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Reflections from the German Perspective***

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Evaluation of Evidence in National Courts: Reflections from the German Perspective

Jochen Burrichter and Hans Logemann *

From the German perspective, no uniform picture can be given with regard to the judicial evaluation of evidence in competition law proceedings. Rather, under German law there are three – to some extent significantly different – ways of national and EC competition law enforcement. Variations exist between these forms of proceedings with respect to possible sanctions, the applicable standards, and the competent courts to hear such cases. As these differences also affect the evaluation of evidence in court proceedings, one must differentiate when looking at competition cases in Germany.

I. Overview of the German Enforcement Regime

1. Proceedings concerning Administrative Fines

Generally speaking, options for German competition authorities to enforce competition law are twofold: First, authorities may initiate proceedings to impose administrative fines or to skim off the economic benefit derived from the competition law infringement pursuant to Sec. 81 et seq. of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*). These proceedings, which are mainly used in cases of horizontal agreements and abusive behaviour, have recently been amended and aligned with the European counterpart pursuant to Art. 23 of Regulation No. 1/2003¹. Comparable with Art. 23(5) of Regulation No. 1/2003, administrative fines under German law are not of a criminal law nature. The national proceedings are nevertheless somewhat stricter with regard to the applicable standards than Commission proceedings. According to German law, some forms of competition law infringements constitute an administrative offence (*Ordnungswidrigkeit*), which is after all of a quasi-criminal law nature. Consequently, the proceedings are shaped similar to criminal procedure and many of the rules of the Code of Criminal Procedure (*Strafprozessordnung, StPO*) are applicable.² Hence, two important features to be strictly observed in such proceedings are the presumption of innocence (*in*

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¹ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1 [2003].

² Cf. Sec. 46(1) of the Code of Administrative Offences (*Gesetz über Ordnungswidrigkeiten, OWiG*).

dubio pro reo-principle) and the requirement of fault. The competent court to review decisions taken by the Federal Cartel Office (FCO, *Bundeskartellamt*) is the Higher Regional Court (*Oberlandesgericht*) Düsseldorf³ which has specialised chambers for antitrust matters and whose judges possess high expertise in the field of competition law.

2. *Administrative Proceedings*

Second, the competition authorities may also institute administrative proceedings according to Sec. 32 et seq. in connection with Sec. 54 et seq. GWB. These antitrust proceedings are similar to general administrative proceedings in other fields of German public law⁴ and are of practical importance, for example, in merger control, sector inquiries and in connection with behaviour that does not constitute an evident breach of competition law (hard core cartels will in contrast generally entail fines pursuant to Sec. 81 GWB). The possible sanctions in administrative proceedings range from cease and desist orders and interim measures to commitment decisions and withdrawals of the applicability of block exemptions.⁵ A further possibility is the (subsidiary) skimming-off of economic benefits.⁶ Against these decisions undertakings may again appeal to the Higher Regional Court Düsseldorf for judicial review. However, although the same chambers and judges are competent to hear such cases, the necessary standards to be applied diverge significantly from the proceedings concerning administrative fines as the Code of Criminal Procedure (and hence the presumption of innocence) is not applicable.

3. *Civil Actions*

The third and final pillar in the German competition enforcement regime consists of civil actions initiated by private parties. The remedies available to potential claimants under German law are cease and desist orders, claims to restore the claimant to its position prior to the infringement (*Beseitigungsanspruch*), claims for damages or simply the declaration of nullity. Such actions are primarily based on Sec. 33 GWB. Private actions, especially damages actions, were facilitated by the recent statutory amendments of 2005. The current development indicates a significant rise in damages actions over the next years. The relevant procedural rules follow from the Code of Civil Procedure (*Zivilprozessordnung, ZPO*) which has several implications regarding the evaluation of evidence. According to Sec. 87 GWB, the courts exclusively competent to adjudicate private actions in connection with breaches of competition law are the district courts (*Landgerichte*). There are no specialised courts in Germany for bringing competition-based private actions. However, federal states have consolidated the jurisdiction for private antitrust litigation by assigning those cases arising in

³ Cf. Sec. 83(1) GWB.

⁴ According to Sec. 73 GWB, however, the Code of Civil Procedure (*Zivilprozessordnung, ZPO*) is subsidiarily applicable.

