## DEVELOPMENTS

# A New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law against Restraints of Competition

*By Wolfgang Wurmnest*[*]

### A. Introduction

On July 1st, 2005, the 7th Amendment to the Law against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* – GWB)[1] became effective. The modernization of the GWB was indispensable in bringing German law in line with Regulation (EC) No. 1/2003.[2] Regulation 1/2003 decentralized the enforcement of EC competition rules and aimed to pave the way for effective private antitrust

[*] Dr. iur, LL.M. (Berkeley), Senior Research Fellow at the Max Planck Institute for Foreign Private Law and Private International Law and Lecturer at the University of Hamburg, Germany.

[1] *Siebtes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen*, Bundesgesetzblatt (BGBl.) 2005, Part I, 1954-1969. Note: This article uses the notions of competition and antitrust law synonymously.

[2] 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 Treaty, O.J. 2003 L 1/1. On the changes brought by Regulation 1/2003, see Céline Gauer, Dorothe Dalheimer, Lars Kjolbye & Eddy de Smijter, *Regulation 1/2003: A Modernised Application of EC Competition Rules*, Competition Policy Newsletter, Spring 2003, 3; Silke Hossenfelder & Martin Lutz, *Die neue Durchführungsverordnung zu den Artikeln 81 und 82 EG-Vertrag*, 53 Wirtschaft und Wettbewerb (WuW) 118 (2003); Karsten Schmidt, *Privatisierung des Europakartellrechts – Aufgaben, Verantwortung und Chancen der Privatrechtspraxis nach der VO Nr. 1/2003*, 12 Zeitschrift für Europäisches Privatrecht (ZEuP) 881 (2004); Felix Müller, *The New Council Regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition*, 5 German Law Journal 722 (2004); see further Ernst-Joachim Mestmäcker, *The EC Commissions's Modernization of Competition Policy: A Challenge to the Community's Constitutional Order*, 1 European Business Organization Law Review (EBOR) 401 (2000); Wernhard Möschel, *Systemwechsel im Europäischen Wettbewerbsrecht?*, 55 Juristenzeitung (JZ) 61 (2000); Katherine Holmes, *The EC White Paper on Modernisation*, 23 World Competition 51 (2000); Jürgen Basedow, *Who will Protect Competition in Europe? From Central Enforcement to Authority Networks and Private Litigation*, 2 EBOR 443 (2001); Suzanne A. Kingston, *A "New Division of Responsibilities" in the Proposed Regulation to Modernise the Rules Implementing Articles 81 and 82 EC? A Warning Call*, 22 European Competition Law Review (ECLR) 340 (2001).

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litigation in Europe.[3] Thus far, private parties have invoked Art. 81 and 82 EC Treaty primarily as shield by arguing that certain agreements were void. Only in very few instances were those rules used as sword to sue infringers for injunctive relief or damages.[4] To stimulate private enforcement, Regulation 1/2003 *inter alia* abolished the European Commission's exclusive power to exempt practices which are prohibited pursuant to Art. 81 (1) EC Treaty and entitled national competition authorities and courts to apply Art. 81 (3) EC Treaty. Moreover, it empowered the European Commission to make written submissions in antitrust cases pending before national courts.[5] In line with the new European approach, the German legislature has overhauled the hitherto existing rules of German competition law considerably. This article will briefly describe the general changes brought by the reform and take a closer look at the amended rules relating to private antitrust litigation before German courts.

## B. Background

### *I. The Road to the 7th Amendment to the GWB*

The tasks to be addressed by the German legislature after the modernization of EC Competition law were quite substantial. Furthermore, swift action was needed as

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[3] The increased role of private antitrust enforcement is very much disputed in Europe, see, e.g., Wouter P.J. Wils, *Should Private Antitrust Enforcement Be Encouraged in Europe?*, 26 WORLD COMPETITION 473 (2003) (arguing that public antitrust enforcement is superior to private enforcement and that there is even no need for a supplementary role for private enforcement, as the adequate level of sanctions and the adequate number and variety of prosecutions can be ensured more effectively and at lower cost through public enforcement). But see Clifford A. Jones, *Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check*, 27 WORLD COMPETITION 13 (2004) (arguing that private enforcement has great value as a supplement to public enforcement and as the primary means of compensating victims of infringements whose interests are to be protected by national courts).

[4] The Ashurst Study, which was commissioned by the European Commission, counted only around sixty judged cases in damages actions in the last forty years (12 on the basis of EC law, around 32 on the basis of national law and 6 on the basis of both). Of these judgments, 28 have so far resulted in an award being made. The study is available at: http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/index_en.html. An analysis of the major obstacles to private antitrust law enforcement in Germany is given by ROLF HEMPEL, PRIVATER RECHTSSCHUTZ IM KARTELLRECHT – EINE RECHTSVERGLEICHENDE ANALYSE 83-87 (2002); Jürgen Basedow, *Private Enforcement of Article 81 EC: A German View*, in EUROPEAN COMPETITION LAW ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW 137, 140-145 (CLAUS DIETER EHLERMANN & ISABELA ATANASIU EDS., 2003); Wolfgang Wurmnest, *Private Durchsetzung des EG-Kartellrechts nach der Reform der VO Nr. 17*, in EUROPÄISCHES WETTBEWERBSRECHT IM UMBRUCH 213, 223-232 (PETER BEHRENS, ELLEN BRAUN & CARSTEN NOWAK EDS., 2004); Michael Buch, *Private Antitrust Litigation in Germany*, THE EUROPEAN ANTITRUST REVIEW, 145-147 (2005).

