

Schriften zum Wirtschaftsrecht

Band 259

**Reforming Private Antitrust
Enforcement in Europe:
Between Harmonisation and
Regulatory Competition**

By

Julian Kammin



Duncker & Humblot · Berlin

JULIAN KAMMIN

Reforming Private Antitrust Enforcement in Europe:
Between Harmonisation and Regulatory Competition

Schriften zum Wirtschaftsrecht

Band 259

Reforming Private Antitrust Enforcement in Europe: Between Harmonisation and Regulatory Competition

By

Julian Kammin



Duncker & Humblot · Berlin

The Faculty of Law of the Christian-Albrechts-University of Kiel
accepted this work as thesis in the year 2013.

Bibliographic information published by the Deutsche Nationalbibliothek

The Deutsche Nationalbibliothek lists this publication in
the Deutsche Nationalbibliografie; detailed bibliographic data
are available in the Internet at <http://dnb.d-nb.de>.

All rights reserved

© 2014 Duncker & Humblot GmbH, Berlin
Typesetting: Konrad Triltsch GmbH, Ochsenfurt
Printing: buchbücher.de gmbh, Birkach
Printed in Germany

ISSN 0582-026X

ISBN 978-3-428-14425-9 (Print)

ISBN 978-3-428-54425-7 (E-Book)

ISBN 978-3-428-84425-8 (Print & E-Book)

Printed on no aging resistant (non-acid) paper
according to ISO 9706 ☺

Internet: <http://www.duncker-humblot.de>

*Meinen Großeltern
Gisela und Siegfried Martin*

Acknowledgements

This book is a slightly updated version of my PhD thesis which was submitted to the Law Faculty of the Christian-Albrechts-University of Kiel in August 2013. I wrote it during my time as a Research Assistant at the Chair of Public Law where I worked on the project “Reforming the European Civil Justice: The case of cross-border private antitrust law actions” which was funded by the European Commission.

I am particularly indebted to my PhD supervisor and employer, Prof. Dr. Florian Becker, LL.M. (Cambridge), for his outstanding academic support. His door was always open to me and without his help and belief in me I would not have been able to write this book. I am also very grateful to the second examiner, Prof. Dr. Joachim Jickeli, for his constructive suggestions.

I want to thank those who worked on the project with me, especially Dr. Mihail Danov, Garnett Traeger and Henning Gründahl. I also want to thank the whole Chair of Public Law for two unbelievable years, with special thanks to Nikola Sieverding and Frederik Heinz for their patience when sharing a room with me.

My gratitude is also extended to Dr. Angus Campbell for his helpful comments on an earlier draft of this book. All remaining errors are mine.

I also want to thank Dr. Tim Reher and Dr. Roland Wiring from CMS Hasche Sigle Hamburg for introducing me to antitrust law and Jon Lawrence and Boris Bronfentrinker from Freshfields Bruckhaus Deringer London for deepening my knowledge of this area.

I thank my whole family, especially my parents, Ute and Jürgen Kammin, for their boundless love and belief in me and all my friends, especially Kathrin Engelbrecht-Greve and Martin Mittelstädt, for giving me the necessary distraction when I needed it.

I would like to extend a special thanks to my grandparents for their eternal support. Without their generous help this book would not have been possible. I dedicate it to them.

In this book I have tried to state the law as it stood in January 2014.

Berlin, April 2014

Julian Kammin

Table of Contents

Part 1

The Situation	17
A. Antitrust Policy and Substantive Antitrust Law in Europe	17
I. Anti-Competitive Agreements	18
II. Abusive Conduct by Monopolists and Dominant Firms	19
B. Development of Antitrust Enforcement in General	20
C. Antitrust Enforcement through Damages Claims in Particular	21
I. Current Situation	21
II. Significance for Compensation and Deterrence	22
III. Application of Primary Law to Antitrust Damages Claims	23
IV. Transnational Dimension of Damages Claims	24
1. International Jurisdiction	25
2. Applicable Law	26
D. Objective of this Thesis	26