⁵ Cf. Sec. 32 – 32d GWB.

⁶ Cf. Sec. 34 GWB.

several district court circuits to one particular district court. Moreover, the courts can assign competition-based cases to a limited number of panels. Thus, although no specialised civil courts exist, there is a possibility to create panels with a higher competition law expertise.

II. Investigation of Facts and Burden of Proof

1. *Proceedings concerning Administrative Fines*

The variations between the different forms of antitrust proceedings have repercussions on the investigation of facts. In appeal proceedings against administrative fines imposed by competition authorities, the appellate court must investigate the facts *ex officio* pursuant to Sec. 77 of the Code of Administrative Offences (principle of official investigation). The undertaking accused of a competition law infringement is not obliged to present facts establishing its innocence. Although the prosecution responsibilities are transferred from the competition authority to the Chief Public Prosecutor (*Generalstaatsanwaltschaft*) subsequent to the lodging of an appeal, the competition authority still functions as *amicus curiae* assisting the court in the establishing of facts. For further clarification of particular facts the court may rely on the competition authority.⁷

If the factual circumstances relevant to the establishing of a competition law infringement remain controversial between the parties, it is incumbent upon the public institutions, i.e. the Chief Public Prosecutor and the appellate court, to provide sufficient evidence of the facts that constitute a breach of competition law. This applies not only to inculpatory but also to exculpatory elements including the conditions for an exemption within the meaning of Art. 81(3) of the EC Treaty. Art. 2 of Regulation No. 1/2003 and its differentiation as regards the burden of proof are therefore not applicable in proceedings concerning administrative fines as this would otherwise conflict with the presumption of innocence.⁸ For the same reason, in proceedings concerning administrative fines the court cannot base its judgement on legal presumptions. Such presumptions available under German competition law are, for example, Sec. 19(3) GWB regarding the presumption of market dominance or Sec. 20(2) GWB regarding the presumption of dependency on a purchaser concerning small or medium-sized enterprises.⁹ Lastly, *prima facie* reasoning in a strict sense is not an admissible means of adducing evidence in connection with administrative fines for it would unduly restrict the principle of official investigation. However, undertakings are not entirely relieved from co-operation as the court is not barred from working with inferences (*Indizienbeweissführung*). If for example the competition authority or the Chief Public Prosecutor succeeds in proving an exchange of sensitive business information between competitors this may very well be an

⁷ Cf. Sec. 76 OWiG.

⁸ Cf. the Statement of the German Delegation on Art. 2 of the Regulation in: *Council of the European Union, Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities of 10 December 2002*, Doc 15435/02 ADD 1 RC 22, p. 8.

⁹ GERHARD DANNECKER/ JÖRG BIERMANN, in: Immenga/Mestmäcker (eds.), *GWB*, 4th ed. (2008), Introd. to Sec. 81 at para. 255.

indication of a concerted practice unless the undertakings offer a plausible alternative explanation for such contact.¹⁰

2. *Administrative Proceedings*

In appeal proceedings against administrative decisions by German competition authorities, the principle of official investigation also applies. Therefore, the affected undertaking is in principle under no obligation to present (exculpatory) facts. The practical experience, however, is different; undertakings will contribute to the investigation of facts in their very own interest. Moreover, the court's *ex officio* investigations are naturally limited by its restricted resources. The court cannot compensate for serious deficiencies in the investigation carried out by the competition authorities. The judiciary has thus emphasised that it is primarily the competition authority's responsibility to comprehensively investigate all relevant facts. The appellate court will only conduct supplemental measures, yet no extensive investigations regarding new aspects.¹¹ If extensive inquiries should become necessary during ongoing appeal proceedings, they will usually be carried out by the competition authority.¹²

Likewise, the court will only further investigate if the parties' submissions give any reason to doubt that all facts relevant to the case have been sufficiently clarified.¹³ A party's simple denial of facts presented by the other party will usually not suffice to raise doubts on the soundness of the submission.¹⁴ Rather, a substantiated submission can be overturned only by an at least equally substantiated submission. Such contrary presentation of facts should be done at an early stage of the written proceedings. In a recent case, the OLG Düsseldorf held that the FCO was too late to dispute the defendant party's calculation of market shares only in the court hearing rather than in the preliminary proceeding. Moreover, the FCO was unable to demonstrate serious flaws in the defendant's market share analysis. The court consequently denied the FCO's request for further market analysis.¹⁵

3. *Civil Actions*

In private antitrust cases, the principle of official investigation does not apply. Rather, the parties must investigate the relevant facts on their own and present them to the court (*Beibringungsgrundsatz*). The court will usually not conduct any investigations *ex officio*. Moreover, each party bears the burden of proof as regards the facts favourable to it. In

¹⁰ Cf. RAINER BECHTOLD, *GWB*, 5th ed. (2008), Sec. 1 at para. 76.

