

# e-Competitions

## Antitrust Case Laws e-Bulletin

### German Private Enforcement

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## German Private Enforcement: an overview of competition law

### GERMANY, DAMAGES, PRIVATE ENFORCEMENT, FOREWORD, GENERAL ANTITRUST

I warmly thank Martin Fischer for providing a linguistic review of the text. The law is reflected as at March 2021.

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#### 1) Introduction

Germany is one of the European jurisdictions in which plaintiffs are particularly active in bringing actions for the enforcement of German and European competition (antitrust) law. [1] Private enforcement of competition law as such is not a particularly new phenomenon in Germany, as courts have dealt with the so-called “antitrust defence” for many years and plaintiffs have also tackled certain abusive practices by dominant market players. [2] A much more recent phenomenon is claims for damages against horizontal cartels. Such claims essentially came before German courts after the CJEU’s 2001 *Courage* judgment [3] and the reform of the German Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, “GWB”) in 2005. A recent survey conducted by Lukas Rengier for the period of 2003 to 2017 counted 69 judgments handed down by German courts in private antitrust proceedings. [4] The number of cases heard since then is constantly rising and it is estimated that around 650 private enforcement cases were pending before German courts in 2019. [5]

Over these years, private antitrust litigation has turned into a field for specialised experts. Antitrust damages involve complex legal and economic issues. Plaintiffs face substantial up-front costs, as they usually have to substantiate their claims with an economic expert opinion. Moreover, the standards for pleading and proof are constantly evolving which makes it difficult for non-specialised lawyers to practice successfully in this area. [6]

The purpose of this foreword is to provide a general overview of the state of affairs in Germany. After a brief look at the historical development of private enforcement actions (2.), the importance of European law for the development of these claims will be highlighted (3.), before selected important decisions of German courts will be considered (4.).

#### 2) Historical development

Prior to World War II, cartel agreements were common in Germany much like in other European states. Such associations were widely regarded as legitimate and necessary means to organise the economy. [7] To combat the excesses of cartels, plaintiffs had to rely on the general rules of tort law – having limited success however. The *Reichsgericht* had ruled that cartel agreements do not restrict freedom of trade [8] and do not violate the German general clause on tort liability (Section 823(1) Bürgerliches Gesetzbuch, “BGB”). [9] Anti-competitive agreements were therefore in principle enforceable.

The first attempt by the German legislature to confine the powers of cartels was the Cartel Ordinance (Kartellverordnung) of 1923. It did not seek to prohibit such agreements, but was rather intended to establish control mechanisms to avoid an excess of economic power. It therefore regulated the termination of cartel agreements by cartel members for good cause, established a weak control of abusive practices and introduced some judicial control over the cartel’s pricing policy. [10] As the Ordinance did not provide for a proper system of private competition law enforcement, plaintiffs still needed to resort to tort law, particularly Section 826 BGB, to combat outrageous anticompetitive conduct such as predatory pricing strategies by cartel members against competitors. [11] This did not change under the decartelisation regime enacted after World War II by the U.S. and British administration. [12]

The foundation for private antitrust enforcement was laid down with the GWB. The GWB, which entered into force on 1 January 1958, was the first proper German competition law statute. Influenced inter alia by the U.S. efforts to strengthen the competitive spirit in Germany, [13] it prohibited cartels and certain abuses by dominant players. Section 35 GWB 1958 enshrined the right to claim injunctions or damages for the violation of German competition law. Violations of the European competition rules could be remedied based on Section 823(2) BGB in conjunction with (then) Articles 85, 86 EEC (today Articles 101, 102 TFEU). [14]

Even though the GWB 1958 established the basis for private antitrust enforcement, the right to claim damages was interpreted rather restrictively to keep the “liability floodgates” shut. The law restricted the right to claim an injunction or damages to persons “protected by the infringed provision” (so-called *Schutznormprinzip*). Against this background, the Bundesgerichtshof, the highest German court in civil and commercial matters, had held in an older decision that “at least” those persons “at whom the illegal activities were specifically directed” were entitled to claims for damages and injunctive relief. [15] In what followed, some courts and commentators argued that only infringements such as boycotts or discriminatory practices could give rise to claims for damages, but not typical price-fixing conspiracies affecting all customers or suppliers. This hindered the development of private actions for damages against horizontal cartels significantly. [16] The German legislature corrected this misapprehension by abandoning the *Schutznormprinzip* in the 7th Amendment to the GWB of 2005 to pave the way for an effective private enforcement regime.