[5] For an analysis of the new rules aimed at bolstering private antitrust law enforcement, see Wolfgang Wurmnest, *supra* note 4, at 224-237.

Regulation 1/2003 became already effective on May 15th, 2004. A first draft proposal, elaborated under the auspices of the Ministry of Economy and Labor, was released in Fall 2003 (so-called *Referentenentwurf*).[6] It was amended by the German Government which seized the opportunity to propose a loosening of the German rules of mergers to allow increased consolidation in the newspaper market. The bill submitted to the German Parliament (so-called *Regierungsentwurf*)[7] introduced an exception for mergers between publishers. According to the Government's proposal, a merger between two or more publishers could obtain clearance even though it would create a dominant position – as long as certain precautions were undertaken to protect the merged newspapers' editorial independence. This de facto exemption from the tight German merger scrutiny encountered strong opposition[8] and was among the main reasons why the *Bundesrat* vetoed the bill in July 2004.[9] Although the Parliament's Committee on Economics and Labor later softened the exceptions for press mergers,[10] the 7th Amendment could only pass after the Mediation Committee *(Vermittlungsausschuss)*[11] had come to an agreement to withdraw any privileges for press mergers.[12]

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[6] The draft was not published but only circulated among interested parties and associations. On the draft's major proposals, see Rainer Bechtold, *Grundlegende Umgestaltung des Kartellrechts: Zum Referentenentwurf der 7. GWB-Novelle*, 57 DER BETRIEB (DB) 235 (2004); Harald Kahlenberg & Christian Haellmigk, *Referentenentwurf der 7. GWB-Novelle: Tief greifende Änderungen des deutschen Kartellrechts*, 59 BETRIEBS-BERATER (BB) 389 (2004). For a critical appraisal of the draft's rules relating to private antitrust litigation, see F. Wenzel Bulst, *Private Kartellrechtsdurchsetzung nach der 7. GWB-Novelle: Unbeabsichtigte Rechtsschutzbeschränkungen durch die Hintertür?*, 15 EUROPÄISCHES WIRTSCHAFTS- UND STEUERRECHT (EWS) 62.

[7] DRUCKSACHEN DES DEUTSCHEN BUNDESTAGES (BT-Drs.) No. 15/3640.

[8] See, e.g., MONOPOLKOMMISSION, DIE PRESSEFUSIONSKONTROLLE IN DER SIEBTEN GWB-NOVELLE 75 (2004); Wernhard Möschel, *Reform des Pressekartellrechts?*, 59 JZ 1060 (2004).

[9] See STELLUNGNAHME DES BUNDESRATES, BT-Drs. No. 15/3640, 79-80.

[10] See BESCHLUSSEMPFEHLUNG UND BERICHT DES AUSSCHUSSES FÜR WIRTSCHAFT UND ARBEIT, BT-Drs. No. 15/5049.

[11] The Mediation Committee, comprised of members of the *Bundesrat* and the *Bundestag*, is a special mediation procedure in order to find a consensus between the two German chambers.

[12] See BT-Drs. No. 15/5735.

*II. Key Changes brought by the Reform*

The 7th Amendment to the GWB brought far reaching changes.[13] It essentially aligned German substantive antitrust law with Art. 81 EC Treaty. This step was indispensable as Art. 3 Regulation 1/2003 enlarged the scope of application of Art. 81 EC Treaty considerably[14]. It states that Art. 81 EC Treaty shall prevail over national competition law in all situations where the conduct is capable of affecting trade between member states. In other words, economic activity which is legal under Art. 81 EC Treaty cannot be restricted by national law as it was possible in certain instances prior to the modernization of EC law. After Reg. 1/2003 became effective, the application of national competition law, if different from EC law, was in consequence confined to activities with local or, at best, regional effects. As the European Court of Justice (ECJ) construes the concept of effects on the trade between EC member states very broadly,[15] agreements between larger undertakings regularly affect intra-community trade. This leaves little room for the application of different standards under German law. In addition, the assessment whether an activity has purely local effect (and is consequently governed by national competition rules) or does affect trade between member states (and is consequently governed by EC law) is rather difficult. The German legislature thus opted to align the German rules on cartels with EC law and abandoned the hitherto existing differentiation between various horizontal and vertical restraints of competition.[16] The alignment shall ensure that agreements or concerted practices are subject to identical control standards, irrespectively whether their effects are of local or European dimensions.

In contrast, German rules on the control of market dominance and abusive practices (§§ 19-22 GWB) were only slightly modified as Art. 3 (2) Regulation 1/2003 allowed EC member states to apply stricter national rules aimed at prohibiting or sanctioning unilateral conduct engaged in by undertakings. The minor changes introduced by the new GWB clarified for example that the relevant geographical

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[13] For a first assessment of the new law, see Harald Kahlenberg & Christian Haellmigk, *Neues Deutsches Kartellgesetz*, 60 BB 1509 (2005).

[14] For an overview of the relationship of EC Competition law and national competition law after Regulation 1/2003 became effective, see ERNST-JOACHIM MESTMÄCKER & HEIKE SCHWEITZER, EUROPÄISCHES WETTBEWERBSRECHT 148-151 (2nd ed., 2004).

