

Myths and untold stories – Private antitrust enforcement in Germany

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ABSTRACT

The European Commission seeks to reform antitrust damages actions for the violation of EU competition law in order to remove obstacles which prevent successful compensation claims. The policy and adjacent debate are based on the assumption that very few successful private antitrust actions exist in Europe and that the present obstacles to successful damages litigation necessitate changes in the legal frameworks of the Member States. However, empirical evidence for the assumptions about the nature and magnitude of competition litigation is rare and, with respect to civil law jurisdictions, virtually non-existent. In this paper, the author contrasts some of the main beliefs that underpin European private antitrust policy with findings from an empirical study on private antitrust litigation in Germany. The paper demonstrates that the propositions as to the state and nature of private antitrust litigation only partially hold true. Antitrust litigation is more complex than the focus on one single remedy – antitrust damages actions – suggests.

JEL Classification Codes: K21, K42

I. INTRODUCTION

In the last decade the antitrust enforcement regime in Europe underwent considerable changes. The enactment of Regulation 1/2003 brought a shift towards the decentralised enforcement of the EU competition rules and the opportunity for the national courts to completely rule on antitrust claims brought by affected individuals.¹ This private enforcement of competition rules is thought to be in a premature state. In order to facilitate and raise the level of antitrust damages actions the Directorate General for Competition of the European Commission suggested amendments in the legal framework of the Member States.² The proposed measures to incentivise damages claims and align the laws of the Member States comprise of *inter alia* rules on class actions, discovery procedure, the legal standing of indirectly harmed individuals, limitation periods and the binding effect of public infringement decisions. The proposals have been intensively discussed but have not yet led to final legislation.³

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¹ Council Regulation (EC) 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 2003 L1/1.

² European Commission, 'Green Paper - Damages Actions for Breach of the EC Antitrust Rules' (Brussels 2005); European Commission, 'White Paper on Damages Actions for Breach of the EC Antitrust Rules' (Brussels 2008).

³ See, for example, Clifford A Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA* (Oxford University Press, Oxford 1999); Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *Effective Private Enforcement of EC Antitrust Law* (Hart, Oxford 2003); Ilya Segal and Michael Whinston, 'Public vs Private Enforcement of Antitrust Law: A Survey' (2007) 28 *European Competition Law Review* 306–315; Thomas Eilmansberger, 'The Green Paper on Damages Actions for Breach of the EC Antitrust Rules and Beyond: Reflections on the Utility and Feasibility of Stimulating Private Enforcement Through Legislative Action' (2007) 44 *CMLR* 431–478; Jürgen Basedow (ed), *Private Enforcement of EC Competition Law* (Kluwer Law International, Alphen a. d. Rijn 2007); Assimakis P Komminos, *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (Hart, Oxford and Portland, Oregon 2008); Wouter P Wils,

The policy focus is on compensation and potential legal changes to foster damages actions while less attention has been paid to the underpinning assumptions about the magnitude of competition litigation in the Member States. Two studies, commissioned by DG Comp, have compared the national legal frameworks in the European Union⁴ and assessed the impact of the proposed reform.⁵ Both studies have fortified the assumption that very few harmed individuals seek compensation before the courts and private antitrust enforcement is generally underdeveloped.⁶ However, the ‘underdevelopment’ conjecture underscoring European policy is not underpinned by comprehensive evidence from the Member States. Except for Rodger’s empirical work undertaken in the UK no other study exists to date that would shed light on civil litigation for the enforcement of EU and national competition law in European countries.⁷ Especially for civil-law jurisdictions no systematic data collection exists – irrespective of anecdotal evidence – that would inform about private competition law enforcement.

This paper describes competition law litigation in Germany from 2005 to 2007 in an attempt to fill a part of this gap. It uses a unique dataset containing decisions which were handed down by German courts between 2005 and 2007. The data collection offers valuable information about parties, remedies, industries, violated statutory provisions, and outcome of antitrust disputes. The dataset shows that the typical German antitrust case differs in many respects from the frequently discussed cartel follow-on damages action. The findings of this study are contrasted with some of the common European perceptions of private antitrust enforcement which are largely based on the experience from common law jurisdictions. The paper shows that there are alternative designs for a private antitrust enforcement system which put less emphasis on compensation and damages actions.

The next section sketches the German legal framework. Section III explains the origin and limitations of the data. Part IV presents the results from the data collection. It explains the level of private antitrust enforcement in Germany and the relationship between public and private enforcement. It examines the parties of antitrust proceedings and the industries in which private litigation occurred, the remedies employed in antitrust litigation, the success rate thereof, and the alleged breaches of statutes and anticompetitive behaviour claimed by antitrust plaintiffs. Part V concludes.

‘The Relationship between Public Antitrust Enforcement and Private Actions for Damages’ (2009) 32 *World Competition* 3–26; Joaquín Almunia, ‘Common Standards for Group Claims Across the EU’ (Speech given at the International Conference on the Private Enforcement of Competition Law, Valladolid, 15 October 2010); European Parliament Resolution of 20 January 2011 on the Report on Competition Policy 2009 (2010/2137(INI)). An unofficial draft Directive was circulated in 2009 but has never been finalised. The European Commission has conducted another consultation on collective redress. European Commission, ‘Commission Staff Working Document, Public Consultation: Towards a Coherent European Approach to Collective Redress’ (Brussels 2011).

⁴ Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, ‘Study on the Conditions for the Claims of Damages in Case of Infringement of EC Competition Rules, Comparative Report’ (Brussels 2004).

⁵ Andrea Renda and others, ‘Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios, Final Report’. Report for the European Commission Contract DG COMP/2006/A3/012 (Brussels, Rome, Rotterdam 2008).

⁶ The Ashurst Study coined the phrase of ‘underdevelopment’ although it suggested a cautious assessment of its empirical findings. Waelbroeck, Slater and Even-Shoshan (n 4) 99.

⁷ Barry J Rodger, ‘Competition Law Litigation in the UK Courts, A Study of All Cases to 2004: Part 1’ (2006) 27 *European Competition Law Review* 241–248; Barry J Rodger, ‘Competition Law Litigation in the UK Courts, A Study of All Cases to 2004: Part 2’ (2006) 27 *European Competition Law Review* 279–292; Barry J Rodger, ‘Competition Law Litigation in the UK Courts, A Study of All Cases to 2004: Part 3’ (2006) 27 *European Competition Law Review* 341–350; Barry J Rodger, ‘Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the United Kingdom, 2000-2005’ (2008) 29 *European Competition Law Review* 96–116; Barry J Rodger, ‘Competition Law Litigation in the UK Courts: A Study of all Cases 2005-2008, Part I’ (2009) 2 *Global Competition Litigation Review* 93–114; Barry J Rodger, ‘Competition Law Litigation in the UK Courts: A Study of all Cases 2005-2008, Part II’ (2009) 2 *Global Competition Litigation Review* 136–147.

II. THE LEGAL FRAMEWORK

The remedies and the procedure for private actions are regulated on the national level in the absence of Community rules governing the matter.⁸ The only 'EU remedy' in antitrust disputes is the nullity sanction of Article 101(2) TFEU.⁹ Article 101(2) TFEU declares void any agreement that violates Article 101(1) and does not qualify for an exemption according to Article 101(3). The victim of a horizontal or vertical anticompetitive agreement can invoke the nullity of a contract even if he was part of the agreement.¹⁰ In addition to the European nullity remedy, section 134 of the German Civil Code orders a legal transaction void that violates a statutory prohibition unless the breached statute leads to a different conclusion. Contracts infringing provisions of the Act Against Restraints of Competition (ARC) or Articles 101 and 102 TFEU are normally rendered void according to section 134. While the voidness of illegal agreements is commanded by both German and EU law, other types of civil law remedies are solely provided for by national law.¹¹ Since the reform of German competition law in 2005 section 33(1) of the ARC includes the right for compensation and permanent injunctive relief. Section 33(1) of the ARC also governs different types of injunctive relief:¹² a removal claim eliminating an ongoing interference with the claimant's rights and an injunction targeting impending violations.¹³ According to section 935 of the Civil Procedure Rules, plaintiffs can request an injunction by way of interim relief. Interim relief is a preliminary and speedy remedy that, in theory at least, precludes a decision on the merits. In the case of a refusal to supply, the defendant may be forced to temporarily uphold deliveries to the plaintiff to ensure that the plaintiff can continue the production process until the dispute is resolved. As for monetary relief, claimants may choose, depending on the circumstances, between two different remedies: a damages claim or an action for unjust enrichment. Damages pursuant to section 33(3) ARC compensate for the loss suffered from the infringement of competition law but do not include punitive elements as this would be against principle in German civil law.¹⁴ Unjust enrichment claims are made under section 812 of the German Civil Code if a person obtains something as the result of the performance of another person without legal grounds. A contract usually provides the legal ground for a performance or financial transfer.¹⁵ If the contract is declared null as the consequence of illegal anticompetitive conduct, the party who received the payment is normally enriched without a valid legal ground. Hence, the restitution plaintiffs inherently postulates that the legal ground for the transaction is null and void due to an antitrust violation.

A claim can be based on the violation of European and German competition law provisions excluding the merger regulations. Article 101 and section 1 ARC prohibit horizontal and vertical agreements between

⁸ European Court of Justice, Case C-453/99, *Courage Limited v Bernard Crehan* [2001] ECR I-06297; European Court of Justice, Case C-295/04, *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619 para 62.

⁹ For simplicity, references herein to Articles 101 and 102 TFEU include the preceding incorporations, namely, Articles 85 and 86 EEC and Articles 81 and 82 EC.

¹⁰ *Courage Limited v Bernard Crehan* (n 8).

¹¹ Komninos holds the view that the ECJ's *Crehan* ruling has established a community right for damages. Komninos (n 3) 167.

¹² The injunction, removal and damages remedies are now governed in section 33 ARC although they had been customarily accepted on general civil law principles before their explicit incorporation in the ARC.

