

**Leave it to the experts:
A comparative analysis of competition-expert lay judges
in private enforcement of competition law**

by

Lena Hornkohl*

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* Ass.-Prof. Dr. Lena Hornkohl, LL.M. (College of Europe) is a Tenure Track Professor at the University of Vienna and a Postdoctoral Researcher at Heidelberg University. The paper was presented at the “International Conference of the Jean Monnet Network on EU Law Enforcement (EULEN) – EU Competition Law Enforcement: Challenges to Be Overcome” at the University of Warsaw in May 2022 and at the “Vienna Competition Law Days” at the WU Vienna in September 2022. The author would like to thank Jasper P. Sluijs and Walter Bruno as well as the participants of the conferences for providing useful comments and Anne-Catherine Kern and Tabea Bergmann for their editorial help. The paper uses a generic feminine form which intends to include persons of all genders. The usual disclaimers apply.

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Abstract

This paper focuses on the procedural instrument of ‘competition-expert’ lay judges to ease damages calculations and private actions for damages for the violation of competition law in general. To this end, the paper analyses various forms of ‘expert’ lay participation that already exist in Europe. It concentrates, in particular, on commercial and intellectual property proceedings, but also delves into the few existing examples of competition-expert lay judges for private enforcement of competition law. It assesses their transferability for competition damages proceedings and attempts to test EU and national competition as well as procedural law boundaries more generally. The paper considers common grounds, advantages and disadvantages, as well as best practices in this context. It concludes with early proposals for including competition-expert lay judges in private enforcement of competition law.

Resumé

Cet article se concentre sur l’instrument procédural que sont les juges non professionnels experts en concurrence pour faciliter le calcul des dommages et intérêts dans les actions privées en dommages et intérêts pour la violation du droit de la concurrence. À cette fin, l’article analyse diverses formes de participation d’experts non professionnels déjà existantes en Europe. Il se concentre en particulier sur les procédures commerciales et de propriété intellectuelle, mais se penche également sur les quelques exemples existants de juges non professionnels experts en concurrence pour l’application privée du droit de la concurrence. Il évalue leur transférabilité aux procédures de dommages-intérêts en matière de concurrence et tente de tester plus généralement les limites du droit de la concurrence et du droit procédural au niveau européen et national. L’article met en évidence les motifs communs, les avantages et les désavantages, ainsi que les meilleures pratiques. Il se conclut par des premières propositions visant à inclure des juges non professionnels experts en concurrence dans l’application privée du droit de la concurrence.

Key words: Competition law; private enforcement; damages; lay judges; expert lay judges; economics; specialisation; commercial court.

JEL: K21, K40, K41

I. Introduction

The 2014 Damages Directive¹ led to an increase in private damages actions for competition law violations across the EU.² Unfortunately, these actions have less often resulted in an award of damages. Instead, courts only handed down interlocutory judgments affirming liability without quantifying damages or they had to dismiss actions altogether.³ This trend results from the considerable difficulty of quantifying cartel damages. According to recital 45 of the Damages Directive, ‘[t]he quantification of harm in competition law cases can [...] constitute a substantial barrier preventing effective claims for compensation’. An analysis often entails reconstructing entire market structures, and ‘prices, sales volumes, and profit margins depend on a range of factors and complex, often strategic interactions between market participants that are not easily estimated’.⁴

For damages calculation, including a calculation of a possible pass-on of damages, parties depend on complex and lengthy economic assessments provided by costly economic experts. There are often several contradictory expert opinions of the parties as well as court appointed expert opinions, which further drive-up procedural costs and the duration of the proceedings.⁵ Particularly the costs incurred for the engagement of economic experts could exceed the actual damages in case of small claims and is, therefore, prohibitive.⁶ Accordingly, the Directive itself contains several measures meant to ease this problem, such as the possibility of damages estimation⁷, and is accompanied by a Practical Guide on quantifying harm⁸. Furthermore, practice and academia have suggested several substantive and procedural solutions to facilitate damages actions and damages calculations across the EU which

¹ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349 (hereinafter: Damages Directive).