[15] Case 56/65 *Société Technique Minière v. Maschinenbau Ulm* [1966] ECR 281, 303.

[16] § 1 GWB (old version) which applied only to restrictions of competition between competitors became essentially identical to Art. 81 (1) EC Treaty. The existing exemption provisions (§§ 2 to 7 GWB) were almost completely replaced by a clause that is identical to Art. 81 (3) EC Treaty.

market to which the GWB applies when assessing market dominance is not limited by the territorial boundaries of the Federal Republic of Germany.[17]

In compliance with Regulation 1/2003,[18] the new law also designates German authorities as responsible for the application of Art. 81 and 82 EC Treaty. These authorities are the Federal Cartel Office (*Bundeskartellamt*) and the highest administrative authorities of the German *Länder* (*Oberste Landesbehörden*). The 7th Amendment to the GWB further introduces novel instruments for enforcement authorities, such as the possibility to impose interim measures,[19] to adopt commitment decisions,[20] or to decide not to intervene in a given case.[21] As Regulation 1/2003 abolished the notification and exemption system for the application of Art. 81 (3) EC Treaty, the German legislature decided to abrogate similar national notification procedures.[22] Further, the new GWB contains rules for the participation of German competition authorities in the European Competition Network[23] and empowers the Federal Cartel Office to impose increased fines (up to € 1 million).[24]

### C. Private Actions to remedy Antitrust Injury

#### *I. European Framework*

Both Art. 81 and 82 EC Treaty have direct effects in relations between individuals and create rights which have to be safeguarded by national courts.[25] However, neither the Regulation 1/2003 nor the EC Treaty contains an explicit provision concerning the availability of damages consequent to a breach of these competition law provisions. It is a general principle of EC law, that in absence of Community rules, it is for the domestic legal system of each member state to provide for rules to

[17] Cf. § 19 (2) GWB.

[18] Cf. Art. 35 Regulation 1/2003.

[19] Cf. § 32a GWB.

[20] Cf. § 32b GWB.

[21] Cf. § 32c GWB.

[22] Cf. § 10 GWB (old version).

[23] Cf. § 50a-50c GWB.

[24] Cf. § 81 (4) GWB.

[25] See Case 127/73 *BRT v. SABAM* [1974] ECR 51, 62.

safeguard the rights which Community law confers upon individuals.[26] Thus, actions for damages due to breach of EC competition law are essentially governed by national (tort) law.[27] Those national remedies for the protection of Community rights, however, must comply with two basic principles of EC law: firstly, they must be no less favorable than those governing similar domestic actions (principle of equivalence), and, secondly, they shall not render the exercise of rights granted by Community law practically impossible or excessively difficult (principle of effectiveness).[28]

Applying these principles, the ECJ recently ruled in *Courage v. Crehan* that the full effectiveness of Art. 81 EC Treaty and, in particular, the practical effect of the cartel prohibition laid down in Art. 81 (1) EC Treaty would be at risk if it were not open to "any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition".[29] Given the current pattern of private antitrust litigation, *Courage v. Crehan* is not a typical private antitrust enforcement case, as it dealt with a counterclaim for damages directed against a claim for breach of contract. However, the ECJ did not confine its verdict to such a fact pattern. Rather, the Court stated generally that any individual can rely on a breach of the EC competition rules even "where he is a party to a contract that is liable to restrict or distort competition"[30] as "actions for damages before the

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[26] See, e.g., PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW - TEXT CASES, AND MATERIALS 230-273 (3rd ed., 2003); RICHARD WISH, COMPETITION LAW 298 (5th ed., 2003).

[27] See ERNST-JOACHIM MESTMÄCKER & HEIKE SCHWEITZER, *supra* note 14, at 512-513; Wolfgang Wurmnest, *Das Gemeinschaftsdeliktsrecht in der aktuellen Rechtsprechung der Gemeinschaftsgerichte* (2001-2003), 1 ZEITSCHRIFT FÜR GEMEINSCHAFTSPRIVATRECHT (GPR), 129, 134-135 (2003/2004). But see Advocate General van Gerven's opinion in case C-128/92 *Banks v. British Coal Corporation* [1994] ECR I-1209, 1243-1260 and Carsten Nowak, *Anmerkung zur* Courage-*Entscheidung*, 12 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EuZW) 717, 718 (2001) (both argue that EC law provides the basis for damages claims against EC competition law infringers).

[28] See, e.g., Case 68/88 *Kommission v. Greece* [1989] ECR 2965, 2985; Case 382/92 *Kommission v. United Kingdom* [1994] ECR I-2435, 2475; Case C-186/98 *Nunes and de Matos* [1999] ECR I-4883, 4894.

[29] Case C-453/99 *Courage v. Crehan* [2001] ECR I-6297, 6323. On this judgment see Assimakis Komninos, *New Prospects for Private Enforcement of EC Competition Law: Courage v. Crehan and the Community Right to Damages*, 39 COMMON MARKET LAW REVIEW (CMLRev.) 447 (2002); Tobias Lettl, *Der Schadensersatzanspruch gemäß § 823 Abs. 2 BGB i.V.m. Art. 81 Abs. 1 EG*, 167 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT (ZHR) 473 (2003); Wolfgang Wurmnest, *Zivilrechtliche Ausgleichsansprüche von Kartellbeteiligten bei Verstößen gegen das EG-Kartellverbot*, 49 RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW) 896 (2003); Gerald Mäsch, *Private Ansprüche bei Verstößen gegen das europäische Kartellverbot – „Courage" und die Folgen*, 38 EUROPARECHT (EuR) 825 (2003); Hartmut Weyer, *Schadensersatzansprüche gegen Private kraft Gemeinschaftsrecht*, 11 ZEUP 318 (2003); see also Giorgio Afferni & F. Wenzel Bulst, *Kartellrechtliche Schadensersatzansprüche von Verbrauchern*, 13 ZEUP 143, 156-161 (2005).