¹¹ Cf. Bundesgerichtshof (BGH), Case KVR 14/01, *WuW/E DE-R* 1163, 1167 – *HABET/Lekkerland*; Kammergericht (KG), Case Kart 7/72, *Wirtschaft und Wettbewerb-Entscheidungssammlung zum Kartellrecht (WuW/E) OLG* 1321, 1323 – *Zahnbürsten*; KARSTEN SCHMIDT, in: Immenga/Mestmäcker (eds.) [Fn. 9], Sec. 70 at para. 4.

¹² Cf. BGH, Case KVR 14/01, *WuW/E DE-R* 1163, 1167 – *HABET/Lekkerland*.

¹³ Cf. KARSTEN SCHMIDT, in: Immenga/Mestmäcker (eds.) [Fn. 9], Sec. 70 at para. 2.

¹⁴ Cf. Oberlandesgericht (OLG) Düsseldorf, Case VI-Kart 11/07 (V), published on juris, at para. 53 et seq. – *WT-Pool*.

¹⁵ Cf. OLG Düsseldorf, Case VI-Kart 11/07 (V), published on juris, at para. 53 et seq. – *WT-Pool*.

damages actions, for example, the claimant is required to show a (culpable) competition law infringement, a causally linked harm, and the amount of damage suffered in order to support his claim.

It generally is extremely difficult for potential claimants to collect the relevant facts and evidence. This is particularly true for victims of hard core violations. Much of the key evidence is often concealed and being held by the defendant, whilst the potential claimants have no knowledge in sufficient detail. Moreover, under German civil procedure – as in many continental European jurisdictions – a party can neither launch discovery proceedings nor is there a general obligation to disclose relevant evidence to the other party.¹⁶ While the 2005 amendments to the GWB left this procedural situation unchanged, the Commission has – as is well-known – presented a proposal for a departure from this rule and for a shift to the Anglo-American system of civil procedure in its recent White Paper on damages actions for breach of the EC antitrust rules.¹⁷ It remains questionable whether such measures to implement disclosure *inter partes* will substantially improve the situation of potential claimants or rather facilitate abusive fishing expeditions.

But even under present law claimants may benefit from several alleviations:

- First, the defendant claiming the benefit of Article 81(3) of the EC Treaty or Sec. 2 GWB bears the burden of proof as regards the conditions of these provisions.¹⁸
- Further, according to case law, fault will be assumed unless the defendant proves the contrary.¹⁹
- The defendant may also be liable under substantive law to furnish information (*Auskunftsanspruch*). Such liability may derive, for instance, from a contractual relationship or simply from the principle of good faith. The judiciary grants an ancillary claim for information if a party cannot be reasonably expected to have sufficient knowledge about the existence and the scope of the (main) claim while the other party is in a position to easily give such information.²⁰
- Further facilitation follows from the so-called secondary obligation to state and prove facts (*sekundäre Darlegungs- und Beweislast*) under German civil procedure. The party not bearing the burden of proof (usually the defendant) may be required to substantiate its submission and state the relevant facts if the other party has no insight into the course of events and therefore does not possess sufficient knowledge about the factual circumstances. If, by contrast, the defendant has better knowledge and if it is

¹⁶ Cf. BGH, Case II ZR 159/89, *Neue Juristische Wochenschrift* (NJW) 1990, 3151.

¹⁷ COM (2008) 165 of 2 April 2008.

¹⁸ Art. 2 of Regulation No. 1/2003 corresponds to a general rule of German civil procedure.

¹⁹ Cf. BGH, Case KZR 36/85, *WuW/E BGH* 2341, 2344 et seq. – *Taxizentrale Essen*.

