

WORKING PAPER

Referat Deutsches und
Europäisches Kartellrecht
(G1)

OFT Discussion Paper on Private Actions in Competition Law: Effective Redress for Consumers and Business (OFT 5 C / 053)

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A. General remarks

The Federal Cartel Office shares the view that private antitrust enforcement plays an important and valuable role. While it is certainly true that in the past the number of antitrust damages actions have been limited, the legal environment for private enforcement in Europe might not be as hostile as sometimes depicted and has certainly improved over the last years.

With regard to legislative changes and policy goals two observations should be made at the outset. While the obligation to pay damages has inherently a desirable preventative effect, the function of a damages award is above all of compensatory nature. On the other hand, sanctions which primarily aim at punishment and deterrence are intended to serve the protection of the legal order in general and appertain in our understanding to the state's monopoly on punishment. They must be exercised with respect to the corresponding procedural and constitutional safeguards which only the state is bound by and which the rules on civil procedure do not mirror. With that distinction in mind private enforcement can play a valuable complementary role to public enforcement.

B. Representative actions

The Bundeskartellamt agrees with the assessment that actions of individual purchasers who have only suffered *minimal* losses are unlikely. Given the amount of

time, energy and money required there seems to be a rational disinterest to file action. While some elements of collective legal protection might merit consideration the Bundeskartellamt rejects the idea that a Community measure should require the Member States to provide a collective instrument.

I.) Representative actions by designated bodies associations

In Germany, elements of collective legal protection were discussed at length in the preparation of the 7th ARC amendment (2005). The legislator deliberately decided against the introduction of any form of representative action in damages as well as against any form of representative action by consumer associations.

On the other hand, the ARC provides for injunctive relief and an action for the disgorgement of profits filed by industry associations. However, the latter instrument is subsidiary to disgorgement initiated by the cartel authorities and in any event, the profit disgorged has to be transferred to the Federal Treasury.

In this regard it should be noted that the specific interest of representative associations (industry's and consumers' alike) cannot be equated with the interest of the general public (and sometimes not necessarily with the interest even of those represented). Potential abuse of out-of-court settlement for the sole benefit of the association itself should be borne in mind. In Germany, there has been previous experience to that effect with regard to the enforcement of the rules against *unfair competition*.

II.) Claims on behalf of consumer at large

In any event, claims on behalf of "consumers at large" with regard to which an individual must "*opt out*" within a specified period if he does not wish to be bound by the outcome of the litigation would – from a German point of view – violate the constitutional principle of *private autonomy* which implies that it is for the individual to decide whether he wishes to become engaged in an action and if so, who would represent him. Hence, an English award in "damages" on behalf of "*consumers at large*" would pose significant problems as to its enforceability in Germany under the *ordre public* reservation. The problem would aggravate if – under the proposal of Art. 6 III of the Rome II Regulation – actions for damages sustained in Germany could be filed in the UK under English substantive law.

III.) Collective action by individual victims

The reservation against actions by designated bodies and associations on behalf of purchasers “at large” would not apply to collective action by groups of individual cartel victims who have given their express consent to be bound by the outcome of the litigation.

IV.) Reservation against the fragmentation of the rules on civil procedure

However, it should be noted that the question of collective litigation goes far beyond the field of competition law enforcement. From an overall perspective, there seems to be little merit to introduce an instrument of collective action specific to competition law infringements. In Germany, as a result of the discussion on possible forms of bundling individual claims, a pilot project was undertaken with the *Act on the Introduction of Test Case Litigation for Capital Investors*, which recently came into effect. The legislator intends to await the outcome of the experience with this model before a decision will be made on which forms of bundling can best be integrated into the existing German legal order.

V.) Representative actions v. public enforcement

Finally, it should be observed that while the right to individual *compensation* is protected by national and Community law alike it is for each national legislator to decide on the instruments (*public* or *private*) to effectively make sure that in the end of the day the cartelists will not profit of the infringement. With disgorgement of the overall profits being primarily aimed at *deterrence* in the public interest and the implication for the effectiveness of the authorities' *leniency programmes* in mind there is strong reason to assume that any device directed at stripping the cartelists of their overall gains (i.e. those which cannot be related to a specific individual loss) should appertain to the exclusive domain of the public authority.