### 3) EU law as incubator

#### a. The development of a general European framework for private antitrust enforcement

The flourishing private enforcement system in Germany was strongly influenced by European developments. An early attempt by the European Commission to harmonise national provisions failed in the 1960s due to strong opposition by the (then) EEC’s Member States. [17] After this, the need to recalibrate the rules on private enforcement was powerfully addressed again by the Commission during the debate on the “modernisation” of the application of the European competition rules that started prior to the EU’s Eastern enlargement. The White Paper on Modernization of 1999 [18] stimulated a debate on the state of private enforcement in Germany and quickly directed the view to U.S. law, where private actions for damages have been regarded as an important mechanism

to supplement public enforcement for a long time. [19] Moreover, in 2001 the CJEU reminded legislatures across Europe in *Courage* that “actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the [European] Community” and that “any individual” must be able to claim damages for loss caused by anticompetitive conduct. [20] As a consequence, the German legislature enacted the 2005 amendment to the GWB which, inter alia, abolished the *Schutznormprinzip* (*supra* 2.) and provided various other reforms to strengthen private antitrust proceedings. The reform introduced, for example, a rule that decisions of competition authorities shall be binding in follow-on actions (Section 33(4) GWB 2005) and widened the obligation to pay interest (Section 33(3) GWB 2005). Since then the legislature has fine-tuned the rules for private enforcement in every major GWB reform. [21]

A further significant European push came with the Directive 2014/104/EU (“Damages Directive”). [22] Germany transposed the Directive at the end of 2017 through the Ninth Amendment to the GWB. The transposition fine-tuned the law of private enforcement. In line with the directive, the German legislature introduced, for example, a rebuttable presumption that cartel conduct results in harm (Section 33a(2) GWB), modified the rules for joint and several liability for the protection of leniency participants and small and medium enterprises (Sections 33d, 33e GWB), amended the rules on prescription (Section 33h GWB) and established a system for the production of evidence and information in antitrust proceedings (Sections 89b to 89e GWB). [23]

In January 2021, the 10th Amendment to the GWB (so-called GWB-Digitalisierungsgesetz) came into force. [24] Even though it primarily focuses on challenges raised by the digital economy, as well as the transposition of the ECN+ Directive, the 10th Amendment to the GWB also clarifies some minor ambiguities that have arisen in the public debate and in the first (very few) German court decisions on the Damages Directive. [25]

## b. The CJEU as promotor of an effective system of private antitrust law enforcement

Given that competition law relies largely on general clauses and concepts which are in need of interpretation, the CJEU has proved to be a strong promotor of private antitrust law enforcement in Europe. Its case law has had a strong impact on German law and considerably cut back national boundaries restricting the right to claim damages. Three examples underline this point.

It all started with the courageous *Courage* case, in which the CJEU held that EU law demands that “any individual” harmed by a violation of Articles 101, 102 TFEU has the right to claim damages. [26] As a consequence, limitations based on the targeting criterion as developed by some German courts could no longer be maintained and the German legislature had to adapt the GWB in 2005 (see *supra* 3) a.).

In *Skanska*, [27] the CJEU widened the circle of persons from whom damages can be sought (“passive standing”). In public enforcement proceedings, it is well established that Articles 101, 102 TFEU apply to “undertakings”, i.e. entities “engaged in an economic activity, regardless of the[ir] legal status ... and the way in which [they are] financed”. [28] In public enforcement, the undertaking concept has two important instances: First, as an “undertaking” can be formed by several natural or legal persons, [29] an administrative fine can be imposed on one or even more than one of the legal entities forming the “undertaking” under EU law (“single economic entity/unit doctrine”). [30] Second, a fine may also be addressed to the legal successor of an infringer as far as the successor carries out the economic activities of the infringer so that from an economic perspective both entities are identical (“economic continuity principle”). [31] Whether these principles also apply in private enforcement actions was strongly disputed in Germany, given that the European undertaking concept stands in sharp contrast to the traditional tort and company law principle that any legal entity shall merely be liable for its own wrongdoing. The CJEU held in *Skanska* that EU law governs the issue of passive standing. [32] As a consequence, the

European undertaking concept applies in its entirety to determine the person(s) from whom damages can be claimed. Even though the CJEU primarily dealt with the economic continuity test, it did not limit the application of the undertaking concept to this instance. Therefore, a parent company can be sued for damages for the infringement committed by its subsidiary if both entities form an economic unit. [33] An open question is whether a subsidiary, that was not aware of the infringement committed by its parent company, can also be sued for damages. [34] This issue might soon be clarified by the CJEU when answering a preliminary reference of the Audiencia Provincial de Barcelona. [35]

