GERMANY

Karl Wach/ Manja Epping/ Ute Zinsmeister/ Eva Bonacker
Ashurst
Prinzregentenstrasse 18
80538 München
T: +49 89 244 421 100
F: +49 89 244 421 101

I. Introduction

Until 1955, when the predecessor of today's § 33 GWB [the German Act Against Restraints of Competition ("Gesetz gegen Wettbewerbsbeschränkungen")] was introduced, damages claims for the infringement of competition law could only be based on general tort law. Since 1955, special provisions in the Act against Restraints of Competition have enabled damages to be sought for harm resulting from anti-competitive conduct, provided the infringed provision is one intended to protect third parties. Under the same conditions, general tort law provides for damages in cases where EC competition law has been infringed[1].

The German government has recently drafted a reform package for the adaptation of German competition law to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty ("EC regulation 1/2003"). The new German competition rules are expected to enter into force on 1 January 2005. According to the current draft published on 28 May 2004 ("Regierungsentwurf")[2], the 7th amendment of German competition law ("7. GWB-Novelle", from now on "the 7th amendment") will significantly facilitate claims for damages based on infringements of competition law. The German government considers these changes to be necessary in order to outweigh the introduction of the new principle that undertakings need to evaluate by themselves the conformity of their conduct with competition law. The government reasons that, as a consequence, the investigative activity of the cartel authorities will be reduced so that civil proceedings need to be encouraged[3]. We will therefore describe the current legal position as well as the position under the draft 7th amendment, which is yet to be introduced in Parliament.

II. Actions for damages - status quo

A. What is the legal basis for bringing an action for damages?

(i) Is there an explicit statutory basis, is this different from other actions for damages and is there a distinction between EC and national law in this regard?

a) Current legal basis

§ 33 GWB is the legal basis for damages claims arising from the infringement of national competition law. § 823 (2) BGB [the German Civil Code ("Bürgerliches Gesetzbuch")] is a general provision of German tort law providing a right to claim damages for harm arising from the infringement of Articles 81 and 82 EC. Damages for infringement of national and/or EC competition law can also be claimed under § 9 UWG [the German Unfair Competition Act ("Gesetz gegen unlauteren Wettbewerb")][4].

(A) § 33 sentence 1, clause 2 GWB

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1 Cp. Emmerich in Immenga/Mestmäcker, *GWB*, (C.H. Beck, 2001), § 33 at point 2-6.
2 *Regierungsentwurf,* [2004], BR-Drucksache 441/04
3 *Regierungsentwurf,* [2004], BR-Drucksache 441/04 at 59.
4 Cp. Köhler in: Köhler/Piper, *UWG*, (C.H. Beck, 2002), Einf. at point 46; BGH, Az. KZR 7/76, *4 zum Preis von 3*, [1978], GRUR 445 at 446; Weber, *Ansprüche aus § 1 UWG bei Kartellverstößen*, [2002], GRUR 485 at 490.

§ 33 sentence 1, clause 2 GWB is a special provision for damages claims under national competition law. Its requirements are the same as those under general tort law for cases of infringement of statutory prohibitions or obligations, that is, § 823 (2) BGB. These requirements include the infringement of provisions of national competition law whose purpose is, inter alia, to protect the plaintiff.

(B) § 823 (2) BGB in connection with Articles 81, 82 EC

§ 823 (2) BGB is a general provision for damages claims in tort for the infringement of statutory prohibitions or obligations. Articles 81 and 82 EC qualify as statutory prohibitions for the purposes of this provision insofar as the plaintiff, under the specific circumstances of the case, belongs to a group of persons whose protection was intended by the cartel prohibition. If the infringement of Articles 81, 82 EC is proved, fault is assumed.

(C) § 9 UWG in connection with §§ 3, 4 No. 11 UWG and national and EC competition law

Since 8 July 2004, § 9 UWG is the general legal basis for damages claims arising from unfair, competition-related conduct. In order to be awarded damages for cartel law infringements under § 9 UWG, it is required that the defendant and the plaintiff are competitors. Under the former UWG, infringements of Art. 81, 82 EC and national competition law have been considered as "per se" acts of unfair competition[5]. On the basis of the existing case law, the infringement of EC or national competition law may also be considered as a breach of a competition-related legal provision in the sense of §§ 3, 4 No. 11 of the new UWG. However, the position of the courts has been criticised by legal experts[6]. Very few claims based on the UWG in connection with EC or national competition law have become known so far.

(D) Contractual and quasi-contractual damages

A quasi-contractual damages claim might be based on the non-disclosure of the fact that certain conditions of the contract, e.g. the price, are caused by an infringement of competition law[7]. To our knowledge, the courts have not yet decided such a case.

b) Planned legal basis under draft 7th amendment

Under the draft 7th amendment, § 33 GWB will be the legal basis for damages claims arising from the infringement of both national and EC competition law. Its basic requirements will remain the same as in general tort law. However, special rules will apply for the calculation of damages, interest, the definition of potential plaintiffs and collective claims. These rules are partly known in unfair competition and intellectual property cases, but not in general tort law.

B. Which courts are competent to hear an action for damages?

(i) Which courts are competent?

a) Civil Courts

The District Courts ("Landgericht") are exclusively competent for any civil litigation based on infringements of national competition law[8], although, as discussed below, a measure of jurisdiction in social insurance cases has been assigned to the Social Courts. Within the District Courts, panels for commercial matters ("Kammer für Handelssachen") are competent to hear such cases upon application of one of the

5 Cp. with regard to § 1 of the former UWG, BGH, Az. KZR 7/76, *4 zum Preis von 3*, [1978], GRUR 445 at 446; LG Frankfurt, Az. 3-11 O 87/02, *Autovermietungsagenturen*, [2004], WuW, DE-R 1200.
6 Cp. Köhler, *Der Rechtsbruchtatbestand im neuen UWG,* [2004] GRUR 381 at 387.
7 Immenga/Mestmäcker, *GWB*, (C.H. Beck, 2001), § 33 at point 64.
8 § 87 GWB.

parties[9]. The same rules apply for litigation in connection with infringements of Articles 81, 82 EC[10]. The exclusive competence of the District Courts and the per se definition as commercial matter differs from the general competence rules.

In addition, most federal states ("Bundesland", political subdivisions of the Federal Republic of Germany with their own areas of competence) have concentrated the jurisdiction for civil litigation arising from infringements of competition law within a small number of District Courts, each of which covers several other District Court circuits[11]. This concentration applies for the courts listed in appendix 1.

For appeals, special cartel law panels at the Higher Regional Courts ("Oberlandesgericht", abbr. "OLG") are exclusively competent. This competence can also be concentrated within a small number of Higher Regional Courts, each of them covering several other circuits, where the federal state has more than one Higher Regional Court[12].

Further appeals on questions of law only ("Revision") will be decided by the panel for cartel law at the Federal Court of Justice ("Bundesgerichtshof", abbr. "BGH")[13].

b) Social Courts

Since 1 January 2000, civil competition litigation in matters of compulsory health insurance, social long-term care insurance and private long-term care insurance, including matters concerning third persons, has been expressly assigned to the jurisdiction of the Social Courts[14]. This means, in particular, that claims of private suppliers of goods or services against compulsory health insurers or social or private long-term care insurers, or against their associations, are assigned to the social jurisdiction[15]. As far as the infringement of domestic competition law is concerned, it is as yet unclear to what extent the Social Courts will exercise their jurisdiction to apply competition law instead of pure social law[16]. As far as the infringement of EC competition law is concerned, it is unanimously held that the Social Courts are bound to apply EC competition law, if applicable. With regard to actions of producers of pharmaceuticals against German compulsory health insurers relating to the insurers' price fixing, the ECJ recently held that the compulsory health insurers did not act as an undertaking in the sense of Art. 81, 82 EC when fixing maximum prices for pharmaceuticals they would reimburse to their members[17].

(ii) Are there specialised courts for bringing competition-based damages actions as opposed to other actions for damages?

There are no specialised courts, but the courts tend to assign competition-related cases to one or a limited number of panels as part of their case allocation procedures. As a result, these panels are specialised in competition law. Appendix 2 contains a table listing these specialised panels within the District Courts.

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9 § 87 (2) GWB, § 94, § 96 (1), § 98 (1), sentence 1 GVG [German Judicature Act (*"Gerichtsverfassungsgesetz"*)]. The panels for commercial matters are primarily competent for claims against business men relating to their business and other sorts of matters of clearly commercial character according to a statutory list in § 95 GVG, this competence being subject to the application of one of the parties. Besides this primary competence, explicit statutory provisions may define certain matters as commercial matters, which has been done for private claims on the grounds of infringements of competition law provisions.

10 § 96 sentence 1 GWB.

11 § 89 GWB.

12 §§ 91, 92 GWB; concentration is applied in Bavaria, Lower Saxonia and Northern Rhenania-Westfalia.

13 § 94 GWB.

14 § 51 (2) SGG in connection with § 87 (1) sentence 3, § 96 (1) GWB.

15 Meyer-Ladewig, *SGG*, (C.H. Beck, 2002), § 51 at point 20; BGH, Az. KZB 34/99, *Hörgeräteakustik*, [2000], WRP 636 at 637.

16 BSG, Az. B 3 KR 3/01, *Hilfsmittel*, [2001], unpublished, BSG, Az. B 3 KR 11/98 R [2000], BSGE 87, 95; BGH, Az. KZR 18/01, *Wiederverwendbare Hilfsmittel* [2004], NZS 33; Diekmann/Wildberger, *Wettbewerbsrechtliche Ansprüche im Rahmen von § 69 SGB V*, [2004], NZS 15.

17 ECJ, C-264/01, C-306/01, C-354/01, C-355/01, *AOK Bundesverband*, [2004].

C. Who can bring an action for damages?

(i) Which limitations are there to the standing of natural or legal persons, including those from other jurisdictions? What connecting factor(s) are required with the jurisdiction in order for an action to be admissible?

a) Standing

Natural and legal persons and those entities without legal personality that are entitled by law to have rights and duties have standing in civil proceedings. The only limitation for those who are ordinarily resident ("gewöhnlicher Aufenthalt") in Germany, in a member state of the European Union or within the European Economic Area is that a plaintiff can only bring a claim where he has the right of action ("Prozessführungsbefugnis"). Therefore, the plaintiff needs to base his claim on his own (alleged) right. No other substantial requirements need to be fulfilled for an action to be admissible. However, as a condition of substantive law, the plaintiff has to belong to a group of persons whose protection was intended by the infringed provision of competition law (see D.(iii) below).

The standing of plaintiffs who are ordinarily resident outside the European Union or the European Economic Area is subject to a special condition. On application of a defendant, such plaintiffs need to provide security for the defendant's costs of the proceedings, if international treaties do not guarantee enforcement of costs reimbursement or if the plaintiff does not have sufficient assets within Germany to ensure such reimbursement[18].

b) Jurisdiction

The decisive connecting factors for an action based on a breach of competition law to be admissible in Germany are the defendant's seat, on the one hand, and the place where the harmful effects occurred or where the anti-competitive act was committed, on the other.

(A) Legal Basis

The jurisdiction of the German courts in civil and commercial matters including claims under civil law arising from the violation of competition law[19] is governed principally by Regulation 44/2001 (see Comparative Report under II.C. (i)). The German Code of Civil Procedure ("Zivilprozessordnung", ZPO)[20], however, still governs the question of jurisdiction vis-à-vis countries outside the EU and the EFTA, except if international treaties apply.
There is no specific or exclusive jurisdiction for damages actions for breach of national and EC competition law in the German Code of Civil Procedure.[21]
The potential venues for civil actions based on violation of competition law are:

- the place of the defendant's seat (forum domicilii[22]);
- the place of performance[23];
- the place of establishment[24];

18 § 110 ZPO.
19 Cp. Art. 1 (1) of Regulation 44/2001; Kropholler, *EuZPR* (Verlag Recht und Wirtschaft, 2002) Art. 1 at point 15; Schmidt in Immenga/Mestmäcker, *GWB* (C.H.Beck, 2001) § 87 at point 43 and § 130 (2) at point 255.
20 Roth in Stein/Jonas, *ZPO* (Mohr Siebeck, 2003) before § 12 at point 26 ff.; Kropholler, *EuZPR* (Verlag Recht und Wirtschaft, 2002) Introduction at point 19 and before Art. 2 at point 16 et sq.
21 In § 87 GWB the international jurisdiction of the German courts for disputes arising from a violation of German competition law is not regulated but presumed. § 130 (2) GWB governs the substantive question of the territorial application of the GWB and has only an indirect impact on the international jurisdiction (cp. Schmidt in Immenga/Mestmäcker, *GWB* (C.H.Beck, 2001) § 87 at point 42 et sq.). § 96 GWB refers to § 87 GWB for claims arising from a violation of Art. 81, 82 EC.
22 Art. 2 (1) of Regulation 44/2001; §§ 12 et sq. ZPO.
23 Art. 5 No. 1 of Regulation 44/2001 / § 29 ZPO; cp. Rehbinder in Immenga/Mestmäcker, *GWB* (C.H.Beck, 2001) § 130 (2) at point 249.
24 Art. 5 No. 5 of Regulation 44/2001 / § 21 ZPO; cp. Rehbinder in Immenga/Mestmäcker, *GWB* (C.H.Beck, 2001) § 130 (2) at point 248 and 250.

- the place where the defendant has assets, if there is no other venue in Germany and if the case has some other connection with Germany[25]; and, above all
- the forum delicti[26] (see (B) below).

The geographical competence of the courts within Germany for competition-related claims is determined by the same criteria as is the international jurisdiction, except that the place where the defendant has assets is not a relevant connecting factor.

(B) Forum delicti

The violation of competition law qualifies as a tortuous act in terms of § 32 ZPO[27].

According to § 32 ZPO, German courts have jurisdiction if the unlawful act was committed in Germany. It is the prevailing view in Germany that in cartel law cases the term "place where the unlawful act was committed" has to be interpreted broadly and with specific regard to competition law. German courts are considered to have jurisdiction when the anti-competitive action either takes place in Germany or is directly related to the German market.[28]

(ii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

Under existing competition law, collective claims to injunct infringements ("Unterlassungsanspruch") are available to certain associations and representative bodies, where, inter alia, national competition law has been infringed, irrespective of whether the infringed statute of competition law aimed at the protection of the representative body's members[29]. The definition of those representative bodies is taken from the law of unfair competition. Potential plaintiffs may include private associations of companies, Chambers of Industry and Commerce as well as craft guilds. Damages can only be claimed by those who actually suffer the harm.

Under the draft 7th amendment, the definition of those representative bodies is included into the wording of § 33 GWB, but also narrowed down to those representative bodies whose members' interests are "affected" by the competition law infringement. In addition, public interest litigation according to the model presented by the provisions of directive 98/27/EC on injunctions for the protection of consumers' interests is introduced. By doing this, the government takes into account that competition also protects consumers' interests.[30] The availability of collective claims and public interest litigation has been expanded to encompass claims based on infringements of Articles 81, 82 EC. Representative organisations and institutions registered for public interest litigation will be given more rights insofar as these organisations will be entitled to claim the profits made by infringers of Articles 81, 82 EC, of any of the provisions of the German Act Against Restraints of Competition or of an order of cartel authorities, provided that the infringement was committed intentionally and the profit has been obtained at the expense of a large number of customers, and provided that these profits have not already been claimed by the competition authority[31]. However, these profits will not be awarded to the plaintiff but to the state. The Federal Cartel Office will be in charge to reimburse the plaintiff for the costs of litigation. Collective claims or public interest litigation are still not available for damages. Litigation by public

25 Cp. § 23 ZPO, Putzo in: Thomas/Putzo, *ZPO*, (C.H. Beck, 2003), § 23 at point 2.
26 Art. 5 No. 3 of Regulation 44/2001 / § 32 ZPO; cp. BGH, Az. KZR 21/78, *BMW-Reimport*, [1980], NJW, 1224 at 1224. Art. 5 No. 3 of Regulation 44/2001 not only regulates the international but as well the local jurisdiction, cp. Kropholler, *EuZPR* (Verlag Recht und Wirtschaft, 2002) before Art. 5 at point 5, Leible in Rauscher, *EuZPR* (Sellier, 2004) Art. 5 at point 4.
27 Vollkommer in Zöller, *ZPO* (Verlag Dr. Otto Schmidt, 2004) § 32 at point 11; Patzina in Lüke/Wax *Münchener Kommentar, ZPO* (C.H.Beck, 2000) § 32 at point 11.
28 Fezer in Staudinger, *BGB* (Sellier/de Gruyter, 2000) EGBGB/IPR International Economic Law at point 305; Rehbinder in Immenga/Mestmäcker, *GWB* (C.H.Beck, 2001) § 130 (2) at point 251.
29 Bechtold, *GWB*, (C.H. Beck, 2002), § 33 at point 10.
30 *Regierungsentwurf,* [2004], BR-Drucksache 441/04 at 93.
31 Cp. § 34 a GWB under the draft 7th amendment.

agents is neither available under existing competition law nor under the draft 7th amendment.

German law allows the assignment of claims to any other person. Thereby, a "pseudo" collective claim by a "collective" plaintiff who has been assigned several claims of other persons, is, in theory, possible.

D. What are the procedural and substantive conditions to obtain damages?

To succeed, the plaintiff needs to establish the breach of either national or EC competition law that is intended to protect the plaintiff's interest, fault (assumed), damage and causation. The amount of damage can be estimated, if sufficient information is established as a basis for estimation.

(i) What forms of compensation are available?

German law provides three forms of "compensation" (widely understood): damages, the injuncting of infringements and the compulsion of infringing defendants to remedy the consequences of infringement[32]. Of these three types of compensation, fault is only required for damages claims.

Damages can be awarded in the form of restitution in kind ("Naturalrestitution") or - if restitution in kind is impossible - as monetary compensation. Restitution in kind can take any possible form necessary to restore the situation as it would be without the damaging event, e.g. an obligation to supply the plaintiff in cases of discrimination of retailers[33]. Monetary damages are awarded as restitution in kind for pecuniary losses or as compensation if restitution in kind is impossible. Only in case of personal injury or property damages, compensation may be chosen even if restitution is possible. Pecuniary losses include reduction in assets, lost profits, loss of chance (if success was proved as probable), moral damages (if the lost had economic value). Exemplary or punitive damages are not awarded. Restitution in kind or remedies regarding the consequences of infringement may also include an order for publication of the judgement[34]. However, claims for publication of the judgement are very unusual in practice.