¹³ For the theoretical distinction between these two types see Alexander Fritzsche, 'Der Beseitigungsanspruch im Kartellrecht nach der 7. GWB-Novelle, Zugleich ein Beitrag zur Dogmatik des quasi-negatorischen Beseitigungsanspruchs' (2005) *Wettbewerb in Recht und Praxis* 42–54; Wulf-Henning Roth, 'Das Kartelldeliktsrecht in der 7. GWB-Novelle' in Theodor Baums and others (eds), *Festschrift für Ulrich Huber: Zum siebzigsten Geburtstag* (Mohr Siebeck, Tübingen 2006) 1133, 1143.

¹⁴ For antitrust damages in general see Hans P Logemann, *Der kartellrechtliche Schadensersatz: Die zivilrechtliche Haftung bei Verstößen gegen das deutsche und europäische Kartellrecht nach Ergehen der VO (EG) Nr. 1/2003 und der 7. GWB-Novelle* (Duncker & Humblot, Berlin 2009).

¹⁵ Gerhard Dannemann, *The German Law of Unjustified Enrichment and Restitution: A Comparative Introduction* (Oxford University Press, New York 2009).

undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction, or distortion of competition. Section 2 ARC contains a provision similar to Article 101(3). Prior to the 7th amendment of the ARC, which came into effect on 1 July 2005, vertical agreements were not included in section 1 ARC and their control differed from EU law. Sections 19, 20 and 21 of the ARC regulate the abuse of market power and other anticompetitive conduct like. Like Article 102 section 19 ARC prohibits the abuse of dominance. Unlike EU competition law, section 20 requires a non-dominant undertaking to refrain from discriminating and unfairly hindering small or medium-sized firms which depend on it as supplier or purchaser (economic dependency or relative market power). A small or medium-sized undertaking is dependent if it cannot reasonably switch to other suppliers or purchasers or switching is not sufficiently possible. Section 21 prohibits calls for boycotts against other undertakings and threatening behaviour to induce third parties to carry out actions that are prohibited under the ARC.

Plaintiffs benefit from a binding effect of public decisions in follow-on proceedings. Infringement findings from final decisions of the European Commission, the European courts, the Member States' courts and the competition authorities are binding in follow-on damages actions according to section 33(4) ARC. The legal standing of indirect purchasers and the availability of the passing-on defence have been clarified only very recently but were in doubt during the observation period.¹⁶ The ARC does not provide for class or representative claims aiming at compensation. The closest tool to a collective action device is the claim of a professional association on behalf of its members according to section 34a ARC. Professional associations may request an account of illegal profits stemming from anticompetitive conduct if a multitude of buyers or sellers were harmed and the Federal Cartel Office (FCO) has not already collected the illegally gained profits in a public investigation. The profits that are skimmed off the violator must be passed on to the federal budget less expenses. Unsurprisingly, professional associations have few incentives to request an account of profits because they risk bearing the opponent's cost if they lose while they only gain zero if they win.

Private antitrust cases are exclusively assigned to the regional courts, the second tier in the hierarchy of ordinary civil law courts, even if the only question is whether or not competition law is applicable.¹⁷ Decisions of the regional courts can be appealed to the higher regional courts and, on points of law, to the Federal Court of Justice (BGH). With regards to appeals, it is interesting to note that since 2002 higher regional courts must explicitly grant leave to appeal their decisions on questions of law before the Federal Court of Justice. Appeal is granted if the matter is of principal importance, it is required for the development of the law, or to safeguard the consistency of the case law.¹⁸ Parties can file a complaint if leave to appeal is denied.¹⁹

¹⁶ Volker Emmerich in Ulrich Immenga and Ernst-Joachim Mestmäcker (eds), *GWB: Kommentar zum Deutschen Kartellrecht* (4th edn Beck, München 2007) § 33 para 29; Eckard Reh binder in Ulrich Loewenheimer, Karl M Meessen and Alexander Riesenkampff (eds), *Kartellrecht: Kommentar* (Beck, München 2009) § 33 para 14. The Federal Court of Justice granted standing to indirect purchasers and allowed the passing-on defence in 2011. Bundesgerichtshof of 28 June 2011 (KZR 75/10).

¹⁷ Section 87 ARC.

¹⁸ Section 543(2) Civil Procedure Code.

¹⁹ The dataset does not comprise of those complaints.

III. THE DATA

The initial data stem from decision lists being held by the German Federal Cartel Office – the most complete information about antitrust litigation in Germany. The courts are obliged to inform the FCO about cases in which a dispute arises out of the application of either European or German antitrust law according to section 90(1) ARC.²⁰ The decision lists contain a short summary of the respective judgement without classified information such as the names of parties. Since the decision lists are based on concluded cases, no data were available for lawsuits being terminated, for example, by settlements or where the claims were withdrawn. The compilation of a dataset based on decisions creates a selection problem which is likely to exaggerate the ratio of stand-alone claims and underreport the number of settled cases. The reporting of cases to the FCO varies so that some cases may have escaped the data gathering. Many data points of the initially compiled information were verified with publicly available legal databases, namely, juris,²¹ beck-online,²² and decision databases of some federal states.²³ The verification process revealed another 57 decisions indicating that the FCO's decision lists were not complete at the time of the data collection.²⁴ It is likely that there are still undiscovered proceedings due to unreported or unpublicised cases and information bottlenecks at the courts.

The database was subsequently adjusted excluding all decisions that were made prior to 2005 and after 2007. Decisions that are clearly not related to private antitrust litigation were eliminated from the dataset.²⁵ All civil law cases in which the plaintiff or defendant raised a competition law issue are regarded as private antitrust cases. The dataset excludes complaints and appeals against public decisions of the FCO, public procurement cases being dealt with under sections 97 ARC, and unfair competition law litigation.²⁶ Decisions were consolidated into cases in order to avoid double-counting. First-instance verdicts and appeal decisions are counted as one case if the same parties and the same subject matter were addressed. A dummy variable was used to indicate whether or not the decision in question was an appeal decision, and a case identification number linked different decisions of the same proceedings. Hence, the dataset does not count decisions but cases and those only once. The information presented in this paper is based on the latest court decision in a given case in the observation period.

IV. EMPIRICAL FINDINGS

This part of the paper presents some of the results from the data gathering. It highlights the level of private antitrust enforcement, explains the parties which are involved in competition litigation, looks at the remedies and their

²⁰ Apart from notifying antitrust cases to the FCO, judges are not bound to publicise their decisions elsewhere. It is normally in their discretion to communicate rulings which they deem to be of public interest. This may cause reporting deficits in legal databases with respect to smaller and more ordinary disputes.

²¹ <http://www.juris.de/>.

²² <http://beck-online.beck.de/>.

²³ As of December 2008 databases were accessible for North Rhine-Westphalia, Rhineland-Palatinate, Baden-Württemberg, Hamburg.

²⁴ The FCO made all relevant lists available. A data processing backlog cannot be excluded though.

²⁵ For the purpose of this study private antitrust enforcement refers to individually initiated litigation, either as stand-alone or follow-on action, before a court to remedy an infringement of antitrust law. If successful, the legal action leads to some sort of civil sanction such as damages, restitution, injunction, nullity or interim relief. Karen Yeung, 'Privatizing Competition Regulation' (1998) 18 *Oxford Journal of Legal Studies* 581, 583; Komninos (n 3) 1.

²⁶ Unfair competition law is regulated in the Act Against Unfair Competition separating it from actions dealing with EU and German antitrust law. The study ignored state aid litigation which generally falls within the scope of the Act Against Unfair Competition.

respective chances of success, and provides an overview of the allegations of breached statutes and anticompetitive conduct.

A. The level of private antitrust enforcement

The level of competition law litigation observed in Germany argues against the wide-spread underdevelopment assumption with regards to the number of proceedings brought. The study reveals that the German courts decided 368 private antitrust cases between 2005 and 2007. The 368 proceedings are based on a conservative assessment of the data and, hence, are the lowest bound for private antitrust litigation. The actual level of private antitrust enforcement is likely to be higher for two reasons. First, this dataset does not contain cases that finished with other than a judgement on the merits. If we had information about settlements, dropped or dismissed claims and generally unreported cases, the magnitude of private antitrust enforcement would exceed the currently observed level. Second, for several cases I could not determine the competition law issue and, subsequently, excluded those proceedings from further analysis.²⁷ Hence, 368 cases distributed over a time period of three years mark the absolutely lowest bound for antitrust litigation in Germany between 2005 and 2007 while further research already undertaken indicates that the number of cases oscillates roughly between 150 and 250 per year.

[Insert Table 1 about here]

The data revealed 180 cases that ended in the first instance and 188 cases which were concluded at the appeal stage including 24 proceedings before the Federal Court of Justice (BGH), the highest ordinary civil court. It appears that parties, once they decide to litigate, regularly appeal first instance rulings. However, the numbers in Table 1 may exaggerate the ratio of first instance rulings and appealed cases. Cases that ended with a regional court verdict are less likely to be publicised than cases appealed before the higher regional courts. It is also more probable to learn about a case if it reaches the appeal stage because higher regional courts seem to notify the FCO more reliably than regional courts. There have been instances in which a higher regional court reported more cases than the lower courts in the respective district – a slightly inconsistent observation barring possible time effects. Assuming that not all regional court decisions are being appealed, one would expect more cases being reported from regional courts than from higher regional courts.²⁸ The data suggest that in some instances the FCO received information about ongoing antitrust litigation only when the parties entered the appeal stage. Table 1 seems to indicate a drop of cases in 2007 but the date of the decision is a rather poor proxy for measuring the distribution of proceedings over time. It is influenced by the process duration which is subject to the court's workload, the parties' pleadings, and the degree of factual and legal difficulties.

²⁷ Some verdicts did not reveal the alleged competition law violation in the reasoning although it must have been brought forward in the first place as it triggered the jurisdiction of the regional court.

