

German antitrust community debates how to most effectively consider economic expert reports in follow-on cartel damage proceedings

by Philipp Tillmann, Ph.D.*

Over the last few months, the German antitrust community has, on multiple occasions,¹ debated how to most effectively and efficiently consider economic expert reports in the context of follow-on cartel damage proceedings, mirroring similar discussions in Spanish and UK court proceedings.² Compared to other jurisdictions, such as the United States, economic expert reports have only relatively recently become commonplace in German cartel proceedings.

Several issues related to the cost and organization of proceedings, objective standards for economic expert reports, and how to most effectively consider divergent conclusions reached by economic experts were raised by judges, attorneys, and economists involved in these proceedings:

How to quantify overcharges and damages when both sides’ experts reach diverging conclusions: A common thread in these debates was that some judges were unsure how to decide on a single figure to quantify price overcharges caused by the cartel, as well as the damages resulting from these overcharges, given that Defendants’ experts regularly reach the conclusion that the overcharge is zero and that Plaintiffs’ experts typically determine a figure that is substantially higher than zero. Judges articulated a need for more guidance on how to assess the merits of both sides’ experts’ arguments and to ultimately reach a decision. The following potential approaches were discussed, some of which have been used in courts:

- **The “broad axe” approach:** In multiple recent cases in regional German courts, the Spanish Supreme Court, and the Competition Appeal Tribunal (CAT) in the UK, no expert reports were submitted at all, or the courts dismissed the reports. In these instances, the courts followed a broad axe approach and simply picked a figure, in some cases based on meta studies that provide average overcharge estimates.³
- **Rebuttable presumption:** Another approach discussed was that of rebuttable presumptions, and specifically rebuttable overcharge figures that are presumed at the outset. With this approach, both sides’ experts could present evidence that supports the rejection of the presumed figure and conclude that the correct overcharge is higher or lower. One downside of this approach is the need to pick a specific figure as the rebuttable presumption. As discussants noted, meta studies can only provide *average* estimates, which are arguably only of limited relevance for most specific cases.

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¹ E.g., Competition Litigation Forum, “Ökonomische Gutachten zur Schadensschätzung in Kartellzivilprozessen – Fluch oder Segen?,” November 23, 2023; Regionalgruppe Rheinland der Studienvereinigung Kartellrecht e. V., “Ökonomische Gutachten in Kartellschadensersatzprozessen – Glaskugellesen oder fundierte Wissenschaft?,” October 26, 2023. See also Klumpe, DKartJ 2023, 86-88. The discussion points mentioned in this article were brought up at these events and in the corresponding publication.

² Klumpe, DKartJ 2023, 86-88.

³ Klumpe, DKartJ 2023, 86-88; Thomas G. Funke, “How European Courts Estimate Cartel Damages,” ABA Antitrust Section Global Private Litigation Committee, November 2023.

- **Hot tubbing/joint expert statements:** The possibility of joint expert conclaves/hot tubbing, as they are common in countries like the UK or Australia, were discussed. An open question was whether both sides' experts could agree on issues of substance and the extent to which these procedures would ultimately lead to less divergence and more guidance to the courts.
- **Instruction letters and consistent data basis:** Given that both sides' experts in European follow-on proceedings typically have limited information on the facts surrounding the cartel, and thus can reach divergent assessments of these facts as well as of relevant theories of harm/plausibility, the possibility of the court providing instruction letters with certain assumptions under which the experts should perform their analyses were discussed. Another common source of discrepancy is that, due to the lack of pre-trial discovery in Germany, both sides' experts typically do not have access to the same data. While Defendants' experts typically have, at least in principle, access to the Cartelists' data systems, Plaintiffs' experts do not, at least not at the outset of the proceedings. A court-ordered exchange of data and instructions to rely on the same data basis (to the extent such court orders are possible) could lead to less room for divergence in both sides' experts analyses.
- **Court-appointed economists:** Some courts have appointed independent economists to assist them in the proceedings. In some cases, these court-appointed economists have provided their own overcharge estimates in addition to an assessment of both sides' experts' analyses. The possibility to get these economists involved early in the proceedings was mentioned as one way to steer the way the parties' experts approach their assignments and to give guidance to the courts throughout the proceedings. One practical challenge with the reliance on court-appointed economists that was raised was the difficulty to find appropriately qualified and experienced economists that were available for the assignment. To overcome this challenge, discussants suggested relying on economic consulting firms that are experienced with these kinds of matters or institutionalizing a pool of court-appointed economists, for example at the Germany Monopoly Commission.

Standards for economic experts: In German court proceedings, expert witnesses are typically not subject to the same binding standards and the same level of scrutiny that are present in other jurisdictions. For example, while in the United States, expert witnesses are regularly subject to depositions, cross examinations, and the risk of Daubert challenges which allow for the exclusion of expert opinions that do not meet certain (scientific) standards, this is not the case in Germany. Participants in the debates suggested the creation of self-imposed common standards and good practices for economic experts and their reports.

Cost efficiency: In Germany, as well as in other countries, different individual claimants in the same matter regularly submit their claims at different courts. This can lead to a situation in which a number of small individual claimants, who are unable to afford hiring an economic expert, go up against Defendants who are supported by economic experts. A potential solution that was discussed for these small claimants was to bundle claims and to allow for true class actions, which are still underdeveloped in Europe.

Administrative and organizational challenges: One reason why courts can be struggling with thousands of pages of complex economic expert reports is that in many cases, judges are not specialized in antitrust matters or even economic matters more generally. In fact, some judges involved in cartel proceedings also deal with a broad array of other types of cases, including traffic accidents. Apart from simple solutions such as imposing page limits and a limited number of rounds of exchanges of expert reports, the possibility of having specialized courts (such as the CAT in the UK) was discussed.