² Jean-François Laborde, *Cartel damages actions in Europe: How courts have assessed cartel overcharges: 2021 edition (5th edn) [2021] Concurrences 232, 235.*

³ *Ibid* 236.

⁴ European Commission, ‘Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the TFEU (SWD (2013) 205)’ par 16, available at: https://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf (accessed on 01.05.2022).

⁵ See Provincial Court of Barcelona, 10 January 2020, No. 1964/2018.

⁶ Tilman Makatsch and Babette Kacholdt, ‘Estimation of cartel damages in competition litigation in Germany: 15 per cent as the new standard?’ (2021) 14 GCLR 12, 15.

⁷ Art. 17(1) of the Damages Directive.

⁸ European Commission (n 4).

include presumptions of harm⁹, various forms of collective redress¹⁰, litigation funding¹¹ or the involvement of competition authorities in the calculation of the damages¹².

This paper focuses on a further procedural instrument that could be added to the toolbox, and that could ease damages calculations and damages actions in general: the use of competition-expert lay judges. This paper uses the terminology of lay judges for any kind of lay participation on the judicial bench, where the layperson either has no (full) legal training directed at being a professional judge or judging is not the primary source of her income. It thus contrasts lay judges with professional judges who are full-time judges, where court work is their primary source of income, and who have obtained full corresponding legal education. This paper does not cover the participation of laypersons in the general public's sense. Instead, the focus will be on so-called expert lay judges.

In most Member States, ordinary civil courts handle cartel damages actions with panels consisting of professional judges. Although these judges could have gradually acquired a competition focus, emphasis on competition-expertise, particularly economic expertise, of the judicial panel could be improved further by including lay judges that are experts on competition issues (hereinafter: 'competition-expert' lay judges) on the bench. These lay judges would be competition economists in particular who are sufficiently familiar with damages and pass-on calculation. These expert lay judges would share the bench with professional judges to handle primarily damages calculation and other economically sensitive issues in private enforcement of competition law that are nowadays handled by (often multiple) economic experts.

The paper is based on and aims to test the following hypothesis: the participation of competition-expert laypersons on the bench, serving instead or next to professional judges, advances the understanding of the economic realities of damages calculation of the judiciary and thus leads to improved damages calculations and overall procedural efficiencies. To this end, the paper analyses various forms of expert lay participation already existing in Europe, especially in commercial and intellectual property matters, but also the few examples of competition-expert lay judges for private competition law

⁹ Lena Hornkohl, 'The Presumption of Harm in EU Private Enforcement of Competition Law – Effectiveness vs Overenforcement' (2021) 5 ECLIC 29.

¹⁰ Eda Şahin, *Collective Redress and EU Competition Law* (1st edn Routledge 2018).

¹¹ Inge Scherer, 'Gewerbliche Prozessfinanzierung' (2020) 3 VuR 83.

¹² Justus Haucap and Ulrich Heimeshoff, 'Kartellschadensermittlung im Spannungsfeld zwischen Präzision und Effizienz: Prinzipielle Anforderungen aus ökonomischer Perspektive und praktische Handlungsoptionen' [2022] ZWeR 80, 100.

damages actions.¹³ However, this paper does not include an empirical study on the usage of lay judges¹⁴ but is based primarily on a systematic legal policy analysis. The paper compares different approaches for lay participation in civil justice across Europe and beyond competition damages proceedings, assesses their transferability for competition damages proceedings, and attempts to test more generally the boundaries of EU and national competition and procedural law. It strives to find the common ground, the advantages and disadvantages of this legal institution as well as formulate best practices. It concludes with a practical proposal for including competition-expert lay judges in private enforcement of competition law.

II. Taking stock: lay judges in civil justice across Europe

This section analyses the general state of play regarding expert lay participation in civil justice across Europe, focusing on commercial and intellectual property proceedings, which have some similarities with private competition litigations. Finally, the section will shed light on existing concepts of lay participation in private damages actions for competition law violations. Thus, it will serve as general background and will provide models for a possible extension of the concept of expert lay judges.