²⁰ Cf. BGH, Case I ZR 44/99, *NJW* 2002, 2475, 2476.

reasonable to impose an obligation to state facts on him, an unsubstantiated denial of the claimant's submission will often not suffice. The court may then regard the claimant's submission as conceded within the meaning of Sec. 138(3) ZPO.²¹

- A potential claimant may also benefit from *prima facie* evidence (*Anscheinsbeweis*). In typical situations, i.e. when common sense suggests that certain circumstances typically result in a specific outcome or are usually caused by a specific behaviour, the adducing of evidence may be based on inferences unless the defendant can rebut the *prima facie* inference by showing that such a generalised rule does not properly reflect the actual situation in the present case.²²
- German competition law provides for several legal presumptions such as Sections 19(3), 20(2) and 20(5) GWB which may result in a reversal of the burden of proof as regards the elements covered by the presumption.
- Finally, the court may order the production of certain documents that have been specified by a party and that are kept by the other (Sec. 142 ZPO). This procedure presupposes, however, that the claimant not only refers to (broad) categories of documents but is also able to identify specific documents.

III. Standard of Proof

1. Proceedings concerning Administrative Fines

In proceedings concerning administrative fines the court evaluates the presented evidence according to its “free conviction gained from the hearing as a whole” (*freie richterliche Überzeugung*).²³ Any nomination of an abstract degree of probability would not correctly reflect the necessary standard of proof as the decisive criterion is whether the disputed fact is considered to be true in the court's (subjective) point of view. The evaluation and weighing of presented evidence lies within the discretion of the court; it is not bound by any (rigid) rules of evidence (*freie Beweiswürdigung*).

However, in appeal proceedings against administrative fines the presumption of innocence (*in dubio pro reo*-principle) must be observed. If the slightest personal doubts remain, there is no proper basis for a conviction.²⁴ The court may rely, of course, on its common sense and its “rules of experience”, especially in relation to the business world.²⁵

²¹ Cf. BGH, Case III ZR 239/06, NJW 2008, 982, 984.

²² Cf. REINHARD GREGER, in: Zöller, Zivilprozessordnung, 29th ed. (2009), Intro. to Sec. 284 at para. 29.

²³ Cf. Sec. 71 OWiG in connection with Sec. 261 Code of Criminal Procedure (*StPO*).

²⁴ Cf. ARMIN SCHOREIT, in: Karlsruher Kommentar, StPO, 6th ed. (2008), Sec. 261 at para. 2.

²⁵ Cf. GERHARD DANNECKER/ JÖRG BIERMANN, in: Immenga/Mestmäcker (eds.) [Fn. 9], Intro. to Sec. 81 at para. 258. Regarding the importance of “rules of experience” in antitrust proceedings, see also ALBRECHT OPPENLÄNDER, Judging Economic Analysis in Germany, ABA Spring Meeting 2009.

Indeed, lessons learned from experience may have the effect of a quasi-presumption. In its *Transportbeton* decision, for example, the German Supreme Court (*Bundesgerichtshof*) made clear that courts must not leave aside the economic principle that the formation of a cartel usually leads to an increase in profits of the participating cartellists.²⁶ The court held that the longer the violation's duration the higher is usually the likelihood of inflated revenues. This was of special importance under the GWB prior to 2005 when the setting of fines was tied to the economic benefit derived from the competition law infringement.²⁷ But even today this decision is of practical relevance with regard to old cases that are still pending and the skimming-off of economic benefits according to the revised Sec. 81(5) GWB. To avoid a violation of the *in dubio pro reo*-principle, courts work with safety margins when assessing the amount of the economic benefit.²⁸ Lastly, as mentioned above, the court may base its judgement on circumstantial evidence regardless of the strict standards applicable in administrative fines proceedings. In fact, inferences are an invaluable means for the establishing of (concealed) anti-competitive agreements or concerted practices. This does not conflict with the presumption of innocence as long as the court's conviction is not based on mere speculation, but on a solid factual basis.²⁹

2. *Administrative Proceedings*

The aforementioned principles more or less also apply to appeal proceedings against administrative decisions pursuant to Sec. 32 et seq. GWB.³⁰ However, the presumption of innocence is not to be regarded in such proceedings. Moreover, in merger control the necessary standards deviate slightly as the court will have to forecast the presumable effects of the concentration on the market. According to the judiciary, for example, it is sufficient for a prohibition of a merger pursuant to Sec. 36(1) GWB to show that the concentration will – based on the factual circumstances – with a *high degree of probability* and within a short period of time result in the formation or strengthening of a dominant position.³¹ A prognosis includes by definition speculative elements and it is therefore hardly possible for the court to dispel any doubt.