Finally, in *Otis*, [36] the CJEU clarified that claimants that are not active as suppliers or customers on the market affected by a cartel are also entitled to claim damages. Austrian courts had doubted whether losses occurring outside the affected market must be compensated. Such indirect losses were considered to be outside the competition rules' protective scope. The CJEU clarified that under EU law, harm caused by the anticompetitive conduct must be compensated. The right to damages is not subject to further restrictions such as "the need for the damage to fall within the scope of protection of Article 101 TFEU". [37] This judgment is also of great relevance for Germany. The right to claim rectification (*Beseitigung*) or an injunction (*Unterlassung*) is limited to persons that are affected (*betroffen*) by the anticompetitive conduct (Section 33(1) GWB). Affected persons are competitors or other market participants harmed by the infringement (Section 33(3) GWB). Some commentators, as well as German courts, also apply this limitation to claims for damages under Section 33a GWB, [38] an interpretation, that in my point of view, cannot be upheld any longer. [39] In any event, after *Otis* the confinement of damages claims to participants that are active in the market would not be in line with EU law. Consequently, the Bundesgerichtshof held in 2020 that under the GWB 2005 – which limits claims for damages to persons affected by the anticompetitive conduct – the affected person criterion shall not limit the circle of potential claimants. Courts should merely check whether the defendant's anticompetitive conduct is capable of directly or indirectly causing harm to the plaintiff. [40] A different issue is – according to the Bundesgerichtshof – whether the cartel agreement actually had an effect on the relevant transaction (usually a sales or services contract) which forms the basis of the damages claim. [41] It is very likely that the Bundesgerichtshof will apply this approach also under the GWB 2017. In addition, after *Otis* the question can be posed as to what extent normative restrictions of the causal link based on the protective purpose of the breached rule (*Zurechnungszusammenhang*) can be upheld. As causation is a normative concept which goes beyond a simple *conditio sine qua non* assessment, such restrictions based on the concrete circumstances of the case should remain possible. Even the CJEU accepted in *Kone* that damages resulting from umbrella prices must be remedied only as far as they were foreseeable, [42] which shows that EU law accepts normative restrictions of the causal link. In any event, the intensive discussion on the *Kartellbetroffenheit* and the fact that in the past some lower courts had put up rather high hurdles for plaintiffs to prove that they were affected by anticompetitive conduct, demonstrates that the German legislature "bet on the wrong horse" when drafting the GWB 2005. [43]

#### 4) The practice of German courts

As many rules governing private antitrust claims are of a relatively recent origin, many details of their application are disputed. Over the years, German courts have clarified some of these issues, thereby reducing the uncertainty which may scare away potential plaintiffs from pursuing their claims. As with any fast growing body of law though, it will take a while before a consistent legal practice emerges. Generally speaking, German courts have tried to apply the law in a way that supports private enforcement but certain developments had to (or might have to) be corrected by the legislature.

##### a. Reach of binding effect

To ease the plaintiff's burden of proof, Article 33b GWB establishes a binding effect for the decisions of national competition authorities. It goes beyond Article 9 of the Damages Directive as not only decisions of the EU Commission have a binding effect but so too do the decisions of national competition authorities of other EU Member States when they are dealing with violations of Articles 101, 102 TFEU. The Directive requires for the latter decisions only that they can be presented as *prima facie* evidence that an infringement of competition law has occurred. The rule on binding effect was incorporated into German law in the reform of 2005 and not substantially altered when the Damages Directive was transposed. Recital 34 of the Damages directive clarifies that the binding effect shall "cover only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction".

The Bundesgerichtshof held that the binding effect relates to the operative part of the decision or judgment ("Tenor") and those parts of reasoning needed to support the decision with regard to facts and law. [44] Information within the decision on causation between the infringement and the damage as well as on the amount of losses are not covered by the binding effect. [45] In turn, the definition of the relevant market is part of the analysis of the competition law infringement and is therefore – as was explicitly stated in the explanation of the *Regierungsentwurf* for the 9th Amendment to the GWB – covered by the binding effect, [46] contrary to an older decision of the Oberlandesgericht München. [47] Further, findings of the competition authority on the "undertaking concept" (see *supra* 3) b.), for example on the exercise of decisive influence, are binding. [48]

## b. Interest for violations before July 2005

In the 2005 GWB reform, the German legislature introduced a claim for interest of 5% over the basic rate that started to run from the time the harm occurred (Section 33(3) sent. 4, 5 GWB 2005). The GWB reform became effective on 1 July 2005. The Bundesgerichtshof ruled in the *Grauzement II* judgment that the new interest regime does not have retroactive effect for violations occurring before that date. [49] Such claims fall under the general rules on interest in tort cases. These rules do not generally provide for interest from the date the harm occurred. Even though the *Grauzement* case concerned only claims for violations of German competition law, the Bundesgerichtshof underscored that the CJEU had ruled in *Manfredi* that the award of interest is an essential component of compensation. [50] Further, the Bundesgerichtshof inferred from the *Marshall II* judgment [51] that interest must run from the date on which the damage occurred. [52] To ensure an effective enforcement of the German competition rules, the Bundesgerichtshof applied Section 849 BGB analogously to award interest of 4 % (cf. Section 246 BGB) from the time the harm occurred.