Part 2

Aspects of Substance, Procedure and Jurisdiction	28
A. Introduction	28
B. Substantive Law in Cross-Border Antitrust Damages Actions	29
I. National Provisions with Regard to Damages	29
1. Burden of Proof	30
a) Follow-On and Stand-Alone Litigation	30
b) Significance of National Provisions	31
2. Requirement of Fault	32
a) England and France: Strict Liability	32
b) Disadvantages for Claimants through Requirement of Fault	33
3. Award of Damage	33
a) Restitution and Punitive Damages	33
b) Assessment of Damages in Germany	35
c) Fines by a Public Authority	35

d) Summary	35
4. Passing-on Defence	36
a) Consequences for Damages Litigation	36
b) Status Quo in the European Union	37
5. Statutes of Limitation	38
6. Concluding Remarks	38
II. Choice-of-Law Rules	39
1. Private International Law Framework	39
2. Contractual Claims in Antitrust Litigation	40
a) Contract/Contractual	40
b) Applicable Substantive Law	41
3. Non-Contractual Claims in Antitrust Litigation	42
a) Applicable Substantive Law	42
b) Role of Art 6 (3) (b) Rome II	43
c) Limit Forum Shopping	44
III. Conclusion	45
C. Procedural Law in Cross-Border Antitrust Damages Actions	45
I. Practitioners' Approach	45
II. Collective Redress Mechanisms	47
1. Role of Consumers	47
2. Principle of Equivalence and Effectiveness	48
3. Different Mechanisms of Collective Actions	49
a) Impracticality of Joint Actions and Test Cases	50
b) Opt-In/Out Class Actions	50
aa) Restrictive Framework in EU Member States	51
bb) Benefits of Class Actions	51
cc) Disadvantages of Class Actions	53
c) Representative Actions by Associations	55
aa) Definition and Benefits	55
bb) Examples from France, the United Kingdom and Germany	55
d) Assignment of Claims	57
aa) Model of "Cartel Damage Claims" (CDC)	57
bb) Relationship to other Collective Redress Tools	58
e) Summary	59
III. Costs	59
1. Practitioners' Approach	60
2. Cost Rules Among Member States	61
3. Consequences for Antitrust Damages Claimants	62
IV. Standard of Proof	63
1. Cartels and Standard of Proof	63

2. National Rules on Standard of Proof	64
V. Access to Evidence	65
1. Information Asymmetry	65
2. Different Approaches	65
3. Practical Outcome	67
VI. Recognition and Enforcement of the Title	67
VII. Conclusion	69
D. Jurisdictional Rules in Cross-Border Antitrust Damages Actions	69
I. Claimants' Uncertainty about the Forum	70
II. Cultural Aspects Guiding Victims	70
III. Position of Courts	71

Part 3

Ideas for Legal Reform

	73
A. Approach of the United States	74
I. Different Approaches	74
II. Characteristics of Antitrust Litigation in the United States	75
1. Deterrence or Compensation?	75
a) Passing-on Defence and Automatic Trebling	75
b) Merging the Approaches	76
2. Access to Evidence	76
a) Exchange of Evidence between Parties in the United States	76
b) Requirement of Related Rules	77
3. Collective Redress Mechanisms	78
a) Opt-Out-Model of the United States	78
b) A Model for the European Union?	78
III. Ideas for Reform Inspired by the US System of Antitrust Enforcement	79
B. "European" Reform	80
I. Harmonisation/Centralisation	80
1. Current Example	81
2. Benefits of Uniform Rules	81
3. Negative Aspects of Centralisation	82
a) Traditional Inconsistency	82
b) Legal Inconsistency	83
c) Harmonisation Costs	84
II. Decentralisation and Inter-Jurisdictional Regulatory Competition	84