Another important issue is the determination of the relevant point of time for considering the underlying facts. Due to the volatility of markets the relevant economic conditions may change significantly during ongoing appeal proceedings. In such cases the question arises as to whether such changes are to be considered by the appellate court or the court rather has to base its decision only on the facts at the time when the competition authority initially decided on the matter. Under German law this depends on the particular proceeding: In an action for

²⁶ Cf. BGH, Case KRB 2/05, WuW/E DE-R 1567, 1569 – *Transportbeton I*.

²⁷ Cf. Sec. 81 (2) GWB of 1998.

²⁸ Cf. BGH, Case KRB 12/07, WuW/E DE-R 2225, 2230 – *Papiergroßhandel*; BGH, Case KVR 17/04, WuW/E DE-R 1513, 1519 – *Stadtwerke Mainz*; BGH, Case KVR 12/98, WuW/E DE-R 375 ff. – *Flugpreisspaltung*.

²⁹ Cf. BGH, Case 1 StR 146/00, Neue Zeitschrift für Strafrecht - Rechtsprechungs-Report (NStZ-RR) 2000, 312.

³⁰ Sec. 71(1) Sentence 1 GWB.

³¹ Cf. RAINER BECHTOLD [Fn. 10], Sec. 36 at para. 3.

rescission of the decision by the competition authority (*Anfechtungsbeschwerde*) usually the facts at the time of the decision's enactment decide. Prohibition decisions in merger control proceedings, on the other hand, are however treated differently; they are commonly considered to be so-called "continuous administrative measures" (*Dauerverwaltungsakte*) which is why the court – as an exception – bases its decision on the facts prevalent at the time of the last hearing in the appeal proceeding.³² A merger clearance, which is contested by a third party, by contrast, will only be judicially reviewed based on facts at the time when the clearance was granted.³³

3. *Civil Actions*

The relevant criterion describing the standard of proof necessary in German civil proceedings is again the "free conviction by the court gained from the hearing and the outcome of the evidence taken" (Sec. 286 ZPO).³⁴ The court must therefore be convinced of the facts beyond reasonable doubt. Absolute certainty is not required. Yet there has to be a high degree of probability. A lesser degree is necessary for applications for preliminary injunctions, which can be based on the mere balance of evidence (*Glaubhaftmachung*).³⁵

a) **Proof of damage**

The statutory procedural rules allow for some alleviation regarding the proof of damage. However, the applicable standard varies in two aspects:

Full proof within the meaning of Sec. 286 ZPO is required as regards the question whether the claimant suffered any harm at all due to an (alleged) competition law infringement. In this context one should bear in mind the aforementioned *Transportbeton* decision of the German Supreme Court. Even though this ruling which allows courts to presume that the formation of a price cartel generally leads to inflated prices was rendered in connection with administrative offences, such presumption must *a fortiori* be permissible in civil proceedings where the required standard is in general somewhat lower. It remains to be seen in how far German civil courts will account for economic theory when deciding on this question. Prior to the 2005 amendments to the GWB, they have been rather reluctant in this respect.

A relaxed standard, on the contrary, applies to the calculation of the damage sustained. According to Sec. 287 ZPO the court may estimate the amount of damages inflicted on the claimant. In doing so, the court may for example award lost profits on the basis of

³² Cf. BGH, Case KVR 5/86, WuW/E BGH 2433, 2438 – *Gruner + Jahr/Zeit*; TOBIAS KLOSE in: Wiedemann (ed.), *Handbuch des Kartellrechts*, 2nd ed. (2008), § 54 at para. 102.

³³ Cf. BGH, Case KVR 14/01, WuW/E DE-R 1163, 1169 et seq. – *HABET-Lekkerland*.

³⁴ Sec. 286 ZPO.

