

The Transposition of the Cartel Damages Directive into German Law

Prof. Dr. Christian Kersting, LL.M. (Yale)

20 June 2019

The Transposition of the Cartel Damages Directive into German Law

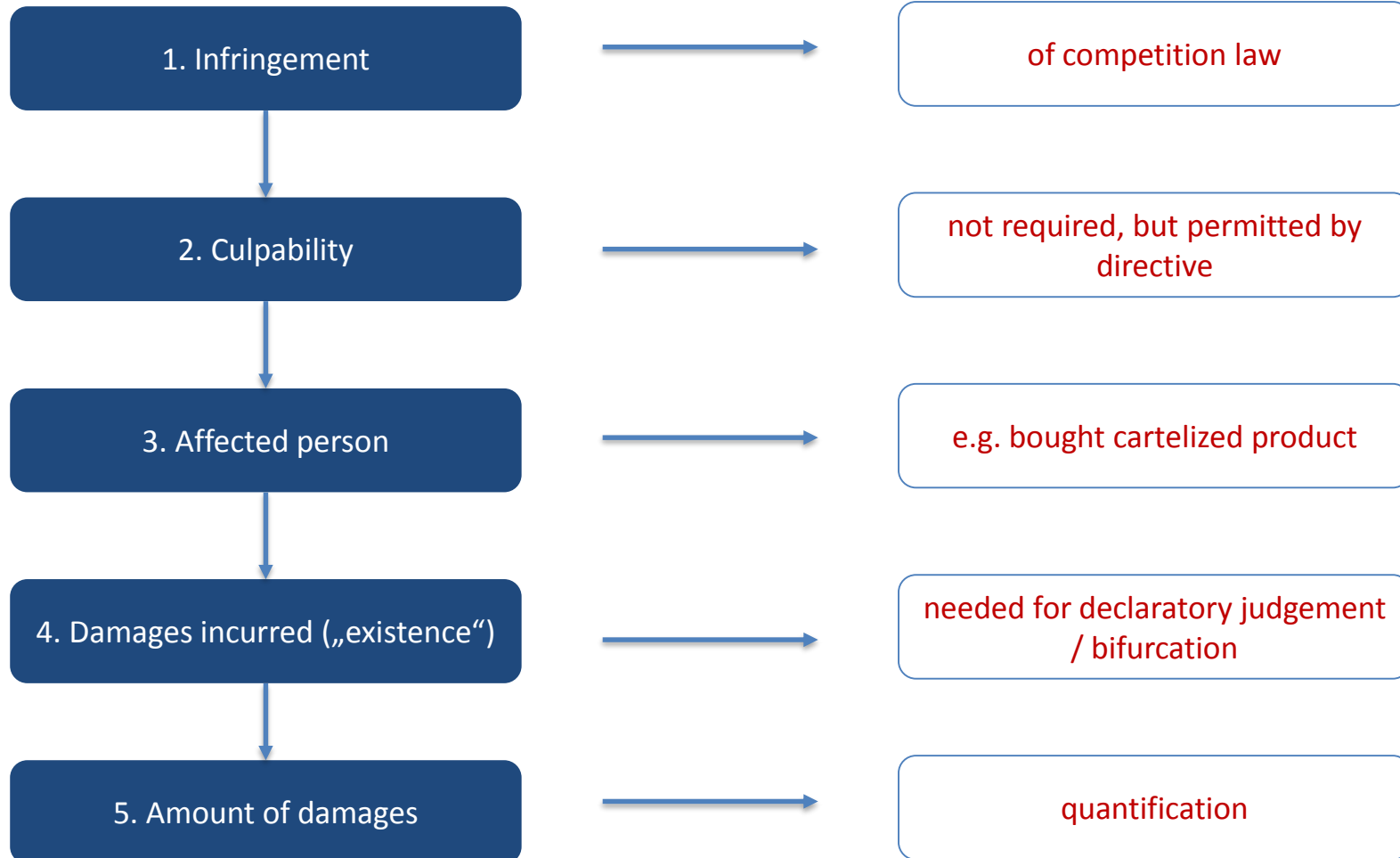
Valencia
20 June 2019

Prof. Dr. Christian Kersting, LL.M. (Yale)

Introduction

- The 9th amendment to the Act Against Restraints of Competition (ARC) introduced some concepts that were to some extent foreign to traditional German law, e.g.:
 - Presumption of damages, Sec. 33a(2) ARC
 - Substantive law claim pertaining to disclosure of evidence, Sec. 33g ARC
 - Parental liability for fines, Sec. 81(3a) ARC
- Temporal scope of application, Sec. 186 (3), (4) ARC
 - Substantive law provisions apply to claims arisen after 26 December 2016
 - Procedural law provisions apply to legal actions filed after 26 December 2016
 - i.e. also to “old” claims
 - however: narrowly interpreted by courts

Overview



Effect of national decisions



1. Infringement

2. Culpability

3. Affected person

4. Damages incurred („existence“)

5. Amount of damages

Transposition of
Art. 9(1)

Binding effect if...

infringement of the
German ARC or
Art. 101, 102 TFEU is...

found by German
competition authority.

found by European
Commission.

found by competition
authority of another
EU Member State.

