

Executive summary and overview of the national report for Germany

Section I – Summary of findings

The current German legal framework for damages actions for breach of national and EC competition law does not contain significant differences in comparison to general German law on damages. The available statistical information shows that, as yet, damages for infringement of competition law have only been awarded in very few cases. The draft 7th amendment to the Act Against Restraints of Competition, issued by the German government on 28 May 2004, yet to be submitted to Parliament, provides significant alleviation for potential plaintiffs.

1. Current legal framework

Germany's current framework for the private enforcement of competition law can be summarised as follows:

- **Basis** Actions for breach of national competition law are based on § 33 of Germany's Act Against Restraints of Competition. Actions for breach of EC competition law are based on a statutory tort law provision in the German Civil Code. Both actions can be based in some cases on a provision of unfair competition law.
- **Courts** Cases are usually heard by Germany's Civil Courts (except for certain cases involving social insurance which are heard by the Social Courts). Within the Civil Courts, cases are usually heard by specialised panels. All German states have concentrated the jurisdiction for competition law matters within a small number of courts.
- **Jurisdiction** German courts have jurisdiction over competition law matters when the defendant has its seat or a business branch in Germany, when the anti-competitive conduct either takes place in Germany or is directly related to the German market, or – in cases outside the scope of Regulation 44/2001 or applicable international conventions – if the defendant has assets in Germany.
- **Standing and other requirements** A plaintiff may be a natural or legal person or any other entity without legal personality that can be entitled to have rights and duties. The only standing requirement for a plaintiff ordinarily resident in the EU or EEA is that it personally has a cause of action. Plaintiffs ordinarily resident outside the EU or EEA may need to provide security for costs. A main requirement of substantive law is that a plaintiff needs to belong to a group of persons whose protection is a purpose of the provision of competition law that has been infringed. This principle applies to the infringement of both domestic competition law and Articles 81, 82 EC. In determining whether it is satisfied, the courts usually require that the infringement of competition law is specifically directed against the plaintiff, despite criticism from certain commentators and courts.
- **Remedies** Civil remedies for competition law infringements are damages, injunctions and orders requiring a defendant to remedy the consequences of infringement, including in some cases the order to publish the judgement itself. Damages are awarded as restitution in kind or – if restitution in kind is impossible – as monetary compensation. Statutory representatives of corporate defendants may be personally liable to third parties if they were responsible for an infringement or knew of an infringement by employees and did nothing to prevent it. In some cases, a ban from profession may be imposed in criminal proceedings.
- **Collective claims** Collective claims for breach of national competition law may be brought for injunctive relief and orders requiring remedial action, but not for damages.
- **Evidence** Although ordinarily the plaintiff bears the burden of proving all facts upon which its claim is based, facts which are beyond dispute or obvious need not be proved. Under national competition law, several exemptions for specific issues in the form of statutory presumptions or express shifting of the burden of proof exist. Further, in some cases the evidential threshold is lowered pursuant to a prima facie evidence rule by which, where a certain cause or event naturally arises from facts which are proved, there is a rebuttable presumption that that cause of event did so arise.