²⁸ This only holds true if the level of filed disputes before regional courts remains relatively constant.

Examining the number of concluded proceedings in isolation may lead to skewed conclusions.²⁹ The litigation frequency in Germany ranks among the highest in Europe for labour law and commercial contract disputes. Blankenburg observed 451,000 civil law proceedings per year in the most populated German state, North Rhine-Westphalia.³⁰ In another study the same author observed 386,789 labour court filings in Germany in 1982. Compared with the general level of civil litigation the number of antitrust cases appears to be marginal. Nevertheless, one should bear in mind that antitrust litigation is a niche even if the damage caused by cartels can be large and some antitrust cases have high damages payouts. What is more, antitrust litigation depends on firms engaging in cartels or firms being dominant – incidents that are less likely to occur than labour law disputes. Against the backdrop of a generally high level of litigation, the data only show that private antitrust cases exist. Viewing the number of proceedings on its own is also insufficient to draw conclusions about the effectiveness of deterrence and the extent to which violations are being committed.³¹ Fewer actions may be the consequence of effective deterrence and, thus, indicate fewer breaches. Or they could point towards a low level of deterrence because there are inadequate incentives to bring lawsuits. Hence, the role of private antitrust enforcement is better judged against the level of public enforcement.

Figure 1 compares German federal public with private cases which were concluded between 2005 and 2007. It shows that private antitrust litigation constitutes a considerable part of the overall enforcement scheme when compared with the enforcement activity of the FCO.³² From 2005 to 2007 the FCO commenced a total of 438 proceedings and completed 577 investigations regarding the cartel prohibition, the abuse of dominance and economic dependency.³³ These proceedings include, for instance, administrative procedures aimed at fines, cease and desist orders, and other remedies against anticompetitive behaviour. The majority of those public proceedings was closed and not further investigated. Cease and desist orders and fines add up to 22 formal infringement decisions in the observation period. In 84 cases the undertakings concerned ceased the illegal behaviour. At the same time, 368 private antitrust proceedings were concluded. Private antitrust actions play a considerable role in the German competition law enforcement scheme bearing in mind that the assessment of the magnitude of private litigation is based on the most conservative criteria and does not include settlements.

[Insert Figure 1 about here]

Whether or not private antitrust enforcement complements public enforcement depends, to a certain extent, on the ratio of stand-alone claims and follow-on actions. Follow-on proceedings are lawsuits being brought in the wake of investigations of national competition authorities or the European Commission. In those cases plaintiffs

²⁹ Litigated disputes are a non-representative sample of all disputes. George L Priest and Benjamin Klein, 'The Selection of Disputes for Litigation' (1984) 13 *Journal of Legal Studies* 1–55.

³⁰ Erhard Blankenburg, 'Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany' (1998) 46 *The American Journal of Comparative Law* 1–41. This statistic does not include interim relief.

³¹ Steven C Salop and Lawrence J White, 'Economic Analysis of Private Antitrust Litigation' (1986) 74 *Georgetown Law Journal* 1001, 1021.

³² Investigations of the European Commission, other national competition authorities and the competition authorities of the German federal states are omitted from the analysis.

³³ Bundeskartellamt, 'Bericht des Bundeskartellamtes über seine Tätigkeit in den Jahren 2005/2006 sowie über die Lage und Entwicklung auf seinem Aufgabengebiet' (Bonn 2007); Bundeskartellamt, 'Bericht des Bundeskartellamtes über seine Tätigkeit in den Jahren 2007/2008 sowie über die Lage und Entwicklung auf seinem Aufgabengebiet' (Bonn 2009). The competition authorities of the federal states commenced 1501 antitrust proceedings between 2005 and 2007.

have the opportunity to refer to the findings of the public procedure.³⁴ Stand-alone actions are independently initiated and do not depend on a public investigation. The authors of the Welfare Impact Report found a large proportion of follow-on damages claims in their sample.³⁵ While stand-alone actions pick up infringements that have not been taken on by the competition authority, the value of follow-on actions is contentious as they do not contribute to the detection of new violations and, in many instances, do not reveal extra information.³⁶ The binding effect or prima facie evidence of public findings provided for in several jurisdictions facilitates the proof of anticompetitive conduct and is said to make follow-on actions more likely to occur than stand-alone claims.³⁷ Kauper and Snyder have shown that follow-on litigation benefits from preceding public efforts as it reduces costs and results in higher awards.³⁸ In contrast, stand-alone cases are deemed to be more complex and difficult to litigate because of the lack of easily available evidence. The dominant notion in Europe is that public enforcers pursue competition law violations in the first place while private enforcement is thought to follow public actions to compensate victims indirectly adding to deterrence.³⁹ At the same time, private enforcement is not meant to ‘replace or jeopardise’ public investigations.⁴⁰

The litigation data reveal only eight cases, 2.2 per cent of the sample, that followed a prior decision of a competition authority. For four cases, 1.1 per cent of total, it could not be established whether the plaintiffs referred to a decision of a competition authority. In three proceedings the plaintiffs followed cartel-related investigations: the German *Concrete* cartel, the worldwide *Vitamins* cartel and the European *Carbonless Paper* cartel. The *Vitamins* and *Carbonless Paper* cartel proceedings were based on decisions of the European Commission.⁴¹ The *Vitamins* decision of the European Commission attracted more follow-on damages claims in Germany though those cases fell outside the observation period.⁴² Interestingly, the claimants in the *Carbonless Paper* case initiated the proceedings and secured a judgement before the Court of First Instance (CFI) finally decided on the cartel members’ annulment action in 2007. The German court held that even if the defendant participated in the cartel, the plaintiff being an indirect purchaser would not have standing according to the (now outdated) protective law requirement.⁴³ While the plaintiffs in both *Vitamins* and *Carbonless Paper* litigation requested damages, the plaintiffs in the *Concrete* cartel

³⁴ I refer to a case as follow-on if it pursues an identical allegation that was brought forward in a public case or the violation is substantially similar to a previous government action but extends the allegation to different markets, time periods or defendants. Thomas E Kauper and Edward A Snyder, ‘An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-on and Independently Initiated Cases Compared’ (1986) 74 *Georgetown Law Journal* 1163, 1175.

³⁵ Renda and others (n 5) 40.

³⁶ Segal and Whinston (n 3) 309. With slightly different conclusions Robert H Lande and Joshua P Davis, ‘Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases’ (2008) 42 *U.S.F.L.Rev.* 879–918.

³⁷ Ariel Ezrachi, ‘From Courage v Crehan to the White Paper - The Changing Landscape of European Private Enforcement and the Possible Implications for Article 82 EC Litigation’ in Mark-Oliver Mackenrodt, Beatriz Conde Gallego and Stefan Enchelmaier (eds), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* (Springer, Berlin 2008) 117, 118.

³⁸ Kauper and Snyder (n 34) 1169.

³⁹ Ulf Böge and Konrad Ost, ‘Up and Running, or Is It? Private Enforcement - The Situation in Germany and Policy Perspectives’ (2006) 27 *European Competition Law Review* 197–205; Gerhard Wagner, ‘Should Private Enforcement of Competition Law Be Strengthened?’, Comment’ in Dieter Schmidtchen, Max Albert and Stefan Voigt (eds), *The More Economic Approach to European Competition Law* (Mohr Siebeck, Tübingen 2007) 115; Wils (n 3).

⁴⁰ European Commission, ‘White Paper’ (n 2) 3.

⁴¹ *Vitamins* (Case COMP/E-1/37.512) European Commission Decision 2003/2/EC [2003] OJ L6/1; *Carbonless Paper* (Case COMP/E-1/36.212) European Commission Decision 2004/337/EC [2004] OJ L115/1.

⁴² See Landgericht Mainz of 15 January (12 HK O 55/02, 56/02) *Vitaminkartell*; Landgericht Mainz (12 HK O 52/02) NJW-RR 2004, 478 *Vitaminkartell*; Oberlandesgericht Karlsruhe (6 U 183/03) NJW 2004, 2243-2245 *Vitaminkartell*; Landgericht Dortmund (13 O 55/02) EWS 2004, 434 *Vitaminkartell*. See also Renda and others (n 5) 40.

⁴³ Landgericht Mannheim (22 O 74/04 Kart) EWiR 2005, 659 *Carbonless paper*. On appeal to the higher regional court of Karlsruhe and, subsequently, to the Federal Court of Justice, the latter decided that indirect purchasers have standing. OLG Karlsruhe of 11 June 2010 (6-U 118/05 (Kart)) and Bundesgerichtshof of 28 June 2011 (KZR 75/10).

case merely invoked the voidness of what they regarded as a cartel-related contract. In the remaining follow-on claims plaintiffs based their actions on the abuse of dominance. In two cases the claimants referred to preliminary findings from an investigation of the FCO. The latter had probed into allegations of abusive conduct in the telecommunication sector but settled the case after it had accepted commitments from the undertaking concerned. In three private proceedings the plaintiffs drew on FCO decisions in the postal services sector.