Whereas injunctive relief aims to stop and prevent current and future infringements, the remedy regarding the consequences of infringement provides redress for harm which has already occurred, but still entails nuisances. Injunctive relief may be granted at an interim stage. In exceptional cases and under narrowly defined conditions, remedy regarding the consequences of infringement can equally be awarded in preliminary proceedings. [35]

In general, injunctive relief is available where there are good grounds for expecting a future infringement of competition law. This future infringement can take the form of action or an omission to remedy a persisting source of harm. An action for injunctive relief can include a claim to remedy future consequences where a persisting infringement is established and is still impairing the plaintiff, such as a continuing exclusion from a particular market.

A person can also claim the remedy for future consequences directly if a persisting source of harm is established which that person is not obliged to tolerate. This remedy can be used to require the defendant to undertake or be responsible for any action that is necessary to prevent further damage, including actions that go well beyond the cessation of infringing conduct, for example to the subsequent payment of the difference between reasonable prices and the reduced prices

32 § 33 sentence 1 GWB; §§ 1004 (1), 823 (2) BGB in connection with Articles 81, 82 EC, § 9 UWG.

33 Cp. OLG München, Az. U (K) 3338/01, *Depositär,* [2002], GRUR-RR 207 at 210. This judgement has however been reversed by the Federal Court of Justice, BGH, Az. KZR 2/02, *Depotkosmetik im Internet,* [2004], DB 311.

34 Cp. Köhler/Piper, *UWG*, (C.H. Beck, 2002) § 23 at point 18. This legal situation is in accordance with Art. 15 of Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights, O.J. EC No. L 157/45 [30 April 2004].

35 For injunctive relief: cp. e.g. OLG Celle, Az. 13 U (Kart) 260/97, *Feuerwehrausrüstung*, [1999], NJWE-WettbR 164; for remedies regarding the consequences of the infringement: cp. e.g. OLG Düsseldorf, Az. U (Kart) 34/01, *Reziprozität*, [2002], GRUR-RR 176.

obtained by a powerful customer in the event of price discrimination against a supplier[36].

(ii) Other forms of civil liability (e.g. disqualification of directors)?

Statutory representatives of companies which commit infringements of competition law are personally liable to third parties, if either they are responsible for the infringement or knew of anti-competitive conduct on the part of employees and did not prevent it[37].

Internal consequences within affected companies such as the dismissal of a managing director cannot be the subject of third party actions against those companies. The managing director of a GmbH (the German private limited company) can be dismissed by the shareholders' meeting by way of simple majority[38]. Good cause for the dismissal is not necessary. For the dismissal of a member of the board of an Aktiengesellschaft (the German public limited company), however, further to a resolution of the advisory board by majority such good cause is necessary[39]. If a member of the board acts in a way which is not in compliance with the law, such good cause is certainly given. The same is the case if the member of the board tolerates that fellow board members violate competition law[40]. The dismissal of a managing director/member of the board does not necessarily affect this person's service contract with the company.

Directors of companies who are convicted for criminal acts related to the exercise of their business may be imposed a ban from their profession, which prevents them from being director of such company[41].

(iii) Protective purpose of the norm ("Schutzzweck")?

a) Current status of law

A plaintiff needs to prove that he belongs to a group of persons whose protection is a purpose of the provision of competition law that has been infringed[42]. This principle applies to both the infringement of domestic competition law and the infringement of Articles 81, 82 EC.

(A) Infringement of domestic competition law (e.g. §§ 1, 19, 20 GWB)

For damages claims for the infringement of domestic competition law, the Act against Restraints of Competition expressly requires that the plaintiff's protection was a purpose of the provision infringed. When applying this requirement, the courts usually demand that the plaintiff be a person or belong to a definable group of persons against whom the infringement was specifically directed with the aim of worsening that person's or group's situation or preventing that person or group from entering the relevant market at all[43]. Such infringements are, e.g., agreements between customers to lower the price[44], joint-ventures of purchasers[45], agreements to prevent a competitor from participating in the market[46] or public recommendations of retail prices vis-à-vis franchisees[47]. In several proceedings commenced by the Deutsche Telekom AG or its affiliates, the

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36 Cp. BGH, Az. KZR 31/95, *Kraft-Wärme-Koppelung*, [1996], NJW 3005 at 3005/3006.
37 Baumbach, Hefermehl, *Wettbewerbsrecht*, (C.H. Beck, 2001), UWG Einl at point 329.
38 §§ 38, 46 No. 5 German private limited companies act ("*Gesetz betreffend die Gesellschaften mit beschränkter Haftung*", GmbHG).
39 § 84 (3) German public limited companies act ("*Aktiengesetz*", AktG).
40 Hüffer, U., *Aktiengesetz*, (C.H. Beck, 5th edition, 2002) § 84 at point 26 sq.
41 However, under current national competition and criminal law, there is only one specific provision of criminal law, prohibiting anti-competitive agreements concerning invitations to tender. In addition, anti-competitive conduct may fall into the scope of the criminal prohibitions of fraud and breach of fiduciary duty.
42 § 33 sentence 1, clause 2 GWB, § 823 (2) BGB.
43 BGH, Az. KZR 12/81, *Familienzeitung*, [1983], GRUR, 259.
44 OLG Bremen, Az. U (Kart) 1/88, *Nachfragerkartell*, [1989], ZIP 1085.
45 Cp. OLG Celle, Az. 13 U Kart 260/97, *Feuerwehrausrüstung*, [1999], NJWE-WettbR 164 at 165.
46 BGH, Az. KZR 6/74, *Zuschussversicherung*, [1976], GRUR, 153, at 153-157, where compulsory health insurance companies entered into agreements with private health insurance companies on the exclusive and subsidised procurement of complementary insurance contracts of these private health insurance companies. Thereby other private companies offering complementary insurance contracts were not able to enter into that market.
47 Cp. OLG Bremen, Az. Kart 2/2001, *Apollo-Optik I*, [2002], WRP 224 at 234.

Federal Court of Justice and several Higher Regional and District Courts ruled unanimously that national cartel law does also protect the private interests of competitors in markets other than the market dominated by the defendant, if the defendant is able to influence the other market due to the dominance in its original market[48]. On the other hand, such influence was denied in cases where the plaintiff itself had a strong market position on the "other" market[49]. Some recent judgements of District Courts have denied damages to customers of global price cartels where the cartel was not directed towards bringing about specific harm but merely a price increase which affected the entire market, including the customers of the respective plaintiffs and ultimate consumers[50]. In a recent judgement of the District Court of Dortmund dealing with the same type of cartel, damages were awarded on the grounds that it was not necessary for the cartelists' activity to be specifically directed against the plaintiff[51]. The German Federal Court of Justice has not yet decided upon the minimum conditions under which an infringement qualifies as being directed specifically against a certain person or group.

Some legal experts and for example the Higher Regional Court of Stuttgart[52] and the District Court of Dortmund[53] have criticised the prevailing position among the courts. They argue that the intention to harm a specific person or definable group of persons is not a statutory prerequisite[54].

(B) Infringement of Articles 81, 82 EC

As regards damages for infringement of Articles 81, 82 EC, general German tort law governing infringement of statutory provisions applies. It too requires that the provisions in question aim (at least among other purposes) at the protection of the plaintiff. Statutes that are merely concerned with the public order do not qualify. German courts generally consider Articles 81, 82 EC as statutory prohibitions whose purpose is, among other things, to protect competitors, customers and other market participants[55]. In addition, according to prevailing case law, infringements of Articles 81, 82 EC only give rise to damages in cases of action targeting the competitive position of the plaintiff[56], as is required for damages claims for the infringement of national competition law.

To date the German Federal Court of Justice has neither decided upon the minimum requirements regarding the protective purposes of Articles 81, 82 EC nor has it decided whether judgements of the European Court of Justice are contrary to this restrictive interpretation of the protection that Articles 81, 82 EC afford. However, some recent decisions of District Courts have held that neither the "Courage" decision[57] nor other decisions of the European Court of Justice oblige the German judicature to refrain from a restrictive application of the principle of the protective purpose of the infringed norm[58]. This point of view has been criticised by several legal experts[59]. The above mentioned judgement of the District Court of Dortmund (see (A) above) did not make any difference between the infringement

48 Cp. for example: BGH, Az. KZR 16/02, *Strom und Telefon I*, [2003], Städte- und Gemeinderat 2003, Nr. 12, 30 at point B. I. 3 concerning the combination of energy and telecommunications services; LG Düsseldorf, Az. 34 O (Kart) 189/02, *Bonusmeilen für Mobilfunkanbieter*, [2003] WuW/E DE-R 1135 at 1137 concerning the combination of bonus miles offered by the most important German airline and mobile phone communications services.

49 LG Düsseldorf, Az. 34 O (Kart) 189/02, *Bonusmeilen für Mobilfunkanbieter*, [2003] WuW/E DE-R 1135 at 1137 concerning the combination of bonus miles offered by the most important German airline and mobile phone communications services.

50 LG Mannheim, Az. 7 O 326/02, *Vitaminkartell,* [2004], GRUR 182; LG Mainz, Az. 12 HK.O 55/02 KART, *Preiskartell auf Vitaminsektor,* [2004] NJW-RR 478; LG Berlin, Az. 102 O 134/02 Kart, *Transportbeton,* [2003], unpublished.

51 LG Dortmund, Az. 13 O 55/02 Kart., *Vitaminkartell III*, [2004], unpublished, at 12.

52 OLG Stuttgart, Az. 2 U 223/97, *Carpartner*, [1998], NJWE-WettbR 260.

53 LG Dortmund, Az. 13 O 42/03 Kart., *Selbstdurchschreibepapier*, [2003], unpublished, at 9.

54 Such as: Emmerich in Immenga/Mestmäcker, *GWB* (C.H.Beck, 2001) at § 33 at point 16.

55 See Bornkamm in Langen/Bunte, *Kartellrecht, Vol. 1* (Luchterhand, 2001) at Art. 81 EC at point 226; K. Schmidt in Immenga/Mestmäcker, *EG-Wettbewerbsrecht* (C.H.Beck, 1997) at Art. 85 (2) at point 76.

56 BGH, Az. KZR 21/78, *BMW-Reimport*, [1980], NJW, 1224 at 1225; BGH, Az. KZR 23/96, *Depotkosmetik*, [1999], GRUR, 276 at 277.

57 Case C-453/99, *Courage v. Crehan*, [2001] ECR I-6297.

58 LG Mannheim, Az. 7 O 326/02, *Vitaminkartell,* [2004] GRUR 182; LG Mainz, Az. 12 HK.O 55/02 KART, *Preiskartell auf Vitaminsektor,* [2004] NJW-RR 478.

59 Cp. e.g. Lettl, *Der Schadensersatzanspruch gemäß § 823 Abs. 2 BGB i.V. mit Art. 81 Abs. 1 EG*, [2003] ZHR 473 at 481 sq.; Köhler, *Kartellverbot und Schadensersatz*, [2004], GRUR 99.

of domestic and EC competition law and based its award of damages on both legal grounds[60].

b) Forthcoming changes as per the draft 7th amendment

Under the draft 7th amendment the requirement of protective purpose will be upheld as such, but alleviated for both the infringement of national competition law and of Articles 81, 82 EC. If the current draft becomes law, the amended statute will expressly state that Articles 81 and 82 EC as well as the provisions of national competition law are intended to protect other market participants even if the infringement is not specifically directed against them[61]. In its explanations of the proposed amendments the German government notes that a restriction of civil claims to infringements specifically directed against the plaintiff would result in a situation where a cartel member is less likely to be liable for damages, the broader the results of the cartel agreement are[62]. With regard to the infringement of Articles 81, 82 EC the German government states that a narrow interpretation of the requirement of protective purpose would not be in accordance with European law. Reference is made to the European Court of Justice which has ruled in *Courage v. Crehan* that "everyone" must be in a position to claim the damage he suffered as a result of an anti-competitive agreement or behaviour[63]. According to the current draft and the explanations given by the government, the indirect purchaser and even the final consumer may be entitled to claim damages[64].

The proposed new wording of § 33 GWB also provides that claims of a market participant under that provision are not excluded for the only reason that the plaintiff was involved in the infringement[65]. Yet, the claim may be excluded for other reasons, e.g. contributory fault. Again, the German government intends to follow the reasoning of the European Court of Justice in *Courage v. Crehan*[66].

(iv) Does the infringement have to imply fault? If so, is fault based on objective criteria? Is bad faith (intent) required? Can negligence be taken into account?

If damages are to be claimed, an infringement needs to imply fault in relation to the violation of competition law, but not necessarily in relation to the effects of the violation. Fault means intent or negligence. A person acts negligently if he or it fails to observe the duty of reasonable care. The duty of reasonable care is defined within specific circumstances by objective and abstract criteria[67]. Negligence is known under three levels: slight, normal and gross negligence. For damages claims, slight negligence is sufficient. It is upon the defendant to prove the absence of negligence, if the infringement of either national or EC competition law has been proved[68].

E. Rules of evidence

(a) General

(i) Burden of proof and identity of the party on which it rests (covering issues such as rebuttable presumptions and shifting of burden to other party etc.)

a) General Rule

Pursuant to the principle of party presentation ("Beibringungsgrundsatz") applicable in civil proceedings the burden of proof for all facts supporting a claim

60 LG Dortmund, Az. 13 O 55/02 Kart., *Vitaminkartell III*, [2004], unpublished, at 11.
61 § 33 (1) sentence 3 with § 33 (3) GWB according to the draft 7th amendment.
62 *Regierungsentwurf,* [2004], BR-Drucksache 441/04 at 92.
63 C-453/99, *Courage v. Crehan,* ECR [2001] I-6297; *Regierungsentwurf,* [2004], BR-Drucksache 441/04 at 92.
64 *Regierungsentwurf,* [2004], BR-Drucksache 441/04 at 92.
65 § 33 (1) sentence 4 with § 33 (3) GWB according to the draft 7th amendment.
66 *Regierungsentwurf,* [2004], BR-Drucksache 441/04 at 92/93.
67 See Palandt / Heinrichs, *Bürgerliches Gesetzbuch*, (C.H. Beck, 2004) at § 276 at point 15.
68 Cp. BGH, Az. VI RZ 22/85, [1986] NJW 2757, Reinholf in: Thomas/Putzo, *ZPO* (C.H. Beck, 2003), vor § 284 at point 28, Sprau in Palandt, *BGB*, (C.H. Beck, 2004) § 823 at point 81 (for § 823 (II) BGB),

lies on the plaintiff[69]. He has to submit a complete chain of evidence proving substantially all facts that justify his claim. With regard to an action for damages for breach of competition law the plaintiff has to prove not only the infringement of competition law but also the fact that the infringement resulted in harm and the amount of damage suffered.

It is for the defendant to counter the plaintiff's arguments by providing evidence supporting his defences to the claim. With regard to a breach of competition law the defendant might, for example, prove that a blocked company claiming damages made no attempt to find alternative suppliers.

b) Exemptions and alleviations

Facts which are beyond dispute or obvious ("offenkundig") do not need to be proved.[70] Obvious means that the facts are either common knowledge or known to the members of the court dealing with the case (e.g., through previous cases involving the same or a similar issue)[71].
Public documents containing a decision made by a public authority constitute full, irrebuttable evidence of the fact that the decision has been rendered at the time and place as set out in the relevant document, but not of the correctness of the decision as such or the underlying facts[72]. Other public documents containing own deeds or perceptions of the issuing authority constitute full, but rebuttable evidence of the certified deed or perception[73] Private documents signed by their author constitute full, rebuttable evidence of the fact that the declaration contained in the document has been made.[74]
In some cases a prima facie evidence rule ("Anscheinsbeweis") provides a procedural alleviation of the burden of proof. The burden of proof is not shifted to the other party but the evidential threshold is lowered. Where facts are proved which - according to general life experience - point to a certain cause or a certain course of events, then this cause or this course of events is accepted as proved, if the case does not differ from ordinary and common cases. The other party can rebut the prima facie evidence by proving other facts that point to a different cause or different course of events[75].
In the event that a party, by its own fault, makes it impossible for the other party to prove a fact, the court may alleviate the burden of proof or even shift the burden of proof to the party that has caused the impediment.[76]

Additionally, a party is exempt from submitting evidence in the event that substantive law provides for a legal presumption (e.g., there is a rebuttable presumption of fault in cases of breach of contract)[77]. German competition law contains several presumptions, both statutory and as a matter of precedent. The most common presumptions are as follows:

- Concerted practices: If undertakings act concurrently when there is contact between them, it is presumed, pursuant to case law, that the concurrent conduct constitutes a concerted practice.[78] The presumption may be rebutted upon proof of other reasons for the concurrence, such as existing market characteristics. The courts have not yet decided whether this presumption applies only to administrative proceedings or also extends to civil proceedings.
- Abuse of dominant position: There is a statutory presumption[79] that single undertakings with a market share of at least one third, or three or less undertakings with a combined market share of at least 50 per cent., or five

69 Thomas/Putzo, *ZPO* (C.H. Beck, 2003), Einl. I, at point 1.
70 § 291 ZPO.
71 Thomas/Putzo, *ZPO* (C.H. Beck, 2003), § 291 at point 1.
72 Thomas/Putzo, *ZPO* (C.H. Beck, 2003), § 417 at point 2. For decisions of competition authorities and courts see II.E.(b)(iii) below.
73 § 418 ZPO.
74 § 416 ZPO.
75 Cp. e.g. Heinrichs in Palandt, *BGB*, (C.H. Beck, 2004), Vorb v § 249 at point 163; LG Dortmund, Az. 13 O 55/02 Kart., *Vitaminkartell III*, [2004], unpublished, at 13, with regard to the fact that cartel prices are higher than market prices.
76 Thomas/Putzo, *ZPO* (C.H. Beck, 2003), § 286 at points 17-19.
77 Thomas/Putzo, *ZPO* (C.H. Beck, 2003), § 292 at point 1.
78 Cp. Bechtold, *GWB,* (C.H. Beck, 2002), § 1 at point 17.
79 § 19 (3) GWB.

or less undertakings with a combined market share of at least two thirds, have a dominant market position, unless they prove that the market conditions may be expected to maintain substantial competition among them or that the number of undertakings has no dominant market position in relation to the remaining competitors. However, it is unclear whether this presumption shifts the burden of proof to the defendant or only amounts to circumstantial evidence.[80]

- Abuse of dominant position through impediment: Pursuant to case law, the burden of proof for a lack of objective justification for the impediment lies on the plaintiff[81].
- Discrimination and unfair hindrance by dominant undertakings: Insofar as discrimination and unfair hindrance are prohibited as against undertakings on which SMEs, as suppliers or purchasers of particular goods or commercial services, depend (in such a way that sufficient or reasonable possibilities of resorting to other undertakings do not exist), there is a statutory presumption[82] that an SME supplier of particular goods or commercial services depends on a purchaser if this purchaser regularly obtains from this supplier, in addition to discounts customary in the trade or other remuneration, special benefits which are not granted to similar purchasers.
- Unfair hindrance by dominant undertakings: Where, on the basis of specific facts and in the light of general experience, it appears that an undertaking has used its market power for acts of discrimination or unfair hindrance, a statutory prima facie evidence rule in § 20 (5) GWB requires the undertaking to rebut the appearance and to clarify such circumstances in its field of business that cannot be clarified by the plaintiff, i.e. the competitor concerned or the representative associations, but which can be easily clarified, and may reasonably be expected to be clarified, by the undertaking against which action is taken. There is uncertainty as to what indications are required to give rise to the appearance of a misuse of market power[83].
- Unfair hindrance by dominant undertakings against SMEs: There is a statutory presumption[84] that unfair hindrance exists, if an undertaking offers goods or services not merely occasionally below its cost price, unless there is an objective justification for doing so.