III. Fundamental Ideas for Legal Reform of the Brussels I Regulation	85
1. Promotion of Forum Shopping to Improve Private Enforcement	86
a) Forum Shopping	86
b) Regulatory Competition	87
2. Negative Attitudes towards Forum Shopping	88
a) Unfairness to the Defendant	88
b) Public Interest	89
3. Limit to the Choice of Forums	89
a) Choice-of-Law Rules	90
b) Jurisdictional Rules	90
c) Lis Pendens Rules	91
4. Availability of Collective Redress and the Claimant's Forum	92
5. Stimulating National Legislators	92
IV. Summary	93

Part 4

Analysis and Reform of the Jurisdictional Rules	95
A. Introduction/Framework	95
B. Scope of the Brussels I Regulation	96
I. Unequal Access to Justice	96
II. Antitrust Damages Claims and Non-EU Parties	97
C. General Jurisdiction and Antitrust Damages Claims	98
I. Actor Sequitur Forum Rei	98
II. Ratio of Protecting the Defendant	99
1. Situation of Antitrust Victims	100
2. Determination of a Well-Placed Court	101
III. Claimants' Venue	101
1. Analogy to Existing Venues	102
2. Home Actions versus Forum Shopping	103
IV. Conclusion	103
D. Jurisdiction in Contract-Based EU Antitrust Damages Claims	104
I. Possible Scenarios	104
II. Matters Relating to a Contract/ <i>Forum Contractus</i>	104
1. Contribution to Private Antitrust Enforcement	105
2. Distinction between Contractual and Non-Contractual Matters	106
a) Significance of the Distinction	106
b) Interpretation	107

c) Scope of Contractual Matters	107
aa) Voidness of Contractual Agreements	107
bb) Damages Claims of a Contracting Party	109
3. Place of Performance of the Obligation in Question	110
a) Interpretation under the Brussels Convention	110
b) Interpretation de Lege Lata	112
aa) Art 5 (1) (b) Brussels I	112
bb) Benefits for Private Enforcement of Antitrust Law	112
c) Consequences for Transnational Antitrust Actions	113
aa) Sale of Goods	113
bb) Provision of Services	114
cc) Other Agreements	115
d) Reform Ideas for the Place of Performance	116
4. Declaration of Voidness of Anti-Competitive Agreements	117
5. Damages Claim of a Contracting Party	118
a) Development towards Tortious Damages Claims	118
b) Antitrust Damages Claim of a Contracting Party	120
aa) Art 5 (3) Brussels I	120
bb) Factual Connection of the Claims	121
cc) Suggestions for Legal Reform	122
6. Ideas for Reform of Art 5 (1) Brussels I	123
III. Disputes Arising out of the Operations of a Branch or Agency	123
IV. A Number of Defendants	125
1. Art 6 Brussels I and Forum Shopping	125
a) Benefits to Claimants	125
b) Potential for Abuse	126
2. Close Connection	127
3. Defendants Domiciled Outside the European Union	128
4. Concluding Remarks	129
V. Matters Relating to a Contract Concluded by a Consumer	129
1. Ratio and Role of Consumer Protection in Antitrust-Based Litigation	130
a) Application to Antitrust Damages Claims	131
b) Betterment of Consumers	131
c) Protection of Defendants versus Effective Legal Protection	131
2. Addressees of Privileges	132
a) Personal Scope: Consumers	132
b) Third Parties on Behalf of Consumers	134
aa) Consumer Associations	135
bb) Consequence for Consumers	135
3. Objective Scope of the Privileges	135