- As regards the means of proof, an individual who is a party to proceedings cannot be heard as a witness nor can the CEO and board members of corporate entities that are a party to the proceedings, although the court may hear such people *ex officio* if there is otherwise insufficient evidence for the truth or falsity of alleged facts. In addition, there is no common law style disclosure regime, whether pre-trial or otherwise, a situation which is ameliorated by the court's right to order the presentation of documents against a party to the proceedings or – subject to certain procedural rights of refusal – against third persons, as well as by substantive legal rights of access to particular types of document (none of which are competition law specific). Evidence obtained by pre-trial discovery in foreign countries is admitted, unless in the individual case an individual right protected by German constitutional law or an applicable international convention on human rights was infringed by the taking of the evidence. Presiding judges may also request the submission of documents and official information from the Federal Cartel Office in order to prepare their hearings. Witnesses and experts are questioned primarily by the judge. Common law style cross-examination does not occur although the parties' lawyers may put questions to witnesses and court-appointed experts once the judge has finished. Witnesses may refuse to give evidence if they are close relatives to a party, subject to professional secrecy, if they would otherwise need to disclose business secrets or if they risk criminal proceedings against or direct financial loss for themselves. If the refusal is unjustified, the court may enforce testimony by fines or arrest.
- **Causation and damage** German courts apply a two-step causation test: the defendant's conduct must have been a *conditio sine qua non* (the "but for" test) and its causal contribution must be "adequate", a requirement that excludes contributions that were causative only under very unexpected circumstances. Damages may be estimated if the occurrence of damage *per se* is duly proved. In a claim for lost profits, the plaintiff needs only prove facts which are sufficient to enable the court to estimate how much profit the plaintiff would probably have made had its business carried on in the same way. As an example, 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. Damages are currently assessed on the basis of injury suffered by the plaintiff, not of the profits received by the defendant. Damages may only be awarded insofar as they derive from the sphere of dangers whose prevention was the purpose of the infringed norm. Interest can be either claimed as part of the damage or as statutory interest. The latter is awarded from the date of default in payment. Punitive damages are not available. The courts may award damages for injury suffered within Germany and outside its borders.
- **Justification and defence** 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. Although not qualifying as justifications, force majeure and act of state exclude damages claims. It may also be open to a defendant to raise the principles of prohibition of unjust enrichment, mitigation of damages through benefits received and mitigation of damages for non-containment of the loss in defence to an action. Some German courts have indicated that they would take the 'passing on' defence into account and claims may be reduced for reasons of contributory negligence.
- **Timing issues** There is a 3 year knowledge-based limitation period and 10 and 30 year long-stop limitation periods based on the date of damage and date of infringement respectively. As regards length of proceedings, although simple cases can be resolved in less than a year, complicated competition law cases can take several years to resolve. There are no specific means of accelerating proceedings, but delayed pleadings on facts or evidence may be excluded. Preliminary proceedings exist in the form of preliminary injunctive relief and a special form of proceedings based on documentary evidence only.
- **Costs** Court fees are to be paid at the outset by the plaintiff, although these may be recoverable in the event of success. Legal costs are likewise recoverable but only at a statutory rate which, for complex cases, can be comparatively low.
- **Alternative dispute resolution** Disputes arising from violation of national and/or EC competition law are arbitrable. Mediation and expert determination would also appear to be permissible means of resolving competition law disputes but there is no evidence of their being used in practice.

2.	<p>Draft 7th amendment to the Act Against Restraints of Competition</p> <p>The private enforcement in Germany of both national and EC competition law is set to be significantly strengthened by an amendment to the Act Against Restraints of Competition. If the current draft 7th amendment to the Act is enacted, it will implement the following changes:</p> <ul style="list-style-type: none"> • The concept of the protective purpose of the norm will be alleviated. • Public interest litigation will be introduced. • When assessing and estimating 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. • Statutory 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.
----	--

Section II – status quo and forthcoming reforms – action for damages

A.	Legal Basis	
(i)	Is there an explicit statutory basis?	Breach of domestic competition law: Yes Breach of Art. 81/82 EC: No. General tort law or, in some cases, unfair competition law applies. (draft 7 th amendment: Explicit statutory basis for breaches of both domestic and European competition law)
(ii)	Is this statutory basis different from other actions for damages?	No, except where unfair competition law applies. (Draft 7 th amendment: Yes. Alleviations for plaintiffs)
(iii)	Is there a distinction between EC and national law in this regard?	Statutory basis: Yes. Requirements for right to damages: No. (Draft 7 th amendment: No distinction at all)
B.	Competent court	
(i)	Which courts are competent?	Civil Courts (specific District Courts and Higher Regional Courts). Social Courts in specific matters.
(ii)	Are there specialised courts for private enforcement of competition rules?	No. However, panels within the courts are specialised.
C.	Standing	
(i)	Limitations on standing of natural or legal persons, including those from other jurisdictions?	Standing: Natural and legal persons, entities without legal personality that can be entitled to have rights and duties Limitations: Germans, EU and EEA members: No. Plaintiffs from outside the EU or EEA: Security for defendant's potential costs.
(ii)	What are the connecting factor(s) required with the jurisdiction in order for an action to be admissible?	Defendant's seat (forum domicilii) or business branch OR place where harmful effects occurred or where anti-competitive act was committed (forum delicti). Also place where the defendant has assets, for cases in connection to countries outside the scope of Regulation 44/2001 or applicable international conventions.