No explicit transposition of
Art. 9(2)

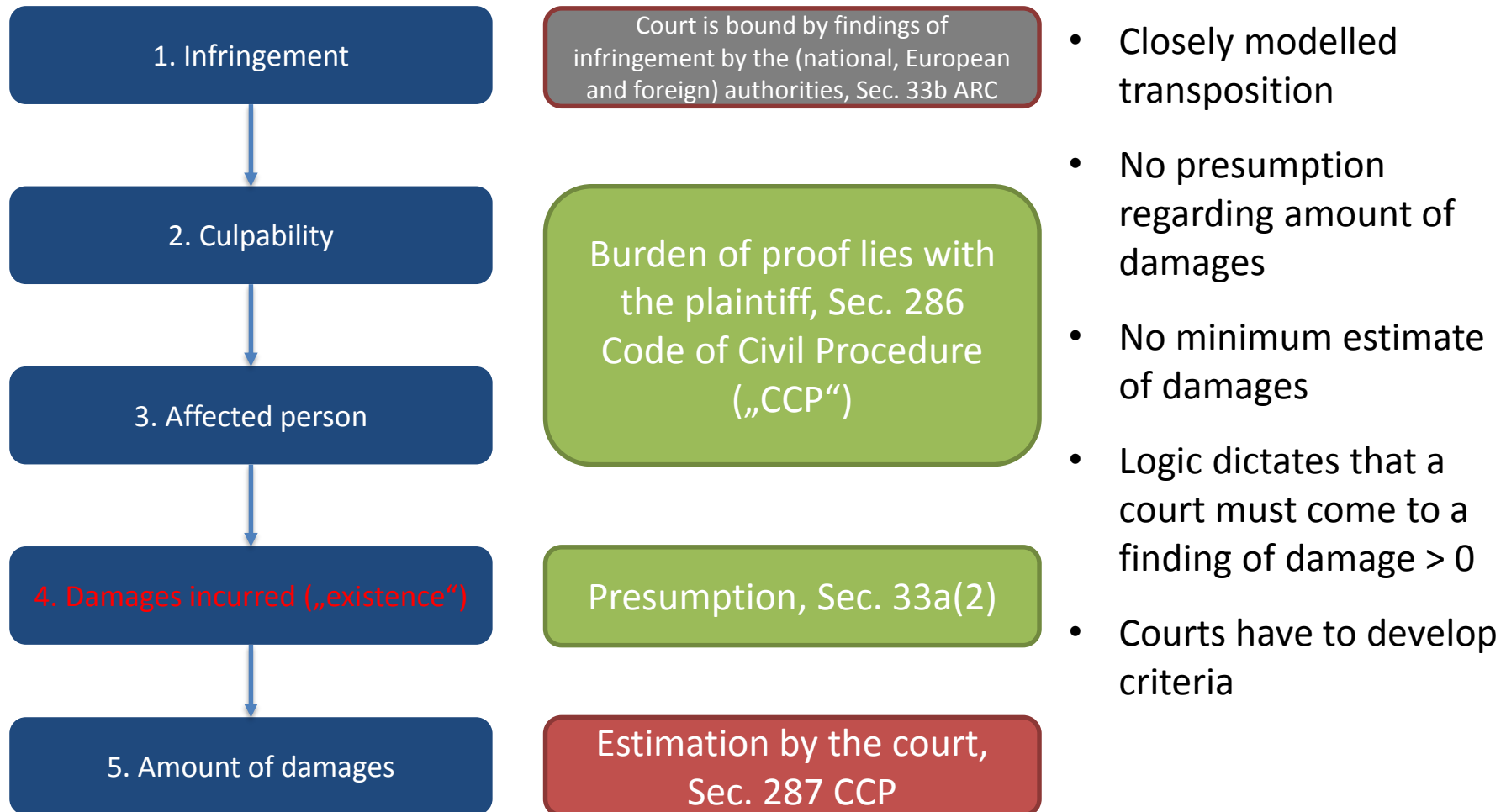
(Only) Prima facie
evidence if...

infringement of
foreign competition
rule is...

found by competition
authority of another
EU Member State.

The same applies to confirming decisions rendered by the review courts.