[30] Case C-453/99 *Courage v. Crehan* [2001] ECR I-6297, 6323.

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national courts can make a significant contribution to the maintenance of effective competition in the [European] Community".[31] According to Advocate General *Mischo* in the *Courage*-case, those parties typically protected by the cartel prohibition laid down in Art. 81 (1) EC Treaty are consumers and competitors.[32]

*II. German Law prior to the Reform*

Under German law, § 823 (2) *Bürgerliches Gesetzbuch* (German Civil Code - BGB) in conjunction with Art. 81 or 82 EC Treaty provided for a remedy for damages for breach of EC competition law. The parallel provision for infringements of German competition law was § 33 GWB. Both provisions limited standing to sue to claimants falling within the scope of protection of the infringed competition law rule (*Schutzgesetzprinzip*). There was uncertainty as to which parties should be protected by Art. 81 and 82 EC law and its German counterparts respectively. In older rulings related to German competition law, the German Federal Court of Justice (*Bundesgerichtshof*) held that at least the parties "at whom the illegal activities were specifically directed"[33] must be regarded as protected. This reasoning caused considerable uncertainty as to which parties are entitled to recover from cartel members. Some authors argued that in typical quota or price fixing conspiracies, direct purchasers have no claims against the cartel members as the conspiring suppliers do not specifically direct their cartel against purchasers but rather they aim at generally raising prices in a given market.[34] The situation is different, for example, in bid rigging conspiracies, which are targeted directly at a purchaser that wants to acquire goods or services by soliciting competing bids. Accordingly, with regard to those conspiracies it was undisputed that harmed purchasers were entitled to claim damages from the conspirators.[35]

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[31] *Id*.

[32] See Advocate General Mischo's opinion, *id.*, at § 6306.

[33] 64 Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 232, 237; 86 BGHZ 324, 330.

[34] See, e.g., Thomas Lübbig, *Die zivilprozessuale Durchsetzung etwaiger Schadensersatzansprüche durch die Abnehmer eines kartellbefangenen Produkts*, 20 WETTBEWERB IN RECHT UND PRAXIS (WRP) 1254, 1255-1256 (2004); Michael Buch, *supra* note 4, at 145. It has to be noted that the majority view rejected this restrictive interpretation and argued that direct purchasers are entitled to recover damages, see, e.g., Karsten Schmidt, in EG-WETTBEWERBSRECHT, KOMMENTAR, VOL. I Art. 85 Abs. 2 no. 79 (ULRICH IMMENGA & ERNST-JOACHIM MESTMÄCKER EDS., 1997); VOLKER EMMERICH, KARTELLRECHT 58 (9th ed., 2001); Wulf-Henning Roth, in FRANKFURTER KOMMENTAR ZUM KARTELLRECHT § 33 GWB 1999 no. 49 (HELMUT GLASSEN, HELMUTH V. HAHN, HANS-CHRISTIAN KERSTEN & HARALD RIEGER EDS., loose-leaf, 2001).

[35] See only VOLKER EMMERICH, *supra* note 34, at 58-59.

It has to be noted that in the aftermath of the abovementioned decisions by the *Bundesgerichtshof*, some courts did not apply the restrictive "specifically directed" criterion,[36] and the *Oberlandesgericht Düsseldorf* rejected it outwardly.[37] However, even after the ECJ's *Courage* ruling, many German courts vigorously argued that purchasers having bought goods or services at inflated prices have no right to claim damages from members of a price or quota fixing cartel.[38] Consequently, most of the actions for damages against members of the vitamin cartels – described as one of the most damaging series of price fixing conspiracies ever investigated by the European Commission[39] – were dismissed.[40] Neither the *Bundesgerichtshof* nor the ECJ could step in to clarify the issue. The Federal Court of Justice was not seized with the matter as lodged appeals were withdrawn after the parties reached out of court settlements and the ECJ could not act because none of the German courts was willing to initiate a preliminary ruling procedure under Art. 234 EC Treaty.

*III. The revised § 33 GWB*

The reform considerably amended the provisions of the GWB which related to claims for damages. The new § 33 GWB addresses claims for breach of German and European competition law and further abandons the disputed *Schutzgesetzprinzip*.

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[36] See, e.g., *Oberlandesgericht* (OLG) (Higher Regional Court of Appeal) Stuttgart, WuW/E DE-R 161, 162 (1998).

[37] See, e.g., OLG Düsseldorf, WuW/E DE-R 143, 146 (1998).