(ii) Standard of proof

Before granting a claim for damages the court must be convinced that the claim is well-founded, i.e. the court must be convinced of the existence of every single fact necessary to found the claim. The conviction ("Überzeugung") must be based on the oral hearing, including the evidence taken[85]. "Conviction" does not mean absolute certainty. A high level of plausibility or "practical" certainty ("für das praktische Leben brauchbarer Grad an Gewissheit") which prevails over remaining doubts, without fully excluding them, is sufficient.[86] The court's conviction may also be based on circumstantial evidence. The question which circumstances may suffice as circumstantial evidence to prove certain infringements of provisions of competition law is discussed in precedents and legal opinions. Damages and lost profits may be estimated, so that the plaintiff only needs to convince the court that the facts on which the estimation is based are true[87] (for further details, pls. refer to E (c) below).

A lesser degree of certainty is required in provisional proceedings such as preliminary injunction or seizure proceedings. In these cases, it is sufficient to show probability ("Glaubhaftmachung").
For the court to reach its conviction, § 286 ZPO recognises the principle of free evaluation of the evidence ("Prinzip der freien Beweiswürdigung"). With few statutory exceptions, the admission and weighing of evidence, including for instance hearsay, lies within the discretion of the court. Thus, judicial review of the

80 Cp. Bechtold, *GWB* (C.H. Beck, 2002), § 19 at point 51.
81 Cp. Bechtold, *GWB* (C.H. Beck, 2002), § 19 at point 68.
82 § 20 (2) sentence 2 GWB.
83 Cp. Bechtold, *GWB* (C.H. Beck, 2002), § 19 at point 75.
84 § 20 (4) sentence 2 GWB.
85 Thomas/Putzo, *ZPO* (C.H. Beck, 2003), § 286 at point 6.
86 Thomas/Putzo, *ZPO* (C.H. Beck, 2003), § 286 at point 2.
87 Cp. § 287 ZPO, § 252 BGB.

weighing and evaluating of evidence is limited to arbitrariness and the violation of the right to be heard before the court ("Recht auf rechtliches Gehör")[88]. However, the reasons for believing one party over the other must be clearly stated in the judgement.
The standard of proof in criminal trials is nearly the same as in civil proceedings, with the exception that reasonable doubts may not exist at all[89] and the burden of proof lies on the state for all elements of crime. In addition, the admissible forms of evidence are different, due to the sovereign character of criminal proceedings.

(iii) Limitations concerning form of evidence

As to the permissible forms of evidence, German courts make the following distinction:

a) As far as the admissibility ("Zulässigkeit") of the action (i.e. the jurisdiction of the court, capacity to be a party, etc.) is concerned, informal evidence ("Freibeweis") is permissible. This means that the decision on admissibility of the action may be based upon any kind of evidence the court considers appropriate.[90]

b) With regard to the merits of the dispute, only the following evidence is admissible in civil court proceedings: visual inspection by the court ("Augenschein"), witnesses, experts, documents, interrogation of the parties and official information. There is no hierarchy in-between those forms of evidence, except for the interrogation of the parties which is considered a subsidiary form of evidence and is only permissible in specific circumstances, mainly if no other evidence is accessible, e.g. to outbalance a lack of witnesses. However, there are some exceptions to this rule:

- For claims directed at a specific sum of money a special kind of summary proceeding is available where only documentary evidence is permissible ("Urkundenprozess").[91]
- In preliminary injunction or seizure proceedings, where a lesser degree of probability is required, the parties are not subject to the same evidential restrictions. For example, an affidavit may be presented instead of a witness. However, due to the urgency of such proceedings, only evidence that can be taken immediately is allowed.[92]

Witnesses are allowed to refuse to give evidence, if they are subject to professional secrecy or close relatives to the parties. In addition, journalists may refuse to give evidence concerning the sources for their editorial work and any witness may refuse to give answers that might lead to criminal proceedings against the witness or close relatives or to direct financial losses of the witness or close relatives, or where the witness would thereby disclose business secrets[93]. In this respect, the term "business secrets" includes all technical work equipment and working methods that are not generally known as well as economic facts, if a substantial and direct interest in the non-disclosure exists[94]. Hearsay evidence is not excluded, but the characteristic as hearsay will be taken into account in the evaluation of the evidence. Where a witness refuses to give evidence without justification, the court enforces testimony by means of an administrative fine between five and 1,000 EUR[95], arrest between one day and six weeks or - in case of repeated disobedience and only upon application of a party - imprisonment for contempt of court to an absolute maximum of six months[96]. If the witness does not appear in court, the court enforces appearance also by the above mentioned fine or arrest and it may also order the bringing forward of the witness by force[97]. With regard to the fine and the arrest, no application of a party is required and it is not within the discretion of the court to impose a fine or arrest.

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88 Thomas/Putzo, *ZPO* (C.H. Beck, 2003), § 286 at point 2.
89 Kleinknecht, StPO, (C.H. Beck, 2001), § 261 at point 2.
90 Thomas/Putzo, *ZPO* (C.H. Beck 2003), vor § 284 at point 6.
91 §§ 592 ff. ZPO.
92 § 294 ZPO.
93 Cp. §§ 383, 384 ZPO.
94 Cp. Damrau in: Lüke/Wax, *Münchener Kommentar, ZPO* (C.H. Beck, 2000) § 384 at point 14.
95 Art. 6 (1) EGStGB.
96 §§ 390 (2), 913 ZPO; Cp. Reinhold in Thomas/Putzo, *ZPO* (C.H. Beck, 2003), § 390 at point 3.
97 § 380 (2) 2 ZPO.

An individual who is a party to proceedings cannot be heard as a witness, but only by interrogation of the parties. This rule also applies to the legal representative (e.g., the CEO, board members) of a company which is a party to proceedings.

A party can also put forward evidence (e.g., witnesses) from other jurisdictions to support its pleadings. In such cases, the special rules on taking evidence abroad have to be observed (see (a) (iv.v)).

(iv) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis:

- **Defendants**
- **Third parties**
- **Competition authorities (national, foreign, Commission)**

a) General rules

The Code of Civil Procedure does not provide for pre-trial or other discovery procedures. The power of the judge to enforce the submission of evidence, or to take evidence that has not been previously offered by one of the parties, is limited. However, there are a few exceptions to this rule:

(A) Court order to submit documents or other objects, §§ 142-144 ZPO

Pursuant to § 142 ZPO the court is entitled to summon ex-officio one of the parties or a third party to disclose documents in their possession, to which a party has made reference in its pleadings. However, § 142 ZPO is not designed as a means of disclosing evidence via the court and cannot be used for exploratory fact finding ("Ausforschungsbeweis")[98].
If a party summoned to present a document refuses to submit the document, the court can preclude the party from relying on connected allegations, if the refusing party has the burden of proof. According to a significant number of legal experts, the court can take the refusal into account in its evaluation of the evidence, which might lead to the result that the character and content of the document as alleged by the requesting party are considered to be proved[99]. Others underline that the refusal might only lead to the party's failure to present a sufficiently substantiated and complete case[100]. A party cannot be forced (e.g. by means of an administrative fine or arrest) to comply with an order for disclosure.

Whether or not an order for disclosure is made, lies within the discretion of the court, even if disclosure has been requested by a party. When exercising its discretion, the court has to take into account the legitimate interests of the parties, such as the interest in discovering the true facts and winning the case or, on the other hand, the confidentiality of personal or business information.

The court can also summon third parties to produce documents, except where production would be unacceptable for the third party or where the third party is entitled to refuse to give evidence, which includes that it does not need to disclose business secrets (see (iii) b) above)[101]. The disclosure of documents qualifies as unacceptable, if reasonable interests of the third party overweigh the interest in efficient discovery of facts before the court in the specific circumstances[102]. Where a third party refuses to comply with a disclosure order the court may enforce its order by means of an administrative fine between five and 1,000 EUR[103], arrest between one day and six weeks or - in case of repeated disobedience - imprisonment for contempt of court to an absolute maximum of six months[104].
Under the same conditions, the court may summon a party or third party to produce items for inspection by the court or evaluation by experts[105].

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98 Musielak, *ZPO,* (Verlag Franz Vahlen, 2002), § 142 at point 1
99 Schwartze in Hannich/Meyer-Seitz, *ZPO-Reform 2002 mit Zustellungsgesetz* (C.H. Beck, 2002), § 142 at point 13.
100 Cp. Gruber, Kießling, *Die Vorlagepflichten der §§ 142 ff. ZPO nach der Reform 2002*, [2003] ZZP 305 at 331.
101 § 142 (2) ZPO.
102 Schwartze in Hannich/Meyer-Seitz, *ZPO-Reform 2002 mit Zustellungsgesetz* (C.H. Beck, 2002), § 142 at point 11.
103 Art. 6 (1) EGStGB.
104 §§ 390 (2), 913 ZPO; Cp. Reinhold in Thomas/Putzo, *ZPO* (C.H. Beck, 2003), § 390 at point 3.
105 § 144 ZPO.

(B) Obligation to submit documents under substantive law, § 422 ZPO

Upon request of a party, the court summons the other party to disclose a document if the requesting party has a substantive legal right of access to that document.[106]
An obligation to submit a document exists, among other cases, where a party is under a duty to account for profits resulting from, e.g., the infringement of an intellectual property right. The German Act against Restraints of Competition does not provide for an obligation to account for profits arising from the infringement of competition law. However, pursuant to § 33 (3) sentence 2 GWB as it stands in the draft 7th amendment, the court may take into account the profit obtained through an infringement of competition law in its assessment of the amount of damage. It remains to be seen whether the courts will conclude from this provision that the defendant is under an obligation to account for this profit[107].

(C) Hearing of a party ex officio, § 448 ZPO

§ 448 ZPO authorises the court to hear a party or both parties ex officio if it is of the opinion that there is otherwise insufficient evidence for the truth or falsity of an alleged fact.

(D) Special provisions outside the Code of Civil Procedure

Pursuant to § 258 HGB [German Commercial Code ("Handelsgesetzbuch")] the court may summon a party to present its accounting books.

(E) Procedure to secure evidence

Provided that it has a legal interest, a party may apply for a written expert opinion on certain valuation aspects (e.g. personal injury and property damages) before filing a claim. A party may also, during or besides court proceedings, apply for an order to secure evidence by inspection, examination of a witness and experts, if the adverse party agrees or if it is to be feared that the evidence shall be lost or the use thereof shall be made more difficult[108].

b) Taking evidence abroad

Since 1 January 2004 taking evidence abroad is primarily governed by Council Regulation (EC) No. 1206/2001 of 28 May 2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters.[109] This regulation takes priority not only over national rules in the Code of Civil Procedure[110] but also over the provisions contained in the Hague Convention of 1 March 1954 on Civil Procedure and the Evidence Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.[111]

The provisions for implementation of Council Regulation 1206/2001 are found in §§ 1072-1075 ZPO.[112] German courts can either request the taking of evidence by a competent foreign court[113] or can take evidence themselves in the relevant EU member state applying the German rules on the taking evidence in the Code of Civil Procedure.[114]

However, the taking of evidence in another EU member state directly by a German court may only take place if it can be performed on a voluntary basis without the need for coercive measures.[115] If coercive measures are required the German court

106 § 422 ZPO.
107 A previous draft issued by the Federal Ministry of Economics and Labour had explicitly provided for the plaintiff's right to claim accounting for the profit the defendant obtained through the infringement of competition law.
108 Cp. § 485 ZPO.
109 O.J. EC No. L 174/1 [27 June 2001].
110 § 363 (3) ZPO.
111 Art 21 of the Council Regulation 1206/2001; Geimer in Zöller, *ZPO* (Otto Schmidt, 2004) § 363 at point 47.
112 §§ 1072 and 1073 ZPO govern the taking of evidence abroad for proceedings in German courts whereas §§ 1074 and 1075 ZPO apply to the taking of evidence in Germany for litigation pending abroad.
113 § 1072 No. 1 ZPO.
114 § 1072 No. 1 ZPO and Art. 17 of the Council Regulation 1206/2001.
115 Art. 17 (2) of the Council Regulation 1206/2001.

has to request the taking of evidence by a foreign court which is permitted to use its domestic rules of procedure for coercive measures.[116] Thus, the German court for example has the authority to summon a witness abroad but, if the witness fails to appear, the German court has no authority to enforce the examination of the witness by means of an administrative fine under German law.[117]

Where Council Regulation 1206/2001 does not apply the president of the German court will send a letter of request to the foreign authority or the German consular officer.[118]

whether evidence obtained through discovery in other countries is admitted in German proceedings is not regulated by statute, so that the judge has to decide on the admittance of such evidence in every individual case. The general principle is that evidence is admitted unless an individual right protected by German constitutional law or an applicable international convention on human rights was infringed by the taking of the evidence and the admittance of the evidence is not exceptionally indicated because overweighing counter interests exist[119]. On one hand, the judge will take into account that Germany has declared a reserve under the Evidence Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters with regard to the obligation to perform pre-trial discovery. However, this reserve was made to protect the German general principle of court proceedings, which does not have the status of constitutional law, that a party may not be obliged to disclose evidence to the advantage of the opponent[120]. On the other hand, precedents exist according to which not even the theft of documents justifies their non-admission as evidence[121] which shows that the admission of evidence is only denied under exceptional circumstances.

c) Discovery vis-à-vis competition authorities (national, foreign, Commission)

The courts are under an obligation to inform the German Federal Cartel Office ("Bundeskartellamt") of pending competition matters and to provide copies of the relevant documents upon request. Members of the Cartel Office appointed by its president are permitted to make statements in court, to refer to certain facts and evidence, to attend hearings, to make comments and to address questions to the parties, witnesses and experts.[122]

Equally, the presiding judges may request the submission of documents and official information from the Federal Cartel Office in order to prepare their hearings[123], either on their own initiative or upon application by a party that needs these documents for proving its allegations[124]. The presiding judges can also request information from foreign cartel offices by means of legal assistance.[125]

As a national authority, the Federal Cartel Office is generally obliged to provide administrative assistance to German courts.[126] As regards a foreign cartel office the general regulations of international legal assistance do apply.[127]

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116 Art. 13 of the Council Regulation 1206/2001.
117 For example § 380 (1) ZPO.
118 § 363 (1) ZPO.
119 Zöller, *Zivilprozessordnung* (Otto Schmidt Verlag, 2004) § 286 at point 15a.
120 Cp. Geimer, *Internationales Zivilprozessrecht* (Otto Schmidt Verlag, 2001) at point 2490 with further references which do not refer to any constitutional status of the above-mentioned principle. In addition, the reserve declared under the Evidence Convention may lose its value if directives were issued by the Federal Ministry of Justice that secured the appliance of the basic principles of German procedural law, which has not been done yet. However, this limitation of the reserve shows that pre-trial discovery does not even infringe basic principles of German procedural law per se.
121 Cp. Zöller, *Zivilprozessordnung* (Otto Schmidt Verlag, 2004) § 286 at point 15b.
122 § 90 (1) and (2) GWB.
123 Official Assistance ("Amtshilfe") according to § 273 (2) No. 2 ZPO. The cartel office qualifies as a (public) authority in terms of § 273 (2) No. 2 ZPO and § 1 (4) VwVfG [Federal Act of administrative procedure ("Verwaltungsverfahrensgesetz")].
124 § 432 ZPO.
125 Prütting in Lüke/Wax *Münchener Kommentar, ZPO* (C.H.Beck, 2000) Vol. 1 § 273 at point 21; Foerste in Musielak, *ZPO* (Verlag Franz Vahlen, 2002) § 273 at point 12; Greger in Zöller, *ZPO* (Otto Schmidt, 2004) § 273 at point 8.
126 §§ 4 et sq. VwVfG and Art. 35 GG [Constitution of the Federal Republic of Germany ("Grundgesetz")]; cp. Geimer in Zöller, *ZPO* (Otto Schmidt, 2004) § 432 at point 3.
127 Council Regulation 1206/2001 only applies to legal relations between the German and the foreign courts but not to other foreign authorities such as cartel offices. The regulations as regards legal assistance in §§ 8-16 of the Hague

(b) Proving the infringement

(i) Is expert evidence admissible?

Expert evidence is an admissible form of evidence, §§ 402 sq. ZPO. The following distinctions have to be made:

a) Experts appointed by the court

The court may appoint experts, with or without prior request of a party, if the case involves specialised knowledge which the court does not possess. If the expert's opinion is not reasonably challenged by a party or obviously incomplete or illogical, the court will rely on the expert's opinion. It is for the court to determine the number of experts and to select them without being bound by any closed list of experts (§ 404 ZPO). The expert is regarded as an assistant to the court and may, like a judge, be challenged by the parties for bias. It is also the court that instructs the expert as to his duties and supervises his activities.[128] However, as soon as the expert opinion has been delivered, the parties are entitled to comment on it. If the court considers the expert opinion to be insufficient, it may appoint another expert (§ 412 ZPO).