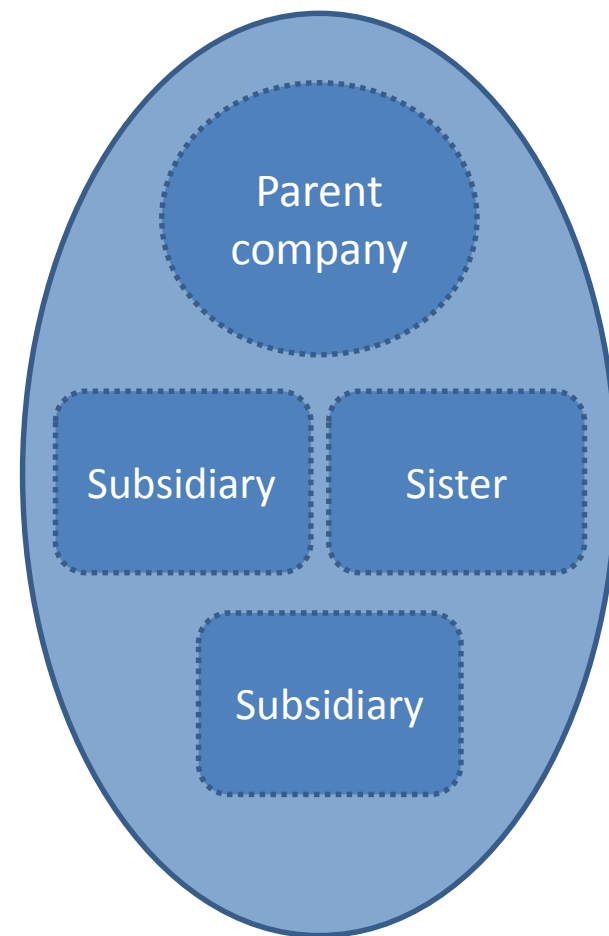
Presumption of damages



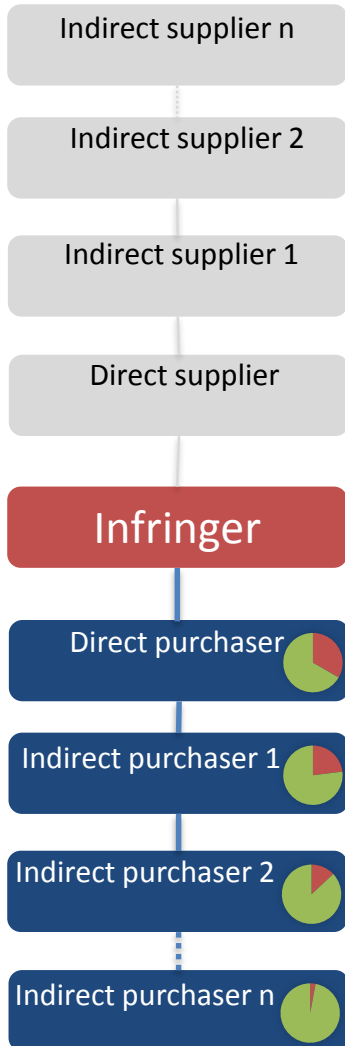
Group liability

- German legislator has opted for imposing liability on parents for their subsidiaries, Sec. 81(3a) ARC.
 - Only relevant for fines, thus outside scope of directive, but see ECN Plus directive
 - Only parent companies are liable, not sister companies
- Introducing parent company liability for fines but not for damages has been criticised closes loopholes only in the interests of the fisc and unjustly disregards interest of cartel victims
- Sec. 33a(1) ARC: „Whoever intentionally or negligently commits an infringement pursuant to paragraph 1 shall be liable for the damages arising therefrom.“
- See now: ECJ, C-724/17, Skanska: direct application of Art. 101 TFEU, concept of undertaking, group liability & successor liability