[38] See, e.g., *Landgericht* (Regional Court) (LG) Berlin, case 102 O 155/02 Kart (not published), cf. on this ruling SILKE HOSSENFELDER, WILKO TÖLLNER & KONRAD OST, KARTELLRECHTSPRAXIS UND KARTELLRECHTSPRECHUNG 2003/2004, No. 101 (19th ed., 2004); LG Mannheim, 106 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT (GRUR) 182 (2004) with a critical case note by Helmut Köhler, *Kartellverbot und Schadensersatz*, 106 GRUR 99 (2004). The OLG Karlsruhe endorsed the legal reasoning of the LG Mannheim, see OLG Karlsruhe, 57 NJW 2243 (2004) with a critical case note by F. Wenzel Bulst, *Private Kartellrechtsdurchsetzung durch die Marktgegenseite – deutsche Gerichte auf Kollisionskurs zum EuGH*, 57 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2201 (2004).

[39] The European Commission described the vitamin cartels as "the most damaging series of cartels the Commission has ever investigated." See Press Release, European Commission, *Commission Imposes Fines on Vitamin Cartels,* IP/01/1625, Nov. 21, 2001, available at: http://europa.eu.int/rapid/. See also Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST LAW JOURNAL 711 (2001), at 712 (describing this cartel as "probably the most economically damaging cartel ever prosecuted under U.S. antitrust law").

[40] See LG Mannheim, 106 GRUR 182 (2004); OLG Karlsruhe, 57 NJW 2243 (2004); LG Mainz, 19 NEUE JURISTISCHE WOCHENSCHRIFT-RECHTSPRECHUNGSREPORT (NJW-RR) 478 (2004). But see LG Dortmund, 14 EWS 434 (2004) (awarding damages to direct purchasers of cartelised vitamin products). On this case, see F. Wenzel Bulst, *Internationale Zuständigkeit, anwendbares Recht und Schadensberechnung im Kartelldeliktsrecht*, 14 EWS 403 (2004).

*1. From protected to affected Parties*

The new GWB employs an 'affected parties' test to limit the circle of potential plaintiffs. The revised § 33 (1) GWB states that "any affected party (*Betroffener*) may demand removal (*Beseitigung*) or injunctive relief (*Unterlassung*) from the party having infringed provisions of the GWB, Art. 81 or 82 EC Treaty, or an injunction of the cartel authority". § 33 (1) GWB defines affected party as "competitor (*Mitbewerber*) or other market participant (*sonstiger Marktbeteiligter*)" impaired by the competition law infringement.[41] § 33 (3) GWB further provides a remedy for damages in case the tortfeasor acted intentionally or negligently.

The scope of the novel affected parties test is not entirely clear. The *Regierungsentwurf* aimed at upholding a modified *Schutzgesetz*-approach by clarifying that Art. 81 and 82 EC Treaty shall also protect such market participants that are not directly targeted by the illegal activity.[42] Yet, this adjustment left open whether in cases of horizontal cartels also indirect purchasers, e.g. persons having purchased goods or services at inflated prices in downstream markets, shall have claims for damages against the suppliers which formed the cartel.[43] Furthermore, the aforementioned hostility of the German courts to allow for damages claims under the *Schutzgesetz*-approach finally tipped the scales towards a more radical change of § 33 GWB.

As most of the lawsuits concerning the vitamins cartel were dismissed during the parliamentary debates, the Mediation Committee decided to re-introduce the affected parties test favored in the original *Referentenentwurf*, at least in part. The newly worded § 33 GWB only refers to affected parties in paragraph one, which addresses claims for injunctive relief, but not in paragraph three, which lays down the prerequisites regarding actions for damages. The new § 33 (3) GWB merely states that any person or undertaking "intentionally committing a breach according to [§ 33 (1) GWB] is liable for damages resulting thereof".[44] This incoherence can be explained with the hastily conducted negotiations in the Mediation Committee. There can be no doubt that the same test standard to limit the circle of potential

[41] § 33 (1) sentence 3 GWB.

[42] BT-Drs. No. 15/3640, 10-11 (§ 33 (1) GWB).

[43] See on the one hand F. Wenzel Bulst, *supra* note 38, at 2202 (suggesting that the draft may be read as giving indirect purchasers a claim for damages); Marc Schütt, *Individualrechtsschutz nach der 7. GWB-Novelle*, 54 WuW 1124, 1129 (2004) (noting that the draft may be interpreted as allowing for indirect purchaser claims); but see on the other hand Thomas Lübbig, *supra* note 34, at 1259 (reading the draft as excluding claims for damages brought by consumers).

[44] Cf. § 33 (3) GWB.

claimants must apply for both types of action, i.e. for injunctive relief under § 33 (1) GWB and for damages under § 33 (3) GWB.

The German legislature seemed to be inspired by the Act Against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb* - UWG) when incorporating the affected parties test in the GWB.[45] § 2 (1) no. 2 UWG defines "market participants" (the legal term also used to define an affected party in § 33 (1) GWB) so as to include consumers and businesses that have no direct relationship to the party infringing upon fair competition. Therefore, one may infer that, under the novel affected parties test, indirect purchasers are also entitled to recover from cartel members that conspired to fix prices or quotas. As result, the amended GWB makes it easier to substantiate private damages claims in German courts as it is clear that the circle of potential claimants in price or quota fixing cartels encompasses direct and indirect purchasers.