4. Reform Proposals to Strengthen the Consumers' Position	136
a) Consumer Collective Redress Mechanisms	136
aa) Home Venue for Consumer Associations	136
bb) Permanent Availability of Collective Redress Mechanisms	137
b) Tortious Damages Claims	137
VI. Agreements on Jurisdiction	138
1. Practical Implication	138
2. Benefits and Disadvantages of Choice of Court Clauses	139
3. Ideas for Legal Reform	140
E. Jurisdiction in Tort-Based EU Antitrust Damages Claims	140
I. Tort-Based Damages Claims and Venue	140
II. International Jurisdiction in Matters Relating to Tort/ <i>Forum Delicti</i>	141
1. Qualification, Scope, Ratio and Benefits for Antitrust Victims	141
2. Place of the Harmful Event	142
a) Interpretation: Place of Damages and Place of Acting	142
b) Consequences for Antitrust Damages Claimants	143
c) Exceptions	144
3. Place of the Event Giving Rise to the Antitrust Damage/Place of Acting	145
a) Infringement of Art 101 TFEU	145
aa) Place of Conclusion	145
bb) Place of Implementation or Operation	146
cc) Place of the Seat	147
dd) Summary	147
b) Infringement of Art 102 TFEU	147
4. Place where the Antitrust Damage Occurred/Place of Damages	148
a) Forum in Antitrust-Based Litigation	148
b) Unrestricted Freedom of Choice	149
c) Indirect Consequences	150
5. Ideas for Legal Reform	150
a) Benefits of Forum Delicti Commissi	150
b) Avoiding Unlimited Forums and Abusive Forum Shopping	151
F. New Venues	152

Part 5

Analysis and Ideas for Legal Reform of <i>Lis Pendens</i> and Related Actions	154
A. Ratio and Scope of Arts 27 and 28 Brussels I	154

B. Avoiding Parallel Proceedings	155
I. Response of the Brussels I Regulation	155
II. Applicability in Antitrust Law	156
1. Art 27 Brussels I and Antitrust Damages Claims	156
2. Art 28 Brussels I and Antitrust Damages Claims	157
C. Defendants' Tactics: Reverse Forum Shopping	157
I. Staying proceedings – <i>Forum Non Conveniens</i>	158
1. Applicability of <i>Forum Non Conveniens</i>	158
2. Position of Courts as Justification for <i>Forum Non Conveniens</i> ?	159
II. Negative Declaratory Proceedings	161
1. Theoretical Basics	161
2. Practical Application	162
3. Suggestions for Legal Reform	163

Part 6

Summary, Conclusion, Policy 165

A. Suggestions for Legal Reform	165
I. Fundamental Considerations	165
II. Legal Reform of Art 2 Brussels I	167
III. Legal Reform of Contract-Based Jurisdiction	167
1. Reform Suggestions for Art 5 (1) Brussels I	167
2. Reform Suggestions for Art 6 (1) Brussels I	168
3. Reform Suggestions for Arts 15 et seq. Brussels I	169
4. Reform Suggestions for Art 23 Brussels I	169
IV. Legal Reform of Tort-Based Jurisdiction	170
V. Legal Reform of <i>Lis Pendens</i>	170
B. Legal Policy/Leniency Programme	171
I. Significance of the Leniency Programme	171
II. Dependence of Private Enforcement on Leniency	172
III. Collision Points of Leniency and Cartel Damages Claims	173
IV. Ideas for Legal Reform	174
1. Civil Immunity for Leniency Applicants	175
2. Waiving Joint and Several Liability	175
3. Restricting Pre-Trial Disclosure and Access to Files	176
4. The Way Ahead	177
References	178
Subject Index	185

Part I

The Situation

A. Antitrust Policy and Substantive Antitrust Law in Europe

Antitrust¹ policy can be defined as “... the set of policies and laws which ensure that competition in the marketplace is not restricted in a way that is detrimental to society”.² National and European legislation has been influenced by numerous objectives; the most significant is consumer welfare surplus, as well as the protection of small undertakings.³ Firms with market power are able to harm welfare by reducing output, raising higher prices, degrading the quality of products, suppressing innovation and depriving consumers and customers of choice.⁴ The goals of antitrust law are, briefly, to stop such abuses and thereby protect competitors, the dispersal of economic power and the redistribution of wealth.⁵

Legal rules establishing the unlawfulness of anti-competitive practices can be found in the Treaty on the Functioning of the European Union (TFEU) and in national Acts like the German Act against Restraints of Competition⁶. Arts 101 – 109 TFEU are meant to help the European Union “work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress ...” as required by Art 3 (3) (2) of the Treaty on European Union (TEU). The Union-wide market integration⁷ shall be kept open by the antitrust rules.⁸

¹ In this thesis, the notion “Antitrust Law” is used instead of “Competition Law” to describe the cartel prohibition, the merger control (which is not subject of this thesis) and the prohibition of abuse of a dominant position. This makes it easier to show the difference to “Unfair Practices” (German: Lauterkeitsrecht).