Group Liability



Pass-on

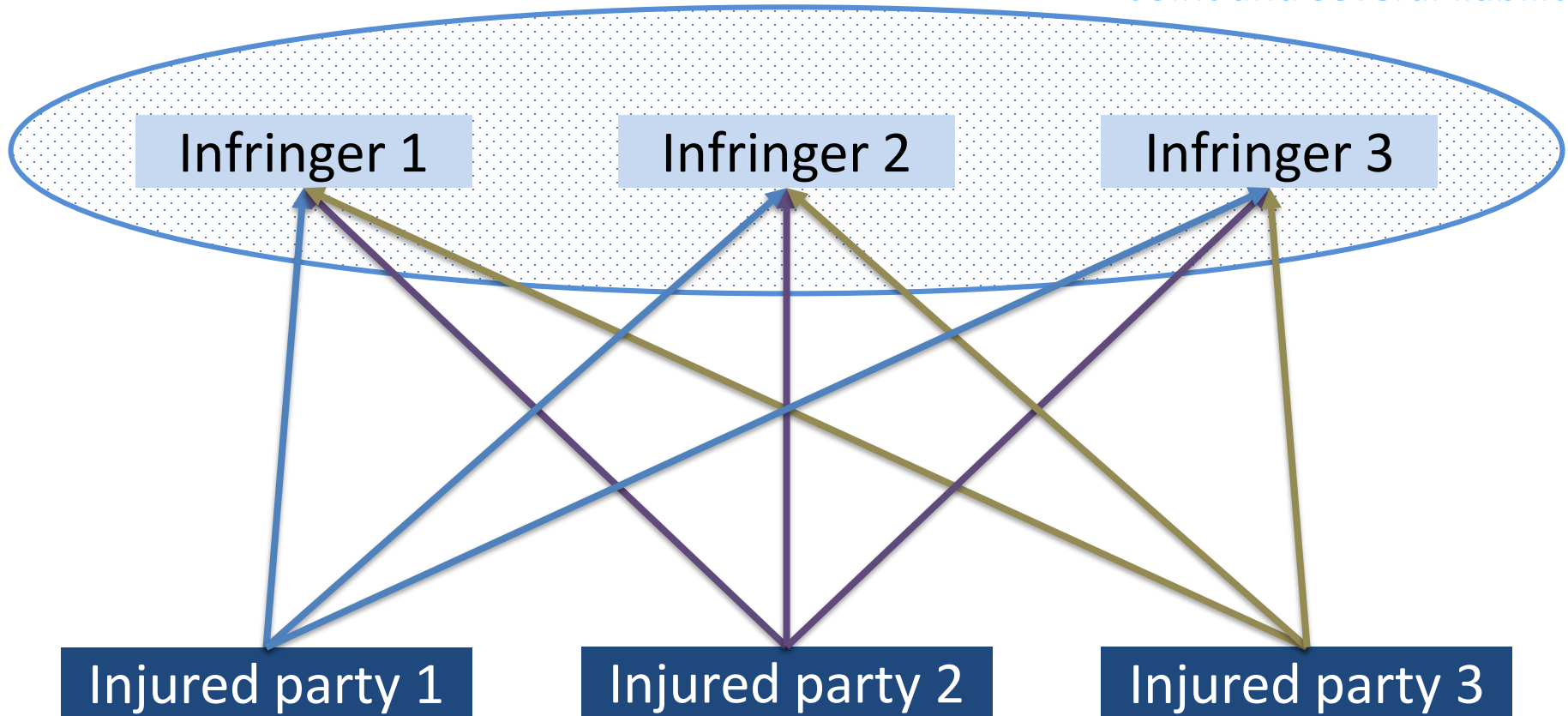


- Transposition closely follows the directive in its effort to allocate the damage at the right level of the distribution chain
- There is the risk of multiple findings of liability or – inversely – no findings of liability at all
 - need for collective redress to avoid that risk
 - not available in Germany (new action for model declaratory judgement not sufficient)
- Presumption of pass-on in favour of indirect purchasers expressly excludes presumption of full pass on, § 33c(2) ARC
 - Art. 14(2) however requires presumption of full pass-on
 - Rebuttal of presumption requires only to show that there was no full pass-on, consequently a full pass-on is presumed