It is however very questionable whether indirect purchaser-actions will ever play a major role in antitrust enforcement before German courts. Unlike U.S. law, German procedural law does not provide for class actions or discovery proceedings. Therefore, each indirect purchaser must substantiate and prove the damage sustained. It goes without saying that it is a very difficult task for a single consumer or even a group of consumers to specify the amount of overcharge incurred in downstream sales. As shown in the vitamins case, this task will become nearly impossible when the goods or services sold by the cartel were used by downstream markets to manufacture new products in which the original product only constitutes an insignificant element. Moreover, when the cartel covers large parts of the global market and endures over a long time it becomes more difficult to calculate the hypothetical market price of a given product or service as there is no market under competitive conditions. It remains to be seen whether German courts will make ample reference to § 287 of the German Civil Procedure Code (*Zivilprozessordnung* – ZPO) which allows to estimate the amount of compensation due.

*2. 'Passing on' Defense*

A much debated issue was whether the legislature should adopt special rules relating to the law of damages and to incorporate a provision on the 'passing on' defense in the GWB. It has to be noted that the law of damages is laid down in the

[45] For an overview about major changes brought by the recent UWG reform in 2004, see Manuela Finger & Sandra Schmieder, *The New Law Against Unfair Competition: An Assessment*, 6 GERMAN LAW JOURNAL 201 (2004).

BGB[46] which sets forth the general rule that a victim is entitled to recover its whole loss (*restitutio in integrum*).[47] In cases of pecuniary loss courts assess the amount of damages by applying the so-called *Differenzhypothese*, an arithmetical comparison between the financial position after the harmful event and the financial situation which would have existed had the harmful event not occurred. It has to be noted that the *Bundesgerichtshof* has recognized that the *Differenzhypothese* is not merely a value-neutral computation but also includes some normative appraisal.[48] Thus, if the victim has not only been damaged by the harmful act but has also received benefits from some independent source, the question arises whether these benefits may be offset against the losses (so-called *Vorteilsausgleichung*).[49]

Against this background it was discussed whether defendants are prevented from invoking the 'passing on' defense as it is the case in the U.S. due to the Supreme Court decision in *Hanover Shoe*.[50] The need to address the 'passing on' issue in the new GWB became apparent when the *Landgericht Mannheim* ruled that cartel members are not liable towards direct purchasers if plaintiffs had passed on the higher prices towards downstream customers.[51] The court argued that the calculation of damages cannot be based on a mere comparison between the inflated purchase price and the prices that would have been paid if there would not have been a conspiracy.[52] The computation must rather include all profits obtained in a resale or by processing the good.[53] Therefore, if the plaintiffs had passed on the higher prices to their clients, they can not seek compensation from the conspirators.[54] This view was endorsed by the *Oberlandesgericht Karlsruhe* which further presumed that direct purchasers will regularly be able to pass the inflated prices on to downstream purchasers.[55] As these judgments were rendered during

[46] Cf. §§ 249-254 BGB.

[47] Cf. § 249 BGB.

[48] BGH, 31 VERSICHERUNGSRECHT (VersR) 480 (1980); 98 BGHZ 212, 218. See also WALTER VAN GERVEN, JEREMY LEVER & PIERRE LAROUCHE, TORT LAW 883 (2000).

[49] See on the complex case law Gottfried Schiemann, in J. V. STAUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN § 249 no. 132-177 (2005).

[50] *Hanover Shoe & Co v. United Shoe Machinery Corporation,* 392 US 481 (1968).

[51] LG Mannheim, 106 GRUR 182 (2004).

[52] *Id*., at 184.

[53] *Id*.

[54] *Id*.

[55] OLG Karlsruhe, 57 NJW 2243, 2244 (2004).

the parliamentary debates, it was impossible to uphold the Government's proposal which abstained from any regulatory intervention in the field of the law of damages and to leave the development of a workable set of rules to the courts.[56]

Although experts strongly argued in favor of incorporating a clear cut prohibition of the 'passing on' defense in the new GWB,[57] the Mediation Committee followed this suggestion only in part. The final version of § 33 (3) GWB which addresses the 'passing on' issue reads as follows: "If a good or a service was purchased at an inflated price, the existence of damage is not precluded because the good or the service was resold". Thus, under the new law, it can not be argued any longer that purchasers do not sustain damage when they resell the goods or services to customers in downstream markets.[58] Furthermore, it can be inferred from § 33 (3) GWB that in cases in which the inflated prices were not passed onto downstream purchasers, direct purchasers may recover damages calculated by reference to the amount of overcharge rather than their actual loss. But the new law does not categorically exclude the possibility to offset benefits resulting from the resale in cases in which direct purchasers manage to pass on the higher prices. Thus, the new GWB gives German courts some leeway to take collateral benefits into account, provided an offset will be deemed equitable.

*3. Prejudgment Interests*

The new GWB introduces rules of prejudgment interest very much in favor of the plaintiff. § 33 (3) GWB allows an injured party to recover interest on pecuniary debts from the time the damage occurred. The interest rate is calculated in accordance with §§ 288 and 289 BGB. According to § 288 (2) BGB, the rate of default interest for transactions involving businesses is 8% above the basic interest rate. § 289 BGB, however, expressly excludes compound interest as recoverable statutory interest. The basic interest rate, as defined in § 247 BGB, is regularly adjusted by the German *Bundesbank* in accordance with the most recent main refinancing operation of the European Central Bank. The basic interest rate currently stands at 1,17%[59], thus totaling the prejudgment interest rate to 9,17% per annum.

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[56] See BT-Drs. No. 15/3640, 54.