1. Examples of lay participation in civil justice

Involving lay judges on the bench is a well-known concept, both in the EU but also in other European States. Generally, lay participation in civil procedures can take different forms and concern different subject matters of civil justice. Layperson involvement can consist of a single lay judge, a panel of lay judges and mixed courts consisting of both lay and professional judges.¹⁵ While general lay participation in criminal matters exists across the board¹⁶,

¹³ Other forms of judicial specialisation, such as concentration or special chambers for competition matters, will also be briefly addressed, as they are thematically related to the question of further expertise on the bench in cartel damages cases. However, a complete analysis is beyond the scope of this paper.

¹⁴ Stefan Machura, 'Civil Justice: Lay Judges in the EU Countries', (2016) 6 *Oñati Socio-legal Series* [online] 235.

¹⁵ *Ibid* 241.

¹⁶ Marijke Malsch (ed), *Democracy in the Courts: lay participation in European criminal justice systems* (Routledge 2009); Gerald Kohl and Ilse Reiter-Zatloukal (eds) *Laien in der Gerichtsbarkeit* (Verlag Österreich 2019); Sanja K Ivkovic, Shari S Diamond, Valerie P Hans and

lay participation in civil matters is more limited. Only the so-called ‘justices of the peace’ known, for example, in Italy¹⁷, Luxembourg¹⁸ and Spain¹⁹, are single lay judges of the first instance in civil matters competent to resolve general but minor civil legal disputes.²⁰ The above-mentioned general distinction between general and expert lay judges should also be noted here; the latter is the subject of the following analysis.

Unlike criminal procedures, lay judges are used in specialised courts or special divisions of ordinary civil courts. In that sense, many European countries foresee lay judges in labour law proceedings.²¹ Lay judge participation in labour law is certainly the most extensive form of judiciary lay participation in Europe, as the concept is known, *inter alia*, in Austria²², Belgium²³, Finland²⁴, France²⁵ and Germany²⁶. Labour courts usually consist of an even number of employer and employee representatives as lay judges who are appointed for a specific period of time. In labour law, other reasons are also given for the use of lay judges, such as an increased acceptance of the decision through the involvement of peers.²⁷ However, the main reason given for their involvement is their workplace knowledge and experience, acquired in their daily professional and social environment that lay labour judges bring to the bench.²⁸

Nancy S Marder (eds), *Juries, Lay Judges and Mixed Courts – A Global Perspective* (Cambridge University Press 2021).

¹⁷ Art. 7 of the Italian Code of Civil Procedure (*Codice di procedura civile*).

¹⁸ Art. 1 of the Luxembourgian Code of Civil Procedure (*Code de procedure civile*).

¹⁹ Art. 100 of the Spanish Law 6/1985 of 1 July 1985 on the Judiciary (*Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial*).

²⁰ In Italy, for example, the ‘giudici di pace’ are, *inter alia*, competent for disputes not exceeding a certain value, for example, € 5000 for disputes relating to movable property, Art. 7 of the Italian Code of Civil Procedure.

²¹ Sue Corby, Peter Burgess and Armin Höland, ‘Employees as judges in European Labour courts: A conflict of interests?’ (2021) 27(3) *European Journal of Industrial Relations* 231; Peter Burgess, Sue Corby, Armin Höland, Hélène Michel, Laurent Willemez, Christina Buchwald and Elisabeth Krausbeck, ‘The Roles, Resources and Competencies of Employee Lay Judges: a cross-national study of Germany, France and Great Britain’ (2017) Working Paper 151, available at: https://www.boeckler.de/pdf/p_fofoe_WP_051_2017.pdf (accessed on 1.05.2022).

²² §§ 10 and 11 of the Austrian Labour and Social Court Act (*Arbeits- und Sozialgerichtsgesetz*).

²³ Art. 81 of the Belgian Judicial Code (*Gerechtelijk Wetboek, Code Judiciaire*).

²⁴ § 8 of the Finnish Act on proceedings before the Labour Court (*laki oikeudenkäynnistä työtuomioistuimessa*).