Joint and several liability

Sec. 33d ARC

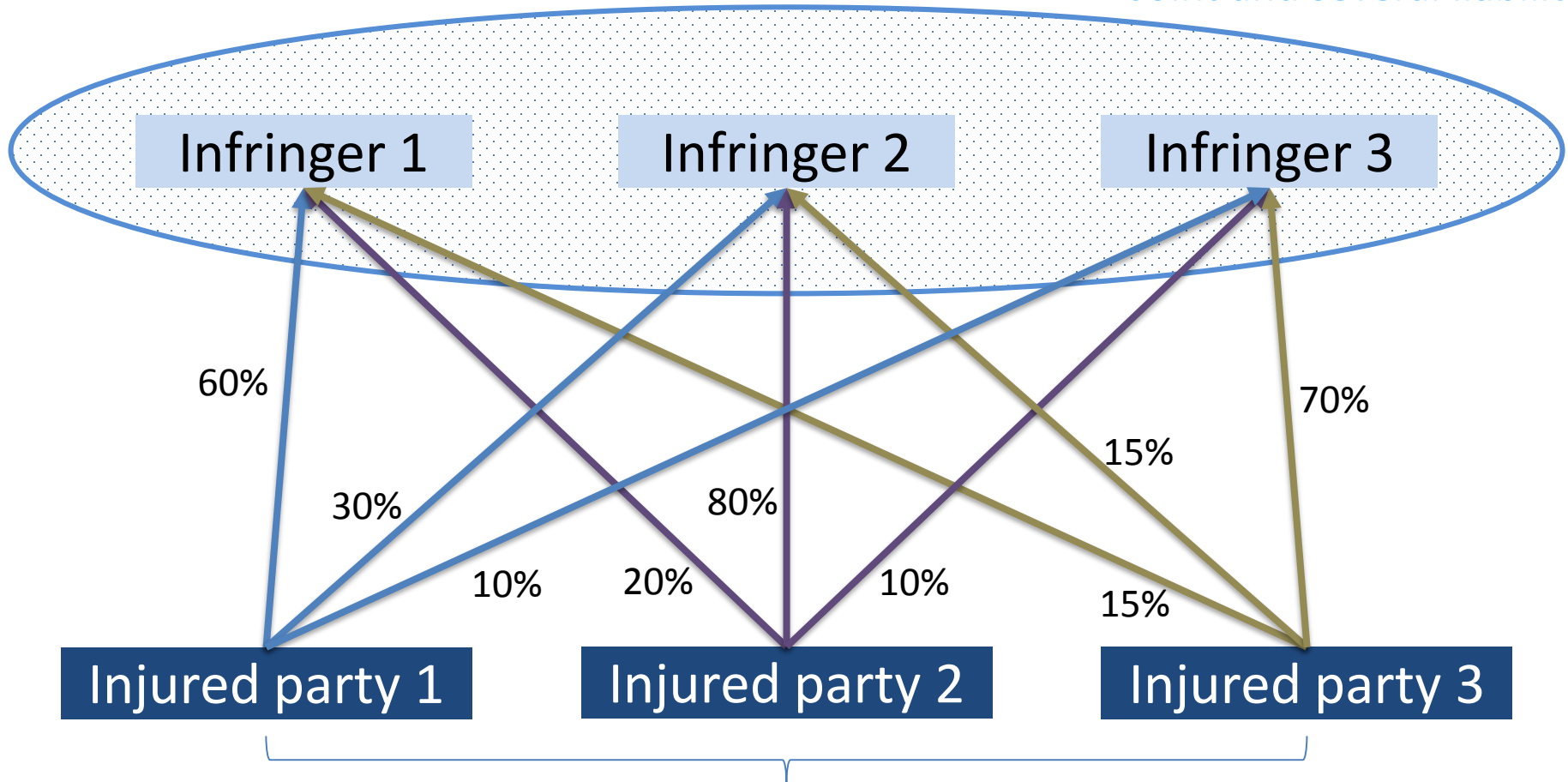
Joint and several liability



Joint and several liability

Apportionment according to Sec. 33d(2) ARC: causation

Joint and several liability

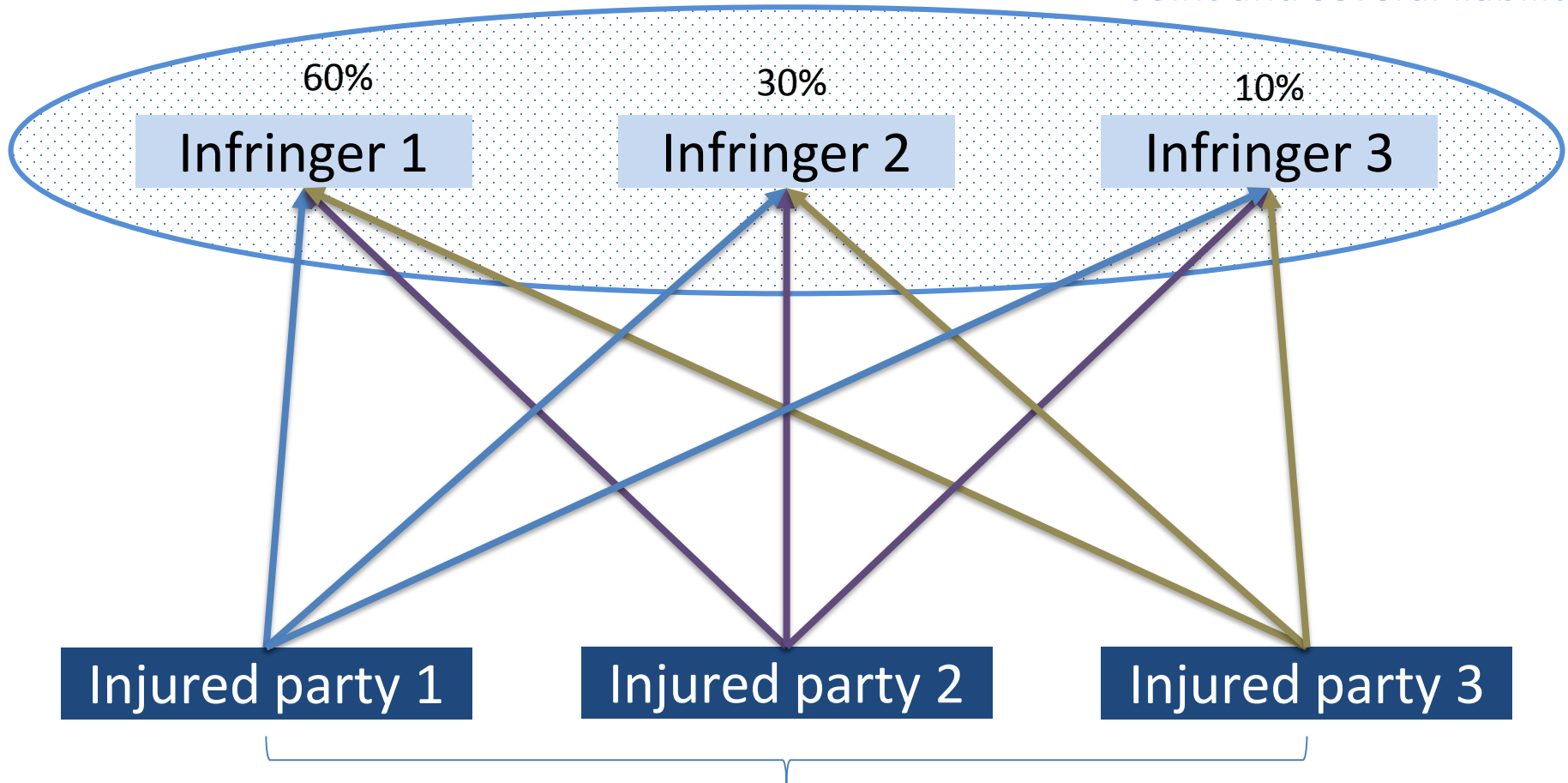


Each infringer holds different relative responsibility towards each injured party

Joint and several liability

Apportionment according to recital 37 of directive: “turnover, market share, or role in the cartel”

Joint and several liability



Unified overarching criteria such as turnover, market share or role in the cartel

Joint and several liability

- German solution is not an unconvincing per se,
- but having to apportion the relative responsibility differently with respect to each injured party makes it more difficult to reach a consensual dispute resolution
- Given the fact that the directive is also intended to foster consensual dispute resolution (see Art. 18 and 19 of the Directive) it would have been better to choose criteria that can be applied consistently with respect to all injured parties.

Immunity recipient

- Normally, an infringer is jointly and severally liable for damages, Sec. 33a(1), 33d(1) ARC.
- However, once an infringer receives immunity,
 - the claims of injured parties who are not direct or indirect purchasers of this infringer, become subordinated
 - and can only be enforced if these injured parties cannot obtain full compensation from the other infringers, Sec. 33e(1) ARC.

Immunity recipient

- Granting of immunity automatically excludes the enforceability of a previously enforceable claim.
- German law nevertheless refrains from regulating the granting of immunity and enabling the injured parties to subject this to court review.
 - This raises questions of constitutionality which, arguably, could force courts hearing claims for damages by other injured parties against an immunity recipient to determine in this context whether immunity was rightfully granted.