According to Art. 1 No. 14 of the First Act for the Modernisation of Judiciary expert opinions delivered in former court proceedings might be introduced into later court proceedings with the full probative value of an expert opinion. Under former law, expert opinions deriving from other court proceedings could only qualify as documentary evidence, but did not have the probative value of an expert opinion.[129]

Expert evidence is only available for matters of fact. This includes questions of foreign law, which are considered as matters of fact, not as legal issues. Expert evidence is, inter alia, available for the assessment of the amount of damages. In order to assess the amount of damages, the expert must rely on the facts contained in the court file.

b) Expert witnesses

Experts may also be heard as witnesses in cases where special expertise is required for the perception of certain facts. According to § 414 ZPO, the expert witness' testimony is treated like normal witness evidence so far as the mere facts he witnessed are concerned[130]. To the extent that the expert also comments on the conclusions to be drawn from those facts, the rules on expert evidence apply (§§ 402 sq. ZPO).

c) Private expert opinions

Written opinions of experts appointed by one of the parties normally do not qualify as expert evidence but as (substantiated) statement by the party submitting the opinion. The court may not deviate from a conclusion of a private expert unless the judges possess the required expertise or use a court appointed expert.

(ii) To what extent, if any, is cross-examination permissible?

Cross-examination is not explicitly excluded but it is unusual in practice as the witness has a right to make a coherent statement and the parties are limited to asking supplementary questions after the witness has been examined by the court.

As a first step, a witness is examined by the presiding judge who is to ensure that the witness is allowed to make his statement without interruption and in a

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Convention of 1 March 1954 on Civil Procedure were replaced by the Evidence Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (Art. 21 of the Evidence Convention).

128 § 404 a ZPO.

129 Art. 1 No. 14 of the First act for the modernisation of Judiciary (*"1. Justizmodernisierungsgesetz"*) as adopted on 9 July 2004, [2004] Bundestagsdrucksache 15/3482.

130 Thomas/Putzo, *ZPO* (C.H. Beck, 2003), § 414 at point 1.

coherent manner.[131] Thereafter, the other members of the judicial panel as well as the parties and their lawyers are entitled to ask supplementary questions. The lawyers normally question the witness one after another, starting with the side that put forward the witness as evidence. The court may exclude questions exceeding the scope of its order to take evidence.

(iii) Under which conditions does a statement and/or decision by a national competition authority, a national court, an authority from another EU Member State have evidential value?

a) National court decisions

There is no principle of stare decisis in Germany. Thus, in principle each court is free to rule on a case as it sees fit. Precedents in similar cases involving other parties are not binding on questions of either fact or law. However, national court decisions constitute documents which a party may submit in support of its legal arguments.

b) Final statements of a public authority ("Verwaltungsakte")

Final statements of the German Federal Cartel Office or other German public authorities have to be accepted by the civil courts[132]. However, usually courts do not consider themselves bound by factual and legal evaluations within such decisions[133].
German courts appear to be following the reasoning of the European Court of Justice in its judgement of 14 December 2000 regarding final statements of the European Commission, known as the "Masterfoods" case.[134] In this case, the ECJ held that national courts would violate the principle of "effet utile" (Art. 10 EC) if they were to rule against decisions of the European Commission stating that certain conduct constitutes infringement of EC competition law[135].

c) Forthcoming changes to the law

The principle laid down in the "Masterfoods" decision is intended to be implemented in the GWB. § 33 (4) GWB will, according to the draft 7th amendment, state that final decisions of national competition authorities in any EU Member State, the EC Commission or a German court on the infringement of competition law are binding upon parties to proceedings for damages, as far as these decisions state an infringement of competition law. Decisions issued by national courts of other member states shall be binding as far as these courts have the function to issue administrative decisions stating the infringement of competition law or if they decide on appeals against such administrative decisions. These decisions shall be binding without any procedure of recognition, which would establish a wider system of precedent as between the German courts and the courts of other member states than is the case under Regulation 44/2001. This element of the draft 7th amendment is criticised, because it is presumed that such a wide recognition of foreign administrative decisions would infringe the German basic rights and Germany's obligations under the European Convention on Human Rights. A reason for this is that the foreign authority or court might not observe

131 § 369 (1) ZPO.
132 Cp. e.g. Sachs in Stelkens/Bonk/Sachs, *Verwaltungsverfahrensgesetz*, (C.H. Beck, 2001), § 43 at point 130.
133 Gaentzsch, *Konkurrenz paralleler Anlagengenehmigungen*, [1986], NJW, 2878 at 2790: It is common opinion that the basic factual statements and legal evaluations that form the basis of a final statement of a public authority do not bind other authorities, unless the law itself orders such binding authority. Also cp. Sachs in Stelkens/Bonk/Sachs, *Verwaltungsverfahrensgesetz*, (C.H. Beck, 2001), § 43 at point 12 sq.: As a result of fundamentally different starting points, final statements of public authorities can not have the same far-reaching binding authority as judgements, because they give less guarantee for their correctness than a judgement. The legislator has to determine the scope of binding authority of a final statement. With regard to effects of competition related final statements of authorities, cp. Immenga in Immenga/Mestmäcker, *GWB*, (C.H. Beck, 2001), Einleitung at point 60: Within their powers, cartel authorities often define the legal basis for civil matters. This applies to the exemptions of agreements from the prohibitions of competition law, to the power to invalidate restrictive contracts, to the power to forbid mergers and the abuse of the market leadership.
134 Case C-344/98, *Masterfoods,* [2000] at point 49-52. This judgement was referenced by LG Mainz, 12 HKO 55/02, *Preiskartell auf Vitaminsektor,* [2004], NJW-RR 478.
135 Case C-344/98, *Masterfoods*, [2000], at points 49-52.

German basic procedural rights when assessing the infringement of competition law provisions[136].

(c) Proving damage: Are there any specific rules for evidence of damage?

There is a specific rule for the evidence of damage which permits the quantum of damages to be estimated if the occurrence of damage as such has been duly proven[137]. The plaintiff needs to plead that it has incurred specific damage of an approximate amount. It is then sufficient if the plaintiff proves surrounding facts which enable an approximate estimation of the plaintiff's damages to be made. The requisite degree of proof depends on how much substantiation is reasonable in the circumstances[138]. With regard to the existence of damage as such, for which the plaintiff bears the full burden of proof, the District Court of Dortmund applied the prima facie evidence rule that cartel prices are higher than market prices so that the plaintiff does not have to prove the existence of damage as such as long as the defendant cannot disprove the prima facie evidence[139].

In addition, if a plaintiff claims for lost profits, he does not need to prove the exact amount that he has lost, but rather the profit that he could expect to have probably made had there been no infringement[140]. In connection with the general rule for the evidence of damage, the plaintiff therefore only needs to prove facts which are sufficient to enable the court to estimate how much profit the plaintiff would probably have made had his business carried on in the same way[141].
The court can also render a partial judgement on all aspects except the quantum[142] ("partial judgement on the grounds"). Consequently, if damages were granted, the court would decide upon the amount of damages to be paid in follow-up proceedings which would end with another, final judgement. The partial judgement on the grounds is subject to appeal as is a full judgement and can become res judicata. In general, all justifications concerning the procedural and substantive conditions are excluded in the follow-up proceedings on the amount of the claim.

In addition, a declaratory judgement stating the defendant's obligation to compensate the plaintiff for all damage caused by the infringement may be rendered if the plaintiff is not in possession of all necessary information to quantify the amount of damage.

(d) Proving causation: Which level of causation must be proven: direct or indirect?

For a defendant to be held responsible for a plaintiff's loss, German law requires the defendant to have participated in the causation of the damaging event according to the principle of "conditio sine qua non" and that his contribution to the causation is adequate ("adäquat kausal"). These causation requirements can imply indirect causation.
The principle of "conditio sine qua non" means that any contribution, however remote or insignificant, without which the event would not have occurred, has caused that event[143]. However, the additional adequacy requirement imposes a filter on what would otherwise be an extremely broad test.

The defendant's contribution is deemed to be adequate if it can be considered causative under ordinary circumstances, and not only under peculiar and

136 Cp. Monopolkommission, *Das allgemeine Wettbewerbsrecht in der Siebten GWB-Novelle, Sondergutachten der Monopolkommission gemäß § 44 Abs. 1 Satz 4 GWB*, [2004], www.monopolkommission.de/sg_41/text_s41.pdf, at 24 sq.
137 § 287 ZPO.
138 Roth in Grassen/v.Hahn/Kersten/Rieger, *Frankfurter Kommentar, GWB* (Otto Schmidt, 2001), § 33 GWB, at point 159; Greger in Zöller, *ZPO,* (Otto Schmidt, 2004), § 287 ZPO at point 4; Prütting in Lüke/Wax, *Münchener Kommentar, ZPO,* (C.H. Beck, 2000), § 287 at point 28, 29.
139 LG Dortmund, Az. 13 O 55/02 Kart., *Vitaminkartell III*, [2004], unpublished, at 13.
140 § 252 ZPO.
141 Cp. e.g. Heinrichs in Palandt, *BGB,* (C.H. Beck, 2004), § 252 at point 5.
142 Cp. § 304 ZPO.
143 Cp. e.g. Heinrichs in Palandt, *BGB*, (C.H. Beck, 2004), vor § 249 at point 57.

improbable circumstances[144]. A defendant's intentional contributing acts always qualify as adequate[145].

In addition, German law requires that the damages claimed derive from the sphere of dangers whose prevention was the purpose of the infringed norm. This means that damages can only be claimed insofar as their character and their origin qualify as the type of damages that were to be prevented. Damages that are only incidentally caused by the infringement of law, are not remedied[146].

F. Grounds of justification

(i) Are there grounds of justification?

Grounds of justification, or defence ("Einwendungen"), do exist under German competition law.

a) Insofar as a claim is based on the abuse of a dominant market position (§ 19 GWB) or on discriminatory behaviour (§ 20 GWB), an infringement of these provisions has not been committed if the respective behaviour was justified by objective reasons.

b) A justification for apparent anti-competitive conduct arises where that conduct was actually in response to (or defending against) anti-competitive or exploitative conduct on the part of another party or where the purpose of the conduct was to protect one's legitimate rights or interests in the face of another party's market dominance. As an example of the latter, in one case an association of physiotherapists called for a boycott against the compulsory health insurers (who exercise overwhelming power in the highly regulated German health care market). The court held that the call for a boycott was not illegal as it was the only means by which the physiotherapists could exert pressure against the compulsory health insurers[147].

c) The principle of "force majeure" is not known as justification under German law, in "force majeure" situations, however, the defendant can exculpate himself for lack of fault.

d) If, by act of state, exemption was granted for the (otherwise) anti-competitive behaviour, or if this behaviour was explicitly ordered by act of state[148], the behaviour does not constitute an infringement of competition law. Even if, for some reason, an official permission were not valid, the defendant would not act negligently if it did not need to realise the invalidity, as negligence is excluded, where the defendant ignores the illegality of its behaviour without negligence[149].

e) Under general tort law, unsolicited consent is accepted as justification, if the consent does not itself infringe statutory prohibitions or public policy[150]. However, in competition law cases, a consent to the defendant's anti-competitive conduct would normally constitute an infringement of competition law in itself so that consent would usually not justify the defendant, as it would not in the Crehan situation, for example. The draft 7th amendment, as it currently stands, explicitly clarifies that a market participant is not excluded from claiming damages for the only reason that he had taken part in the infringement of competition law (see above II. D (iii) b)).

144 Cp. e.g. Heinrichs in Palandt, *BGB*, (C.H. Beck, 2004), vor § 249 at point 59.
145 Cp. e.g. Heinrichs in Palandt, *Bürgerliches Gesetzbuch*, (C.H. Beck, 2004), vor § 249 at point 60.
146 Sprau in Palandt, *BGB*, (C.H.Beck, 2004), Einf v § 823 at point 17; Heinrichs in Palandt, *BGB*, (C.H.Beck, 2004), Vorb v § 249 at point 62, 63; LG Kiel, Az. 14. O Kart. 43/01, *Füllfederhalter*, [2001], not yet published, at 6.
147 § 227 BGB, cp. Emmerich in Immenga/Mestmäcker, *GWB,* (C.H. Beck, 2001), § 33 at point 38; BSG, Az. B 3 KR 14/00R, *Physiotherapeuten,* [2002] GRUR-RR, 210.
148 Cp. BGH, Az. KZR 06/02, *Verbindung von Telefonnetzen*, [2004], not yet published, at 8.
149 Cp. Bechtold, *GWB*, (C.H. Beck, 2002), § 33 at point 7.
150 Cp. Sprau in: Palandt, *Bürgerliches Gesetzbuch,* (C.H. Beck, 2004), § 823 at point 38.

f) Where the plaintiff is in a contractual relationship with the infringing party, the latter cannot rely on exclusion of liability clauses in defence to a claim, unless expressly otherwise stated in the contract[151].

(ii) Are the 'passing on' defence and 'indirect purchaser' issues taken into account?

a) 'Passing on' defence

Under current German competition law, some courts have indicated that they would take the 'passing on' defence into account.
In a recent case involving an alleged world-wide price cartel, the District Court of Mannheim stated, in obiter dicta, that the 'passing on' of a price increase reduces the recoverable damage, because the damages are calculated by comparing the plaintiff's total assets before and after the damaging event[152]. This point of view was confirmed by the Higher Regional Court of Karlsruhe[153].
By contrast, the District Court of Dortmund expressed doubts as to the applicability of the 'passing on' defence.[154]
The German Federal Court of Justice has not yet considered this issue. However, opinions of legal experts exist, in which the issue is discussed in the context of the principles of prohibition of unjust enrichment and mitigation of damages by benefits received (see (iii) c), d))[155], on the basis of which one may argue that the mitigation of damages for 'passing on' contradicts the purpose and intent of the cartel prohibition, so that the defendant cannot rely on 'passing on' as a defence[156].
In the course of drafting its proposal for a 7th amendment of the German Act Against Restraints of Competition, the German government has considered the possibility to explicitly exclude the 'passing on' defence, but finally decided to leave it to the courts to find an appropriate solution. In its explanations of the draft 7th amendment, the government points out that, under German law, a mitigation of damages by benefits received is only accepted under very narrowly defined conditions and stresses that, according to the prevailing opinion among legal experts, the 'passing-on' defence should be excluded[157].

b) 'Indirect purchaser'

The 'indirect purchaser' issue is not addressed as a discrete issue in German law. In theory, provided the indirect purchaser has suffered damage as a result of the infringement, and that the damage has been adequately caused, he is entitled to damages. However, to date German courts have only granted damages to direct customers of infringing parties. There are no published judgements concerning indirect purchasers, whether granting or declining damages[158]. However, some of the legal experts who criticise the principle of protective purpose and deny the 'passing on' defence argue that only direct purchasers can claim damages, because otherwise the number of damages claims would become excessive[159].

(iii) Is it relevant that the plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement? Mitigation?

a) Claims may be reduced for reasons of contributory negligence. In such cases, the amount of damages to be paid depends on the level of the plaintiff's and

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151 Cp. e.g. Sprau in Palandt, *Bürgerliches Gesetzbuch,* (C.H. Beck, 2004), Einf v § 823 at point 5.
152 Cp. e.g. LG Mannheim, Az. 7 O 623/02, [2004], GRUR 182 at 184.
153 OLG Karlsruhe, Az. 6 U 183/03, *Vitaminpreise*, [2004], WuW/E DE-R 1229, 415.
154 LG Dortmund, Az. 13 O 55/02 Kart., *Vitaminkartell III*, [2004], unpublished, at 13.
155 Roth in Glassen/v. Hahn, Kersten, Rieger, *Frankfurter Kommentar, GWB*, (Otto Schmidt, 2001), § 33 at point 147; Mailänder, *Privatrechtliche Folgen unerlaubter Kartellpraxis*, (Verlag Versicherungswirtschaft, 1965), at 188.
156 Köhler, *Kartellverbot und Schadensersatz*, [2004], GRUR 99 at 103; Hempel, *Privater Rechtsschutz nach der 7. GWB-Novelle,* [2004] WuW 362 at 369/370..
157 *Regierungsentwurf,* [2004], BR-Drucksache 441/04 at 94.
158 Cp. for cases where only direct purchasers were held to qualify for being granted damages: BGH, Az. KZR 12/81, *Familienzeitung*, [1983], GRUR 259; BGH, Az. KZR 23/96, *Depotkosmetik*, [1999], GRUR 276; BGH, Az. KZR 21/78, *BMW-Reimport*, [1980], NJW 1224.
159 Cp. Roth in Glassen/v. Hahn, Kersten, Rieger, *Frankfurter Kommentar, GWB*, (Otto Schmidt, 2001), § 33 at point 50.

defendant's respective contributions to the harming event or loss. A plaintiff may be held contributorily negligent if he acts below the standard of due care expected in the conduct of one's own affairs[160].

b) The principle of prohibition of unjust enrichment seeks to ensure that the compensation payable to the plaintiff does not include any element of profit, that is, that the compensation does not put the plaintiff in a better position than he would have been in had the infringement not occurred. In other words, the plaintiff shall not profit through the defendant's indemnity[161]. This principle only applies if the prohibition of unjust enrichment does not contradict the purpose and intent of the damage claim[162].

c) The principle of mitigation of damages by benefits received is that benefits brought about by the otherwise damaging event reduce the amount of damages that can be claimed[163]. In such cases only the negative difference between losses and benefits qualifies as damage[164]. However, the mitigation of damage must not unreasonably burden the injured party or unreasonably favour the defendant; in other words, the mitigation must not contradict the purpose and intent of the provision on which the damage claim is based[165].

d) Damages are also mitigated if the plaintiff negligently omitted to seek containment of the damages suffered[166]. In order to avoid mitigation, the plaintiff needs to take those measures a diligent and reasonable person would take[167]. An example of negligent non-containment of harm would be the omission of a blocked company to seek supplies from other sources[168].

G. Damages

(a) Calculation of damages

(i) Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?

Under existing German competition law, damages are assessed on the basis of injury suffered by the plaintiff. The principle of assessing damages on the basis of profits is generally unknown in German law, with the exception of intellectual property law, where that part of the infringer's profits resulting from the infringement of intellectual property rights can be claimed instead of damages based on the injury suffered by the plaintiff[169].
However, if the draft 7th amendment in its current form is enacted, the courts will be explicitly permitted to take into account, when assessing and estimating the amount of damage according to § 287 ZPO, that part of the infringer's profit generated as a result of the anti-competitive conduct.[170] This new provision is intended to facilitate the enforcement of damages claims, especially in cases where the assessment of a hypothetical market price as a basis for the calculation of damages is difficult.[171]

(ii) Are damages awarded for injury suffered on the national territory or more widely (EC or otherwise)?