Private antitrust enforcement in Germany is characterised by independently initiated litigation. This raises the question of why litigants do not capitalise more on public enforcement activity. Admittedly, the observation period of only three years does not suffice to explain mid or long-term consequences of the binding effect provided for in section 33(4) ARC which came into force in July 2005. One explanation could be that the binding effect only applies to damages claims which are more difficult to bring than, for instance, injunctions because the plaintiff seeking compensation bears the difficult burden of proof for his loss. This may increase the costs for a damages claim relative to other remedies. The narrow interpretation of standing rules (protective law requirement) until 2005 may have also influenced the willingness to file actions in the aftermath of a public decision. In fact, before the 7th amendment of the ARC in 2005 the protective law requirement hampered damages actions, for instance, in the *Carbonless Paper* and *Vitamins* litigation. Another possible reason why follow-on actions have not shaped private antitrust litigation is the lack of final public decisions. The FCO carried out 298 investigations related to the cartel prohibition, the abuse of dominance or the abuse of economic dependency according to its activity report 2005/2006.⁴⁴ Only very few investigations lead to final infringement decisions – a necessary prerequisite for the binding effect in follow-on damages litigation.⁴⁵ The low number of actually litigated follow-on actions also hints towards a settlement practice.⁴⁶ Since there was a number of cartel cases in both the EU and Germany during the observation period and given that these cases on the whole are easier to litigate because culpability has been established, one would expect a high level of settlements in cases where the defendant's position is weak, leaving the cases where the plaintiff misjudged the strength of the defendant's case to go to court.⁴⁷ In other words, cases in which the defendant knows that he is likely to lose are settled before or during trial and, hence, did not become part of this dataset.⁴⁸ Claims directed at optimistic defendants, thinking that they have a good chance of fending off the claim, are litigated and end with a decision on the merits. The high proportion of stand-alone litigation supports the view of private antitrust enforcement as a complement to public action.⁴⁹ Private enforcers appear to be willing to take up potential anticompetitive behaviour which is not investigated by a competition authority.

⁴⁴ Bundeskartellamt (n 33).

⁴⁵ Similarly, the European Commission concluded only a fraction of all proceedings with a formal infringement decision. Between January 1999 and February 2004 the number of settlements exceeded the number of prohibitions with fines. Jordi Gual and Nuria Mas, 'European Commission Decisions on Anti-Competitive Behavior' (2010) SSRN e-library (<http://ssrn.com/paper=1599472>).

⁴⁶ For the UK see Rodger (n 7).

⁴⁷ Sylvain Bourjade, Patrick Rey and Paul Seabright, 'Private Antitrust Enforcement in the Presence of Pre-trial Bargaining' (2009) 57 *Journal of Industrial Economics* 372–409.

⁴⁸ For the same reason the ratio of litigated stand-alone cases might be exaggerated.

⁴⁹ Ulf Böge, 'Public and Private Enforcement: Harmony or Discord' (2006) 5 *Competition Law Journal* 114, 115.

B. Parties involved in antitrust litigation

The European Commission has stressed the need for effective compensation for consumers and small firms.⁵⁰ Particularly in price-fixing cases harmed individuals, who often do not have direct dealings with the infringer, find it difficult to obtain redress.⁵¹ If the antitrust violation takes place somewhere upstream in the production chain, losses are likely to be passed-on to consumers depending on the level of competition in the respective downstream markets.⁵² The individual harm is scattered on the consumer level where aggrieved parties suffer only small individual losses and are remote to the actual infringement. The comparatively high costs and risks of legal actions diminish the incentives to sue.⁵³ Although consumers and small firms have been identified as those likely to be affected by anticompetitive conduct, little information is available about the parties in antitrust litigation in the Member States. This study divides the parties which raised the competition law issue into seven different categories: competitors, dealers or suppliers, customers, franchisees, licensees, final customers or end users, and indirect purchasers. If a vertically integrated or diversified undertaking was active in an upstream and downstream market, the subject matter of the legal dispute indicated whether this was litigation between a dealer and a purchaser or competitors. I could not retrieve information about the number of plaintiffs and defendants involved in each case.

[Insert Figure 2 about here]

Figure 2 shows that direct customer claims dominate private antitrust enforcement in Germany. They account for the vast majority of antitrust claimants with 212 proceedings or 57.6 per cent of all disputes. In 17.7 per cent of the cases competitors raised an antitrust issue. Franchisees and licensees contributed relatively little to antitrust litigation in Germany. In only one procedure an end user alleged the breach of competition law and only one indirect purchaser claim was identified – a striking contrast to the United States where consumer actions exist in the shape of class litigation.⁵⁴ Even with some potentially undetected consumer cases – the quality of the data considerably affected the identification of end-user litigation – the proportion of consumer claims remains low. In the absence of a class action mechanism it is unlikely that consumers will risk the substantial costs of litigation to remedy a petty individual loss. A mere binding effect of public decisions does not overcome the incentive problem. The data do not reveal disgorgement actions initiated by professional associations. Since potential gains from successful actions must be passed on to the federal budget this is not surprising.

The available data tell us little about the size of the parties. Judges typically omit market shares as well as names of the parties in publicised decisions. Despite the lack of information the impression is given that antitrust disputes usually take place between small or medium sized companies. This may indicate that actions are based on

⁵⁰ European Commission, 'White Paper' (n 2) 4.

⁵¹ Renda and others (n 5) 457.

⁵² Elmer J Schaefer, 'Passing-on Theory in Antitrust Treble Damages Actions: An Economic and Legal Analysis' (1975) 16 *William and Mary Law Review* 883–936; Foad Hoseinian, 'Passing-on Damages and Community Antitrust Policy - An Economic Background' (2005) 28 *World Competition* 3–23.

⁵³ William M Landes, 'An Economic Analysis of the Courts' (1971) 14 *Journal of Law & Economics* 61–107; Richard A Posner, 'An Economic Approach to Legal Procedure and Judicial Administration' (1973) 2 *Journal of Legal Studies* 399–458; John P Gould, 'The Economics of Legal Conflicts' (1973) 2 *Journal of Legal Studies* 279–300; Steven Shavell, 'The Social versus the Private Incentive to Bring a Suit in a Costly Legal System' (1982) 11 *Journal of Legal Studies* 333–340.

⁵⁴ Steven C Salop and Lawrence J White, 'Private Antitrust Litigation: An Introduction and Framework' in Lawrence J White (ed), *Private Antitrust Litigation: New Evidence, New Learning* (MIT Press, Cambridge Mass. 1988) 3.

allegations of an abuse of economic dependency (relative market power) according to section 20 ARC rather than on the abuse of dominance under section 19 ARC or Article 102 TFEU. It is sometimes claimed that this idiosyncrasy of German law is the driving force behind private enforcement. In the absence of better data this remains a speculative statement.⁵⁵ Whether or not economic dependency is regularly employed by German courts, as denoted by the firm size, depends on how the courts define markets and the size of the market for which no information is available. A number of cases were directed against former incumbents which are still likely to be dominant or nearly dominant in their respective markets.

Claimants brought antitrust cases in 14 sectors. Most proceedings were concluded in the wholesale and retail trade sector including the sale and repair of motor vehicles.⁵⁶ These sectors account for 20.1 per cent of all cases. A considerable part of the proceedings in this area stemmed from or was partly caused by the introduction of Motor Vehicle Block Exemption Regulation 1400/2002 in October 2003.⁵⁷ Car manufacturers began to review and reorganise their distribution systems and, subsequently, let dealer contracts expire or terminated contracts referring to Regulation 1400/2002. Car dealers who feared for their lucrative contracts or business brought forward their reading of Regulation 1400/2002 and a number of those disputes were taken to court. A search of the database produced 13 cases, or 17.6 per cent in the wholesale and retail sector, in which the plaintiffs or defendants referred to Block Exemption Regulations for the car industry.

[Insert Table 2 about here]

An interesting aspect of German antitrust litigation is that it often takes place in regulated or partly regulated sectors such as energy, railway transportation, postal services and telecommunication. Cases with an alleged violation in these industries account for more than a third of all proceedings in the sample. It appears that the regulation of certain industries does not reduce the incentives to privately enforce the antitrust provisions. The affected markets are typically characterised by an ex-ante regulation of the bottleneck or network level and ex-post competition law enforcement on the wholesale or retail level. Public and private competition law enforcement often deals with pricing practices in areas that do not fall in the remit of the regulator. Private antitrust litigation in regulated or partly regulated sectors is frequently directed against the former incumbent which is likely to operate networks or hold essential inputs. The Federal Network Agency (FNA) exercises ex-ante control over grid operators in the gas and electricity sector to ensure that operators do not abuse their local or regional monopolies but it does not oversee retail prices for gas and electricity leaving scope for an ex-post control through private antitrust litigation and public enforcement by the FCO. The same division of responsibilities applies to the telecommunication industry in which the Deutsche Telekom AG still enjoys a strong market position in various

⁵⁵ This problem is currently scrutinised.

⁵⁶ For a majority of the decisions I could identify the relevant industry sector. The industry was determined for the sector in which the violation or the anticompetitive effect had allegedly occurred based on the UK Standard Industrial Classification of Economic Activities 2007. http://www.statistics.gov.uk/methods_quality/sic/downloads/sic2007explanatorynotes.pdf accessed 24 October 2011. The wholesale and retail trade sector was defined too broadly and limited the identification of litigation patterns in certain sectors.

⁵⁷ Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector [2002] OJ L203/30. This was also observed by Renda and others (n 5) 40. Regulation 1400/2002 is replaced by Council Regulation (EU) No 461/2010 of 27 May 2010 on the Application of Article 101(3) of the Treaty of the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices in the Motor Vehicle Sector.

telecommunication markets. As for competition in the railway sector, the FNA enjoys supervision over railways and regulates the access to infrastructure in order to avoid discrimination. Regulatory oversight in the water sector falls within the domain of the federal states. In general, accusations of unfair pricing or discrimination by final customers or consumers are dealt with under competition law rules despite the existence of regulatory regimes in certain sectors.