## c. Burden of proof

Proving antitrust damage is a complex endeavour and the application of the rules of pleading and proof in antitrust damages proceedings poses difficult questions. The Bundesgerichtshof acts rather cautiously to strike the right balance between the interests of the plaintiffs and defendants. Two decisions underline this point.

According to Section 33a(2) GWB (transposition of Article 17(2) Damages Directive), it shall be rebuttably presumed that a cartel causes harm. This presumption applies to claims which arose after 26 December 2016 (Section 186(3) GWB). The precise reach of this legal presumption is subject to debate, so that older doctrines might still be applicable for issues not covered by this rule. Some commentators argue that Section 33(2) GWB does not apply to damage caused by umbrella pricing. [53] Prior to the Directive's transposition some (albeit not all) Oberlandesgerichte have held that cartels generally cause higher prices on the affected market so that the prices



of non-cartel members will usually also rise. [54] In 2018, the Bundesgerichtshof affirmed in the *Grauzement II* judgment that the assumption of such an effect does not violate the law when the cartel has a strong market coverage and the remaining competitors are aware of the cartel's pricing policy. [55]

In the *Schienenkartell I* judgment of 2018, the Bundesgerichtshof stopped – at least for quota fixing and customer protection cartels (the precise reach of the judgment is not clear) – a common practice of lower courts of strongly relying on prima facie evidence to assume that the plaintiffs purchases were affected by the cartel and that they had at least in principle sustained damage. The Bundesgerichtshof was not convinced that there is a high probability that such cartel agreements are implemented by each cartel member in each individual case – especially in the beginning of the co-operation. [56] Therefore, the Court held that – depending on the facts of the case – there can merely be a presumption (*tatsächliche Vermutung*) that certain purchase are covered by the cartel agreement, [57] which puts a slightly higher burden on the plaintiff, as courts must look at circumstantial evidence (*Indizbeweis*) to assess whether the presumption is justified. This approach was confirmed and elaborated in more detail in more recent decisions rendered by the Bundesgerichtshof [58].

To prevent plaintiffs from being unable to prove justified claims, the 10th Amendment to the GWB introduced a rebuttable presumption. It shall be presumed that the legal transactions concerning goods or services of direct and indirect purchasers, or suppliers of cartel members, falling within the substantive, geographic and temporal scope of the cartel agreement, were covered by the cartel (Sections 33a(2) sent. 4, 33c(3) sent. 2, GWB 2020). This presumption can help in non liquet situations, i.e. situations in which a court despite a comprehensive assessment of the circumstances of the case cannot determine whether a transaction was affected by the cartel or not. [59]

#### d. Pooling of claims

Germany lacks a proper collective redress mechanism. The *Musterfeststellungsklage* enacted in 2016 is for various reasons not a powerful weapon against competition law infringers. [60] Against this background, the plaintiffs often bundle claims via assignment to enable the assignor to enforce the assigned claims against the competition law infringer(s). The assignment has to conform with certain conditions to be valid, especially if a special purpose vehicle is involved.

The Oberlandesgericht Düsseldorf has ruled in 2015 that assignments of damages claims are null and void if the vehicle lacks the financial resources to bear the cost of the litigation in case of a dismissal of the action, which under German law includes the legal fees of the defendants. [61]

Moreover, vehicles set up to enforce claims for damages provide legal services. They must therefore be authorised and comply with the German Legal Services Act (*Rechtsdienstleistungsgesetz*). The application of this Act to special purpose vehicles is not entirely settled yet. In 2020, the Landgericht München dismissed an action brought by a special purpose vehicle set up by Financial Right, a legal tech start-up. [62] It had pooled claims from over 3,000 parties against the truck cartel and was supported by a litigation financier. After carefully scrutinizing the standard contract terms of the assignment and the implementation of the pooling process the Landgericht concluded that in this very specific case, the assignments were null and void because the services provided were not in line with the rules of the Legal Services Act. The court found that the pooling was from the outset exclusively aimed at the legal enforcement of the claims so that it could not be characterized as (out-of-court) debt collection. Further, the court identified certain conflicts of interest between the assignors and the vehicle as well as the litigation financier as the pooling concerned rather heterogeneous claims of direct and indirect purchasers/lessees of trucks. Also other courts dismissed actions given that the pooling of claims was not in line with the German

Legal Services Act [63]. As the plaintiffs have appealed in many cases, the issue may end up before the Bundesgerichtshof one day. Moreover, as a reform of the Legal Services Act is currently reviewed by the German Parliament [64] it is not excluded that legislative amendments will facilitate the pooling of claims in certain cases.

