in bundling claims with more legal certainty.
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