C. Remedies

This section scrutinises the incidence of damages requests and other types of relief. The damages actions category in this dataset does not solely consist of actions for affirmative relief but also incorporates declaratory requests. The latter type of relief is appropriate in situations in which the claimant is not yet able to specify the precise amount of the loss. In those circumstances the court will determine whether a violation occurred and whether the claim meets all other conditions apart from the actual amount of loss. The data contain a category of ‘other claims’ referring to, for example, information requests, non-damages declaratory requests, and payment of contractual penalties. In categorising the remedies being employed in antitrust disputes, the study deviates from the doctrinal classification of claims under German law and focuses on what antitrust plaintiffs aimed to achieve.⁵⁸ The following analysis is limited to the primarily requested remedies.⁵⁹

[Insert Figure 3 about here]

Figure 3 shows that antitrust plaintiffs invoked the nullity of a contract in 22.8 per cent of all proceedings on the grounds of competition law violations. Permanent injunctions and interim injunctions were sought in 51 cases (13.9 per cent of total) and 50 cases (13.6 per cent of total) respectively. The proportion of permanent injunctive relief increases to 28.5 per cent including claims in which plaintiffs sought to continue or conclude a contract.⁶⁰ Claimants requested damages payments or a declaration thereof in 40 cases (11.4 per cent). Adding up damages and unjust enrichment claims, we find that almost 20 per cent of the litigated cases actually dealt with pecuniary requests. Whether all damages claimants requested precise payments or whether some of them sought a declaratory judgement is not always clear from the data. Assuming that some of the monetary actions are requests for declaratory judgements as they are common in civil law proceedings,⁶¹ one would anticipate that some of those cases reappear before the courts in order to clarify the precise amount of damages. However, the dataset does not reveal an instance in which a court established the amount of compensation on the basis of a previous declaratory judgement. This may point towards an unobservable settlement practice: once the judge has established the

⁵⁸ German civil procedure knows actions for performance, actions requesting a change of a legal right or status and actions for a declaratory judgement.

⁵⁹ Claimants may ask for more than one type of relief. Primary remedy refers to the remedy that appeared first in the judgement or claimant’s statement.

⁶⁰ The nature of claims to requests the conclusion of a contract is contentious. Some argue that the conclusion of a contract is some type of damages remedy without the mandatory fault requirement. Others assert that the request for a conclusion of contract is a removal or injunction claim. For this study it is viewed as some form of injunctive relief. For an overview see Rolf Hempel, *Privater Rechtsschutz im Kartellrecht: Eine rechtsvergleichende Analyse* (Nomos, Baden-Baden 2002) 52; Reh binder (n 16) para 44.

⁶¹ Alexander Rinne and Tatjana Mühlbach, ‘Germany: Private Antitrust Litigation’ (2009) *The European Antitrust Review*.

infringement and determined the liability, parties negotiate the actual payment. Of the 37 cases in which the secondary claim of the antitrust plaintiff was established most were damages requests (18 cases). Three plaintiffs also asked for injunctions, one for voidness, three for the conclusion or continuation of a contract and three for restitution because of unjust enrichment.

In a number of cases the initial defendant countered the plaintiff's non-competition claim with the assertion that the plaintiff had breached competition law. The literature refers to cases in which antitrust law is used as a defence by the initial defendant as 'shield' cases.⁶² When the plaintiff actively pursues a breach of competition law, the action is labelled as 'sword' litigation. Antitrust cases in Germany are said to be mostly 'shield' cases – an assertion this study does not confirm.⁶³ In 91 proceedings or 24.7 per cent of all 368 cases the defendants raised the competition law issue in the counterclaim. Those counterclaims cover both 'real' claims for antitrust damages or other remedies, and pure defences such as voidness. In 79 out of 91 cases, or 86 per cent of all 'shield' cases, the defendants used competition law purely defensively seeking the voidness of an agreement. This finding may be slightly worrying as it is sometimes asserted that defendants use the antitrust laws strategically to free themselves from undesirable contract obligations when faced with the plaintiff's demand to perform a contract duty.⁶⁴ As for the remaining 'shield' cases, damages, injunctive relief and interim injunctions were claimed twice respectively. In one instance the antitrust claimant made the case for unjust enrichment and on one occasion the initial defendant sought the continuation of a contract.

The discussion about private antitrust enforcement in Europe focuses on the current lack of compensation, the purported obstacles for victims seeking compensatory payments, and the benefits that will arise from enhanced damages actions.⁶⁵ However, parties to disputes in civil litigation avail themselves of more than just the damages remedy. They employ different forms of injunctive relief,⁶⁶ disgorgement or unjust enrichment claims,⁶⁷ voidness,⁶⁸ and interim remedies. The differences in costs may prompt victims of anticompetitive behaviour to choose a remedy other than damages. The widespread employment of permanent injunctive relief in competition law litigation shows that there are alternative resolutions for antitrust disputes. It also questions the European view of private antitrust enforcement as a tool to primarily compensate victims.⁶⁹ While European policy is concerned with group actions and the reparation of pecuniary harm, the data show that a proportion of affected individuals chose non-damages remedies. The study does not reveal why private enforcers opt for injunctive relief. It may be that damages claims are expensive because of the calculation of losses and the difficult proof of causation and harm. It may also be that

⁶² Francis G Jacobs and Thomas Deisenhofer, 'Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective' in Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *Effective Private Enforcement of EC Antitrust Law* (Hart, Oxford 2003) 187; Wouter P Wils, *Principles of European Antitrust Enforcement* (Hart, Oxford 2005); Komninos (n 3).

⁶³ Karsten Schmidt, 'Procedural Issues in the Private Enforcement of EC Competition Rules: Considerations Related to German Civil Procedures' in Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *Effective Private Enforcement of EC Antitrust Law* (Hart, Oxford 2003) 253, 260.

⁶⁴ Assimakis P Komninos, '"Transient" and "Transitional" Voidness of Anti-competitive Agreements: A Non-issue and an Issue' (2007) 28 *European Competition Law Review* 445–450.

⁶⁵ Waelbroeck, Slater and Even-Shoshan (n 4); Renda and others (n 5).

⁶⁶ Kenneth G Elzinga and William Breit, *The Antitrust Penalties: A Study in Law and Economics* (Yale University Press, New Haven 1977); Wouter P Wils, 'Should Private Enforcement Be Encouraged in Europe?' (2003) 26 *World Competition* 472–488.

⁶⁷ Barry J Rodger, 'The Interface Between Competition Law and Private Law: Article 81, Illegality and Unjustified Enrichment' (2002) 6 *Edinburgh Law Review* 217–243; Tony Singla, 'The Remedies (not) Available for Breaches of Article 81 EC' (2008) 29 *European Competition Law Review* 201–205.

⁶⁸ Komninos (n 64).

⁶⁹ Okeoghene Odudu, 'Effective Remedies and Effective Incentives in Community Competition Law' (2006) 5 *Competition Law Journal* 134–151; Eilmansberger (n 3); Wils (n 3).

injunctions satisfy the need for an efficient, more certain and immediate remediation for which plaintiffs are willing to forego uncertain and difficult compensation. The use of unjust enrichment – a gain-based remedy – also underpins the doubts as to the compensation goal. If a failed or void contract underpins the parties’ business relationship, the plaintiff may prefer restitution in order to obtain pecuniary relief. Since no culpability or damage need to be established, unjust enrichment is probably easier to prove than damages if the defendant’s gain consists of a plain and reversible transfer of money. The use of unjust enrichment claims, injunctions or voidness actions in antitrust litigation raises concerns that allegations of anticompetitive conduct are used to renegotiate contracts. The European Commission and commentators from common-law jurisdictions have pointed at the so-called litigation abuse where plaintiffs bring non-meritorious antitrust claims to extort settlements from the defendant.⁷⁰ The fear of anticompetitive or non-meritorious antitrust litigation is fed by a skewed comparative view on US antitrust rules where special, plaintiff-favouring antitrust rules like, for instance, damages multipliers incentivise private actions. The wide scope of competition laws and the ambiguity inherent in expressions like ‘abuse’ or ‘anticompetitive’ create uncertainty for defendants as to the legality of their conduct. A business-minded plaintiff could use the legal uncertainty and the fear of trial costs to exert pressure on the defendant forcing him to settle. However, injunctions are less apt to exploit the defendant’s weakness as they provide less of a lever but the threat of litigation may still be used in contract negotiations. In the case where a contract already exists, a plaintiff can request nullity for the breach of competition law in order to dispose of an unwanted contractual obligation. While the considerable number of nullity requests, which are basically brought to fend off contractual obligations, supports this view, further analysis is required to assess this issue definitively.

D. Prospect of success

The existing investigations of private antitrust enforcement in Europe report very few successful damages awards in absolute numbers.⁷¹ However, for the damages actions known, the Welfare Impact Report documents an astonishing success rate of 46 per cent, or six out of 13 cases, for cartel damages litigation.⁷² In litigation which was founded on the abuse of dominance plaintiffs achieved a positive outcome in 55 per cent of the cases, or 12 out of 22 proceedings. Although the success of damages claims is one possible measure of the effectiveness of private antitrust enforcement, the outcome of other remedies and the settlement rate are likely to create a more exhaustive picture.⁷³ For the purpose of this study, the antitrust plaintiff is deemed to have ‘won’ a claim if the court decided in favour of the plaintiff with respect to both the substantive pleadings and the remedy. ‘Partly won’ refers to outcomes in which, for instance, the judge lowered the amount of damages compared to the initial plea or granted an

⁷⁰ A. M Polinsky and Daniel L Rubinfeld, ‘Sanctioning Frivolous Suits: An Economic Analysis’ (1993) 82 *Georgetown Law Journal* 397–435; Steven Shavell, ‘The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System’ (1997) 26 *Journal of Legal Studies* 575–612; Wils (n 66); R. P McAfee and Nicholas V Vakkur, ‘The Strategic Abuse of Antitrust Laws’ (2004) 1 *Journal of Strategic Management Education* 1–18; European Commission, ‘White Paper’ (n 2); European Commission, ‘Commission Staff Working Paper accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules’ (Brussels 2008).

⁷¹ Renda and others (n 5) 40. To date there has not been a final damages award before UK courts. Barry J Rodger, ‘UK Competition Law and Private Litigation’ in Barry J Rodger (ed), *Ten Years of UK Competition Law Reform* (Dundee University Press, Dundee 2010) 53.

⁷² Cartel damages litigation between May 2004 and 2007. Renda and others (n 5) 40.