## 5) Conclusion

The framework for private antitrust proceedings has improved significantly over the last two decades in Germany. Generally speaking, the basic structure is now well calibrated and courts provide more and more guidance with regard to the application of the legal framework. A significant gap is the lack of effective collective redress mechanisms. Given that the pooling of claims is also rather cumbersome, the legislature should step-in to fix this issue.

**Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.**

[1] Matthijs Kuijpers, Stefan Tuinenga, Elaine Whiteford and Thomas B. Paul, 'Actions for Damages in the Netherlands, the United Kingdom, and Germany' (2017) 8 JECLAP 47; Jens-Uwe Franck, 'Private Enforcement in Germany' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M.J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Wolters Kluwer 2020) 77, 78.

[2] Philipp v. Dietze and Eckart Brödermann, 'Germany' in Albert A. Foer and Jonathan W. Cuneo (eds), *The International Handbook on Private Enforcement of Competition Law* (Edward Elgar 2010) 330; Franck (*supra* note 1) 78; see also Ulf Böge and Konrad Ost, 'Up and Running, or Is It? Private Enforcement – the Situation in Germany and Policy Perspectives' (2006) 27 ECLR 197 (for the period after 2002).

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

[4] Lukas Rengier, 'Kartellschadensersatz in Deutschland – die ersten 15 Jahre in Zahlen und Lehren für die Zukunft' [2018] WuW 613, 614. Most of these judgments were *Grundurteile* and declaratory judgments (*Feststellungsurteile*). See also Böge and Ost (*supra* note 2) 197 (pointing out that between 2002 and 2005 the Bundeskartellamt registered more than 900 judgments with antitrust relevance).

[5] Lukas Rengier, 'Cartel Damages Actions in German Courts: What the Statistics Tell Us' (2020) 11 JECLAP 72.

[6] See, e.g., LG Dortmund 8 July 2020, [2020] NZKart 450 – *Sanitärgroßhändler* (dismissed because plaintiff did not sufficiently substantiate claim).

[7] For details see Wolfgang Wurmnest, *Marktmacht und Verdrängungsmissbrauch: Eine*

*rechtsvergleichende Neubestimmung des Verhältnisses von Recht und Ökonomik in der Missbrauchsaufsicht über marktbeherrschende Unternehmen* (2nd edn, Mohr Siebeck 2012) 50-53 (Germany), 60-62 (France, Belgium and Italy).

[8] RG 25 June 1890, RGZ 28, 238, 243-44 – *Rabattkartell Buchhändler*; RG 4 February 1897, RGZ 38, 155, 158 – *Sächsisches Holzstoffkartell*.

[9] RG 14 December 1902, RGZ 56, 271, 275-76 – *Börsenverein der Deutschen Buchhändler*.

[10] For details see Gerald Spindler, *Recht und Konzern: Interdependenzen der Rechts- und Unternehmensentwicklung in Deutschland und den USA zwischen 1870 und 1933* (Mohr Siebeck 1993) 46-48; Joachim Jickeli, 'Das Kartellrecht in der Weimarer Republik – Lehren für das europäische Kartellverbot', in: Andreas Hoyer, Hans Hattenhauer, Rudolf Meyer-Pritzl and Werner Schubert (eds), *Gedächtnisschrift für Jörn Eckert* (Nomos 2008) 405, 415-19; Wurmnest (*supra* note 7) 53-54.

[11] RG 18 December 1931, RGZ 134, 342, 355-56 – *Benrather Tankstelle*.

[12] Franck (*supra* note 1) 79-80.

[13] For details see Lisa Murach-Brand, *Antitrust auf deutsch: Der Einfluss der amerikanischen Alliierten auf das Gesetz gegen Wettbewerbsbeschränkung (GWB) nach 1945* (Mohr Siebeck 2004) 169-224.

[14] Franck (*supra* note 1) 79.

[15] BGH 25 January 1983 BGHZ 86, 324, 330 – *Familienzeitschrift*.

[16] For details see Wolfgang Wurmnest, 'A New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law against Restraints of Competition' (2006) 6 German Law Journal 1173, 1179-82; Franck (*supra* note 1) 79-80.

[17] Clifford A. Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA* (OUP 1999) 33 note 67; Wolfgang Wurmnest, 'Schadensersatz wegen Verletzung des EU-Kartellrechts. Grundfragen und Entwicklungslinien' in Oliver Remien (ed), *Schadensersatz im europäischen Privat- und Wirtschaftsrecht* (Mohr Siebeck 2012) 27, 34.