[57] See, e.g., statement of Professor Hellwig, Member of the German Monopolies Commission, in BT-Drs. No. 15/5049, 44. See also Norbert Reich, *The "Courage" Doctrine: Encouraging or Discouraging Compensation for Antitrust Injuries?*, 42 CMLRev. 35, 44-48 (2005) (arguing to reject on the one hand the 'passing on' defence, but limit on the other hand indirect purchaser claims, though without excluding them completely).

[58] This view was taken by certain authors, see Jürgen Beninca, *Schadensersatzansprüche von Kunden eines Kartells?*, 54 WuW 604, 607 (2004); Thomas Lübbig, *supra* note 34, at 1257.

[59] The current rates can be traced online at: www.bundesbank.de.

## D. Follow on Actions

The new GWB introduces procedural tools for the promotion of follow on actions,[60] i.e. actions filed by private plaintiffs subsequent to cartel convictions by public enforcement organs.

### *I. Binding Effect of Decisions issued by Enforcement Authorities*

§ 33 (4) GWB provides for final and definitive decisions issued either by German cartel authorities, the European Commission, enforcement authorities of other EC member states, or courts acting as competition authorities, to be binding upon German courts with regard to the existence of the infringement. The reference to decisions of the European Commission in § 33 (4) GWB is aimed at clarification only.[61] Regulation 1/2003 already prohibits national courts to rule against decisions of the European Commission when assessing the legality of agreements or practices with respect to Art. 81 or 82 EC Treaty.[62] With regard to decisions of German authorities, the GWB reform codified established court practice as prior to the GWB-reform, civil courts treated statements by authorities essentially as prima facie evidence.[63] However, as it was up to the judges to assess the evidence presented, there was the – rather theoretical – possibility for a civil court to reject the findings of competition authorities. After the amendment to the GWB, such a scenario is excluded, as the findings of competition authorities relating to the existence of a breach of competition rules are now binding for courts hearing private antitrust actions.

In contrast, the choice of the German legislature to also award the binding effect to decisions adopted by foreign authorities of EC member states is unprecedented. Thus far, there are no general rules in German law allowing for the recognition and enforcement of foreign administrative acts.[64] § 33 (4) GWB certainly is a first step in the correct direction. Nevertheless, the decision to opt for an unconditional

[60] For an overview see Rolf Hempel, *Private Follow-on Klagen im Kartellrecht*, 55 WuW 137 (2005).

[61] Cf. BT-Drs. No. 15/3640, 54.

[62] Cf. Art. 16 Regulation 1/2003.

[63] See ANDREAS ZUBER, DIE EG-KOMMISSION ALS AMICUS CURIAE 94-96 (2001).

[64] There are, however, very specific areas, in which Germany, based on EC legislation or bilateral agreements, recognizes foreign administrative acts, e.g. driving licences or university diplomas.

recognition of foreign decisions was rightly criticized for being too broad.[65] Critics emphasize that the new law does not limit the binding effect of administrative decisions to claims against parties addressed by the decision. Thus, even parties that either could not duly participate in the foreign administrative proceeding or are not addressed by the adopted decision (and therefore are usually barred from challenging it), cannot defend themselves against the alleged EC competition rules infringement before German courts. This is a clear violation of the right to be heard as enshrined in the German Constitution,[66] European Community law,[67] and in the European Convention on Human Rights.[68]

As the right to receive a fair hearing can be said to form the very central standard of justice, it is possible that German courts will interpret the binding effect in such cases very narrowly and allow for an exception to safeguard the defendant's right to be heard.

*II. Suspending Prescription Limitations*

The new GWB also introduces special legislation concerning the prescription of damages claims brought forward against competition law infringers in follow on actions. The new German law resembles the solution adopted under U.S. law[69] as it suspends the general prescription period. In German law, the general rules on prescription of claims are laid down in the BGB.[70] As basic rule, the debtor is entitled to refuse performance after the period of prescription has expired.[71] According to § 195 BGB, the regular period of prescription is three years. It starts upon the expiry of the year in which the claim has arisen,[72] i.e., in actions for damages under tort law, when the victim knew, or could have known, of the harmful event.

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[65] See, e.g., MONOPOLKOMMISSION, DAS ALLGEMEINE WETTBEWERBSRECHT IN DER SIEBTEN GWB-NOVELLE 31 (2004); Rolf Hempel, *supra* note 60, at 144.

[66] Cf. Art. 103 (2) Grundgesetz.

[67] See, e.g., HANNS-PETER NEHL, PRINCIPLES OF ADMINISTRATIVE PROCEDURE IN EC LAW, 70-99 (1999) with ample references.

[68] Cf. Art. 6 (1) of the European Convention of Human Rights.

[69] Cf. Sec. 5 of the Clayton Act.

[70] Cf. §§ 194-213 BGB.

[71] Cf. § 214 (1) BGB.

[72] Cf. § 199 (1) No. 1 BGB.

§ 33 (5) GWB provides for suspension of this general limitation period if a German cartel authority initiates an infringement proceeding. The same holds true whenever the European Commission or a cartel authority of another EC member state launches investigations for alleged breaches of Art. 81 or 82 EC Treaty. The suspension ends six month after the competition authority has made a final decision or has ended the investigation by other means.[73] This comfortable suspension allows for potential plaintiffs to await the outcome of public investigations, which might last for several years, before filing their actions for damages in German courts.