⁷³ Lawrence J White (ed), *Private Antitrust Litigation: New Evidence, New Learning* (MIT Press, Cambridge Mass. 1988); Lande and Davis (n 36); Brian T Fitzpatrick, ‘An Empirical Study of Class Action Settlements and Their Fee Awards’ (2010) 7 *Journal of Empirical Studies* 811–846.

injunction that did not contain all the points requested. An antitrust action is characterised as ‘lost’ if the court did not find a breach of competition law or dismissed the claim.⁷⁴

[Insert Table 3 about here]

As Table 3 shows, parties which brought forward allegations of anticompetitive conduct succeeded or partly succeeded in 37.2 per cent of all proceedings in the sample. Most of the antitrust claims were lost. Settlements were discovered by chance and do not allow any conclusions as to the frequency of their occurrence. I do not have information about the content of settlements and, therefore, no information about the relative success of the settling parties. It appears that the chance of winning a counterclaim is not much greater than the average for the entire sample: 37.4 per cent of the counterclaims were partly or totally successful and 58.2 per cent were lost. Separating first instance trials from cases decided on the first appeal level, the ratio of won and lost proceedings does not change significantly. In the first instance 60 per cent of the antitrust claims were lost and 35.6 per cent won or partly won. On appeal to the higher regional courts antitrust plaintiffs succeeded or partially succeeded in 37.8 per cent of all 1st appeal cases and lost in 56.7 per cent of cases. Only appeals on questions of law to the Federal Court of Justice (BGH) had a higher chance of success. Plaintiffs won 45.8 per cent and lost 54.2 per cent of their BGH appeals. The higher regional courts must grant leave to appeal if plaintiffs seek to challenge the decision on points of law before the Federal Court of Justice. This seems to be an effective tool for identifying potentially unsuccessful or hopeless cases and increasing the success rate substantially.

[Insert Figure 4 about here]

Figure 4 shows that the success rate differs greatly with respect to the various remedies. Plaintiffs requesting restitution won in more than 50 per cent of the cases. Claims for injunction relief, not taking into account the continuation or conclusion of contracts, also proved to be relatively successful. As for interim relief, the success rate is around 40 per cent. A closer look at the case law reveals that many requests for interim injunctions are struck down because a decision in favour of the applicant would anticipate a decision on the merits or lacks the required urgency. Victims seeking compensation had the lowest chance of success (17.5 per cent). This is a striking contrast to the findings of the Impact Assessment Report in which 46 per cent of the cartel damages cases and 55 per cent of the unilateral conduct damages cases were successful.⁷⁵ Most of the cases in the Impact Assessment Report seem to be follow-on proceedings which, as they rely on evidence from public investigations, have a greater prospect of success. The moderate prospect of obtaining a successful court verdict in damages litigation may hint towards the intrinsic difficulties of bringing a damages claim, especially if claims are brought as stand-alone actions, since plaintiffs have to prove the infringement and loss. This is not a deficit of antitrust damages actions but the nature of compensation claims across the board. An alternative explanation for the unfavourable outcome of litigated damages

⁷⁴ There might be some proceedings in which the overall outcome for the antitrust plaintiffs was positive although the competition law claim was lost.

⁷⁵ Renda and others (n 5) 40.

cases might be a higher settlement rate in compensation disputes.⁷⁶ From the defendant's point of view damages claims present a higher financial risk than requests for injunctions. The prospect of higher cost if the trial is lost might induce risk-averse defendants to settle earlier and more frequently in damages disputes. The plaintiff may also be more willing to dispose of the case prior to trial taking into account the potentially greater cost of successfully arguing a damages claim. In addition to damages actions, German law provides for another form of monetary relief that may, under certain circumstances, offset the rather dismal prospect of compensation. Unjust enrichment requests had the greatest success rate of all remedies and were three times more promising than damages claims. However, unjust enrichment actions are normally based on void contracts inevitably posing the question of where the boundary between antitrust and contract litigation lies.

The ratio of lost and won cases may indicate that the actual volume of private antitrust disputes is higher if we presume the existence of US settlement rates.⁷⁷ According to Bourjade, Rey and Seabright, defendants who have committed an antitrust violation are more likely to settle out of court while those who are innocent are more likely to defend their case bringing the matter to court.⁷⁸ Hence, the courts become the place where the innocent proves that he is innocent.⁷⁹ Based on the high ratio of lost cases the results imply a certain level of pre-trial settlement activity assuming that litigants do not overestimate their chances of success and do not commence hopeless legal actions. Although the dataset comprises only three proceedings in which the parties actually settled their dispute, the real number of settlements is presumably higher taking into account the data generation bias.⁸⁰ The observed level of antitrust litigation in Germany seems to be the tip of the iceberg rather than the maximum number of antitrust disputes.

E. Statute violation and anticompetitive conduct

The data in Table 4 show the statutes on which antitrust actions were based. The statutory provisions were sorted into four categories: violations of Article 81 (now 101 TFEU), Article 82 (now 102 TFEU), sections 1 to 18 and 19 to 21 ARC. Section 19 and 20 ARC could not be distinguished in the study due to the lack of precise data. The category 'other' refers to special norms, for instance, in the energy and telecommunication sectors or to the regulation of resale price maintenance for books. The following analysis focuses on the primarily alleged statute violation which is the statute parties named first in their statements.

[Insert Table 4 about here]

⁷⁶ Landes (n 53); Steven Shavell, 'Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs' (1982) 11 *Journal of Legal Studies* 55–82; Priest and Klein (n 29); Donald Wittman, 'Dispute Resolution Bargaining and the Selection of Cases for Trial: A Study of the Generation of Biased and Unbiased Data' (1988) 17 *Journal of Legal Studies* 313–352; Jeffrey M Perloff and Daniel L Rubinfeld, 'Settlements in Private Antitrust Litigation' in Lawrence J White (ed), *Private Antitrust Litigation: New Evidence, New Learning* (MIT Press, Cambridge Mass. 1988) 149.

⁷⁷ See White (ed) (n 73). It is said that 90 per cent of private antitrust cases are settled in the United States.

⁷⁸ Bourjade, Rey and Seabright (n 47).

⁷⁹ A success rate of 37.2 per cent could mean that some guilty defendants do not settle or that there is an element of uncertainty about the infringement or causation. It may also hint towards judicial error and judges wrongly holding for the plaintiff.

⁸⁰ This was signalled by practitioners too. See also Rinne and Mühlbach (n 61).

More than half of all cases are based on allegations of unilateral conduct under sections 19 to 21 of the ARC. Horizontal and vertical anticompetitive arrangements violating German antitrust regulations accounted for 19.3 per cent of all cases. Plaintiffs referred less often to infringements of the EU antitrust rules: 13.3 per cent asserted an anticompetitive horizontal or vertical agreement while only 4.6 per cent of all cases dealt with the breach of Article 101 TFEU. The proportion of anticompetitive agreements and unilateral conduct allegations is reversed if we separate cases which were primarily founded on EU law from those based on German law. Accusations of unilateral conduct were made in 74.9 per cent of the cases that built on a violation of German law. When actions hinge on a breach of EU competition law, 74.2 per cent of the antitrust plaintiffs asserted an anticompetitive agreement under Article 101 TFEU.

Violations of EU antitrust rules are alleged less often than violations of German competition law. At first glance, the European Commission appears to be correct in pointing out that the private enforcement of European competition law is underdeveloped.⁸¹ However, this narrow interpretation misses the point. Under the Modernisation Regulation 1/2003 the laws of the Member States can no longer provide for rules that differ from Article 101 TFEU. The Modernisation Regulation permits a deviation of national provisions only for the regulation of market power. Thus, with respect to Article 101 TFEU, it does not make a practical difference whether the action is based on national or EU competition law. Consequently, one needs to take into account litigation that is based on identical national prohibitions in order to achieve a complete picture of private antitrust enforcement. As for the widespread application of statutes prohibiting the abuse of market power before German courts, the differing concepts of Article 102 TFEU and sections 19 and 20 ARC may motivate victims of anticompetitive conduct to initiate lawsuits. Unilateral behaviour under section 20 ARC is broader than dominance under Article 102 TFEU as the former also prohibits the abuse of economic dependency.⁸² As the current data do not reveal the distribution of section 19 and section 20 ARC cases, a final conclusion as to the effect of section 20 ARC on the level of private antitrust cases has to await further analysis.

The alleged anticompetitive behaviour is laid out in more detail in Table 5 which specifies the allegations that were made in antitrust actions. This table shows Article 101-type behaviour at the top, vertical restraints in the middle and abuse of market power at the bottom.⁸³ Only a few cases dealt with hard-core cartels. In eleven cases allegations of horizontal price fixing were brought forward. Other horizontal agreements included quotas, bid rigging allegations and assertions of anticompetitive non-compete clauses. Non-compete clauses are a routine element of contracts between businesses or shareholders and often turned out to be the reason for legal disputes. In 19 cases antitrust plaintiffs accused the defendants of resale price maintenance. Tying arrangements were less often the source of antitrust litigation with just five cases. Other vertical agreements like single branding, export bans, customer allocation and anticompetitive franchise agreements accounted for 35 cases. As I have already explained above, a considerable number of plaintiffs asked the court to order a conclusion of contract or to continue a contract with the defendant. This is reflected in the number of proceedings which are based on a refusal to deal (60 cases) or

⁸¹ European Commission, 'Green Paper' (n 2).

⁸² Wulf-Henning Roth, 'Private Enforcement of European Competition Law - Recommendations Flowing from the German Experience' in Jürgen Basedow (ed), *Private Enforcement of EC Competition Law* (Kluwer Law International, Alphen a. d. Rijn 2007) 61, 62.

⁸³ It is difficult to precisely determine the illegal conduct for many cases because allegations are often phrased in very broad terms covering several types of anticompetitive conduct.

an allegedly anticompetitive termination of a contract (24 cases). The abuse of market power accounted for the majority of accusations.