		Collective claims for injunctive relief and action for remedy of consequences are possible. (Draft 7 th amendment: also public interest litigation) <u>No possibility</u> of damages claims. (Draft 7 th amendment: right to claim the infringer's profits which will, however, be awarded to the state.)
(iii)	Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?	
D.	Procedural and substantive conditions	
(i)	What forms of compensation are available?	Damages (restitution and compensation, including lost profits), injunction, remedy of consequences (including order to publish judgement).
(ii)	What are the other forms of civil law liability (if any)?	Personal liability of directors to third parties, in some cases ban from profession in criminal proceedings.
(iii)	Does the infringement have to imply fault?	Yes (for damages), but presumed.
(iv)	If so, is fault based on objective criteria?	Yes.
(v)	Is bad faith (intent) required?	The statute requires fault (intent or negligence).
(vi)	Can negligence be taken into account?	Yes.
(vii)	Do other substantive requirements exist?	Yes: The claimant needs to belong to a group of persons whose protection is, i.a., the purpose of the infringed provision. (7 th draft amendment: This requirement will be alleviated).
E.	Rules of evidence	
a.	General	
(i)	Burden of proof and identity of the party on which it rests?	Burden of proof generally lies upon the party that relies on the facts. Burden of proof upon plaintiff for all facts giving rise to the claim. Evidential threshold is lowered when prima facie rule is applied. Several exemptions or alleviations for specific issues (presumptions or shifting of the burden of proof) exist under national competition law.
(ii)	Standard of proof	Conviction (" <i>Überzeugung</i> ") of the court = high level of plausibility or "practical" certainty that prevails over remaining doubts (Criminal proceedings: Conviction without any reasonable remaining doubt).
(iii)	Limitations concerning form of evidence	Limitations only when proving requirements of substantive law: documents, witnesses, inspection by the court, experts, interrogation of the parties and official information. Witnesses may refuse to give evidence for certain statutory reasons (e.g. close kinship, professional secrecy). If the refusal is unjustified, the court may enforce testimony by fines or arrest.
(iv)	Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis parties	Principle of party presentation: no obligation of a party to disclose documents, but certain exceptions, e.g. right of the court to order documents a party referred to (§ 142 ZPO). Evidence obtained by pre-trial discovery in foreign countries is admitted, unless in the individual case an individual right protected by constitutional law infringed by the taking of the evidence.
(v)	Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis third parties	Limited authority of the court to order third parties to disclose documents one of the parties referred to. Taking of evidence abroad possible according to EC Regulation 1206/2001.
(vi)	Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis competition authorities (national, foreign, Commission)	Separation of powers: Courts are not competent to interfere with investigations of public authorities. However, court may suspend proceedings as long as investigations are pending. Court can request information from national and foreign cartel office (legal assistance) to prepare hearing.