 - Such a possibility would, however, lead to more legal uncertainty for the immunity recipients.
 - ECN Plus – Directive requires legislative action

Statute of limitation

Sec. 33h(4) ARC: 30 years

Sec. 33h(3) ARC: 10 years

Sec. 33h(1, 2) ARC: 5 years

Infringement

Claim arisen +
infringement
ceased

Claim arisen + knowledge or
grossly negligent lack of
knowledge of the circumstances
giving rise to a claim and that
these circumstances lead to an
infringement + identity
of the infringer + infringement
ceased

Statute-barred

- Standard limitation period is 5 years, Sec. 33h(1).
- Commences when requirements in Sec. 33h(2) are fulfilled.
- Art. 10(2) lit a) requires knowledge of fact that behaviour constitutes infringement, Sec. 33h(2) only knowledge of circumstances (English translation is misleading)

Statute of limitation

Sec. 33h(4) ARC: 30 years

Sec. 33h(3) ARC: 10 years

Sec. 33h(1, 2) ARC: 5 years

Infringement

Claim arisen +
infringement
ceased

Claim arisen + knowledge or
grossly negligent lack of
knowledge of the circumstances
giving rise to a claim and that
these circumstances lead to an
infringement + identity
of the infringer + infringement
ceased

Statute-barred

- 10-year limitation period begins to run after the claim has arisen and the infringement has been terminated (Sec. 33h(3) ARC).
- 30-year limitation period which begins to run with the infringement that has caused the harm (Sec. 33h(4) ARC).

Statute of limitation

Sec. 33h(4) ARC: 30 years

Sec. 33h(3) ARC: 10 years

Sec. 33h(1, 2) ARC: 5 years

Infringement

Claim arisen +
infringement
ceased

Claim arisen + knowledge or
grossly negligent lack of
knowledge of the circumstances
giving rise to a claim and that
these circumstances lead to an
infringement + identity
of the infringer + infringement
ceased