[Insert Table 5 about here]

The number of hard-core cartel cases is relatively small and represents less than ten per cent of all proceedings in the sample despite the importance being attached to price-fixing and similar horizontal violations in policy discussion. The secrecy of cartels and the difficulties of filing stand-alone actions against them may contribute to a low level of private cartel actions. Plaintiffs usually rely on evidence from public investigations in the absence of discovery or other mechanisms to obtain information about the existence of cartels although the US experience suggests that discovery may not always be able to solve the information problem. As I have shown above, the FCO concluded just a few investigations with a formal decision between 2005 and 2007. Hence, potential plaintiffs may not learn about an infringement at all. The protective scope requirement, which existed in Germany until 2005, may have also hampered damages actions. Some argue that other factors such as the lack of representative consumer or class actions or the unclear status of the passing-on defence in Germany are responsible for the small number of cartel cases.⁸⁴

V. CONCLUSIONS

The data call for further analysis of, for instance, the determinants of the outcome of claims, the remedies employed by plaintiffs, and the interplay of public and private enforcement in regulated sectors. However, the descriptive story presented in this paper already undermines the assumption that private antitrust enforcement is underdeveloped in all Member States and challenges the current focus on compensation litigation. The study has shown that private enforcement flourishes even in the absence of ‘US-style’ litigation enhancing rules. Injunctive relief – a remedy that has been largely ignored by policy makers – proves to be an integral and pivotal part of antitrust litigation in the German setting. Thus, the German experience raises important questions as to the objective of private actions (is it really just compensation?), the interaction with public enforcement (do follow-on actions actually complement agency investigations?), and the design of litigation enhancing rules (are plaintiffs always driven by high damages awards?).

The hypothesis of underdeveloped private enforcement only holds true if it is limited to damages actions for the violation of EU law. However, if we include other remedies and the enforcement of parallel national provisions in the analysis plaintiffs seem to be very active. The widespread usage of injunctive relief may cast doubts as to the ubiquity of compensation as the primary objective of private antitrust litigation although a number of claims in the dataset aim at monetary, but not always compensatory, relief. Private parties do not necessarily pursue hard-core breaches – a task for which public enforcement agencies are arguably better suited – but seem to comply with their envisaged role as a complement to agency enforcement. Claimants pick up infringements that

⁸⁴ Roth (n82) 68.

have less impact on the economy as a whole and, thus, their cases do not duplicate public investigations into hard-core or grand-scale violations. The high ratio of stand-alone claims shows that private enforcement can fulfil this complementary function if non-damages remedies and non-cartel violations are taken into account. However, the envisaged changes of antitrust and class litigation on the European level aim at raising the number of follow-on damages claims and, hence, are likely to achieve quite the opposite. In the German context, facilitated damages and class actions are likely to transform private antitrust enforcement from a complementary mechanism into an overlapping enforcement mode and, thus, lessen the additional benefits received from private litigation. Duplicated enforcement does not only increase overall enforcement costs but it is also likely to cause more interference, for instance, with government leniency programmes. The German experience suggests that other remedies can be equally valuable as a means of enforcing the competition laws if they are, for instance, cheaper, easier to handle, more promising, or less risky in a given case. There is a general bias towards measuring the volume and impact of private antitrust enforcement according to the success of damages actions. This is a misconception of antitrust litigation which has also impinged upon the European Commission's policy proposals.

The question that remains unanswered is why injured individuals are inclined to bring their disputes in front of a judge. It is puzzling that victims seek the protection of their rights in the courts in the absence of rules which are commonly held to incentivise claims in other jurisdictions like, for instance, one-way fee shifting, contingency fee agreements, discovery procedures, and multiple damages awards. One could suspect that low and predictable litigation costs provide for lower litigation barriers and, thus, motivate parties to ask for a court-imposed solution to their conflict. Or maybe private enforcers prefer to target softer infringements, for which it may be easier to secure a positive decision, with softer remedies. This amounts to the question of what type of infringements private enforcers are supposed to take on: hard-core cartel violations or more ambiguous and, maybe, small-scale infringements like vertical restraints and unilateral conduct? My research indicates that the current policy discussion fails to take into account the complexity of antitrust litigation. Against this background policy makers ought to clarify what type of private enforcement system they actually aim to create and how it will fit into national systems. Most importantly though, European policy makers ought to revise the assumptions on which potential legislative measures will be based. The assumption of a complete underdevelopment of private antitrust actions in *all* Member States is certainly a myth.

APPENDIX

Table 1. Private antitrust cases per year

Year	Cases total	First instance	Appeal	Appeal to BGH
	Frequency	Frequency (% year)	Frequency (% year)	Frequency (% year)
2005	147	79 (54%)	59 (40%)	9 (6%)
2006	131	63 (48%)	60 (46%)	8 (6%)
2007	90	38 (42%)	45 (50%)	7 (8%)
Total	368	180 (49%)	164 (45%)	24 (7%)

Note: The Federal Court of Justice (BGH) is the highest appeal instance. The data do not contain complaints against a denial of leave to appeal.

Table 2. Industry in which the legal dispute took place

	Industry	Frequency	% of total	% of regulated
Regulated and partly regulated industries*	Electricity, gas, steam, air conditioning supply	47	12.8	34.8
	Information and communication	44	12.0	32.6
	Transport, storage, mail	39	10.6	28.9
	Water supply, sewerage, waste management and remediation activities	5	1.4	3.7
	Subtotal for regulated industries	135	36.8	100
		Frequency	% of total	% of unregulated
Unregulated industries	Wholesale and retail trade; repair of motor vehicles and motor cycles	74	20.1	44.3
	Manufacturing	26	7.1	15.6
	Arts, entertainment and recreation	21	5.7	12.6
	Administrative and support service activities	14	3.8	8.4
	Construction	11	3.0	6.6
	Accommodation and food service activities	10	2.7	6.0
	Financial and insurance activities	5	1.4	3.0
	Human health and social work activities	3	0.8	1.8
	Other service activities	2	0.5	1.2
	Professional, scientific and technical activities	1	0.3	0.6
	Subtotal for unregulated industries	167	45.4	100
	Missing value	66	17.9	
Total	368	100.0		

Note: Some unregulated markets appear in regulated industries due to wide sector definitions.

Table 3. Outcome of the antitrust claim

		Won	Partially won	Lost or dismissed	Settled	Other	Missing value	Total
1 st instance	Frequency	59	5	108	1	2	5	180
	% of 1 st inst	32.8	2.8	60	0.6	1.1	2.8	100
1 st appeal	Frequency	53	9	93	2	1	6	164
	% of appeal	32.3	5.5	56.7	1.2	0.6	3.7	100
BGH appeal	Frequency	11	0	13	0	0	0	24
	% of BGH	45.8	0	54.2	0	0	0	100
Total	Frequency	123	14	214	3	3	11	368
	% of total	33.4	3.8	58.2	0.8	0.8	3.0	100.0

Note: 1st appeal refers to appeals to the higher regional courts excluding appeals on questions of law to the Federal Court of Justice (BGH). Settlements were discovered by chance.

Table 4. Primarily alleged statute violation

		Frequency	% of EU competition law	% of total
EU competition law	Art 101 TFEU	49	74.2	13.3
	Art 102 TFEU	17	25.8	4.6
	Subtotal EU law	66	100	17.9
			% of German competition law	
German competition law	Section 1-18 ARC	71	25.1	19.3
	Sections 19-21 ARC	212	74.9	57.6
	Subtotal German law	283	100	76.9
	Other	18	n/a	4.9
	Missing value	1	n/a	0.3
	Total	368	n/a	100.0

Table 5. Primarily claimed anticompetitive conduct

	Frequency	Percent of total
Horizontal price fixing	11	3.0
Other horizontal violations	25	6.8
Resale price maintenance	19	5.2
Tying	5	1.4
Other vertical violations	35	9.5
Exclusive dealing	14	3.8
Termination of contract	24	6.5
Refusal to deal or supply	60	16.3
Excessive pricing	44	12.0
Predatory pricing	6	1.6
Price discrimination	23	6.2
Non-price discrimination	51	13.9
Other	24	6.5
Missing value	27	7.3
Total	368	100.0