[18] EU Commission, 'White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty', [1999] OJ C 132/1.

[19] See Jürgen Basedow, 'Who will Protect Competition in Europe? From central enforcement to authority networks and private litigation' (2001) 2 EBOR 443, 463 and 466.

[20] Case C-453/99 *Courage v Crehan* [2001] ECR I-6297, paras 26-27.

[21] For details see Fabian Stancke, 'Einleitung' in Fabian Stancke, Georg Weidenbach and Rüdiger Lahme (eds) *Kartellrechtliche Schadensersatzklagen* (2nd edn, 2021) paras 12 ff.

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[22] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1.

[23] On the changes brought by the 9th amendment of the GWB see the contributions to Christian Kersting and Rupprecht Podszun (eds), *Die 9. GWB-Novelle* (C.H. Beck 2017).

[24] Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer wettbewerbsrechtlicher Bestimmungen (GWB-Digitalisierungsgesetz), BGBl. 2021 I p. 2.

[25] See Stancke (*supra* note 21) para 19.

[26] Ibid para 26.

[27] Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions Oy* [2019] ECLI:EU:C:2019:204. See **Alexandre G. Verheyden, Charlotte Breuvert, Henry de la Barre d'Erquelinnes**, *The EU Court of Justice expands cartel damages liability for corporate parents and successors (Vantaan Kaupunki / Skanska Industrial Solutions)*, 14 March 2019, *e-Competitions March 2019*, Art. N° 96737; **Lesley Hannah**, *The EU Court of Justice hands down a judgement in which it ensures victims of competition law breaches get compensation in the context of an asphalt cartel (Vantaan Kaupunki / Skanska)*, 14 March 2019, *e-Competitions March 2019*, Art. N° 96436; **Carolin Marx, Judith Solzbach**, *The EU Court of Justice rules that the concept of undertaking and the principle of economic continuity apply in private enforcements cases as in public enforcement proceedings (Vantaan kaupunki / Skanska Industrial Solutions)*, 14 March 2019, *e-Competitions March 2019*, Art. N° 90399.

[28] Case C-41/90 *Höfner and Elser v Macrotron* [1991] ECR I-1979, para 21; Case C-205/03 *FENIN v Commission* [2006] ECR I-6295, para 25. See **Didier Ferrier**, *Scope of Competition Law: The ECJ rules that the person who purchases products to use them within the framework of a "social" activity is not subjected to Competition Law (FENIN)*, 11 July 2006, *Concurrences N° 4-2006*, Art. N° 27389.

[29] Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos* [2006] ECR I-11987, para 40. See **Cyril Sarrazin**, *Resale Price Maintenance: The ECJ specifies the conditions under which a supplier can impose an obligation on service-station operators to sell fuel at a specific price (Spanish petrol stations)*, 14 December 2006, *Concurrences N° 1-2007*, Art. N° 12847.

[30] For details see Okeoghene Odudu and David Bailey, 'The Single Economic Entity Doctrine in EU Competition Law' (2014) 51 CML Rev. 1721; Dominik Braun and Manuel Kellerbauer, 'Das Konzept der gesamtschuldnerischen Verantwortlichkeit von Konzerngesellschaften bei Zuwiderhandlungen gegen das EU-Wettbewerbsrecht' [2015] NZKart 175-181 (Teil 1), [2015] NZKart 211-16 (Teil 2); Mark Leddy and Athina Van Melkebeke, 'Parental liability in EU competition law' (2019) 40 ECLR 407.

[31] Case C-280/06 *Autorità Garante della Concorrenza e del Mercato v ETI and Others* [2007] ECR I-10893, paras 42-43. See **Cyril Sarrazin**, *Fine - Personal responsibility: The ECJ interprets the principal of personal responsibility in order to protect the effectiveness of the rules in the sphere of competition (Ente Tabacchi Italiani - ETI)*, 11 December 2007, *Concurrences N° 1-2008*, Art. N° 15254.

[32] Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions Oy* [2019] ECLI:EU:C:2019:204, para 28. The following analysis draws from Wolfgang Wurmnest, 'Liability of "undertakings" in damages actions for breach of Articles 101, 102 TFEU: *Skanska*' (2020) 57 CMLRev 915, 916-34.

[33] See Christian Kersting, 'Kartellrechtliche Haftung des Unternehmens nach Art. 101 AEUV – Folgerungen aus EuGH, Urt. v. 14.03.2019, C-724/19 – Skanska –' [2019] WuW 290, 292; Aidan Robertson, 'Skanska Industrial Solutions: what does the Court of Justice's landmark judgment mean for cartel litigation?' (2019) 40 ECLR 347, 352; Franck (*supra* note 1), 104; Wurmnest (*supra* note 32), 928; see also LG Dortmund 8 July 2020, [2020] NZKart 450 – *Sanitärgrößhändler* (obiter); doubts are voiced by Rüdiger Harms and Philipp Kirst, 'Anmerkung zu EuGH Rs. C-724/17' [2019] EuZW 377, 378.