³⁵ Sec. 294 ZPO.

what probably could have been expected in a regular course of events.³⁶ This judicial leeway is to ensure that a legitimate claim will not be rejected simply because the claimant is not able to furnish (full) proof of the amount of damage. Thus, if the court is convinced that the claimant was harmed by illegal behaviour it must therefore – irrespective of the factual complexities – try to estimate the amount of damage as closely as possible. Yet, the amount of the damages may not be determined by mere speculation, but must be based on evidence from which the amount can be ascertained as a matter of reasonable inference.

A very difficult task is the estimation of prices that would have prevailed in the absence of the alleged competition law infringement in order to calculate possible overcharges (*Preisüberhöhungsschäden*). Similar difficulties emerge in connection with the calculation of lost profits. Here, expert opinions are often indispensable. Economic theory has identified several methods for the calculation of damages; the most common approach so far applied by German courts is the comparison of the inflated prices in the relevant market with prices in a competitive benchmark market (*Vergleichsmarktkonzepte*). This may be accomplished by comparing prices during the period of the alleged cartel with the prices in the same market in the period before and/or after (*before-and-after approach*) or by looking at the actual prices during the cartel period in a similar yardstick market where prices were unaffected by the conspiracy (*yardstick method*). Complex quantification methods, on the contrary, such as econometric modelling or simulation are rarely used in practice. In its recent *Papiergroßhandel* decision, the German Supreme Court reaffirmed that the calculation of the economic benefit derived from the competition law infringement in connection with administrative fines should be primarily based on “before-and-after” or “yardstick” methods.³⁷ Again, if such rather imprecise approaches suffice in proceedings concerning administrative fines, this must be even more so the case in private actions.

b) Further Alleviation

Further alleviation for the claimant with regard to the standard of proof may be attained by means of *prima facie* evidence, which in practice especially facilitates the showing of a causal link between the competition law infringement and the harm sustained. Here, the court may also rely on economic common sense and economic theory.

Lastly, the claimant is exempt from showing the occurrence of a competition law infringement if he files an action subsequent to the finding of a breach of Art. 81 or 82

³⁶ Sec. 252 Sentence 2 ZPO.

³⁷ Cf. BGH, Case KRB 12/07, WuW/E DE-R 2225, 2228 – *Papiergroßhandel*.

of the EC Treaty either by the Commission, a German competition authority, or any national authority in another Member State as such decisions have binding effect upon the court pursuant to Art. 16 of Regulation No. 1/2003 and Sec. 33(4) GWB.

IV. Admissible and Inadmissible Evidence

With regard to the merits of the dispute, only formalized types of evidence (*Strengbeweis*) are generally admissible in German antitrust proceedings, be it proceedings concerning administrative fines, administrative proceedings, or civil actions. Without prejudice to circumstantial evidence, the kinds of evidence allowed are judicial inspections (*Augenschein*), witnesses, court-appointed experts, and documents. In proceedings concerning administrative fines, the court may also base its judgement on the undertaking's pleading to the charge, whereas in civil actions evidence may additionally be taken by means of interrogations of the parties.

The scope of the applied forms of evidence is thus somewhat broader than in Community competition law cases, where oral evidence plays only a minor role compared to written documents.³⁸ In German antitrust proceedings by contrast, not only documents and electronic data are of practical relevance but also witnesses and expert opinions. Possible experts are *inter alia* economic experts that render an opinion in merger control proceedings (for example on the definition of the relevant market) or in proceedings concerning administrative fines (on the economic benefit derived from a competition law infringement). Often, however, they are only appointed by one of the parties (and not by the court) which is why such opinions are technically no evidence but constitute merely substantiated party submissions.

In certain cases, however, pieces of evidence may be excluded from the judicial evaluation of evidence if they were improperly obtained and used by the competition authority. Restrictions to the admissibility of evidence may particularly follow from the principle of legal privilege and the privilege against self-incrimination. The latter is of special relevance with regard to the quasi-criminal proceedings concerning administrative fines.

- The aspect of legal privilege is treated differently under Community law and German law. The European Court of Justice acknowledges the confidentiality of written communications between lawyers and clients provided that such communications are made for the purposes and in the interests of the client's rights of defence and they emanate from independent lawyers.³⁹ Inhouse-lawyers, on the contrary, are expressly excluded from the personal scope of the legal professional privilege under the Community system.⁴⁰ In German proceedings concerning administrative fines, attorney correspondence kept *on the premises of the undertaking* is not explicitly

³⁸ Cf. European Court of Justice (ECJ), Case C-411/04 P, [2007] E.C.R. I-959 at para. 42 – *Mannesmann*.