C. Costs and funding arrangements

I.) Costs

The Bundeskartellamt shares the view that the potential costs of litigation constitute a major reason for potential claimants not to file action. On the other hand, the general rule that the non-successful party must bear the costs of the proceedings is the key element to avoid the social and personal costs of those law-suits which are little

promising in the first place. In this context, it should be noted that an increase in the overall number of private antitrust proceedings is not an end in itself. Though it is true that with regard to complex factual and economic evidence the risk/benefit-analysis might be specifically difficult in antitrust cases there is little justification to tilt the procedural balance to the detriment of the defendant. The claimant being the benefactor of a potential damages award it is for him to assess the procedural risk. From our point of view, there is no reason to deviate from the general “costs follows the event”- rule in antitrust matters.

That said there might be exceptional cases where the amount of the potential cost of antitrust litigation is still so high as to even deter well-founded action. Therefore, in Germany the 7th amendment has introduced a specific rule to the ARC according to which the judge is empowered to adjust the calculatory basis of the proceedings’ costs if a party’s economic situation would be *seriously jeopardised*.

We understand under that under current English rules on civil procedure courts do already now have the necessary discretion to deal with atypical exemptions.

II.) Funding arrangements

As to funding arrangements it is in essence within the responsibility of the claimant to take up the necessary action. Given the example of the Cartel Damages Claims SA there is good reason to assume that business will find ways to develop the most suitable tools. From a German point of view, there is however one reservation to be made with regard to conditional fee arrangements. Widening the scope of conditional fee arrangements would significantly increase Counsel’s immediate financial interest in the outcome of the litigation which in our understanding would be in conflict with the idea of Counsel being an independent organ of the judiciary.

D. Evidential issues

There is agreement with the analysis that access to evidence above all in stand-alone cases is a fundamental prerequisite for successful private enforcement. The need for legislative action, however, is dependent upon the general standard of civil procedure. With regard to the significantly wide disclosure provisions English law already has, there seems to be little need for action beyond the applicable law.

With regard to access to documents in the possession of the OFT the Bundeskartellamt welcomes that the OFT will take all possible steps to protect leniency documents from disclosure. The same applies to leniency documents held by the Bundeskartellamt. We also welcome that the OFT will oppose disclosure applications in the form of “fishing expeditions” (that is an application for documents submitted to the OFT without further particularisation). From our point of view, the need for substantial particularisation is a fundamental prerequisite for disclosure in civil procedure in general.

E. Passing-on Defence and Indirect Purchaser Standing

As to the passing-on defence and indirect purchaser standing it is submitted that the problem can be adequately dealt with under the general rules of national tort law.

In our view *Courage* para. 26 does not support the assumption that EC primary law itself provides for an all-embracing definition on who is entitled to claim damages in cases of antitrust infringements. The ECJ has clarified in *Manfredi* that in the absence of Community rules governing the matter and provided that the principles of equivalence and effectiveness are observed, it is for the domestic legal system of each Member State to prescribe the detailed rules governing the conditions of the claim in damages including those on the application of the concept of ‘causal relationship’. So whether we look at the degree of directness of causality, remoteness of the damage, antitrust injury or scope of protection of the rule infringed, it is common ground in all European legal orders that a mere but-for-causality test is too simplistic to trigger liability.

Correspondingly, there is – not least in the interest of effectiveness of private antitrust enforcement - some argument to exclude the passing-on defence under general tort law – or at least to make it rather difficult - to avoid the tortfeasor being unduly exonerated. In any event multiple liability for the same overcharge must be avoided.

F. Applicable Law

As to the law applicable to a non-contractual obligation arising out of a restriction of competition we agree that the general rule should be the applicability of the law of the country where the market is or is likely to be affected.

Although it is true that in cases where more than one market is affected complex situations may arise, application of the substantive law of a country other than that

where the damage was actually incurred should only be allowed in exceptional circumstances. To avoid principle policy decisions of national tort law being undermined by excessive forum shopping (e.g. the ban on punitive or exemplary damages in continental legal orders) it is submitted that the option to base the claim on the law of a country other than that in which the damage in question was sustained (as provided for in the proposal of the Rome II - Regulation) should be understood narrowly to the effect that there must be a clearly appreciable direct and substantial effect on the market of that country.