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160 Cp. e.g. Heinrichs in Palandt, Bürgerliches Gesetzbuch, (C.H. Beck, 2004), § 254 at point 12.
161 Cp. e.g. Schiemann in Staudinger, *BGB,* (Sellier/de Gruyter, 1998), vor § 249 at point 2.
162 Cp. e.g. Schiemann in Staudinger, *BGB,* (Sellier/de Gruyter, 1998), vor § 249 at point 2.
163 Cp. e.g. Heinrichs in Palandt, *BGB*, (C.H. Beck, 2004), vor § 249 at point 119.
164 Cp. Motives *on the draft of a Civil Code for the German Empire,* (1888), II at point 19 (according to Heinrichs in Palandt, *BGB*, (C.H. Beck, 2004), vor § 249 at point 119).
165 Cp. e.g. Heinrichs in Palandt, *BGB*, (C.H. Beck, 2004), vor § 249 at point 120, 122.
166 Cp. § 254 (2) sentence 1 BGB.
167 Heinrichs in Palandt, *Bürgerliches Gesetzbuch*, (C.H. Beck, 2004), § 254 at point 32.
168 BGH, Az. K ZR 7/64, *Brotkrieg II*, [1965], BGHZ 44, 279 at 284 sq.; Emmerich in Immenga/Mestmäcker, *GWB*, (C.H. Beck, 2001), § 33 at point 40.
169 § 97 (1) sentence 2 UrhG [German Copyright Act (*"Urheberrechtsgesetz"*)]; Ingerl/Rohnke, *Markengesetz*, (C.H. Beck, 2003), vor §§ 14-19 at point 114 (trademarks); Schulte, *Patentgesetz*, (Heymanns, 2001), § 139 at point 79 (patents).
170 § 33 (3) sentence 2 GWB according to the draft 7th amendment.
171 *Regierungsentwurf,* [2004], BR-Drucksache 441/04 at 93.

Where German courts have jurisdiction (see II.C.(I) above), they are authorised to award damages not only for injury suffered within Germany but also for injury suffered by the plaintiff abroad, whether in other EU member states or otherwise.

Under German law it is necessary to differentiate between violations of competition law having effects within German territory and violations having effects elsewhere. In both cases a German court will normally be competent to award damages for injuries suffered but on different legal grounds.

Pursuant to § 130 para. 2 GWB the rules of German cartel law are applicable if and so far as[172] the violation of competition law has a noticeable effect within German territory, irrespective of where the injury was suffered. In that case German courts are competent to award damages on the basis of § 33 GWB. However, if the effects of anti-competitive behaviour within German territory are only marginal, such link is not sufficient to establish the applicability of German competition law. As an example, German competition law does normally not apply in cases where a foreign customer is discriminated by a German supplier[173]. Pursuant to Art. 40 (1) of the Introductory Act to the Civil Code ("Einführungsgesetz zum Bürgerlichen Gesetzbuch", EGBGB) German courts will also, on the basis of German general tort law, award damages for the breach of EC competition law[174] if either the place where the tort was committed or the place where the harmful effects occurred is in Germany.

The question whether a German court has the authority to award damages for injuries suffered outside the domestic territory without any or with only marginal effects on the German market is more controversial. It is closely connected with the question whether a German judge is obliged to apply foreign cartel law regulations.

German courts have to survey ex officio at every step of the proceedings whether German international private law prescribes the application of German substantive law or any foreign law.[175] The German judge is not expected to know the foreign law but - according to § 293 ZPO - is obliged to gain this knowledge ex officio[176] and to apply the foreign law in the same way as a foreign judge.[177]

Yet there is no decision by the German Federal Court of Justice as to whether a German judge has to apply foreign substantive cartel law. The reason why the application of foreign competition law is not self-evident is that cartel law is not only private law but partly also public law.[178]

The prevailing view in Germany is that foreign private cartel law applies.[179] Damages for violation of foreign cartel law are awarded by German courts pursuant to the provisions of the state whose cartel law was violated, provided the violation has an effect on the territory of that state and that this state claims territorial competence in respect of the case.[180]

(iii) What economic or other models are used by courts to calculate damage?

When calculating damage, the courts will use all information available to compare the plaintiff's actual position following the harmful event with the hypothetical position which would have existed had the harmful event not occurred. Thereby, inter alia, the effects of inflation or intervening events will be taken into account. In cases where the calculation of damages is difficult, the courts have the option of estimating the amount of damages according to § 287 ZPO.

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172 Rehbinder in Immenga/Mestmäcker, *GWB* (C.H.Beck, 2001) § 130 (2) at point 223; Fezer in Staudinger, *BGB* (Sellier/de Gruyter, 2000) EGBGB/IPR International Economic Law at point 143.

173 Cp. OLG Frankfurt am Main, Az. 11 U (Kart) 70/00, *Brüsseler Buchhandlung*, [2001], WuW/E DE-R 801 at point 5.

174 § 823 (2) BGB in connection with Art. 81, 82 EC.

175 Von Hoffmann, IPR (C.H.Beck, 2002) § 3 at point 131.

176 Von Hoffmann, IPR (C.H.Beck, 2002) § 3 at point 133.

177 Von Hoffmann, IPR (C.H.Beck, 2002) § 3 at point 140

178 Fezer in Staudinger, *BGB* (Sellier/de Gruyter, 2000) EGBGB/IPR International Economic Law at point 50.

179 Von Hoffmann in Staudinger, *BGB* (Seller/de Gruyter, 2001) EGBGB/IPR Art. 40 EGBGB at point 361; Rehbinder in Immenga/Mestmäcker, *GWB* (C.H.Beck, 2001) § 130 (2) at point 238. These authors either apply Art. 40 EGBGB or interpret and apply the unilateral conflict rule of § 130 (2) GWB as a total conflict rule ["*allseitiger Ausbau*"].

180 Staudinger, *BGB* (Seller/de Gruyter, 2001) Art. 40 EGBGB at point 366.

In the case of significant price cartels, the court might estimate the hypothetical market price which would have prevailed absent the influence of the cartel, by reference to comparable markets in other regions, in other time periods or with regard to comparable products[181]. Comparable markets in other regions would show the development of prices which - taking into account different cost structures and other differences within the structure of that market - can serve as parameter for the development of the hypothetical prices within the market in question. If the comparison is made with other time periods, the product's price before or after the existence of the cartel can be used as basis for estimation. In this latter case, various factors such as the price development of raw materials or significant changes in supply or demand need to be taken into account[182]. In a recent judgement, a District Court used the product's price after the termination of the cartel as the measure for the hypothetical market price applicable over the whole period of existence of the cartel, which was approximately ten years[183].

Given the way cartels of bidders operate, pre-calculations by members of the cartel and compensation payments among them provide significant information on the price for which the product could have been sold without the cartel[184]. Cartels of bidders for a specific product succeed because all the bidders agree amongst themselves on the highest bid for the product and on which of the cartel members' tenders will be accepted. All members of the cartel benefit from the confidential agreement because the agreed final bidder pays a price significantly below the price he would otherwise have had to pay and those bidders that agreed not to better the agreed final bidder will receive compensation from that bidder amounting to a reasonable portion of the difference in price achieved by the cartel. This compensation and its calculation can show with some precision the price which the cartel members expected to prevail in a truly competitive market[185].

Other reasonable methods to estimate the amount of damages are also allowed.

(iv) Are ex-ante (time of injury) or ex-post (time of trial) estimates used?

For the estimation of the amount of damages, every information available at the moment of trial will be used (cp. (iii) above).

(v) Are there maximum limits to damages?

No. German law always estimates the damages actually suffered, except in cases of strict liability[186].

(vi) Are punitive or exemplary damages available?

No. Punitive damages are forbidden under German constitutional law[187].

(vii) Are fines imposed by competition authorities taken into account when settling damages?

No, because such a calculation would hinder the injured person's entitlement to full compensation for harm suffered. However, the competition authorities take

181 Cp. e.g. Emmerich in Immenga/Mestmäcker, *GWB*, (C.H. Beck, 2001) § 33 at point 51.
182 Cp. Roth in Grassen/v.Hahn/Kersten/Rieger, *Frankfurter Kommentar, GWB*, (Otto Schmidt, 2001), § 33 at point 160.
183 LG Dortmund, Az. 13 O 55/02 Kart. *Vitaminkartell III*, [2004], unpublished, at 14.
184 Cp. e.g. Emmerich in Immenga/Mestmäcker, *GWB*, (C.H. Beck, 2001) § 33 at point 51; OLG Frankfurt a.M., Az. 6 U (Kart) 176/88, *Bieterabkommen*, [1989], WM 1102; OLG Bremen, Az. U (Kart) 1/88, *Nachfragerkartell*, [1989], ZIP 1085; Volhard*, Schadensersatz bei Preisabsprachen in der neueren Rechtsprechung*,(1992), FS Gaedertz, C.H. Beck, 599 at 599, 600 sq.
185 Cp. OLG Frankfurt a.M., Az. 6 U (Kart) 176/88, *Bieterabkommen*, [1989], WM 1102; OLG Bremen, Az. U (Kart) 1/88, *Nachfragerkartell*, [1989], ZIP 1085.
186 Such as claims on grounds of the German Product Liability Act ("*Produkthaftungsgesetz*") or the German Drug Act ("*Arzneimittelgesetz*").
187 Mertens in Rebmann/Säcker/Rixecker *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Vol. 5* (C.H. Beck, 1997) Vor §§ 823-853 at point 41.

damages already paid into account when confiscating profits or imposing fines which include the confiscation of profits[188].

(b) Interest

(i) Is interest awarded from the date

- **the infringement occurred; or**
- **of the judgement; or**
- **the date of a decision by a competition authority?**

Insofar as interests are proved or reasonably estimated as part of the damage, they are fully recoverable. Damages are assessed by reference and up to the date of the defendant's payment of damages[189].

Statutory interest is awarded from the moment of default in payment. Default occurs when the defendant could have known about the amount of damages and has received a reminder ("Mahnung") concerning the damage claim[190]. The latest point of time from which interest is awarded is the date of service of an action for damages ("Eintritt der Rechtshängigkeit")[191].

According to the current draft 7th amendment, under future competition law statutory interest will be awarded from the moment the damage occurs[192].

(ii) What are the criteria to determine the levels of interest?

Statutory interest amounts to 5 per cent. above the base rate pursuant to § 247 BGB ("Basiszinssatz")[193], which actually amounts to 1.13 per cent.[194].

However, as far as interests are proved or reasonably estimated as part of the damage, the plaintiff can claim any level of interest, such as e.g. costs for a necessary overdraft loan[195].

(iii) Is compound interest included?

Compound interest is expressly excluded as recoverable statutory interest. However, compound interest can be claimed as part of further damage[196].

H. Timing

(i) What is the time limit in which to institute proceedings?

The time limit to institute proceedings is three years from the end of the year in which the right to damages arises and the plaintiff has knowledge of both the circumstances underlying the claim and the defendant or does not know of them through gross negligence[197]. The plaintiff generally needs to know the facts supporting all elements of the grounds for his damages claim[198], i.e., in competition law cases the basic facts that constitute the competition law infringement and that the plaintiff is affected by this infringement. This applies

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188 §§ 34 (4), 81 (2) GWB.
189 Heinrichs in Palandt, *Bürgerliches Gesetzbuch*, (C.H. Beck, 2004), Vorb v § 249 at point 174.
190 § 286 (1) BGB - § 286 (3) sentence 1 BGB does not apply to damage claims, so that a reminder letter is necessary, cp. Ernst in Rebmann/Säcker/Rixecker, *Münchener Kommentar BGB Vol. 2a*, (C.H. Beck, 2003), § 288 at point 19.
191 § 291 BGB.
192 § 33 (3) sentence 4 GWB according to the 7th amendment.
193 § 288 (1) BGB; the higher interest rate of § 288 (3) BGB for commercial transactions without consumers as participants does not apply for damage claims, as it also requires a claim for consideration, which cannot be a damage claim.
194 http://www.bundesbank.de/presse/presse_zinssaetze.en.php.
195 § 288 (3), (4) BGB; Heinrichs in Palandt, *BGB*, (C.H. Beck, 2004), § 288 at point 14.
196 § 289 BGB; Note: The plaintiff can calculate his "further damage" caused by default in a rather abstract way, so that in fact, compound interests are not out of reach for institutional plaintiffs; critical: Reifner, *Das Zinsverbot im Verbraucherkredit,* (1992) NJW 337 at 343; Bülow, *Zum aktuellen Stand der Schuldturmproblematik,* (1992) WM 1009 at 1011.
197 §§ 195, 199 (1) No. 1+2 BGB.
198 Cp. e.g. Heinrichs in Palandt, *Bürgerliches Gesetzbuch*, (C.H. Beck, 2004), § 199 at point 26 sq.

equally to claims based on the infringement of German national competition law and Articles 81, 82 EC.

Regardless of knowledge of the circumstances, the time limit for damages claims is the shorter of either ten years from the date the damages arise or thirty years from the date of the infringement that causes the damage[199].

For damages claims based on infringements committed before 1 January 2002 slightly different limitation periods might apply[200].

If damages cannot be quantified before the time limit ends, the plaintiff can file a declaratory action to stop the time limit from expiring and thereby preserve its claim.

Under the draft 7th amendment, the limitation period also stops running when German cartel authorities institute proceedings for a breach of either domestic competition law or Articles 81, 82 EC or if the EC Commission or a cartel authority of another EU member state institutes proceedings for a breach of Articles 81, 82 EC.[201]

(ii) On average, how long do proceedings take?

It is difficult to estimate an average duration of proceedings. The average duration of all first instance proceedings before the District Courts in 2000 amounted to 6.9 months[202]. Damages claims in cases of competition law infringement can include a complicated process of taking evidence. Such proceedings may therefore take several years, if not settled earlier. As far as can be seen from recent judgements, proceedings which include damages claims currently take at least 4–5 years until a (first) decision of the Federal Court of Justice is rendered. Often the case is then remanded to the Higher Regional Court for further clarification. The maximum length of proceedings can be estimated at about 9 years.

(iii) Is it possible to accelerate proceedings?

There are no procedural rules enabling lawyers to accelerate proceedings. Where facts or evidence are presented after specified time limits, and admission of these facts or evidence would delay the proceedings, they may be excluded from the proceedings.

The proceedings to obtain preliminary injunctive relief, however, have the nature of summary proceedings as it is sufficient to show probability and affidavits are admissible means of evidence (see E.(a)(ii) above). In addition, a plaintiff can accelerate proceedings by using the special form of proceedings "Urkundenklage" based on documentary evidence only (see E.(a)(iii)b) above).

(iv) How many judges sit in actions for damages cases?

The panels for commercial matters consist of one professional judge and two lay judges for commercial matters ("Handelsrichter"). The lay judges for commercial matters are appointed for a limited period of time and are businessmen. They have the same voting rights as the professional judge and enjoy the same judicial independence as that of professional judges.

The panels for civil matters at the District Courts, as well as the senates at the Higher Regional Courts consist of three professional judges. The panels for civil matters have the possibility to refer the matter to a single judge if it does not show special difficulties and is not of fundamental significance. The senates of the Federal Court of Justice comprise five professional judges.

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199 § 199 (3) No. 1+2 BGB.

200 Art. 229 § 6 EGBGB providing transitional provisions relating to the Reform of German Contract Law as of November 2001.

201 § 33 (5) GWB according to the draft 7th amendment.

202 Federal Ministry of Law, *Zahlen aus der Justiz*, [2003], see reference on page: http://www.bmj.bund.de/ger/service/statistik/?sid=6cc8860ab365fb3c97b58f8b55d6de3a&offset=13

(v) How transparent is the procedure?

Hearings in civil proceedings are open to the public. Every statement of the parties has to be introduced orally into the proceedings. However, oral references to the briefs for details are allowed and common practice[203]. The process of taking evidence is also a public process[204]. In particular, the public cannot be excluded from the proceedings for reasons of business secrets or similar aspects.

All persons involved in the proceedings are informed about every detail and have access to every single document. In particular, privileged confidential correspondence between the court and the lawyers does not exist. This also derives from the right to be heard before court[205].

Judgements may be published if made anonymous. Judgements of the Federal Court of Justice are normally published. The Higher Regional Courts and District Courts decide on their own whether to publish their judgements or not. Often the decision upon publication is taken incidentally. If a party wishes a judgement to be published, it should apply for an order of publication (see D.(i) above), because the publication of the judgement by the interested party itself might be considered as an act of unfair competition[206].

I. Costs

(i) Are Court fees paid up front?

In civil proceedings court fees have to be paid up front.[207] The plaintiff is obliged to pay these fees[208] but is entitled to recover them from the defendant in the event of success.

(ii) Who bears the legal costs?

According to the general rule in § 91 para. 1 ZPO the losing party has to bear the costs of the litigation. Where the plaintiff partly wins and partly loses its case, the costs will be compensated ("gegeneinander aufgehoben") or proportionally allocated by reference to the degrees of success and loss.[209]

Specific rules are found in §§ 91-107 ZPO concerning, for example, the costs of a settlement, costs in cases of immediate acknowledgements and the costs of third parties having joined the proceedings.

(iii) Are contingency fees permissible? Are they generally available for private enforcement of EC competition rules?

Contingency fees are not permissible for litigation[210] and are thus not available for the private enforcement of EC competition rules.

This applies to cases where the lawyer will be paid either a fixed amount of money or a percentage of proceeds in the event of success but nothing in the event of failure, as well as to agreements whereby the lawyer is in any event paid the statutory fees but is entitled to an extra fee in the event of success ("palmarium").[211]

By contrast, the prevailing view on agreements between lawyer and client to increase the originally agreed fees after the lawyer has ceased to act for the client

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203 Cp. §§ 169 sq. GVG, 128 ZPO.
204 Cp. § 357 ZPO.
205 Cp. above section E.a), (ii).
206 Cp. Baumbach/Hefermehl, *Wettbewerbsrecht* (C.H. Beck, 2001) § 23 at point 1.
207 §§ 61 (1) No. 1, 65, 68 of the Law governing Court Costs ("*Gerichtskostengesetz*", GKG).
208 § 49 S. 1 GKG.
209 § 92 ZPO.
210 § 49 b (2) of the Rules and Regulations for the bar ("*Bundesrechtsanwaltsordnung*", BRAO).
211 Nerlich in Hartung/Holl, *Anwaltliche Berufsordnung* (C.H.Beck, 2001) BRAO § 49 b at point 30.