² *Motta*, Competition Policy, p. 30.

³ *Motta*, Competition Policy, p. 18 et seq.; *Whish*, Competition Law, p. 1.

⁴ *Whish*, Competition Law, p. 1; *Jickeli*, in: Schliesky/Ernst/Schulz, Die Freiheit des Menschen in Kommune, Staat und Europa (2011), p. 713 (716, 727).

⁵ *Whish*, Competition Law, p. 19 et seq.

⁶ Gesetz gegen Wettbewerbsbeschränkungen (in the version of the 8th Amendment of 26 June 2013); *Jickeli*, in: Schliesky/Ernst/Schulz, Die Freiheit des Menschen in Kommune, Staat und Europa (2011), p. 713 states that the German Act against Restraints of Competition is considered to be the “constitution of the free market economy”.

⁷ See Arts 29, 45, 49, 56, 63 TFEU; see in general *Jickeli*, JZ (1995), p. 57.

I. Anti-Competitive Agreements

There are different practices controlled by antitrust law. The most common ones are anti-competitive agreements which have as their object or effect the restriction of competition.⁹ They are targeted by Art 101 (1) TFEU which prohibits *inter alia* all agreements between undertakings and concerted practices which may affect trade between Member States and have as their object or effect the prevention, restriction, or distortion of competition within the internal market. They are automatically void, Art 101 (2) TFEU.

Horizontal agreements between firms, often competitors who operate at the same market level¹⁰, are the most obvious target for European antitrust law and can be subdivided into two groups.¹¹ First, cartels, referred to as “cancers on the open market economy”¹², play *the* outstanding role in horizontal anti-competitive agreements. The most widespread way competition is distorted is a price-cartel between competitors fixing prices at the expense of third parties.¹³ Other ways to eliminate competition is for undertakings to agree to share particular markets between themselves geographically or according to classes of customers¹⁴ or to agree to restrict output, as purchase prices will rise in consequence¹⁵. The second area of horizontal agreements that is potentially targeted by Art 101 (1) TFEU is an oligopoly in markets, with merely few operators able to conduct themselves in a parallel manner.¹⁶ Art 101 (1) TFEU also applies to vertical agreements between firms on different market levels, usually between producers and retailers, but also possibly including wholesalers, sub-contractors, transport operators, and other undertakings.¹⁷

⁸ *Streinz*, *Europarecht*, para. 1011.

⁹ *Whish*, *Competition Law*, p. 2.

¹⁰ *Elhaug/Geradin*, *Global Competition Law and Economics*, p. 73.

¹¹ See the subdivisions in *Whish*, *Competition Law*, p. 496 and the following chapters.

¹² Speech by *Mario Monti* of 11 September 2000, available at http://europa.eu/rapid/press-release_SPEECH-00-295_en.htm?locale=de (last accessed 14 February 2014).

¹³ *Wiedemann*, *Handbuch des Kartellrechts*, § 1 para. 1.

¹⁴ *Whish*, *Competition Law*, p. 513.

¹⁵ See for example Commission Decision of 6 August 1984 (IV/30.350 – zinc producer group), OJ (1984) L 220 p. 27 para. 67; Commission Decision of 23 July 1984 (IV/30.988 – Agreements and concerted practices in the flat-glass sector in the Benelux countries), OJ (1984) L 212 p. 13; *Décision de la Commission du 18 décembre 1972 (IV-581-Cementregeling voor Nederland)*, JO (1972) L 303 p. 7.

¹⁶ *Whish*, *Competition Law*, p. 544 et seq.

¹⁷ See *Whish*, *Competition Law*, p. 604 et seq.