b.	Proving the infringement	
(i)	Is expert evidence admissible?	Yes. Also, expert evidence from other court proceedings will be admissible as expert evidence according to an Act for the modernisation of the Judiciary.
(ii)	To what extent, if any, is cross examination permissible?	§ 396 ZPO: Judge examines witness first. Afterwards parties are entitled to ask supplementary questions.
(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?	Court decisions: No stare decisis, no binding precedents. Existence of administrative acts is a fact, but the content is not binding. (Draft 7 th amendment: 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)
c.	Proving damage	
(i)	Are there any specific rules for evidence of damage?	§ 287 ZPO: Damages can be estimated – facts provided as a basis of estimation need to be proven. § 252 BGB: Lost profits are estimated on the basis of profits probably made in case of usual business. A partial judgement on all aspects except the quantum is possible as well as a declaratory judgement in the event that amount of damage cannot be specified yet.
d.	Proving causation	
(i)	Which level of causation must be proven: direct or indirect?	Indirect causation is sometimes included. Without the cause in question, the effect would have been non-existent or different, the causation must have been adequate and the damages must derive from the sphere of dangers whose prevention was the purpose of the infringed norm.
F. Grounds of justification		
(i)	Are there grounds of justification?	<ul style="list-style-type: none"> • Defence against illegal offence. • Protection of legitimate interest. • (force majeure, act of state: no justifications, but exclude damages for other reasons)
(ii)	Is the 'passing on' defence taken into account?	Yes, by some courts, but under discussion.
(iii)	Are 'indirect purchaser' issues taken into account?	Differentiation between direct and indirect purchasers does not exist. Statute asks whether the plaintiff is a person whose protection was purpose of the statute.
(iv)	Is it relevant that plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement?	Contributory negligence: Yes. Benefits from infringements: Yes, but under discussion. Mitigation for non-containment: Yes, if negligent.
G. Damages		
a.	Calculation of damages	
(i)	What economic or other models are used by courts to calculate damage?	Estimation on the basis of all available information.
(ii)	Are damages awarded for injury suffered on the national territory or more widely (EC or	Damages awarded more widely, no restrictions to EC. Even if the infringement has no effect on German market, courts may award damages based on foreign

	otherwise)?	cartel law regulations.
(iii)	Are ex ante (time of injury) or ex post (time of trial) estimates used?	All information available during trial.
(iv)	Are there maximum limits to damages?	No.
(v)	Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?	Injury suffered by plaintiff. (Draft 7 th amendment: Court may take into account infringer's profits when assessing damage)
(vi)	Are punitive or exemplary damages available?	No.
(vii)	Are fines imposed by competition authorities taken into account when settling damages?	No. But damages are taken into account when confiscating profits, whether on the occasion of calculating fines or in case of stand-alone confiscation.
b.	Interest	
(i)	Is interest awarded from the date the infringement occurred, the date of the judgement or the date of a decision by a competition authority?	As part of damage: Any interests paid or not earned from the date of infringement. Statutory interest: From the date of a warning letter or of the filing of claim.
(ii)	What are the criteria to determine the levels of interest?	Statutory interest: 5 per cent. above the ECB base rate (Since 1 July 2004: 1.13 per cent.). Upon proof of related loss: Any higher amount of interest.
(iii)	Is compound interest included?	As part of damage suffered: Yes. As statutory interest: No.
H.	Timing	
(i)	What is the time limit in which to institute proceedings?	3 years from knowledge. Without knowledge: the shorter of 10 years from the date the damage arises or 30 years from the date of infringement.
(ii)	On average, how long do proceedings take?	Competition related proceedings might take several years for being complicated. Average duration of First Instance proceedings in Germany: 6.9 months (in 2000).
(iii)	Is it possible to accelerate proceedings?	Preliminary proceedings exist in the form of preliminary injunctive relief and a special form of proceedings based on documentary evidence only.
(iv)	How many judges sit in actions for damages cases?	Commercial panels (District Court): 1 professional + 2 lay judges (businessmen). Civil panels (District Court), Higher Regional Courts: 3 professionals Federal Court of Justice: 5 professionals
(v)	How transparent is the procedure?	Public hearings. No confidential correspondence. Publication of judgements possible if made anonymous.
I.	Legal costs	
(i)	Are Court fees paid up front?	Yes, by the plaintiff (with a right to reimbursement if the claim is successful).
(ii)	Who bears the legal costs?	The losing party. If no party succeeds completely: Costs are compensated or allocated.
(iii)	Are contingency fees permissible?	No.
(iv)	Are contingency fees generally available for private enforcement of EC competition law?	No.