G. Final Remarks

Finally, attention should be paid that the *substantive* antitrust rules are interpreted in such a way as to enable potential private claimants to properly assess the risks of litigation within a reasonable amount of time and money. This implies that in the bulk of private competition law cases, especially with regard to Art. 82 EC and vertical agreements, the claimant (or its legal advisor) must be in a position to foresee with a reasonable degree of certainty whether a specific behaviour constitutes an infringement or not. Only then will private actors be able to fulfil their positive role within the overall system of antitrust enforcement.

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**Comments of
the Federal Ministry of Economics and Technology
and the Federal Cartel Office
on the Green Paper
of the EU Commission
“Damages actions for breach of the EC antitrust rules”**

I. General

The Federal Ministry of Economics and Technology and the Federal Cartel Office welcome that the Commission has presented the Green Paper on damages actions for breach of the EU antitrust laws. In Germany as in other Member States in the past, private damages actions for victims of hardcore cartels did not have large significance. The competition authorities specifically set up therefor are primarily responsible for the enforcement of antitrust law in Germany and they have far-reaching authority for this purpose. Above all in regard to the new rule in Council Regulation I/2003, private legal enforcement is also important for effective and comprehensive protection of competition. Violations of antitrust law, as interference with the competitive process, are not only undesired and damage the economy as a whole, but also damage the assets of the undertakings and consumers concerned. In the case of behavior in violation of antitrust law, it is therefore reasonable for the infringing party to compensate the damage that occurred. In this way, profits from the antitrust law violation are also confiscated and motivation for future antitrust law violations is thereby reduced. Damages, thus, have a compensatory function. However, the obligation to pay damage compensation inherently also has a preventative effect. At the same time it makes it clear that antitrust law violations are illegal actions that are disapproved of by the legal system.

The legislature in Germany has taken the necessary steps regarding this situation with the seventh amendment to the Act against Restraints of Competition (“ARC”) and significantly improved the prerequisites for damages actions for antitrust law violations. The new rules in §§ 33 et seq. ARC, which was passed by the Parliament after detailed discussion, should ensure reasonable compensation of damages particularly as to hardcore cartels. From the German perspective, the amendment effectuated the measures that are necessary and reasonable as an addition to the already existing law for effective enforcement of private damage compensation claims in accordance with the existing level of information. Consequently, there is currently no need for further action in Germany.

The Green Paper, which contains numerous options, enables comprehensive discussion at the European level. The Federal Ministry of Economics and Technology and the Federal Cartel Office expressly support this and will participate intensively in the discussion. In these comments we limit ourselves to certain fundamental points and do not comment upon all of the options in detail.

At the outset, with reference to **Question O** of the Green Paper, the following sets forth overlapping aspects that, in the opinion of the Federal Government, are important in regard to further consideration of the issues:

- The starting point for all consideration should be the principle of subsidiarity set forth in Art. 5 EC Treaty. While uniform substantive standards for competition law are necessary in the internal market, the enforcement of damages claims to a large extent is governed by the general legal provisions of the Member States. These differ from one another fundamentally in many respects. Even the jurisprudence of the ECJ assumes that the modalities of private damages claims are governed by the domestic law of the Member States. There should only be deviation from this when a concrete need is shown, for example, to avoid serious differences in the internal market. However, national efforts of the Member States have first priority.
- In the Green Paper and the Working Paper attached to it, numerous instruments in a variety of areas are listed in connection with civil law penalties for antitrust law violations. Many of these recommendations are not specific to antitrust, but rather, relate to the general civil and civil procedure law of the Member States to a not insignificant extent. In the opinion of the Federal Government only specific antitrust law rules should be enacted to the extent absolutely necessary in regard to relevant characteristics. In so doing, contradictory valuations in relation to the general rules for civil law disputes should be avoided.
- The Green Paper contains options for further consideration and possible measures to optimize damages claims actions both in the area of follow-on actions (after a finding of an antitrust violation) as well as stand-alone actions that are independent of administrative measures. Both types of action must be optimally developed. In practice, the rules in the case of hardcore cartels, which cause particular damage, have greater significance. Private law enforcement in cases of abuse by means of actions for restraining orders, nullity, or geared toward specific action is already widely used and does not pose any specific problems. Thus, the Federal Government welcomes that the Green Paper is limited to damages actions focusing on hardcore cartels.

In comparison to administrative prosecution, stand-alone actions pose a number of much more serious problems as to hardcore cartels that also cannot be dealt with through the measures recommended in the Green Paper. Because swift improvements are important, the legislature in Germany has focused on measures that make follow-on actions easier. This does not exclude future improvements for stand-alone actions when there is a need for this and appropriate rules promise success.