³⁹ ECJ, Case 155/79, [1982] E.C.R. 1616 at para. 21 – *AM & S*.

⁴⁰ Court of First Instance (CFI), Joined Cases T-125/03 and T-253/03, [2007] E.C.R. II-3523 at para. 165 et seq. – *Akzo*.

protected from seizure as the wording of Sec. 97(2) StPO only covers documents *kept by the attorney*. Nevertheless, according to the judiciary written communications may not be obtained by the competition authority provided that they have been created for defence purposes during an ongoing investigation.⁴¹ Written communications emanating from general legal advice prior to the initiation of proceedings by the competition authority are, on the contrary, not deemed to be confidential.⁴² Legal correspondence by inhouse-lawyers vis-à-vis the undertaking may also fall outside the scope of the legal privilege.⁴³ It can be assumed that more or less the same standards apply to administrative proceedings in competition law matters.

- Suspects of administrative offences are protected from being forced to incriminate themselves and must be advised of their right by the competition authority – and in appeal proceedings by the court – prior to testimony.⁴⁴ An incriminating statement by a suspect will otherwise not constitute admissible evidence.⁴⁵ It is controversial whether members of the management may invoke the privilege against self-incrimination in favour of the company when they are heard as witness.⁴⁶ Pursuant to Sec. 55(1) StPO any witness may refuse to answer questions the reply to which would subject him to the risk of being prosecuted for a criminal offence or a administrative offence. The German Federal Constitutional Court (*Bundesverfassungsgericht*) held that this provision cannot be invoked analogously by corporations since the privilege against self-incrimination originates from the inviolability of human dignity which in its scope is limited to natural persons only.⁴⁷ With regard to the principle of the rule of law (*Rechtsstaatsprinzip*) (which also protects corporations) and the exorbitant fines imposed on undertakings in antitrust proceedings nowadays the soundness of this ruling remains questionable.⁴⁸ In most cases, however, members of the management may anyhow not be forced to disclose incriminatory information as they also face the risk of being personally prosecuted for an administrative offence. The right to refuse self-incriminatory answers when heard as a witness also applies in administrative and civil proceedings if the witness would otherwise risk a prosecution for an administrative offence.⁴⁹

⁴¹ Cf. Landgericht Bonn, Case 37 Qs 91/01, WuW/E DE-R 917, 918 – *Der Grüne Punkt* (with reference to Sec. 148 StPO).

⁴² Cf. Landgericht Bonn, Case 37 Qs 27/05, WuW/E DE-R 1787, 1789 – *Anwaltskorrespondenz*.

⁴³ Cf. Landgericht Bonn, Case 37 Qs 27/05, WuW/E DE-R 1787, 1790 – *Anwaltskorrespondenz*.

⁴⁴ Cf. Sec. 46(1) OWiG in connection with Sec. 136 (1) Sentence 2 StPO (with regard to the competition authority) and Sec. 71(1) OWiG in connection with Sec. 243(4) StPO (with regard to the court).

⁴⁵ Cf. GERHARD DANNECKER/ JÖRG BIERMANN, in: Immenga/Mestmäcker (eds.) [Fn. 9], Introd. to Sec. 81 at para. 237.

⁴⁶ Cf. MARTIN KLUSMANN, in: Wiedemann (ed.) [Fn. 32], § 57 at para. 37.

⁴⁷ Bundesverfassungsgericht (BVerfG), Case 1 BvR 2172/96, BVerfGE 95, 220, 241 et seq.

⁴⁸ Cf. GERHARD DANNECKER/ JÖRG BIERMANN, in: Immenga/Mestmäcker (eds.) [Fn. 9], Introd. to Sec. 81 at para. 215 et seq.

⁴⁹ Cf. Sec. 284 Nr. 2 ZPO and Sec. 59(5) GWB. See also SIEGRIED KLAUE, in: Immenga/Mestmäcker (eds.) [Fn. 9], Sec. 59 at para. 36 et seq.