(v) Can the plaintiff/defendant recover costs?	Yes. (7 th draft amendment: If the value of the claim is reduced with regard to one party because of its economic inability to bear the full costs of proceedings, the recovery claim of the other party will be reduced)
(vi) What are the different types of litigation costs?	Court costs (fees and disbursements) and out-of-court costs (lawyers' fees and disbursements and parties' costs)
(vii) Are there any national rules for taxation of costs?	Yes (Exact rules). Special procedure for taxation beyond litigation.
(viii) Is any form of legal aid insurance available?	Legal aid insurance in Germany does not cover costs relating to cartel law. (7 th draft amendment: The value of the claim may be reduced with effect on one party because of its economic inability to bear the full costs of proceedings)
(ix) What are the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law with a value in dispute of EUR 1 million?	<ul style="list-style-type: none"> • Litigation risk, first instance = up to EUR 45,000. • Litigation risk, second instance = up to EUR 60,000. (Costs for expert opinions are not included)
J. General	
(i) Are some of the answers to the previous questions specific to the private enforcement of competition rules?	No. (Draft 7 th amendment: Yes)
(ii) If the answer to the previous question is yes, in what way do they differ from general private enforcement rules?	(Draft 7 th amendment: Fewer barriers than private enforcement of rights in general, greater flexibility as to remedies)
(iii) EC competition rules are regarded as being of public policy. Does that influence any answers given?	It entails a rather restrictive interpretation of the concept of protective purpose. (Draft 7 th amendment: competition law is intended to protect other market participants even if infringement is not specifically directed against them.)
(iv) Are there any differences according to whether defendant is public authority or natural or legal person?	Differences exist as far as a public authority performs "genuinely governmental or administrative acts": This activity is evaluated according to public law only.
(v) What are the key differences, if any, from region to region <u>within</u> the Member State as regards damages actions for breach of national or EC competition rules?	Legal basis is uniform within Germany. Only interpretation might differ.
(vi) Is there any interaction between leniency programmes and actions for claims for damages under competition rules?	No statutory regulation. Presumably no effects on substantive rights (e.g. calculation of damages). Open questions concerning procedural effects: E.g. whether submission of the documents produced within the leniency program can be ordered by the civil court.
(vii) Please mention any other major issues relevant to the private enforcement of EC competition law in your jurisdiction	National competition law applies to all restraints on competition which have effects on German national territory.
(viii) 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	To our knowledge, damages were awarded in nine cases, six of which were declaratory decisions stating the defendant's obligation to pay damages. One award of monetary damages was based, inter alia, on the infringement of EC competition rules.

Section III: Means to facilitate private enforcement of Articles 81 and 82 EC	
(i) Which of the above elements of claims for damages as applied in each Member State and accession country provide scope for facilitating the private enforcement of Articles 81 and 82 EC?	The forthcoming changes by the draft 7 th amendment affect nearly all relevant elements of claims.
(ii) How could that be achieved?	<ul style="list-style-type: none"> • Making use of possibilities to base claims on the law of unfair competition. • Amendments to statutory law, as intended by the German government. • Facilitating the proof of infringement. • Increased transparency through regular publication of judgements. • Explicit statutory provision allowing claims of indirect purchasers, including consumers. • Right to claim damages for consumers' organisations. • Right to be awarded and to keep the infringer's profit for representative and consumers' organisations. • Double damages as a means of deterring potential infringers of competition law.
(iii) Are alternative means of dispute resolution available?	Yes, arbitration, mediation and expert determination.
(iv) If so, to what extent are they successful?	Cannot be estimated. Arbitration is generally becoming more popular in commercial matters.