- In parallel with the Green Paper, the Commission published a discussion paper on the application of Art. 82 EC Treaty to exclusionary abuses, in which the new approach (more economic approach) for the assessment of cases of abuse (Art. 82 EC Treaty) is discussed in detail. In certain cases this new approach may run counter to the Commission's goal of strengthening private damages actions as an instrument for the enforcement of competition law. Such an effect certainly should be avoided.
- In many of the options in the Green Paper the Commission takes up ideas from the Anglo-American legal system that are applied there under completely different conditions. In Europe, the protection of the public interest as to the prosecution of antitrust violations is primarily entrusted to state authorities. Damage compensation serves to compensate for losses that have occurred; however, it does not have a punishment or deterrent role. This corresponds to public policy in accordance with the jurisprudence of the German courts. In addition, experience in the USA shows a significant potential for misuse, which must be considered equally along with the benefits of some of the Anglo-American instruments.
- The Green Paper should lead to an intense discussion regarding improved rules on the enforcement of private damages actions. The successes that the Member States themselves have achieved through improved national rules will have great significance for further measures. Only on the basis of this experience can the question of further need for action at the European level be discussed. The knowledge gained from the Directive on the enforcement of intellectual property rights should also be considered in this regard. In light of the manifold intrusions upon general civil law and the principle of subsidiarity mentioned above, use of the instrument of recommendation should also be contemplated as to the rules regarding damages actions in cases of antitrust law violations.

2. *Access to evidence*

There is agreement with the Commission's analysis that access to evidence above all in stand-alone cases is a fundamental prerequisite for successful damages actions. The need for action, however, is dependent upon a general standard and the rules of civil procedure. As to the Federal Republic of Germany there is no ascertainable need for action beyond applicable law. As to private law follow-on actions, which are at the center of the German rules, the binding effect of decisions by the cartel authorities (see Answer to Question C) provides a sufficient basis for the foundation of a damage compensation claim.

Question A:

Should there be special rules on disclosure of documentary evidence in civil proceedings for damages under Articles 81 and 82 of the EC Treaty? If so, which form should such disclosure take?

From the German perspective there is no need for special rules for the disclosure of documentary evidence in antitrust law damages claims proceedings. The difficulties set forth in the Green Paper regarding proof likewise affect many damages actions in other legal areas. It would not be justified to deviate from generally applicable rules regarding access to evidence and to establish special rules for the disclosure of documentary evidence particularly in the area of antitrust law.

The necessary rules for the disclosure of evidence – which under German law above all encompasses the production of documents – should remain reserved to national law. In Germany, the production of documents can be ordered either by the court pursuant to § 142 German Code of Civil Procedure or in the context of the taking of evidence pursuant to §§ 421 et seq. German Code of Civil Procedure. There is agreement with Option 1 as to the requirement of fact pleading. Otherwise Options 1 – 4 to some extent go far beyond the rules generally applicable in German civil procedure. In particular, the prohibition of fishing expeditions is part of the basic principles of civil procedure. The danger of misuse arising from the instruments named should also be taken into account. On the other hand, the approach in Art. 6 para. 1 sentence 1 of the Directive on the enforcement of intellectual property rights, whereby the obligation of production is subject to exactly defined prerequisites, seems acceptable. Special rules for preserving evidence (Option 5) seem conceivable in principle; however, the specific formulation must still be assessed.

Question B:

Are special rules regarding access to documents held by a competition authority helpful for antitrust damages claims? How could such access be organised?

The comments regarding Question A correspondingly apply particularly in regard to the very far-reaching Option 6. The generally applicable rules in Germany appear sufficient so that there is no need for further provisions. Rules that approach fishing expeditions as part of which all documents (including operational and business secrets) must be produced without specific grounds, must be rejected.

The cooperation of the courts with the Commission (Option 7) is governed by § 90a ARC. § 90a ARC does not contain special provisions on the protection of business secrets and other confidential information (sub-question a); the general rules apply. Pursuant to § 142 German Code of Civil Procedure, the court may order the disclosure of documents at its discretion. In so doing it must also take account of justified interests in the protection of secrets and personality. A request for documents

that could also be delivered by the parties (sub-question b) should not be possible (cf. § 432 subsec. 2 German Code of Civil Procedure).