**E. The Role of Associations in Antitrust Enforcement**

The role of consumer associations in antitrust enforcement was particularly disputed during parliamentary debates. Prior to the reform, only certain associations for the promotion of commercial interests, such as the Chambers of Commerce, had standing to sue for injunctive relief. In practice, however, these associations hardly ever exercised their right to sue antitrust infringers in court. In an endeavor to strengthen the rights of consumers, the German Government proposed to extend standing to sue to special consumer associations.[74] More importantly, in case of an intentional breach of competition rules, both consumer associations and associations for the promotion of commercial interests should have the right to claim the infringing party's profits (*Vorteilsabschöpfung*). It has to be noted that the *Regierungsentwurf* did not entitle the associations to keep those profits which had to be transferred to the Federal Treasury after deduction of the legal fees incurred in the lawsuit.[75] It was thought that in cases where the competition rule infringement harmed many people, but where the injury sustained by a single person was of negligible quantum, the involvement of associations would create an effective remedy to deprive antitrust violators from their profits. The *Bundesrat*, however, rejected the entire concept of empowering consumer associations to handle antitrust enforcement. In consequence, during the negotiations in the Mediation Committee the rights for consumer associations were struck out of the bill in their entirety.

Therefore, under the amended GWB only associations for the promotion of commercial interests are entitled to sue for injunctive relief. Their rights were fortified by giving them the option to claim the wrongdoer's profits. It is not

[73] Cf. §§ 33 (5) GWB in conjunction with 204 (2) BGB.

[74] Cf. BT-Drs. No. 15/3640, 11 (§ 33 (2) GWB).

[75] Cf. BT-Drs. No. 15/3640, 11-12 (§ 34a (1) GWB).

difficult to predict that these associations will not play a major role in the future of private antitrust enforcement, bearing in mind that they practically did not exercise their right to sue for injunctive relief in the past. The newly created right to deprive the wrongdoer from his profits will also not lead to a rise of actions initiated by those associations. As this right is subsidiary to similar actions taken by the German competition authorities[76] which regularly exercise their right to claim the infringer's profits, there is little room for actions of associations. Even if cartel authorities abstain from retracting the infringer's profits, e.g., in cases in which profits are of a negligible quantum, it is very questionable whether a private association will step in. Given that they are under an obligation to transfer collected profits to the Federal Treasury, they have no proper economic incentive to sue.

## F. Conclusion

The revised GWB mirrors the clear message sent out by Regulation 1/2003 and strengthens private antitrust enforcement in Germany. The reform clarified the circle of potential claimants entitled to sue for injunctive relief or damages, introduced plaintiff friendly rules on prejudgment interests and procedural tools for the promotion of follow on actions. Yet, it would be far fetched to argue that the new GWB creates a similarly fertile ground for private antitrust litigation as existent in the U.S., given that German law does not provide for class actions, discovery rules, or treble damages awards.

This situation might be changed by forthcoming EC legislation. The European Commission has installed a think tank and plans to release a Green Paper on private enforcement in fall 2005. This Green Paper will set out a number of possible options to facilitate the decentralized enforcement of EC competition law.[77] It is not unlikely that the Commission will propose to introduce multiple damages as one option to boost private antitrust litigation.[78] Such an alignment of European law with U.S. law would certainly throw the doors of courthouses wide open for plaintiffs harmed by anticompetitive conduct. Yet, as all legal systems of the EC

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[76] *Id*.

[77] Cf. Donncadh Woods, Ailsa Sinclair & David Ashton, *Private Enforcement of Community Competition Law: Modernization and the Road Ahead*, COMPETITION POLICY NEWSLETTER, Summer 2004, 31, 37.

[78] Some authors argue that private plaintiffs will only take the risk of commencing a private action when there is a promising incentive such as the expectation of multiple damages, cf. Jürgen Basedow, *supra* note 4, at 145 (showing sympathy for treble damages); Rolf Hempel, *Privater Rechtsschutz im deutschen Kartellrecht nach der 7. GWB-Novell*e, 54 WuW 362, 371 (2004) (advocating the introduction of treble damages); MONOPOLKOMMISSION, DAS ALLGEMEINE WETTBEWERBSRECHT IN DER SIEBTEN GWB-NOVELLE 67 (2004) (recommending the introduction of double damages as a remedy under German law for breaches of EC competition law).

member states and also Community law only allow in very limited areas for damages exceeding the nominal damage,[79] it is very uncertain whether the Commission can overcome the predictable opposition against such a far-reaching proposal.

Given the law as it now stands, there is reason to believe that in the years to come private antitrust litigation before German courts will only moderately increase. There will be a rise of follow on actions after the conspirators were fined by the European Commission or the Federal Cartel Office. The main workload of German courts will however remain on cases in which private litigators use German or European competition law as shield to challenge anticompetitive contract terms or commercial practices of dominant market players.

[79] See CHRISTIAN V. BAR, COMMON EUROPEAN LAW OF TORTS, VOL. I no. 605-612 (1998); Walter van Gerven, Jeremy Lever & Pierre Larouche, *supra* note 48, at 871-874; WOLFGANG WURMNEST, GRUNDZÜGE EINES EUROPÄISCHEN HAFTUNGSRECHTS – EINE RECHTSVERGLEICHENDE UNTERSUCHUNG DES GEMEINSCHAFTSRECHTS 101-106 (2003).