²⁵ Art. L-1421-1 of the French Labour Law (*Code du travail*).

²⁶ § 6 of the German Labour Court Act (*Arbeitsgerichtsgesetz*).

²⁷ Malte Creutzfeldt, ‘Ehrenamtliche Richter in der Arbeitsgerichtsbarkeit’ [1995] AUA 263.

²⁸ Burgess/Corby/Höland/Michel/Willemez/Buchwald/Krausbeck (n 21) 79.

In some Member States, such as Germany²⁹ and France³⁰, there are special courts or chambers for agricultural disputes where expert lay judges participate in the decision-making process.³¹ These courts are usually competent for disputes concerning agricultural leases or tenancy.³² Lay judges are appointed for a specific period. They usually consist of an even number of landlords and farmers appointed based on a proposal by the representative professional organisation or elected by their peers.³³ The main reason for the involvement of lay judges in agricultural disputes is their specialist knowledge. Agricultural land disputes have a strong economic orientation, and the legislator wanted to make courts more independent from expert opinions.³⁴ Therefore, the panels themselves should include persons who have the necessary expertise to contribute to an independent base for the judgements through their professional experience and their familiarity with the conditions of agriculture.³⁵

In several branches of the civil judiciary, technical questions play an important role. Above all, intellectual property proceedings, especially patent infringement and invalidity proceedings usually revolve around technical questions or even concerns the novelty of a specific technical feature. In many systems, so-called ‘technical judges’ sit alongside professional judges (fully legally qualified judges), on panels in patent courts that deal with invalidity and infringement proceedings. Although the conditions of appointing technical judges to the judicial benches as well as their tasks vary in their details, those mixed panels can be found in patent courts in Austria³⁶, Germany³⁷, Sweden³⁸, Switzerland³⁹ and even the newly established Unified Patent Court⁴⁰. Similarly, at the mixed civil-administrative Italian Higher Public Water Court (*Tribunale Superiore delle Acque Pubbliche*), which, *inter alia*, deals with damages actions

²⁹ §§ 2 and 3 of the German Agricultural Procedures (*Landwirtschaftsverfahrensgesetz*).

³⁰ Art. L492-1 of the French Rural and Maritime Fishing Code (*Code rural et de la pêche maritime*).

³¹ Mechthild Baumann, Hasso Lieber, ‘Ehrenamtliche Richter in Landwirtschaftsverfahren’ [2012] Richter ohne Robe 6; Ute Gerlach-Worch, ‘Ehrenamtliche Landwirtschaftsrichter: Mitwirkung auf Augenhöhe durch Sachkunde’ [2016] Richter ohne Robe 7.

³² § 1 of the German Agricultural Procedures Act.

³³ Art. L492-2 of the French Rural and Maritime Fishing Code.

³⁴ BT-Drs. I/3819 16, 19; BT-Drs. I/4429 1.

³⁵ German Constitutional Court, 3 June 1980, 1 BvL 114/78; 7 November 1975, 2 BvL 13/75.

³⁶ § 146 of the Austrian Patent Act (*Patentgesetz*).

³⁷ § 65 (2) of the German Patent Act (*Patentgesetz*).

³⁸ Chapter 2 § 1 of the Swedish Act on Patent and Market Courts (*Lag om patent- och marknadsdomstolar*).

³⁹ Art. 8 of the Swiss Patent Court Act (*Patentgerichtsgesetz*).

⁴⁰ Art. 15 (1) Unified Patent Court Agreement.