Question C:

Should the claimant's burden of proving the antitrust infringement in damages actions be alleviated and, if so, how?

The seventh amendment to the ARC established in § 33 subsec. 4 sentence 1 that final decisions by the competition authorities in regard to the finding of an infringement of competition law are binding on the civil courts. Accordingly, there is agreement with the first alternative recommended in Option 8. Corresponding rules in other European Member States would support private law follow-on actions.

The general principles of national law are basically sufficient as to shifting or lowering the burden of proof in other cases (Option 9). In principle there is no difference between the situation of a claimant in the area of antitrust law damage compensation claims and those of other claimants. In § 20 subsec. 5 ARC, the German legislature incorporated a reduction of the burden of proof in the area of control of abusive practices in the interests of affected small and medium-sized businesses.

Unjustified refusal by a party to produce evidence is taken into account in Germany within the framework of the independent assessment of evidence by the court pursuant to § 286 German Code of Civil Procedure. This corresponds to the principle of independent assessment of evidence by the court. Therefore, there is agreement only with the third alternative in Option 10.

3. *Fault requirement*

Question D:

Should there be a fault requirement for antitrust-related damages actions?

The fault requirement should be retained for damages actions based on antitrust law violations. The existing rules appear sufficient and reasonable. In Germany, pursuant to the jurisprudence of the highest court, upon presentation of an objective violation of duty by the infringing party, fault is presumed or there is *prima facie* evidence for it. The acting party, however, always has the opportunity to exculpate itself. A legal mistake can also be taken into consideration in this context, whereby high standards must be placed on this.

Strict liability independent of fault (Options 11 and 12) would be far removed from the general damage compensation system. The parallel to strict liability does not seem appropriate in this respect, because it is founded on permissible action by the liable party, whereas damage compensation claims in the case of antitrust violations require prohibited action by the infringing party. In addition, in borderline cases in the area of Art. 82 EC Treaty, for example, the element of fault offers a corrective against excessive liability on the part of the undertaking. This is because it cannot otherwise be

excluded that undertakings will refrain from desired innovations and increased competition because of a fear of strict liability.

The applicable rules on accounting for excusable error (Option 13) are sufficient and do not require amendment.

4. Damages

Question E:

How should damages be defined?

In principle, damages should have an equalization effect (restitution and compensation). Subject to this proviso, there is agreement with Option 14.

Under German law there is now an express provision that the infringing party's pro rata profits can also be taken into account when estimating the damage (§ 33 subsec. 3 sentence 3 ARC). Thus, Option 15 is agreed in the form that the illegal profits may provide the grounds for the damage suffered. On the other hand, under German law reclaiming illegal profits is not a damages compensation claim. This claim, which is in addition to the damage compensation claim of the injured party, can be asserted by the cartel authorities (§ 34 ARC). In exceptional cases industry associations also have this authority pursuant to § 34a ARC.

The introduction of multiple damages (Option 16) should be rejected in all forms. This would be contrary to the equalization function of the right to damage compensation, which is one of the main principles of the law on damage compensation in Germany. In accordance with the jurisprudence of German courts, punitive damages violate public policy in Germany. In the judgment in the *Courage* matter, the ECJ also established that damage compensation claims of injured legal personalities serve to compensate the losses suffered. The goal is not punishment or a deterrent effect (beyond the compensation as such).

The obligation to pay interest from the time the damage occurred has been applicable law in Germany since the seventh amendment to the ARC (§ 33 subsec. 3 sentence 4 ARC). In this form, Option 17 (last alternative) deserves support.

Question F:

Which method should be used for calculating the quantum of damages?

Complex economic models for the quantification of damages (Option 18) may provide more exact results in individual cases than simpler methods. However, they are always encumbered by uncertainties and are dependent upon numerous factors. Because of their complexity, in many cases

legal certainty and the calculability of litigation risks, which are important for claimants, are reduced by the use of economic models. The consequence of this would be that the enforcement of substantive competition law would be made rather more difficult. Thus, in principle, the applicable rule – that the court can estimate damages in light of all circumstances based on its independent conviction (§ 287 German Code of Civil Procedure) – should be retained. This allows all methods to be taken into account, including economic models, when their use promises more exact information and can be implemented.

Commission guidelines on the quantification of damages (Option 19) would probably not be helpful for the courts in the context of independent assessment of the evidence. Thus, no need is seen for such guidelines.