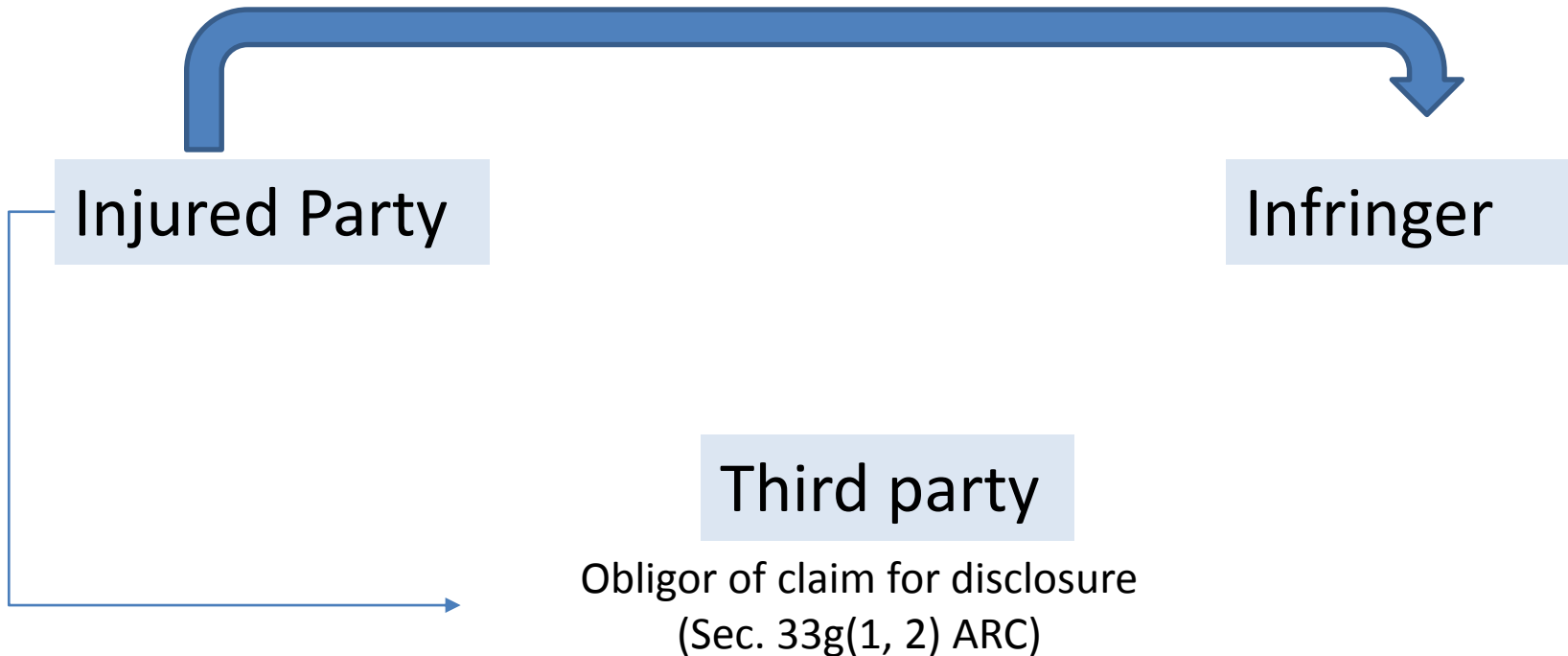
Statute-barred

Sec. 33h(6) ARC: limitation period suspended if

- a competition authority takes action with respect to an infringement of German, European or other MS competition law
- the claimant sues for disclosure of evidence according to Sec. 33g ARC