[34] Rejected by LG Mannheim 24 April 2019, [2019] NZKart 389, 390 – *LKW-Kartell*; LG München I 7 June 2019, [2019] NZKart 392 – *Löschfahrzeug-Kartell*; affirmed by LG Dortmund 8 July 2020, [2020] NZKart 450 (obiter) – *Sanitärgrößhändler*.

[35] Case C-882/19 *Sumal v Mercedes Benz Trucks España*.

[36] C-435/18 *Otis v Land Oberösterreich* [2019] ECLI:EU:C:2019:1069. See **Darius Maximilian Mosleh**, *The EU Court of Justice clarifies the eligibility requirements of claims for indirect damages caused by a violation of Art. 101 TFEU (Otis / Land Oberösterreich)*, 12 December 2019, *e-Competitions December 2019*, Art. N° 93538; **Martin Favart**, *The EU Court of Justice rules that a public body indirectly affected by a cartel can claim compensation for losses resulting from an antitrust infringement (Otis)*, 12 December 2019, *e-Competitions December 2019*, Art. N° 92929; **Donald Slater, Alexi Dimitriou**, *The EU Court of Justice clarifies that a public body granting promotional loans to the purchaser of products covered by a cartel is entitled to claim damages for loss caused by the cartel (Otis / Land Oberösterreich)*, 12 December 2019, *e-Competitions December 2019*, Art. N° 95514.

[37] C-435/18 *Otis v Land Oberösterreich* [2019] ECLI:EU:C:2019:1069, para 31.

[38] Fabian Stancke, 'Die Betroffenheit und Aktivlegitimation im Rahmen kartellrechtlicher Schadensersatzklagen' [2017] NZKart 636, 637; Joachim Bornkamm and Jan Tolkmitt in Eugen Lange and Hermann-Josef Bunte, *Kartellrecht: Kommentar*, vol 1: Deutsches Kartellrecht (13th edn, Luchterhand 2018) § 33a GWB para 6.

[39] Jens-Uwe Franck in Ulrich Immenga and Ernst-Joachim Mestmäcker, *Wettbewerbsrecht*, vol 2: GWB: Kommentar zum deutschen Kartellrecht (6th edn, C.H. Beck 2020) § 33a GWB para 20; Christian Kersting in Ulrich Loewenheim, *Kartellrecht* (4th edn, C.H. Beck 2020) § 33a GWB para 13.

[40] BGH 28 January 2020, [2020] NJW 1430, para 25 – *Schienenkartell II*. See **Christopher Sickinger, Mariya Serafimova**, *The German Federal Court of Justice provides guidance on the requirements for establishing liability and the assessment of evidence in cartel damages cases (Schienenkartell II)*, 28 January 2020, *e-Competitions January 2020*, Art. N° 94296; **Julia Pranz**, *The German Federal Court of Justice defines, in line with EU case-law, the substantive and procedural requirements for establishing causality in cartel-related damages actions (Rail Cartel)*, 28 January 2020, *e-Competitions January 2020*, Art. N° 94761.

[41] Ibid para 26 – *Schienenkartell II*.

[42] Case C-557/12 *Kone v. ÖBB-Infrastruktur* [2014] ECLI:EU:C:2014:1317, para 34. See **Sebastian Peyer, Albert Sánchez Graells**, *The EU Court of Justice establishes that national provisions on civil liability for loss caused by a cartel shall include compensation for loss resulting from price setting above the level expected in competitive conditions by a non-party to the cartel (Kone / ÖBB-Infrastruktur)*, 5 June 2014, *e-Competitions June 2014*, Art. N° 67004; **Nicola Boyle, Boris Bronfentrinker, Tom Bolster**, *The EU Court of Justice allows an interpretation of the matter of civil liability according to which a cartel member may be kept liable for damages caused by umbrella pricing (Kone / ÖBB)*, 5 June 2014, *e-Competitions June 2014*, Art. N° 67232; **Hans Vedder**, *The EU Court of Justice deals with the question to what extent the cartelists are required to compensate the higher price charged not just by the members of the cartel, but also by other competitors (Kone)*, 5 June 2014, *e-Competitions June 2014*, Art. N° 67315.

[43] Gerhard Klumpe and Thomas Thiede, ‘Flogging a Dead Horse’ [2020] NZKart 104, 105.

[44] BGH 12 July 2016, [2016] NJW 3527, paras 18-19 – *Lottoblock II*.