There is already the possibility of splitting between the basis for and the amount of the claim (Option 20) in German civil procedure and this is generally viewed as sensible. The majority of antitrust damages actions in Germany currently are directed toward the establishment of an obligation to pay damage compensation; the amount of damages is often subsequently established within the framework of a settlement. In addition, as to damages actions specifying an amount, the court has the option of issuing an interim judgment regarding the basis of the claim pursuant to § 304 German Code of Civil Procedure if this is appropriate in the individual case. These procedural options have proven themselves. In contrast, a compulsory splitting between proceedings regarding the basis and the amount should be rejected, because in many cases this would lead to unnecessary bloating of the entire court proceedings.

5. *The passing-on defense and indirect purchaser's standing*

Question G:

Should there be rules on the admissibility and operation of the passing-on defense? If so, which form should such rules take? Should the indirect purchaser have standing?

The enforcement of antitrust law damages claims particularly as to hardcore cartels in practice is significantly dependent upon the statutory rules and, above all, the question of the burdens of presentation and of proof in cases of the passing-on of damages. For this reason the legislature in Germany has decided to regulate the “passing-on defense” by statute. It is now expressly clarified in the law that the resale of goods or services does not cause the occurrence of damages as to the purchaser to lapse. Under German law, thus, the passing-on of damages can only be considered as a lapse of damages under the strict prerequisites regarding the offsetting of benefits received. The burdens of presentation and of proof for these apply to the infringing party. A legal assessment is required as to whether taking the benefit into account corresponds to the goal of damage compensation and does not unjustly relieve the party causing the damage. Consequently, the result is that the

“passing-on defense” is only applied in exceptional cases in cases of antitrust law violations. Whether in addition or instead of the direct purchaser, indirect purchasers including final consumers have a claim to damage compensation, is not specifically regulated under German law. This is governed by the general rules of the law on damage compensation.

Therefore, none of Options 21 – 24 appears to be overall reasonable as a statutory rule. In this regard it must be taken into account that damage compensation claims as to hardcore cartels in practice, if at all, are only asserted by direct customers. Claims of indirect purchasers including final consumers are not excluded, but are insignificant in practice. The fundamental problems of difficulties of proof and the “atomization” of losses by resale also cannot be rectified by targeted statutory assistance.

6. *Defending consumer interests*

Question H:

Should special procedures be available for bringing collective actions and protecting consumer interests? If so, how could such procedures be framed?

The Federal Government concurs with the assessment that actions by individual consumers and purchasers who have only suffered minimal losses are very unlikely (see answer to Question G). Collective legal protection elements for the protection of consumer interests, such as, for example, an action for an injunction for the benefit of qualified institutions (especially consumer advice centers) or a claim for the confiscation of benefits, could not be agreed on in the context of the seventh amendment to the ARC. Parliament decided against a corresponding rule. On the other hand, a claim by industry associations for the confiscation of benefits pursuant to § 34a ARC, which is subsidiary to the confiscation of benefits by the cartel authorities, is standardized.

Possible doubts against actions by associations do not apply to collective actions by groups of purchasers other than final consumers or individual consumers (Option 26) when these do not lead to automatic application of a final judgment to third parties not involved in the proceedings. During the course of the discussions on the possible forms of bundling individual claims, a pilot project was undertaken in Germany with the Act on the Introduction of Test Case Litigation for Capital Investors, which recently took effect. We must wait for the results of experience with this model before a decision is made on which forms of bundling can be best integrated into the existing German legal system.

7. *Costs of actions*

Question I:

Should special rules be introduced to reduce the cost risk for the claimant? If so, what kind of rules?

In principle, the general rules of procedural law should apply to the costs in antitrust law disputes. Rules such as in Option 27 would be foreign to German civil procedure. That every non-successful party in general must bear the costs of the proceedings should be retained. The amount of the costs in Germany generally is calculated according to the value of the dispute. Beyond the general rules as to assistance with the cost of proceedings, the newly introduced § 89a ARC enables adjustment of the value of the claim as to antitrust law claims pursuant to §§ 33 or 34a ARC to the extent the party concerned credibly asserts that the burden of the costs of the proceeding based on the full value of the dispute would significantly endanger its economic situation. Otherwise, reference is made to the consultations up until now on the Small Claims Regulation (cf. the statements on pp. 5 and 6 of Document 15054/05 of 29 November 2005 at letter e), which were agreed at the JI-Council on 1 and 2 December 2005).