("honorarium") is that they do not qualify as contingent fee agreements and are therefore permissible.[212]

(iv) Can the plaintiff/defendant recover costs? Are there any excluded items?

The winning party can only recover those costs which were necessary for bringing or defending an action. The costs have to be kept as low as possible.[213]
The costs consist of court fees and disbursements, on the one hand, and out-of-court costs, on the other. The out-of-court costs consist of lawyers' fees and disbursements and the parties' other costs.

a) Court fees and disbursements are generally recoverable.[214]
b) As regards the lawyers' fees, the unsuccessful party is only liable to pay the opposing lawyer's statutory fees as set by the Code of Lawyers' Fees ("Rechtsanwaltsvergütungsgesetz", RVG) and not any higher level of fees which the opponent may have agreed to pay to his lawyer.[215]
   In some cases the draft 7th amendment might reduce cost recovery in damages claims based on the infringement of a provision of national or EC competition law because it contains a provision on costs reduction for undertakings whose economic standing would be endangered if they had to pay the full amount of court fees. In such a case the court may order that the court fees for that party are to be assessed on the basis of a proportion of the claim value considered reasonable by reference to the party's economic situation ("reasonable value of the claim"). If that party is unsuccessful in the action and liable to pay its opponent's lawyers' fees, its liability will be calculated on the basis of the reasonable value of the claim, rather than the claim's actual value, notwithstanding that its opponent will be obliged to pay its lawyer at least the higher statutory fees under RVG by reference to the claim's actual value.
c) A party's recoverable costs consist mainly of travelling expenses[216] and reimbursement for lost time, e.g., loss of salary.[217] These costs are reimbursed according to the Act governing the Compensation to Witnesses ("Zeugenentschädigungsgesetz", ZSEG).[218]
d) Costs spent to avoid litigation or prepare a formal warning letter do not qualify as "costs" in terms of § 91 ZPO. These costs have to be claimed as part of the damages in the party's substantive claim.

(v) What are the different types of litigation costs?

Litigation costs can be divided into court fees on the one hand and out-of-court costs on the other hand (cp. (iv)).

The court fees cover the public-law costs of the judicature and the costs of court disbursements such as witnesses and experts, mail charges and carriage costs.[219]

Out-of-court costs are mainly the lawyers' fees and disbursements and the parties' costs.

(vi) Are there national rules for taxation of costs?

The decision on who has to bear the legal costs usually forms part of the judgement on the merits and can only be appealed together with that judgement.[220] As to the amount of recoverable costs, the German Code of Civil Procedure provides a special procedure for the taxation of these costs.[221]

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212 Nerlich in Hartung/Holl, *Anwaltliche Berufsordnung* (C.H.Beck, 2001) BRAO § 49 b at point 34.
213 Hartmann in Baumbach/Lauterbach/Albers/Hartmann, *Zivilprozeßordnung* (C.H.Beck, 2003) § 91 at point 29; Putzo in Thomas/Putzo, *ZPO* (C.H.Beck, 2003) § 91 at point 9.
214 Putzo in Thomas/Putzo, *ZPO* (C.H.Beck, 2003) § 91 at point. 8.
215 Putzo in Thomas/Putzo, *ZPO* (C.H.Beck, 2003) § 91 at point 19.
216 Travelling expenses are recovered when the travel is necessary. It is "necessary" in the terms of § 91 (1) S. 2 ZPO when retrospectively from the party's point of view travelling was, at least by way of precaution, urgently advisable (Hartmann in Baumbach/Lauterbach/Albers/Hartmann, *Zivilprozessordnung* (C.H.Beck, 2003) § 91 at point 34).
217 Putzo in Thomas/Putzo, *ZPO* (C.H.Beck, 2003) § 91 at point 15.
218 Cp. § 91 (1) S. 2 ZPO.
219 Putzo in Thomas/Putzo, *ZPO* (C.H.Beck 2003) before § 91 at point 3, 4.
220 § 99 (1) ZPO.
221 §§ 103-107 ZPO.

The court of first instance is competent to rule on the amount of recoverable costs.[222] Its decision ("Kostenfestsetzungsbeschluss") which may be made without an oral hearing is an executory title.[223]

The decision of the court of first instance is subject to appeal[224] provided that the value of the matter exceeds EUR 50.[225]

(vii) Is any form of legal aid insurance available?

Legal aid insurance in Germany does not cover the costs relating to cartel law litigation.
Pursuant to § 4 para. 1 e) (75) of the General Policy Conditions of Defence Insurance[226], a claim to compel someone to refrain from doing something anti-competitive is excluded from insurance.
According to § 3 para. 2 e) (94) of the General Policy Conditions of Defence Insurance[227], all claims relating to cartel law fall under the policy exclusion for risks. Even in special agreements for German legal aid insurance litigation relating to cartel law is apparently excluded.
However, subject to certain conditions (i.e. financial need, prospect of success, and no malicious litigation), parties are entitled by law to request legal aid[228] (as distinct from private legal aid insurance). The court decides on the request in a special procedure without a hearing.[229]
In addition, the draft 7th amendment provides for the possibility to have the court fees and lawyers' fees assessed on the basis of a reduced "reasonable value of claim", if a party cannot bear the full amount of legal costs (see point (iv) b) above)

(viii) What are the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law?

The costs in an action arising from the violation of competition law depend on neither the procedural status of the parties nor on the gravity of infringement, but only on the value in dispute and of the procedural stages covered (e.g. oral hearing, taking of evidence). The higher the value in dispute, the higher the costs, but the relationship is not linear; costs decrease in proportion to the value of the claim as claim values increase.
The value in dispute for liquidated damages claims (i.e., quantified claims) equals the amount claimed.
Where damages are not quantified, the value in dispute is a matter for the court's discretion as per § 3 ZPO.[230]
The value in dispute in claims for declaratory relief is generally around 20 per cent. lower than that in claims for substantive relief.[231]
If for instance both parties are represented by a lawyer and the court needs to take evidence, the financial risk of litigation with a value in dispute of e.g. EUR 1,000,000 amounts, in a court of first instance, to approximately EUR 45,000. In a court of appeal the risk for an equal value in dispute amounts to around EUR 60,000 (to be added to the costs of first instance)[232].

J. General

(i) Are some of the answers to the previous questions specific to the private enforcement of competition rules? If so, in what way do they differ from the general private enforcement rules?

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222 § 104 (1) ZPO.
223 § 794 (1) No. 2 ZPO.
224 § 104 (3) sentence 1 ZPO and § 567 (1) No. 1 ZPO.
225 § 567 (2) sentence 2 ZPO.
226 "*Allgemeine Bedingungen für die Rechtsschutzversicherung*", ARB 75.
227 "*Allgemeine Bedingungen für die Rechtsschutzversicherung*", ARB 94.
228 §§ 114 et sqq. ZPO.
229 § 127 (1) ZPO.
230 Putzo in Thomas/Putzo, *ZPO* (C.H.Beck, 2003) § 3 at point 63.
231 Putzo in Thomas/Putzo, *ZPO* (C.H.Beck, 2003) § 3 at point 65.
232 Should the unsuccessful party have agreed to pay to its lawyer a higher fee than the statutory fee under RVG or should the court need to obtain an expert opinion, these costs can increase considerably.

Under existing competition law, there are no differences between the private enforcement of competition rules and the general private enforcement rules. By contrast, under the draft 7th amendment, the private enforcement of competition rules will be subject to fewer barriers than apply to private enforcement generally and will benefit from greater remedial flexibility.

(ii) EC competition rules are regarded as being of public policy. Does that influence any answers given?

The fact that EC competition rules - as well as German competition law - are regarded as matters of public policy currently entails a rather restrictive interpretation of the concept of protective purpose of the infringed provision. The decisive question is under which conditions and to what extent are private interests - and not only public interests - protected by the law. The draft 7th amendment explicitly addresses this issue by providing that Articles 81, 82 EC and the provisions of national competition law are intended to protect other market participants even if the infringement is not specifically directed against them (see above II.D.(iii).b)).

(iii) Are there any differences according to whether defendant is public authority or natural or legal person?

If the defendant is a public authority, it either qualifies as performing genuinely governmental or administrative acts or is otherwise fully liable for competition law infringements in the same way as are natural or private legal persons. In the case of natural or private legal persons, competition and procedural law applies as usual[233]. The question whether public entities are subject to domestic competition law does not depend on their institutional form but on the nature of their activity[234]. If the activity of a public entity is sovereign in nature, with regard to both its relationship with the customer or supplier and its relationship with competitors, then domestic competition law will not apply to that activity[235].

Where EC competition law is infringed, the courts draw no distinction between public authority defendants and natural or private legal persons, except in cases where EC law would categorise the activity as genuinely governmental or administrative or if EC law would draw such a distinction for other reasons[236].
Insofar as compulsory health or long time care insurers are involved, the special jurisdiction of the social courts applies. Although it is clear that the social courts have to apply Art. 81, 82 EC, legal experts still debate the extent to which those courts are obliged to apply national cartel law.

(iv) Is there any interaction between leniency programmes and actions for claims for damages under competition rules?

There is no statutory regulation regarding the interaction between private actions for damages and leniency programmes instituted to facilitate co-operation within public proceedings and linked to the mitigation of public fines. According to a guideline published by the Federal Cartel Office ("bonus scheme")[237] civil claims for the infringement of cartel law shall remain unaffected by the German leniency rules. A difficult and to date unanswered question is whether the disclosure of documents that were specifically produced for the purposes of a leniency program, such as detailed descriptions of anti-competitive conduct, can be ordered in civil proceedings.

(v) Are there differences from region to region within the Member State as regards damages actions for breach of national or EC competition rules?

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233 Cp. Zimmer in Immenga/Mestmäcker, *GWB*, (C.H. Beck, 2001), § 1 at point 28.
234 Cp. Zimmer in Immenga/Mestmäcker, *GWB*, (C.H. Beck, 2001), § 1 at point 28.
235 Cp. Zimmer in Immenga/Mestmäcker, *GWB*, (C.H. Beck, 2001), § 1 at point 28.
236 Cp. Emmerich in Immenga/Mestmäcker, *EG-Wettbewerbsrecht*, (C.H. Beck, 2001), Art. 85 EGV at point 27, Art. 86 EGV at points 1-5.
237 Bekanntmachung des Bundeskartellamts No. 68/2000, [2000], at point F.

The legal basis for actions for damages based on competition law infringements is uniform. However, the Higher Regional Courts are free to interpret the statutes as they see fit and will do so unless the Federal Court of Justice determines an issue. An example is the OLG Stuttgart which, in its decision "Carpartner II" (see above D.(iii.i)1.), criticised the prevailing position in German case law on the scope of possible private enforcement of competition rules.

(vi) Please mention any other major issues relevant to the private enforcement of EC competition law in your jurisdiction

As regards the conflict of laws, we already mentioned above under point G.(a)(ii) that pursuant to § 130 para. 2 GWB German competition law is applicable to all restraints of competition which have effects on its area of application, i.e. German national territory, even if the violation in question was caused outside its scope of application. This unilateral conflict rule (§ 130 para. 2 GWB) contains the "effects principle" which is common in other legal systems like the U.S., Switzerland or France as well[238].

Pursuant to a general rule in conflict of laws provisions the conditions of liability and the method of awarding damages should have an unitary connection ["einheitliche Anknüpfung"]. Splitting up these aspects ["dépeçage"] would lead to discrepancies. According to the effects principle ["Auswirkungsprinzip"] both the statutory prohibition of restrictive practices and the civil sanctions therefore must conform to the law of the state where the effects occur.[239]

(vii) Please provide statistics about the number of cases based upon the violation of EC competition rules in which the issue of damages was decided upon

We performed a survey among German courts that deal with damages claims for infringements of competition law (both EC and national law) in order to get some statistical information. We asked the courts to provide statistical information on proceedings (excluding injunctions) finished since 1999. Of the 42 District Courts and Higher Regional Courts eight did not react at all, four could not give us any information due to the substantial workload the answer to the survey would mean for them, 14 have not had any such proceedings since 1999, six courts and the Federal Court of Justice answered the survey thoroughly and of the remaining nine courts, three gave us general statistical information based on their experience. The courts that answered the survey provided us with information about 57 proceedings, 17 of them being still pending and 16 of them having ended by settlement or otherwise without a decision that could be published.
Based on this information and 102 published judgements concerning civil litigation with regard to infringements of EC and/or national competition law (including injunctions and remedies on the consequences), we analysed 159 proceedings, 140 of which are finished and 119 of which have led to a court decision, and we can provide the following statistical information:

- **Damages awarded/refused:** Monetary damages were awarded only three times and declaratory decisions stating the defendant's obligation to pay damages without determination of the amount were rendered in six cases. One award of monetary damages was based on the infringement of both EC and national competition law, the other eight decisions were based on the infringement of national competition law only. In 20 cases, damages were refused, five of these were based on the infringement of both Articles 81 or 82 and national competition law, 15 on the infringement of national competition law only. Among the 19 pending claims for damages 10 are based on the infringement of national competition law and 3 on the infringement of EC competition law. The legal basis of the remaining claims is unknown to us.
- **Results of decisions in general:** Among the 119 proceedings finished by decision, 32 claims were awarded (26.89 per cent.), and 54 claims were dismissed on the merits (45.37 per cent.). The rest consists of eight awarded interim measures, six denied interim measures, one inadmissible

238 Immenga/Mestmäcker, *GWB* (C.H.Beck, 2001) § 130 (2) at point 19.
239 Staudinger, *BGB* (Sellier/de Gruyter, 2001) Art. 40 at point 360.

claim and 9 proceedings of which we do not know the result. For 27 of the 54 dismissed claims, we do not know the reason why they were dismissed. Of the remaining 27 claims, an infringement could not be established in 16 cases (59.26 per cent.). In six cases the plaintiff was found not to be a person whose protection was aimed at by the infringed provision (22.2 per cent.). In two cases the damage could not be proved (7.41 per cent.).

- **Legal basis:** In 117 cases we know whether the claim was based on the infringement of national competition law, EC competition law or both. In 109 cases (93.16 per cent.) the claim was based on the infringement of national competition law, in 93 of these cases (79.49 per cent.) the claim was based exclusively on the infringement of national competition law. Opposed to these numbers, only 8 cases (7.69 per cent.) were exclusively based on the infringement of EC competition law. Altogether 19 claims were based on an infringement of EC competition law in addition to the alleged infringement of other legal provisions (16.24 per cent).
- **Type of infringement:** In 66 cases we know on which type of infringement the claim was based (whether of the prohibition of cartels, discriminations, price maintenance, etc.). Eight times the claim was (i.a.) based on an infringement of the cartel prohibition (12.12 per cent.). In 47 cases the claim was (i.a.) based on an infringement of the provisions against discrimination, unfair hindrance, boycott etc. (71.21 per cent.). In ten cases the plaintiff had (i.a.) alleged illegal price maintenance measures (15.15 per cent.) and in five cases the claim was based on other types of infringements. To our knowledge, the success rate was around 50 per cent. within all three groups of common types of infringements.

III. Facilitating private enforcement of Articles 81 and 82 EC

(i) Which of the above elements of claims for damages (under section II) provide scope for facilitating the private enforcement of Articles 81 and 82 EC? How could that be achieved?

Under current competition law private enforcement of Articles 81 and 82 EC could be facilitated in some cases if competitors more often used their possibilities under the law of unfair competition to sue infringers of competition law provisions (see A.(i) a) (C))[240].

The draft 7th amendment to the Act Against Restraints of Competition, which is yet to be introduced in Parliament, is the result of the government's deliberations as to how the private enforcement of Articles 81 and 82 EC (as well as of domestic competition law) can be facilitated. If enacted, the main changes it will implement are as follows:

- The concept of the protective purpose of the norm will be alleviated.
- When assessing the amount of damage, courts will be permitted to take into account the infringer's profit.
- Representative organisations and institutions registered for public interest litigation will have the right to claim the infringer's profit which will however be awarded to the state. The Federal Cartel Office will be in charge to reimburse those plaintiffs for their costs.
- Interest will be due from the moment of occurrence of the damage.
- Final Decisions of the German Federal Cartel Office, the EC Commission and competition authorities of other EU member states, final decisions issued by courts of other EU member states having the function of a competition authority as well as court decisions on appeals against the aforementioned decisions will be binding on civil courts, insofar as they find an infringement of competition law.
- Limitation periods for actions will stop running when competition authorities institute proceedings for infringement of competition law.
- Court fees and lawyers' fees will be subject to reduction if a party is not in a financial position to bear those costs.

From the point of view of potential plaintiffs, these changes will significantly facilitate the private enforcement of competition law.

240 Weber, *Ansprüche aus § 1 UWG bei EG-Kartellverstößen*, [2002] GRUR 485 at 490.

Further measures to facilitate private enforcement of competition law might include the following:

- The proof of infringement and damages could be facilitated through statutory presumptions or the shifting of the burden of proof on the defendant[241].
- Increased transparency through regular publication of judgements.
- Explicit statutory provision allowing claims of indirect purchasers, including consumers[242].
- Right to claim damages for consumers' organisations[243].
- Right to be awarded and to keep the infringer's profit for representative organisations and public interest plaintiffs[244].
- Double damages as a means of deterring potential infringers of competition law[245].

(ii) Are alternative means of dispute resolution available and if so, to what extent are they successful?

Prior to 1998, arbitration agreements in respect of disputes arising out of cartel agreements, cartel decisions or civil actions for damages pursuant to § 33 GWB were permissible but subject to a significant practical limitation. The limitation, in § 91 GWB, was that an arbitration agreement was void if it did not confer a right on each party to request a decision through the courts instead of an arbitral tribunal. It was considered that confidential arbitration did not provide a sufficient check against anti-competitive conduct.
However, in January 1998 Germany modernised its arbitration laws. The enacting legislation ("Gesetz zur Neuregelung des Schiedsverfahrensrechts", SchiedsVfG) reformed the 10th Book of the Code of Civil Procedure regarding arbitration, ushering in an internationally recognisable framework based on the UNCITRAL Model Law on International Commercial Arbitration, and repealed § 91 GWB.[246]

Since then all disputes arising from violation of national and EC competition law are arbitrable according to § 1030 para. 1 ZPO.[247] Only arbitration agreements which were concluded before 1998 are still subject to the restrictions of § 91 GWB a.F.[248]

In reforming the law, it was considered that judicial control over arbitral awards by way of applications to set aside and resist enforcement of awards constitutes sufficient policing of competition law[249]. In this regard, the court may set aside an award if recognition or enforcement would produce a result in conflict with public policy ("ordre public") (§ 1059(2) ZPO)[250]. It is well established that contravention of compulsory provisions of national and European competition law is against public policy and therefore that an award made in contravention of such provisions may be set aside.