resulting from the exploitation of water⁴¹, technical judges sit on the panel with professional judges⁴². The technical judges in either field are to be regarded as lay judges, since they have not received full legal education, but have instead attained a degree in a technical subject plus, if necessary, further legal training.⁴³ However, in contrast to the above examples from labour or agricultural law, in some jurisdictions technical judges can also pursue this judicial activity full-time.⁴⁴ Their lay status follows solely from the fact that they have not had a full legal education but are technicians by training. Similar to the above examples, technical judges are involved in the adjudication because of their specialised knowledge; they should ensure specialised expertise of the courts in technical questions, which professional judges are not familiar with by virtue of their training, even if they have gained experience in patent law.⁴⁵ Their involvement also results from the possibility of dispensing with a likely to be costly expert opinion in view of the technical judge's own expertise.⁴⁶ Furthermore, as intellectual property law could also involve potentially difficult-to-quantify damages claims, the organisation of courts in intellectual property law in Sweden should be highlighted here as another compelling example. In Sweden, next to a technical judge, an economic judge also sits on the panel to better assess the economic questions in intellectual property proceedings.⁴⁷

Due to their long-standing tradition of involving commercial lay judges, commercial courts, commercial chambers, or senates in civil courts in some European countries are particularly noteworthy.⁴⁸ They are especially relevant as commercial proceedings are on a general level comparable to private

⁴¹ Art. 140 Royal Decree 1975 of 1933, the Italian Consolidated Law on Public Waters (*Regio Decreto n° 1775 del 1933 (Testo Unico delle Acque Pubbliche)*).

⁴² Art. 142 Royal Decree 1975 of 1933 (Consolidated Law on Public Waters).

⁴³ See Chapter 2 § 4 of the Swedish Act on Patent and Market Courts, Art. 15 (3) Unified Patent Court Agreement.

⁴⁴ See § 65 (3) of the German Patent Act.

⁴⁵ Karl-Heinz Leise, 'Das Selbstverständnis des Bundespatentgerichts unter besonderer Berücksichtigung des technischen Richters' [1981] GRUR 470; Rudi Beyer, 'Bewährte Zusammenarbeit zwischen technischen Richtern und rechtskundigen Richtern auch bei einem zentralen europäischen Patentgericht' [2001] MittPatA 329; Antje Sedemund-Treiber, 'Braucht ein europäisches Patentgericht den technischen Richter?' [2001] GRUR 1004.

⁴⁶ German Federal Court of Justice, 26 August 2014, X ZB 19/12.

⁴⁷ Chapter 2 §§ 1 and 4 of the Swedish Act on Patent and Market Courts.

⁴⁸ Vito Piergiovanni (ed), *The Courts and the Development of Commercial Law* (Dunker & Humblot 1987); Alexander Brunner (ed), *Europäische Handelsgeschichte* (Stämpfli Verlag 2009); Alexander Brunner and Isabelle Monferrini (eds), *Die Zukunft der Handelsgesichte in Europa* (Stämpfli Verlag 2019). There are states that foresee commercial courts without lay participation, such as the Netherlands, Quincy C Lobach, 'Netherlands Commercial Court – Englisch als Gerichtssprache in den Niederlanden' [2017] IWRZ 256.

damages actions for competition law violations, since both belong to the overall business law sector. Therefore, in some states, private competition law damages proceedings directly fall within the jurisdiction of their commercial courts. Austria⁴⁹, Belgium⁵⁰, France⁵¹, Germany⁵² and Switzerland⁵³, for example, acknowledge the concept of commercial expert lay judges. These commercial judges are not legal professionals, but they come from different

⁴⁹ §§ 7(2), (3), 15–18 of the Austrian Jurisdictional Rules (*Jurisdiktionsnorm*), see also Paul Oberhammer, 'Österreichische Handelsgerichte' in Brunner (n 48) 87; Sonja Bydlinki and Maria Wittmann-Tiwald (eds), *300 Jahre staatliche Handelsgerichtsbarkeit* (NMW 2018); Georg Kathrein, 'Grundlagen Österreich' in Brunner/Monferrini (n 48) 45; Karl-Heinz Krenn, 'Der Beitrag der fachmännischen Laienrichter aus dem Handelsstand für die Handelsgerichtsbarkeit' in Kohl/Reiter-Zatloukal (n 16) 431.

⁵⁰ In Belgium, commercial courts have recently been replaced by so-called business courts. Nevertheless, business courts also know the concept of lay judges deriving from the business community, Artt. 85 and 203 of the Judicial Code Belgium (*Code judiciaire*), see Paulette Vercauteren, 'Pratique en Belgique' in Brunner/Monferrini (n 48) 119.