8. *Coordination of public and private enforcement*

Question J:

How can optimum coordination of private and public enforcement be achieved?

Public and private enforcement of competition law should be coordinated in such a way that the functionality and attractiveness of leniency applications should be affected to the least extent possible. This includes protecting the confidentiality of such applications and the information connected thereto (Option 28). Through the disclosure of the antitrust violation the leniency applicant should not be additionally burdened and subject to a larger risk of damage compensation than other participants in the anti-competitive behavior.

Reducing or limiting the obligation to pay damage compensation and the joint and several liability of the leniency applicant in parallel to this (Options 29 and 30) would create numerous problems. The extent to which preferential treatment of the leniency applicant as compared to other infringing parties is justified and how this can be carried out when necessary can only be sensibly decided within the framework of the applicable national law. The leniency application, which in Germany currently is based on administrative principles of the Federal Cartel Office, cannot encroach upon damage compensation claims and the rule of joint and several liability.

Conversely, it would significantly reduce the attractiveness of leniency applications if potential applicants saw themselves as being subject to the danger of multiple damage compensation claims or far-reaching civil procedure law obligations to produce evidence, which could extend to a fishing

expedition. Thus, these instruments should also be rejected because of their negative effects on leniency applications – notwithstanding the serious doubts mentioned above.

9. *Jurisdiction and applicable law*

Question K:

Which substantive law should be applicable to antitrust damages claims?

The question of the controlling jurisdiction has great significance in regard to damages actions based on antitrust violations. This is governed by Regulation 44/2001, which does not contain any special provisions as to this area. The extent to which a variety of possible jurisdictions and, thus, forum shopping, can be better limited by consolidation pursuant to Art. 6 of the Regulation should be examined.

In the future, the Rome II Regulation, regarding the provisions of which the Council of Justice Ministers reached political agreement on 28 April 2006, will be applicable to the question of the law to be applied. As to antitrust law disputes the location where the damage affected or threatened to affect the market concerned will be determinative, in accordance with the effects principle generally applicable to antitrust law. The choice of another legal system is not possible (Article 5(3) and (4) of the Rome II Regulation). Therefore, the statements as to Options 33 and 34 are unnecessary.

In the case of damages in different Member States, this solution leads to the situation that a different substantive law applies in each state where damage occurs. The disadvantages for antitrust law damages actions, however, do not appear to be excessively serious, because usually an injured party is only affected in one Member State and, thus, only one legal system applies as to him. There could be increased expense in prosecution of the action in only a few individual cases. Therefore, the Federal Government adheres to the proven effects principle.

10. *Other issues*

Question L:

Should an expert, whenever needed, be appointed by the court?

The question of whether an expert should be appointed by the court relates to general civil procedure law. In accordance with applicable German civil procedure law, in the event of disputed issues that go beyond the expertise of the court, the court can appoint an expert to clarify the questions (§ 404 German Code of Civil Procedure). Prior to the appointment it can order the parties to name suitable

experts; if the parties agree upon a certain person as expert, the court must follow this agreement (§ 404 subsecs. 3 and 4 German Code of Civil Procedure). A condition as to the appointment by the court in this regard (Option 35) must be rejected. It would not likely expedite the proceedings if the parties are required to always agree upon an expert – to be appointed by the court – because there are often disputes over this. Otherwise, there also is no discernible basis as to why in the area of antitrust law proceedings this question should be regulated in deviation from general principles.

Question M:

Should limitation periods be suspended? If so, from when onwards?

Suspension of the limitations period for antitrust law damages claims (Option 36) is already applicable law in Germany (§ 33 subsec. 5 ARC). As soon as a national cartel authority or the Commission institutes proceedings, the limitations period for private claims is suspended. Such a rule ensures that in the event of administrative proceedings against an antitrust violation, individual victims can wait for the conclusion of these proceedings without fear that their claims will be barred in the interim. In addition, a reinforcing effect from the binding effect of administrative decisions (cf. Question C) is achieved.

Question N:

Is clarification of the legal requirement of causation necessary to facilitate damages actions?

In regard to the question of causality, clarification does not appear necessary. In accordance with general principles of damage compensation law, there must be a causal connection between the violation of the law and the loss that occurs in regard to every claim for damage compensation. National law also determines the scope and prerequisites for proving causality.