[45] OLG München 21 February 2013, [2013] NZKart 162, 163 – *Fernsehvermarktung*.

[46] Entwurf eines Neunten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, BT-Drucksache 18/10207, 56.

[47] OLG München 21 February 2013, [2013] NZKart 162, 163 – *Fernsehvermarktung*.

[48] Franck (*supra* note 1) 110.

[49] BGH 12 June 2018, [2018] NJW 2479, para 49 – *Grauzementkartell II*. See **Christian Ritz, Carolin Marx**, *The German Federal Court clarifies controversial judgments around the statute of limitations for cartel damages claims (Grauzementkartell II)*, 12 June 2018, *e-Competitions June 2018*, Art. N° 87344; **Philip Bentley, Jacques Buhart, Mai Muto**, *The German Federal Court of Justice grants a claim for damages relating to a cement cartel by extending the time period in which limitation rules can be suspended (Grauzementkartell II)*, 12 June 2018, *e-Competitions June 2018*, Art. N° 89746; **Manuel Knebelsberger**, *The German Supreme Court rules that statute of limitations is tolled for cartel damages claims that arose before July 2005 (Grauzementkartell II)*, 12 June 2018, *e-Competitions June 2018*, Art. N° 96458.

[50] Ibid para 46 – *Grauzementkartell II* referring to Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR-I 6619, para 97.

[51] Case C-271/91 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4367, para 31.

[52] BGH 12 June 2018, [2018] NJW 2479, para 46 – *Grauzementkartell II*.

[53] Franck (*supra* note 1) 95; Jannik Otto, ‘(Kartell-)Betroffenheit und Schadensallokation nach der 9. GWB-Novelle’ [2019] ZWeR 354, 394-95; but see Kersting (*supra* note 39) Art. 33a GWB para 70 (arguing that the presumption covers damages arising from umbrella pricing).

[54] OLG Karlsruhe 31 July 2013, [2014] NZKart 366, 367 – *Löschfahrzeuge*; OLG Jena 22 February 2017, [2017] NZKart 540, para 47 – *Schienenkartell*; but see OLG Düsseldorf 8 May 2019, [2019] NZKart 354, 355-56 – *Schienenkartell III* (there is neither a presumption nor

prima facie evidence for umbrella prices).

[55] BGH 12 June 2018, [2018] NJW 2479, para 40 – *Grauzementkartell II*.

[56] BGH 11 December 2018, [2019] NJW 661 para 62 – *Schienenkartell II*.

[57] Ibid para 61.

[58] BGH 28 January 2020, [2020] NJW 1430, paras 34 ff. – *Schienenkartell II*; BGH 29 September 2020, [2021] NJW 848, paras 37 ff. – *LKW-Kartell*.

[59] See Explanatory memorandum (Gesetzesbegründung), BT-Drucksache 19/23492, 87.

[60] Wolfgang Wurmnest, ‘Mehr Freiheit wagen im Kartell- und Marktregulierungsrecht’ in Anatol Dutta and Christian Heinze (eds), *“Mehr Freiheit wagen”: Beiträge zur Emeritierung von Jürgen Basedow* (Mohr Siebeck 2018) 213, 240-41; Roman A. Mallmann and Sarah Erne, ‘Musterfeststellungsklage und Kartellschadensersatz’ [2019] NZKart 77; Thomas Thiede, ‘Anmerkung zu LG München 7. February 2020’ [2020] EuZW 285.

[61] OLG Düsseldorf 18 February 2015, [2015] NZKart 201 – *Zementkartell (CDC)*. See **Christian Ritz, Ilka Mauelshagen**, *The Higher Regional Court Düsseldorf dismisses transferred follow-on damages claims because of the shift of the risk of litigation costs (Cartel Damages Claims)*, 18 February 2015, *e-Competitions German Private enforcement*, Art. N° 74678.

[62] LG München 7 February 2020, [2020] EuZW 279 – *LKW-Kartell*. See **Martin Favart**, *The Regional Court of Munich dismisses follow-on damages claims totalling €600 million against participants in a truck cartel (Trucks cartel)*, 7 February 2020, *e-Competitions German Private enforcement*, Art. N° 94018.

[63] LG Mannheim 23 January 2019, [2019] NZKart, 173 – *Zuckerkartell*; LG Hannover 4 May 2020, [2020] NZKart, 398 – *Zuckerkartell (Kaufland)*; LG Hannover 1 February 2021, [2021] NZKart, 195 – *Zuckerkartell (CDC)*.

[64] Entwurf eines Gesetzes zur Förderung verbrauchergerechter Angebote im Rechtsdienstleistungsmarkt, BT-Drucksache 19/27673.