V. Handling of Evidence obtained by Competition Authorities *vis-à-vis* Private Claimants

A particular but nonetheless very important aspect relates to the question of how evidence obtained by the Federal Cartel Office from applicants to the leniency programme (*Bonusregelung*)⁵⁰ should be dealt with *vis-à-vis* potential private claimants. In terms of competition policy, corporate statements and evidence voluntarily handed over to the FCO by the applicant should not be made available to private parties as this would seriously diminish the incentives to participate in such programmes and thus would jeopardise the success of leniency programmes which are currently one of the most powerful tools in public competition law enforcement. Consequently, the FCO has announced that it would not grant access to corporate statements and submitted documents.⁵¹ However, it is unclear whether the judiciary will accept such denial of access to the files. Recently, the Local Court (*Amtsgericht*) Bonn held that a private party not only has the right under Sec. 406e StPO to gain access to the FCO's files but also to sensitive leniency materials.⁵² This decision has not yet become final. However, against this background, it is advisable to ensure prior to filing of a leniency application that the FCO will return the corporate statement and the voluntarily submitted documents as soon as the proceeding has come to an end.

VI. Standard of Judicial Review

In civil actions the court will naturally have to decide whether the claimant succeeded in showing all facts necessary to support his claim or if perhaps the defendant was able to assert a valid defence. The court is free in its legal appraisal of the factual circumstances and the evaluation of the evidence submitted by the parties, unless the claimant may rely on a binding administrative statement as regards the occurrence of a competition law infringement. The parties' own legal assessments are in contrast without relevance. The same standards apply if the losing party lodges an appeal to the Higher Regional Courts. The parties are, however, generally barred from presenting new facts in (civil) appeal proceedings unless they are undisputed.⁵³

In competition law proceedings following a decision taken by a competition authority (either imposing administrative fines or administrative sanctions pursuant to Sec. 32 et seq. GWB) the court will fully review the decision with regard to both the fact finding by the

⁵⁰ Cf. Bundeskartellamt, Bekanntmachung Nr. 9/2006 über den Erlass und die Reduktion von Geldbußen in Kartellsachen - Bonusregelung - of 7 March 2006, available at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_deutsch/06_Bonusregelung.pdf

⁵¹ Cf. para. 22 of the Bonusregelung.

⁵² Amtsgericht Bonn, Case 51 Gs 53/09 (unpublished).

⁵³ Cf. Sec. 539 and 531 ZPO for exceptions.

authority and the administrative act's legality in terms of admissibility and merits. Moreover, contrary to general principles of administrative proceedings in other fields of public law the court also decides on the expediency of the measure. With the exception of ministerial authorisations pursuant to Sec. 42 GWB, German competition authorities thus do not have any power of discretion. Whereas prior to the modernisation of the enforcement system of the Community competition rules it was widely accepted that the Commission had to some extent discretion in the application of Art. 81(3) of the EC Treaty, such powers are not conceded to national authorities under German law. Consequently, the appellate court will also have to scrutinise whether the elements for an exemption from the prohibition of Art. 81(1) of the EC Treaty are fulfilled.

Despite the appellate court's competence to fully review decisions taken by competition authorities the court, however, may not always amend or replace such decisions at its discretion. Instead, in administrative proceedings the court may in general only uphold or annul the competition authority's prior orders. This is particularly the case when the addressee of a prohibition decision has lodged an action for rescission (*Anfechtungsbeschwerde*).⁵⁴ The court's options are, by contrast, wider in cases where an undertaking has a right to a specific (favourable) administrative act which the competition authority is legally bound to grant (*Verpflichtungsbeschwerde*) as well as in cases of applications for preliminary court measures.⁵⁵

Lastly, judicial review is limited, when a further appeal is lodged before the German Supreme Court, be it in civil proceedings (*Revision*), in proceedings concerning administrative fines, or in administrative proceedings (*Rechtsbeschwerde*), since the parties may appeal on points of law only. The court will therefore neither re-investigate the facts or evaluate evidence nor review the previous evaluation of evidence. It will rather base its legal appraisal on the facts established by the court of lower instance.

⁵⁴ Cf. KARSTEN SCHMIDT in: Immenga/Mestmäcker (eds.) [Fn. 9], Sec. 71 at para. 14.

⁵⁵ Concerning the court's discretion in cases of preliminary rulings according to Sec. 64 (3) and 60 GWB cf. KARSTEN SCHMIDT in: Immenga/Mestmäcker (eds.) [Fn. 9], Sec. 64 at para. 19.