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241 Cp. Monopolkommission, *Das allgemeine Wettbewerbsrecht in der Siebten GWB-Novelle, Sondergutachten der Monopolkommission gemäß § 44 Abs. 1 Satz 4 GWB, [2004],* www.monopolkommission.de/sg_41/text_s41.pdf, at 22.

242 Cp. Monopolkommission, *Das allgemeine Wettbewerbsrecht in der Siebten GWB-Novelle, Sondergutachten der Monopolkommission gemäß § 44 Abs. 1 Satz 4 GWB, [2004],* www.monopolkommission.de/sg_41/text_s41.pdf, at 38.

243 Cp. Monopolkommission, *Das allgemeine Wettbewerbsrecht in der Siebten GWB-Novelle, Sondergutachten der Monopolkommission gemäß § 44 Abs. 1 Satz 4 GWB, [2004],* www.monopolkommission.de/sg_41/text_s41.pdf, at 47 sq.

244 Cp. Monopolkommission, *Das allgemeine Wettbewerbsrecht in der Siebten GWB-Novelle, Sondergutachten der Monopolkommission gemäß § 44 Abs. 1 Satz 4 GWB, [2004],* www.monopolkommission.de/sg_41/text_s41.pdf, at 51.

245 Cp. Monopolkommission, *Das allgemeine Wettbewerbsrecht in der Siebten GWB-Novelle, Sondergutachten der Monopolkommission gemäß § 44 Abs. 1 Satz 4 GWB, [2004],* www.monopolkommission.de/sg_41/text_s41.pdf, at 40sqq.

246 Art. 2 § 19 SchiedsVfG, Federal Law Gazette 1997 I 3224 at 3249.

247 Schlosser in Stein/Jonas, *ZPO* (Mohr Siebeck, 2002) § 1030 at point 2; Münch in Lüke/Wax, *Münchener Kommentar*, *ZPO* (C.H.Beck, 2001) § 1030 at point 19; Rehbinder in Immenga/Mestmäcker, *GWB* (C.H.Beck, 2001) § 130 (2) at point 260).

248 Schmidt in Immenga/Mestmäcker, *GWB* (C.H.Beck, 2001) § 87 at point 61.

249 See e.g., Wagner, G., "Germany" in Weigand, F-B., *Practitioner's Handbook on International Arbitration* (Beck, München, 2002) at 702; Lachmann, *Handbuch für die Schiedsgerichtspraxis* (Otto Schmidt, 1998) at 52-53.

250 Cp. Lachmann, *Handbuch für die Schiedsgerichtspraxis* (Otto Schmidt, 1998) at point 1226; Rehbinder in Immenga/Mestmäcker, *GWB* (C.H. Beck, 2001) § 130 (2) at point 322.

Given the confidential nature of arbitration, it is difficult to gauge the extent to which it is used in practice for competition law disputes. Since the enactment of the new arbitration laws, however, arbitration is becoming more popular and one can expect greater utilisation of this form of dispute resolution for competition law matters.[251]

Expert determination and mediation are both available forms of ADR in Germany. They would appear to be permissible means of resolving competition law disputes but there is no publicly available evidence of these forms of ADR having been used for competition law matters.

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251 With this in mind, the Academy of European Law and the International Arbitration Institute have organised a conference on "Regulation 1/2003 in Arbitration Proceedings" in Trier, Germany, in March 2004.

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V. National case law summaries

Please provide a summary of each judgement using the following format:

BGH, Az. KZB 34/99, *Hörgeräteakustik,* [2000], WRP 636
Facts and legal issues
The plaintiff, a producer of hearing devices, filed a claim with the regional court of Hamburg against AOK Bayern, a compulsory health insurer, to compel it to pay the plaintiff for hearing devices delivered to the insurer's members, on the basis of cartel law infringements. Due to the recently modified § 51 (2) sentence 2 SGG, the court had to decide primarily whether claims of suppliers against compulsory health insurers on the basis of cartel law infringements have to be transferred to the Social Court in Hamburg.
Held
Regardless of whether the relationship between a compulsory health insurer and a supplier within the health sector is of a civil or public nature, since 1 January 2000 the litigation, even if based on cartel law, was to be assigned to the social courts. The claim was dismissed for lack of jurisdiction.

BGH, Az. KZR 18/01, *Wiederverwendbare Hilfsmittel,* [2004], NZS 33.
Facts and legal issues
The plaintiff, an association representing several manufacturers of medical products, sued a compulsory health insurer for injunction on the basis that the insurer worked with a small number of manufacturers with whom it had concluded framework supply agreements following a public tender and thus prevented the plaintiff's members from entering the market. The court raised the question whether a transfer of the case to the social jurisdiction would render German competition law inapplicable.
Held
The court raised the question whether courts of the social jurisdiction would apply competition law, but the court did not need to decide on this question in the case before it. The claim was dismissed because the defendant's conduct did not infringe German competition law.

BGH, Az. KZR 12/81, *Familienzeitung,* [1983], GRUR 259
Facts and legal issues
The plaintiff, a publisher, sought damages from a printing plant on the basis that the defendant and other printing plants agreed to boycott the plaintiff and cancel printing contracts with it so as to prevent it from publishing a new and competing magazine. The court had to decide whether, under these circumstances, the plaintiff's protection was the purpose of the cartel prohibition.
Held
The opposing market side (including the plaintiff in the present case) was protected by the cartel prohibition, at least and insofar as the anti-competitive agreement or the co-ordinated behaviour was intended to prejudice specific customers or suppliers. The case was referred back to the Higher Regional Court with the order to take further evidence upon the infringement.

BGH, Az. KZR 23/96, *Depotkosmetik,* [1999], GRUR 276

Facts and legal issues

The plaintiff was a perfumery, the defendant a trader in cosmetics. The defendant only supplied authorised perfumeries fulfilling certain quality requirements, prescribed by the defendant. The plaintiff fulfilled the quality requirements and applied for authorisation with the defendant. However, the defendant declined the application, allegedly due to the plaintiff's low-price policy. The court had to decide whether the plaintiff was entitled to restitution in kind in form of a right to be supplied against the trader in cosmetics under these circumstances.

Held

A business which is barred from participating in a selective sales system by the producer of the goods, although fulfilling the producer's quality requirements (the requirements themselves complying with EC cartel law) belongs to the group of persons whose protection was intended by article 81 EC. The plaintiff was therefore entitled to an award of restitution in kind. The case was referred back to the Higher Regional Court with the order to take further evidence upon the infringement.

OLG Bremen, Az. U (Kart) 1/88, *Nachfragerkartell,* [1989], ZIP 1085

Facts and legal issues

The plaintiff was an insolvency receiver, the defendant one of several bidders for a bankrupt company administered by the plaintiff. The defendant agreed with the other bidders that it would acquire the target company at its lowest bid and would compensate the other bidders for allowing it to acquire the target at a price significantly below the market price. The court had to decide whether the insolvency receiver - to the benefit of the property to be divided amongst creditors - was entitled to damages against the bidders.

Held

Several bidders interested in a target and agreeing amongst themselves on one person being the only bidder, with the intention of keeping the price at the lowest bid, constitute an illegal cartel of bidders. In such circumstances, the seller of the target company qualifies as a person whose protection was intended by the cartel prohibition. Damages were awarded.

BGH, Az. KZR 6/74, *Zuschussversicherung,* [1976], GRUR 153 at 153 sq.

Facts and legal issues

The plaintiff was a private health insurer offering insurance contracts covering risks not covered by compulsory health insurance. The defendants were two large compulsory health insurers that co-operated with four specific private health insurers by referring members interested in additional insurance exclusively to the four private health insurers. The plaintiff claimed that through this referral arrangement it was prevented from entering the market for additional health insurance so far as the members of the two large compulsory health insurers were concerned. The court had to decide whether such private health insurer was, under these circumstances, entitled to an injunction against the compulsory health insurers.

Held

Competitors of a cartel who, through the cartel's restraints on competition, are prevented from entering the market, qualify as persons whose protection was intended by the cartel prohibition. The injunction was granted.

LG Mannheim, Az. 7 O 326/02, *Vitaminkartell*, [2004], GRUR 182

Facts and legal issues

The plaintiff was a producer of infant food and for this purpose a purchaser of vitamins. The defendant was a producer of vitamins. The plaintiff sought damages on the basis that the defendant participated in a world wide vitamins price cartel, as a result of which the plaintiff suffered reduced profits due to artificially increased prices for vitamins. The court had to decide whether customers of members of world wide price cartels are entitled to damages against the cartelists.

Held

In the event of a world wide price cartel affecting all customers equally, the customers do not qualify as persons against whom the cartel's action was intentionally directed. Therefore the plaintiff was not entitled to damages. The court also held that the passing on defence is - if proved - available under German law.

OLG Karlsruhe, Az. 6 U 183/03, *Vitaminpreise*, [2004], WuW/E DE-R 1229, 415

Facts and legal issues

The plaintiff was a producer of infant food and for this purpose a purchaser of vitamins. The defendant was a producer of vitamins. The plaintiff sought damages on the basis that the defendant participated in a world wide vitamins price cartel, as a result of which the plaintiff suffered reduced profits due to artificially increased prices for vitamins. The court had to decide whether customers of members of world wide price cartels are entitled to damages against the cartelists and whether damages were to be denied in application of the 'passing on' defence. (Judgement on the appeal on LG Mannheim, Az. 7 I 326/02)

Held

The court let open the question whether customers of members of world wide price cartels were entitled to damages in general and dismissed the claim as inadmissible, because the plaintiffs had only sought declaration of the obligation to pay damages instead of claiming a specified amount. The court explained nevertheless in detail that the 'passing on' defence had to be applied.

LG Mainz, Az. 12 HK.O 55/02 KART, *Preiskartell auf Vitaminsektor*, [2004] NJW-RR 478

Facts and legal issues

The plaintiff was a producer of animal food and for this purpose a purchaser of vitamins. The defendant was a producer of vitamins. The plaintiff sought damages on the basis that the defendant participated in a world wide vitamins price cartel, as a result of which the plaintiff suffered reduced profits due to artificially increased prices for vitamins. The court had to decide whether customers of members of world wide price cartels are entitled to damages against the cartelists.

Held

In the event of a world wide price cartel affecting all customers, the customers do not qualify as persons against whom the cartel's action was intentionally directed. Therefore the plaintiff was not entitled to damages.

BGH, Az. K ZR 7/64, *Brotkrieg II,* [1965], BHGZ 44, 279.

Facts and legal issues

The plaintiff operated several discount grocery stores. The defendant was a major bakery that owned shops but also sold its products through other grocery stores, including those of the plaintiff. In 1961, the plaintiff lowered its prices for the defendant's products, thereby causing other bakeries or groceries to lower their prices correspondingly, which in turn resulted in a significant price war. Eventually the other bakeries agreed with the defendant that this price battle needed to stop and therefore the defendant agreed with the other bakeries to stop supplying the plaintiff, if the plaintiff did not guarantee prices above a certain minimum. The plaintiff continued to offer lower prices so the defendant ceased supply. The plaintiff suffered loss because it did not find new suppliers immediately and sought damages on the basis of anti-competitive conduct. The court had to decide whether the blocked plaintiff was entitled to be supplied by the defendant and / or to monetary damages.

Held

The plaintiff was not entitled to be supplied by the defendant, as the defendant was free to decide with whom to co-operate. The defendant could not be forced to supply the plaintiff in future, if such conduct was not any more performed for anti-competitive reasons, notwithstanding that the reason for ceasing supply to the defendant was anti-competitive and illegal. The court also held that it would in any event have had to consider whether the plaintiff had been able to find alternative suppliers, when examining whether the plaintiff suffered any harm. The case was referred back to the Higher Regional Court with the order to establish whether the anti-competitive behaviour was still ongoing and whether the plaintiff would have been able to find alternative suppliers.

BSG, Az. B 3 KR 11/98 R, *Festbeträge*, [2000], BSGE 87, 95.

Facts and legal issues

The plaintiff, a company producing birth control pills, sued the central associations of the compulsory health insurers ("Spitzenverbände der Krankenkassen" abbr. "KKn") for injunctive relief because they had set a fixed price for birth control pills. The KKn's decision in this regard had been made as a general disposition (a special form of final statement of a public authority). Only the fixed price was paid by the health insurers. Although the plaintiff was still allowed to sell its product for a higher price, consumers would have to pay the difference between the fixed price and the producer's price. Consequently the plaintiff was forced to reduce the price for its birth control pill. Preliminary, the court had to decide whether both European competition law and domestic competition law was applicable or whether the case was governed by German administrative law, only.

Held

The court stated in obiter dicta that European competition law was applicable but held that domestic competition law was not applicable. On the facts before it, however, the court did not need to apply competition law, as the claim was allowed for reasons of constitutional law.

BGH, Az. KZR 21/78, *BMW-Reimport*, [1980], NJW 1224

Facts and legal issues

The (German) plaintiff imported BMW cars from Belgium so as to profit from the sales price difference between Belgium and Germany. The defendant, the Belgian affiliate of BMW, barred all Belgian licensed dealers from selling cars to the plaintiff. The plaintiff sued the defendant for damages on the basis that the export prohibition was anti-competitive. The claim was filed in Germany because the damage became manifest in Germany, which was where the plaintiff had its seat. However, the jurisdiction of German courts was challenged.

Held

German courts had jurisdiction on the basis of *forum delicti*, because the defendant acted with the intention of adversely affecting the plaintiff's competitive position in its domestic market in Germany, so that the place where the harm occurred was in Germany. The court also held that it is within the purposes of Article 81 to protect a purchaser against whom the anti-competitive behaviour was aimed. The case was referred back to the Higher Regional court.

OLG Stuttgart, Az. 2 U 223/97, *Carpartner II*, [1998], NJWE-WettbR, 260

Facts and legal issues

The plaintiff was a car rental agency. The defendant was an auto liability insurer that co-operated with other auto insurers; they founded and subsidised their own car rental agency, "Carpartner", with the intention of using Carpartner's dumping prices to lower the reference prices for substitute cars in the case of accidents. This co-operation was held to be an illegal cartel by the German Federal Cartel Office. The plaintiff sued the defendant for damages on the basis that it could only claim rental fees similar to the "Carpartner" fees and thus significantly below the former market prices, in cases where the defendant was the insurance to settle the claim arising from the accident. The court had to decide whether, under these circumstances, the plaintiff was entitled to damages.

Held

If auto insurers use a joint venture to lower the reference prices for substitute cars in the event of accidents, and subsequently use these lowered reference prices to lower their compensation duties towards their clients, this anti-competitive conduct entitles the harmed car rental agencies to damages. The court also criticised the approach of most of the German judicature, which requires the anti-competitive behaviour to be aimed against the person claiming damages. The claim was dismissed because the damages claimed were not found to be adequately caused by the infringement in question.

BGH, Az. KZR 31/95, *Kraft-Wärme-Kopplung*, [1996], NJW 3005

Facts and legal issues

The defendant was a regional power company, being the sole electricity supplier within its business region, producing 5 per cent. itself and being supplied with the remaining 95 per cent. by other companies. The plaintiff operated, as a supplement to its core business, a thermal power station; it sold the power it did not need to the defendant. Partly due to special environmental law, the low prices the defendant paid to the plaintiff for its electricity constituted anti-competitive conduct against the plaintiff. However, the plaintiff could not prove fault. Thus, the court had to decide whether the plaintiff was entitled to monetary restitution based on the remedy for consequences of the infringement of competition law, as this remedy did not require fault.

Held

The plaintiff was entitled to reimbursement of the difference between the reduced prices he received and the fair market prices the defendant would have had to pay, by way of claiming the remedy for consequences of the infringement of competition law. The court held that the reduced past income was a persisting consequence of the infringement, so that the remedy was reimbursement of the difference. The case was referred back to the Higher Regional Court with the order to take further evidence.

OLG Frankfurt a. M., Az. 6 U (Kart) 176/88, *Bieterabkommen*, [1989], WM 1102

Facts and legal issues

The plaintiff was the former owner of real estate property that was sold by compulsory auction. The defendant was a creditor of the plaintiff in possession of a secondary lien on the property. At the time of the auction, the defendant agreed with a third person that the defendant would not outbid that third person, so that the latter would obtain the property at the minimum bid. As consideration, the third person would pay a further amount directly to the defendant, so that the defendant would get this further amount instead of his portion of the earnings of the compulsory auction. The plaintiff sued for damages arising from the reduced clearance of debts following the auction. The court had to decide whether the plaintiff was entitled to damages and on which basis the damages were to be estimated.

Held

The defendant and the third person co-operated and intentionally directed their anti-competitive conduct against the plaintiff. The plaintiff therefore qualified as person whose protection was a purpose of the cartel prohibition. The amount of damage, i.e., the amount by which the earnings of the auction were reduced, could be calculated on the basis of the calculations made by the defendant and third person when agreeing on their bids and compensation. The court awarded damages for the infringement of competition law in the form of indemnification from claims of the defendant against the plaintiff.

BSG, Az. B 3 KR 14/00R, *Physiotherapeuten*, [2002], GRUR-RR 210

Facts and legal issues

The plaintiff was a compulsory health insurer, the defendant an association of physiotherapists. After expiry of a framework agreement between the association and several health insurers regarding, among other issues, the fees for the physiotherapists' treatments, the association called for a boycott against the compulsory health insurers. As a consequence, members of the plaintiff only received physiotherapist treatment against payment of fees usually paid by patients with private health insurance. The plaintiff sought damages on the basis that this boycott was illegally directed against the plaintiff. The illegality of the defendant's conduct was challenged.

Held

The court held that the boycott was not illegal but justified, because its purpose was to protect one's legitimate interests in the face of another party's market dominance. The court argued that such collective behaviour was the only means the physiotherapists had to exert pressure against the compulsory health insurers.