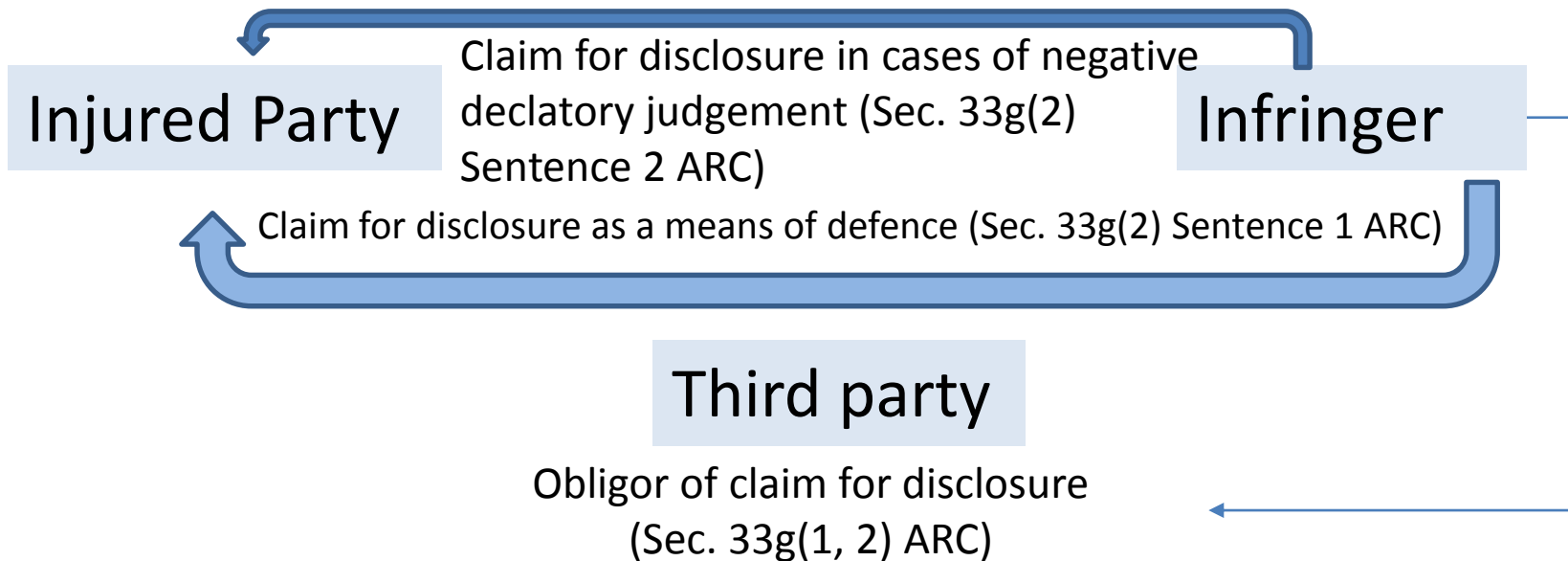
Disclosure of evidence

Claim for disclosure (Sec. 33g(1) ARC)



- Directive only requires the rules on the disclosure of evidence “in proceedings relating to an action for damages”, Art. 5
- German legislator went beyond that and took the structural decision to introduce a substantive law claim for the production of evidence.
- Stand-alone action possible; with suspension of limitation period, sec. 33h(6) ARC

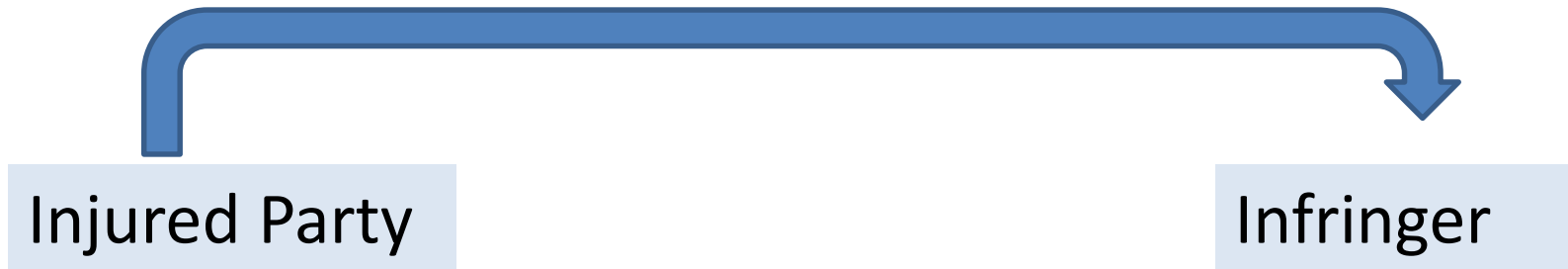
Disclosure of evidence



- Defendants can also claim for disclosure, Sec. 33g(2)1 ARC.
 - not only in defence against an action for damages,
 - but also when they have brought – as claimants – an action for a negative declaratory judgement that no claim for damages exists
- Last option problematic because it allows for delaying tactics

Disclosure of evidence

Claim for surrender of decision, Sec. 89b(5)



Sec. 89b (5): “Any party whose infringement [...] has been established by a decision [...] that is binding pursuant to § 33b can be ordered by way of preliminary injunction to **surrender this decision** if the conditions of § 33g are fulfilled, [...]. [...].”

- Temporal application: should apply to old claims; courts have decided differently
- Courts have introduced urgency requirement
- Legislative intervention necessary

Disclosure of evidence

Claim for disclosure (Sec. 33g(1) ARC)

Claim for disclosure in cases of negative
declaratory judgement (Sec. 33g(2)
Sentence 2 ARC)

Claim for disclosure as a means of defence (Sec. 33g(2) Sentence 1 ARC)

Injured Party

Infringer

Third party

Obligor of claim for disclosure
(Sec. 33g(1, 2) ARC)

Sec. 33(7): “Where the party obliged to surrender evidence in accordance with paragraphs 1 or 2 incurs costs which he may reasonably consider necessary, he shall be entitled to claim from the other party the **reimbursement** of these costs.”

Disclosure of evidence

Claim for disclosure (Sec. 33g(1) ARC)

Claim for disclosure in cases of negative
declaratory judgement (Sec. 33g(2)
Sentence 2 ARC)

Claim for disclosure as a means of defence (Sec. 33g(2) Sentence 1 ARC)

Injured Party

Infringer

Third party

Obligor of claim for disclosure
(Sec. 33g(1, 2) ARC)

Sec. 33g (8): “Where the party obliged to surrender evidence in accordance with paragraphs 1 or 2 intentionally or with gross negligence discloses incorrect or incomplete information, or fails to disclose information, or intentionally or with gross negligence surrenders incorrect or incomplete evidence, or fails to surrender evidence, he shall be **liable for any resulting damage** incurred by the claimant.”

Thank you for your attention.

Comments: Christian.Kersting(at)hhu.de

Further reading:

Act against Restraints of Competition (ARC) in English,
http://www.gesetze-im-internet.de/englisch_gwb/

Transposition of the Antitrust Damages Directive into German Law,
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2998586

Liability of Sister Companies and Subsidiaries in European Competition Law,
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3355816