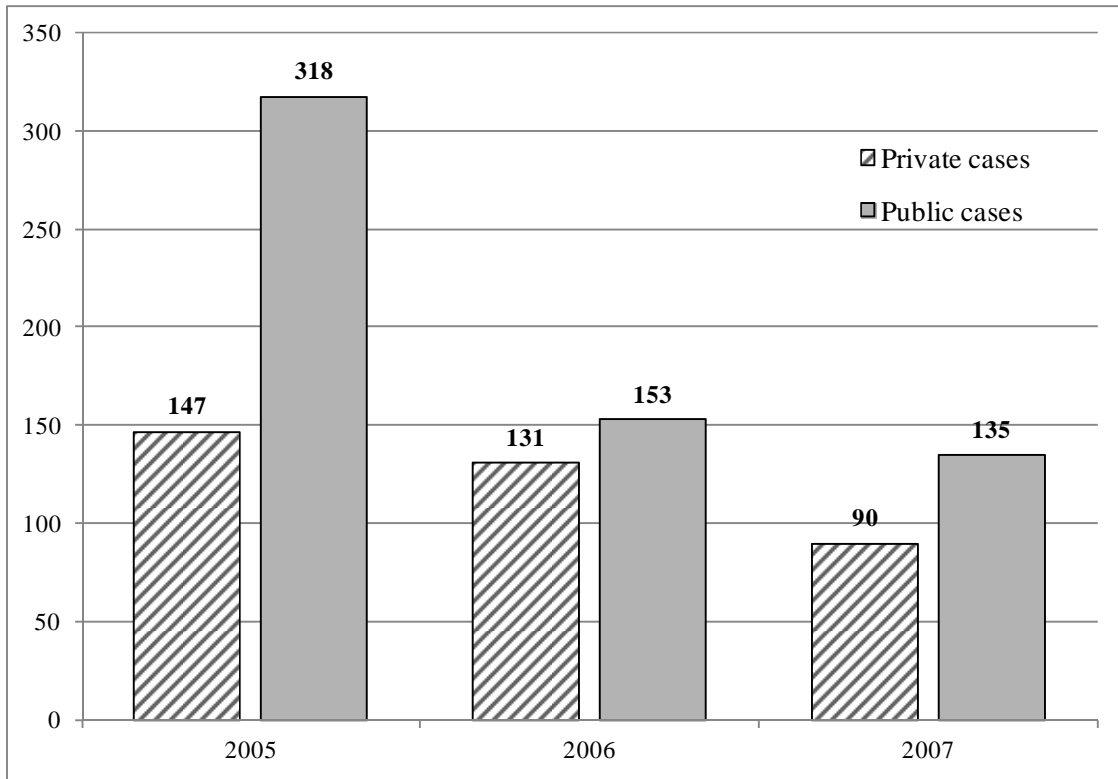


Figure 1. Concluded public and private cases 2005 to 2007

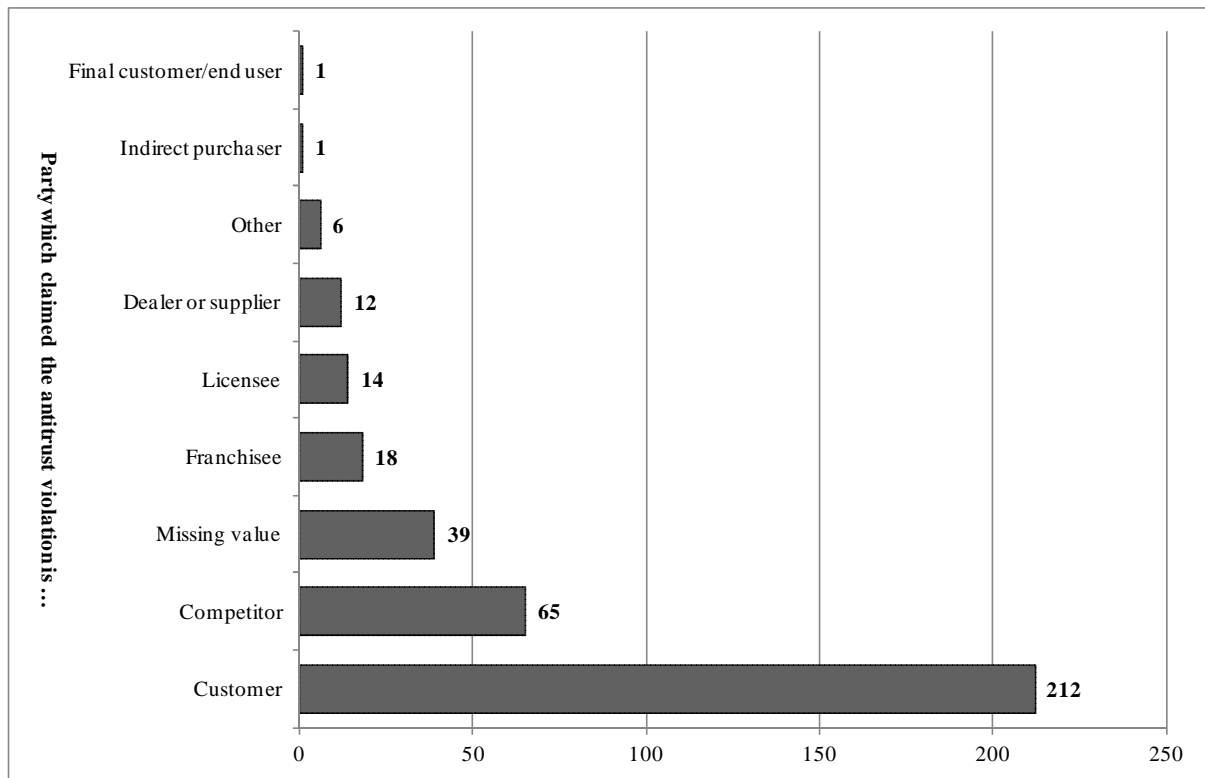


Figure 2. Frequency of business relationship between parties

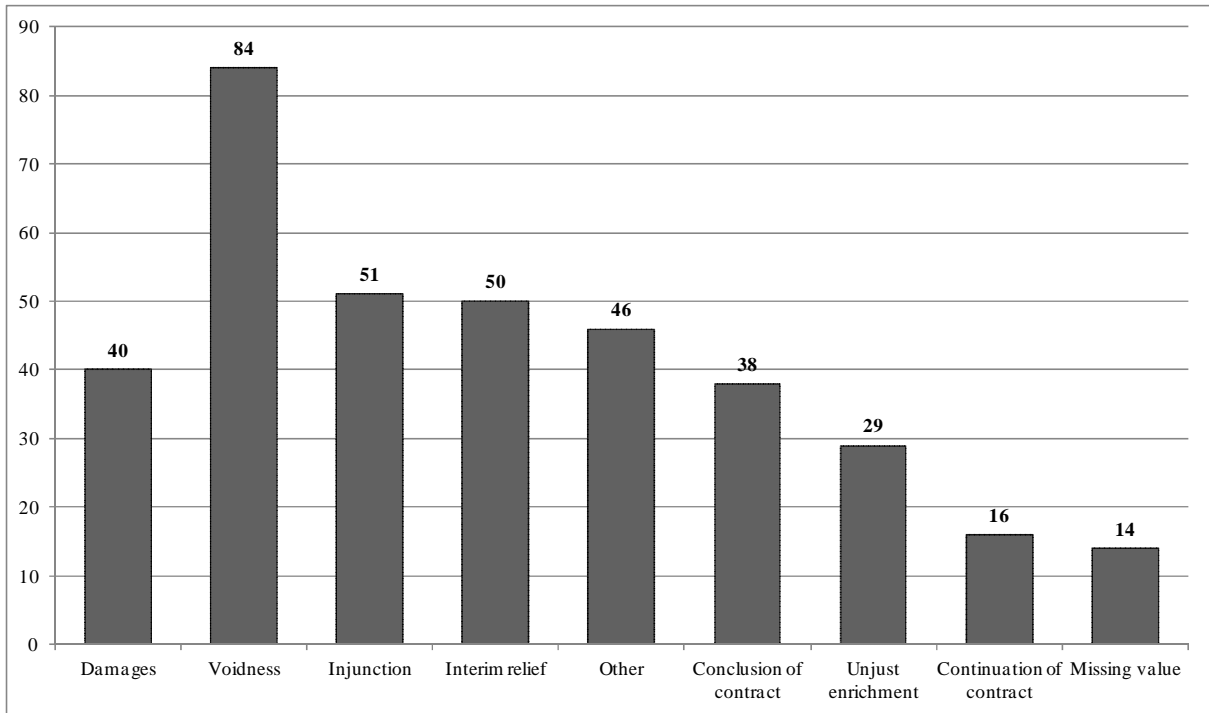


Figure 3. Frequency of primarily requested remedy

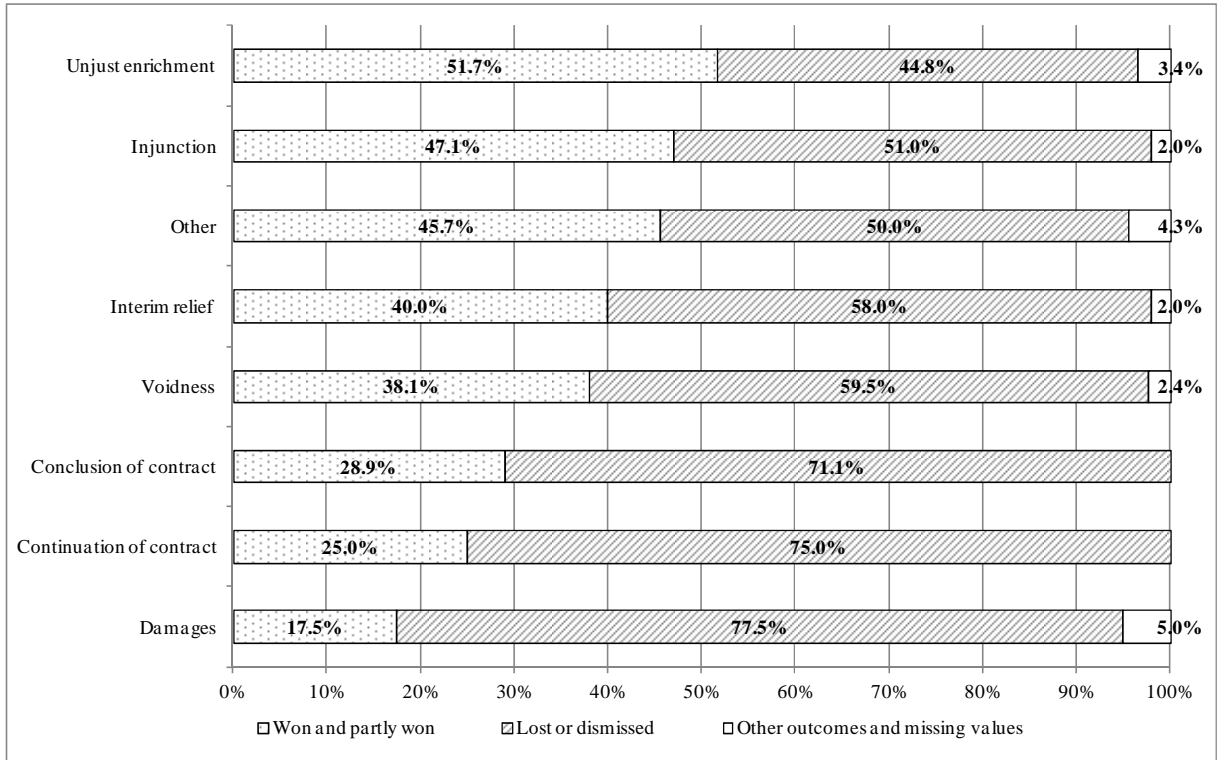


Figure 4. Outcome per remedy in percent