LG Frankfurt, Az. 3-11 O 87/02, *Autovermietungsagenturen*, [2004], WuW, DE-R 1200

Facts and legal issues

The parties were competitors in the car rental business, both working partially with agencies. As a basis for its negotiations with the agencies, the defendant used a draft contract, comprising i. a. non-competition clauses and fixed prices. On the basis that most clauses of the defendant's draft contract infringed Art. 81 EC, the court had to decide whether the plaintiff as a competitor was entitled to damages and injunctive relief under § 1 UWG (now § 9 UWG) which sanctions unfair competition related conduct.

Held

The defendant infringed public cartel law. The breach of Art. 81 EC constituted a "per se" infringement of § 1 UWG. The plaintiff was thus entitled to damages and injunctive relief under § 1 UWG. The court only ruled on the defendant's obligation to pay damages, but not on a specified amount.

BGH, Az. KZR 7/76, *4 zum Preis von 3*, [1978], GRUR 445:

Facts and legal issues

In this case an interim injunction had been granted against the defendant prohibiting it from distributing sweets in special packages with the imprint "Four for the price of three", because the imprint would either give rise to illegal retail price maintenance if retailers sold the packages for the same price as normal packages or would constitute deceptive statements as to pricing vis-a-vis consumers. The injunction was based on a breach of the Act Against Unfair Competition (the UWG) and the remedial provision in that Act under which damages and injunctions may be awarded for such a breach (§ 1 UWG, now § 9 UWG). The plaintiff, a representative organisation, also based its claim for an injunction on the combination of a breach of the Act Against Restraints on Competition (the GWB) and the remedial provision in the UWG (§ 1).

Held

A breach of the UWG had not been established but a breach of the GWB had been established. An injunction for this breach could be granted under § 1 UWG as a breach of the relevant GWB provision was considered as a "per se" act of unfair competition. The court granted the injunction accordingly. (Damages were not claimed.)

BSG, Az. B 3 KR 3/01, *Hilfsmittel*, [2001], unpublished:

Facts and legal issues

The German Association of Orthopaedic Technology and one of its members claimed for injunctive relief against several associations of compulsory health insurers in order to obtain a prohibition to the compulsory health insurers to perform an agreement between the compulsory health insurers and the umbrella organisation of the German Associations of Pharmacists. The agreement allowed the pharmacies to sell special orthopaedic devices which - according to the plaintiffs - may only be sold by special handicraft businesses. The plaintiffs argued that the defendant's conduct in performing this agreement was anti-competitive. The defendant counter-argued that the plaintiff as supplier in the health care business could not use competition law as legal basis for a claim against the compulsory health insurers, because not only the jurisdiction was assigned to social jurisdiction, but also the applicable law was expressly defined as social law.

Held

Claims of suppliers in the health care business are assigned to social jurisdiction and are exclusively governed by social law insofar as only national law is concerned. In such circumstances, national competition law does not apply. The court therefore dismissed the claim. In obiter dicta, it stated that - given the cross-border relevance of the case - EC competition would have to be applied.

LG Berlin, Az. 102 O 134/02 Kart, *Transportbeton,* [2003], unpublished:

Facts and legal issues

The plaintiff, a building contractor, sued a producer of ready-mixed concrete for damages on the basis that the producer of ready-mixed concrete was part of an anti-competitive agreement that distributed market shares between the 40 members of the agreement and that allowed the cartelists and the defendant to raise their prices for ready-mixed concrete. The damage of the plaintiff allegedly consisted of the overcharge paid to the defendant. The defendant argued that the damage claimed was not caused by the anti-competitive agreement.

Held
The claim was dismissed, but not for lack of causation. The court held that the plaintiff was not even member of a group of person whose protection was the purpose of the infringed provision of competition law, because the effect of price increases was only indirect.

BGH, Az. KZR 6/02, *Verbindung von Telefonnetzen,* [2004], not yet published:
Facts and legal issues
A German telecommunications company sued the Deutsche Telekom AG, for damages with regard to the time period between 1996 and 1999. The plaintiff offered telecommunications services for corporate networks and closed user groups and, after the monopoly of Deutsche Telekom AG ended on 31 December 1997, telecommunications services for the public. For access to external communications, the plaintiff needed the services of the Deutsche Telekom AG. The damages claim was based on the allegation that the defendant misused its monopolistic position by not offering special rates for providers of corporate networks or closed user groups. The defendant argued that it was not liable to damages because the rates it offered were approved by the Federal Ministry for Mail and Telecommunication, according to the corresponding applications of Deutsche Telekom AG.
Held
A behaviour does not constitute an abuse of a dominant market position, if it was ordered by act of state without leaving the dominant company any scope for own decisions. However, this principle did not apply to the present case, because the defendant had a scope for decisions within the process of applying for authorisation of its rates. The court referred the case back to the Higher Regional Court with the order to establish the rates that the defendant was allowed to demand from the plaintiff.

LG Kiel, Az. 14 O Kart. 43/01, *Füllfederhalter,* [2001], not yet published:
Facts and legal issues
A retailer of fountain pens sued a wholesaler of fountain pens for damages because he had relied on the recommended retail selling price for the assessment of profitability and for determining a realistic sales price. It turned out that, due to an Italian retailer selling the fountain pens at half the price compared to the recommended retail selling price, the fountain pens could not be sold at the recommended retail price. With the recommendation of retail prices, the defendant infringed national competition law. The plaintiff therefore based its damages claim on § 33 GWB.
Held
Although the German legal prohibition of price maintenance was infringed by the defendants, the damages claim could not be based on this infringement, because the purpose of the infringed provision is to avoid that retailers act unanimously according to the will of the producers and thereby restrain competition. The provision does not, however, protect a specific retailer insofar as it believes in the profitability of the investments. The claim was dismissed.

OLG Frankfurt am Main, Az. 11 U (Kart) 70/00, *Brüsseler Buchhandlung*, [2001], WuW/E DE-R 801:
Facts and legal issues
A Belgian book retailer, offering – among other services - mail order sales via the internet, sued a German publisher with the aim to be supplied. The claim was based on German competition law although the plaintiff was principally acting within Belgium. The plaintiff argued however, that it might receive orders through the internet from Germany and would be disadvantaged if it then had to buy from resellers, because the supply by resellers would take more time and would be more expensive than direct supply by the defendant. However, the plaintiff was not able to quantify any present or expected sales volumes for the German territory.
Held
Presumably, the plaintiff's present or expected sales volume within German territory is, if existing at all, of marginal importance. Such marginal effect within German territory is not a sufficient link to establish the applicability of German competition law. The claim was dismissed as inadmissible.

OLG Celle, Az. 13 U (Kart) 260/97, *Feuerwehrausrüstung*, [1999], NJWE-WettbR at 164:

Facts and legal issues

A producer of equipment for fire brigades applied for an interim injunction against a joint venture of several local authorities within a region. The joint venture negotiated the supply contracts for equipment of the fire brigades for all participating local authorities, but also obliged the participating local authorities to purchase their equipment only from those companies with whom the joint venture had negotiated. The applicant formerly supplied certain of the local authorities, but was not approached by the joint venture. It therefore lost its entire sales volume within the region. It based the application for interim injunction on the grounds that the joint venture infringed the national cartel prohibition which applied on the public authorities in this case, because they acted like a private company when purchasing equipment for fire brigades.

Held

The national cartel prohibition applies, because the public authorities forming part of the joint venture act as a private company. The applicant also belongs to the group of persons whose protection was intended by the cartel prohibition, because the alleged agreement and behaviour worked against the applicant as former supplier, i.e. the opposing market side, of the local authorities. The interim injunction was awarded.

OLG Bremen, Az. Kart 2/2001, *Apollo-Optik I*, [2002], WRP224:

Facts and legal issues

The defendant is the second largest chain of opticians in Germany with around 300 shops, whereof 80 per cent. were owned by the defendant itself and 20 per cent. were franchise shops. The plaintiff was a franchisee of the defendant. Among other issues, the plaintiff complained that the defendant was publicly offering specific prices without taking into account that franchise shops were not bound by these price offers. The plaintiff argued that the defendant thereby achieved an anti-competitive retail price maintenance. It claimed for the declaratory statement that the defendant was obliged to bear the not yet quantified damages that arose from the binding effect of the defendant's price offers on the plaintiff. The plaintiff argued that the provisions on price maintenance did not only protect competition as such, but also those market participants that were restrained in their ability to determine their own selling prices, even if they were not ordered to sell at these prices, but merely recommended to do so.

Held

Insofar as the prohibition to recommend prices applies in cases where the defendant has merely circumvented the prohibition to fix prices in the downstream market, the prohibition of price recommendations is not only aimed at the protection of competition as such but also of the addressee of the recommendation. The declaratory judgement stating the defendant's obligation to pay damages was rendered as requested.

OLG München, Az. U (K) 3338/01, *Depositär*, [2002], GRUR-RR 207; BGH, Az. KZR 2/02, *Depotkosmetik im Internet,* [2004], DB 311

Facts and legal issues

The defendant was a producer of luxury cosmetics; the plaintiff was a retailer of cosmetics, selling via the internet only. The defendant sold its products through a network of authorised dealers that it determined by certain quality criteria, among them the condition that the dealer had at least one real shop and not only internet trade. The plaintiff based its claim on the national prohibition against discriminatory behaviour of undertakings with a dominant market position and claimed damages in the form of an obligation of the defendant to supply the plaintiff with its luxury cosmetics.

Held

The Munich Higher Regional Court held that the defendant infringed the prohibition of discrimination by not supplying the plaintiff. Under national competition law, the plaintiff could be awarded a right to be supplied as damages. However, the Federal Court of Justice took the view that, due to the nature of the business, the defendant had a legitimate interest to exclude from its network dealers that only sell via internet, and that its behaviour was therefore justified. The claim was dismissed.

BGH, Az. KZR 16/02, *Strom und Telefon I*, [2003], Städte- und Gemeinderat 2002, Nr. 12, 30:

Facts and legal issues

The plaintiff was Deutsche Telekom AG, the former state owned and still most important German telecommunications enterprise; the defendants are a local energy supplier and its affiliate company offering telecommunications services for the purpose of customer retention. The defendants co-operated insofar as they offered a special rate for customers that purchased both energy and telecommunications services. The energy supplier had a dominant position on the relevant energy market, while on the relevant telecommunications services market, Deutsche Telekom AG was still dominant. However, Deutsche Telekom AG argued that the defendants infringed national competition law by using the energy supplier's dominance on the energy market to adversely influence the competition on the telecommunications services market by their joint offers.

Held

German national cartel law also protects the private interests of competitors in markets other than the market dominated by the defendant, if the defendant misuses its dominance on one market to adversely influence the other market. Therefore, the plaintiff could, in principle, invoke the energy supplier's dominance on the energy market. However, due to Deutsche Telekom AG's overwhelming dominance on the telecommunications services market, the court denied any anti-competitive influence of the defendants on the telecommunications services market. The claim was dismissed.

OLG Düsseldorf, Az. U (Kart) 34/01, *Reziprozität*, [2002], GRUR-RR 176:

Facts and legal issues

The applicant was an electric power company founded in 2000 and willing to act as gas supplier without owning a network of gas transportation pipelines. It applied for an interim remedy regarding the consequences of an infringement against the market leader among German gas companies with a national transportation network of natural gas pipelines, which, in Germany, was the biggest gas transportation network owned by one single gas company. The applicant who was supplied by an Austrian gas company, applied for access to the gas transportation network of the defendant. The defendant denied for lack of reciprocity, because it had previously been denied transportation through the Austrian gas transportation network of that same Austrian gas company that would now supply the applicant with gas. The applicant argued that it had a special interest in immediate access to the network and transport of the gas from Austria, because its actual customer was its first customer at all and inability to supply the customer might destroy any possibility to enter the gas market. On the other hand, the opponent would only need to re-allocate the contingents of transported gas among its customers. However, the opponent argued that by awarding this interim remedy, a final ruling would become obsolete, because the situation created by the interim remedy would be final.

Held

In general, interim measures should not render a final ruling obsolete by creating final situations. However, under special circumstances it might be necessary to award interim remedies with final consequences, if the overweighing interests of the applicant make such measures necessary. Therefore, the applicant needed to show that, in the specific case, he depended so urgently on enforcing its rights that, otherwise, any suspension or any referral to a later action for damages would be economically unacceptable. In the present case, the applicant would probably have lost its possibility to enter the gas market, which would have entailed serious, irreversible economic disadvantages. The interim remedy was awarded.

LG Düsseldorf, Az. 34 O (Kart) 189/02, *Bonus-Meilen für Mobilfunkanbieter*, [2003], WuW/E DE-R 1135:

Facts and legal issues

The plaintiff and the second defendant are both important German operators of mobile telecommunications services, the first defendant arranges co-operations between a major German airline and partner companies insofar as these partner companies may offer certain services of the airline, e.g. bonus miles, to their own customers. The airline had a dominant market position on the market for German national flights. Negotiations between the plaintiff and the first defendant failed in 2001. Since 2002, the defendants have been performing a co-operation. The plaintiff also operates a system for customer retention with other partner companies, but not with bonus miles of another airline. It claims for an injunction of the defendants to stop their co-operation unless they do not allow a parallel co-operation between the airline and the plaintiff. The claim was based on German national cartel law.

Held

German national cartel law also protects the private interests of competitors in markets other than the market dominated by the defendant, if the defendant influences the other market due to its dominance on its original market. However, in the present case, the relevant market is the market for customer retention systems in general and not for airline bonus miles only. Therefore, the first defendant, the agency for airline services, does not have a dominant position with regard to the relevant market, which consists of any services available for customer retention systems, such as hotel vouchers, restaurant vouchers, car rentals etc. The claim was dismissed.

LG Dortmund, Az. 13 O 55/02 Kart., *Vitaminkartell III*, [2004] unpublished

Facts and legal issues

The plaintiff was a producer of sweets and for this purpose a purchaser of vitamins. The defendant was a producer of vitamins. The plaintiff sought damages on the basis that the defendant participated in a world wide vitamins price cartel, as a result of which the plaintiff suffered reduced profits due to artificially increased prices for vitamins. The court had to decide whether customers of members of world wide price cartels are entitled to damages against the cartelists and whether damages were to be denied in application of the 'passing on' defence.

Held

Damages were awarded to the plaintiff. The court held that customers of world wide price cartels belonged to the group of persons whose protection was intended by the infringed cartel prohibition and that it was not necessary that the infringement was specifically directed against the plaintiff.

The court assessed the damage as amounting to the difference between the cartel price and the hypothetical market price. It applied the prima facie rule, based on general life experience, that a market price is lower than a cartel price. It held that the defendant bore the burden of proof of the contrary but that he did not present sufficient facts therefore. The court also held that the defendant bore the burden of proof for any 'passing on' effects but that he did not present sufficient facts for an application of the 'passing on' defence. The court did not need to decide upon the applicability of the 'passing on' defence in general. For the assessment of the exact amount of damage, i.e. for the assessment of the hypothetical market price, the court mainly took into account the price decline after the termination of the cartel.

LG Dortmund, Az. 13 O 42/03 Kart., *Selbstdurchschreibepapier*, [2003], unpublished:

Facts and legal issues

The plaintiff was a trader of non-carbon paper, the defendant one of its customers. The plaintiff sued the defendant for payment of several deliveries of non-carbon paper. The defendant set off an alleged claim for damages on the grounds of the plaintiff's alleged participation in a Europe-wide price cartel concerning non-carbon paper against the payment claim.

Held

The claim for payment was awarded and the set-off claim dismissed, because the defendant could not prove that the plaintiff had participated in the price cartel, whose existence had been established by the European Commission. However, the court stated in obiter dicta that customers

of the opposing market side do belong to the group of persons whose protection is intended by § 1 GWB because of the direct impact of horizontal price cartels.

APPENDIX 1

District Courts competent to hear damages claims for infringement of competition law according to the concentration regulations of the federal states:

District Court	**Circuits concentrated on this District Court**
Stuttgart	Circuit of the Higher Regional Court Stuttgart
Mannheim	Circuit of the Higher Regional Court Karlsruhe
München I	Circuit of the Higher Regional Court München
Nürnberg-Fürth	Circuits of the Higher Regional Courts Nürnberg and Bamberg
Potsdam	Circuits of all Courts in the federal state of Brandenburg
Frankfurt am Main	Circuits of the District Courts Darmstadt, Frankfurt/Main, Gießen, Hanau, Limburg/Lahn, Wiesbaden
Kassel	Circuits of the District Courts Fulda, Kassel, Marburg
Rostock	Circuit of the Higher Regional Court Rostock
Hannover	Circuits of all Courts in the federal state of Lower Saxony
Dortmund	Circuits of the Higher Regional Court Hamm
Düsseldorf	Circuit of the Higher Regional Court Düsseldorf
Köln	Circuit of the Higher Regional Court Köln
Mainz	Circuits of the Higher Regional Courts Koblenz and Zweibrücken
Leipzig	Circuits of all District Courts in the federal state of Saxony
Magdeburg	Circuits of all District Courts in the federal state of Saxony-Anhalt
Kiel	Circuits of the District Courts Flensburg, Itzehoe, Kiel and Lübeck

APPENDIX 2

Panels within District Courts competent to hear cases based on competition and cartel law[252]:

District Court	**Panels**
Stuttgart	17th Panel for civil matters 41st Panel for commercial matters
Mannheim	7th Panel for civil matters 2nd Panel for commercial matters
München I	33rd Panel for civil matters 4th Panel for commercial matters
Nürnberg-Fürth	
Potsdam	2nd Panel for civil matters
Frankfurt am Main	3rd Panel for civil matters 8th Panel for commercial matters
Kassel	2nd Panel for commercial matters Panels for civil matters according to cycle system
Rostock	
Hannover	18th Panel for civil matters 6th Panel for commercial matters
Dortmund	2nd Panel for commercial matters = 13th Panel for civil matters
Köln	28th Panel for civil matters 1st Panel for commercial matters (for initials A-N) 4th Panel for commercial matters (for initials O-Z)
Mainz	10th and 12th Panel for commercial matters (according to initials)
Leipzig	5th Panel for civil matters 1st, 2nd, 6th Panel for commercial matters (according to cycle system)
Magdeburg	7th Panel for civil matters
Kiel	1st Panel for commercial matters

252 These competence are subject to changes.