⁵¹ Artt. L721-1 – L724-7 of the French Commercial Code (*Code du commerce*); see Jean-Luc Vallens, 'Les tribunaux de commerce en France' in Brunner (n 48) 145; Holger Fleischer and Nadja Danninger, 'Handelsgerichte in Frankreich und Deutschland zwischen Tradition und Innovation' [2017] RIW 549; Nicole Stolowy and Matthieu Brochier, 'France's commercial courts: administration of justice by ordinary citizens' [2017] JBL 1; Yves Chaput, 'Objectifs en France' in Brunner/Monferrini (n 48) 93; Jean Bertrand Drummen, 'Pratique en France' in Brunner/Monferrini (n 48) 101.

⁵² § 105 of the German Judicature Act (*Gerichtsverfassungsgesetz*), §§ 44–45a of the German Judiciary Act (*Deutsches Richter Gesetz*); see Ulrich Haas, 'Deutsche Zivilkammern in Handelssachen' in Brunner (n 48) 113; Dieter Kunzler, 'Deutsche Handelsgerichtsbarkeit – Praxis' in Brunner (n 48) 133; Klaus Lindloh, *Der Handelsrichter und sein Amt* (6th edn Vahlen 2012); Fleischer/Danninger (n 51) 549; Holger Fleischer and Nadja Danninger, 'Die Kammer für Handelssachen: Entwicklungslinien und Zukunftsperspektiven' [2017] ZIP 205; Nils Neumann and Hans-Gert Bovelett, 'Zur KfH oder nicht? – Prozesslagen und Anwaltstaktik' [2018] NJW 3498; Rupprecht Podszun and Tristan Roher, 'Die Zukunft der Kammer für Handelssachen' [2019] NJW 131; Eberhard Kramer, 'Grundlagen Deutschland' in Brunner/Monferrini (n 48) 67; Dieter Kunzler, 'Praxisvorschläge Deutschland' in Brunner/Monferrini (n 48) 77; Felix Fuchs, 'Aktuelle Fragen und Rechtsprechung im Zusammenhang mit der Verweisung des Rechtsstreits von der Zivilkammer an die Kammer für Handelssachen' [2020] GWR 280.

⁵³ Art. 6 of the Swiss Code of Civil Procedure (*Zivilprozessordnung*), most prominently in Zurich §§ 38, 39 Law on the Organisation of Courts and Authorities in Civil and Criminal Procedure (*Gesetz über die Gerichts- und Behördenorganisation im Zivil- und Strafprozess*); see also Peter Nobel, 'Zur Institution der Handelsgerichte' (1983) I ZSR 137; Friedemann Vogel, '125 Jahre Zürcher Handelsgericht' (1992) 88 SJZ 17; David Rüetschi, 'Die Zukunft der Handelsgerichte' (2005) 101 SJZ 29; Alexander Brunner, 'Handelsrichter als Vermittler zwischen Wirtschaft und Recht', (2006) 102 SJZ 428; Isaak Meier and Michael Rüegg, 'Handelsgerichtsbarkeit in der Schweiz' in Brunner (n 48) 33; Thomas Klein, 'Praxis an den Schweizer Handelsgerichten' in Brunner (n 48) 75; Alexander Brunner and Peter Nobel (eds), *Handelsgericht Zürich 1866–2016: Zuständigkeit, Verfahren und Entwicklungen* (Schulthess 2016); Christoph Leuenberger, 'Grundlagen Schweiz' in Brunner/Monferrini (n 48) 21; Peter Nobel, 'Praxisvorschläge Schweiz' in Brunner/Monferrini (n 48) 33.

business sectors.⁵⁴ They are usually honorary- or part-time judges appointed or elected for a specific period.⁵⁵ In some systems, they are paid like professional judges.⁵⁶ In others, they are unpaid but compensated for their efforts.⁵⁷ In most systems, they share the bench with professional judges in mixed courts.⁵⁸ In France, however, despite plans to introduce a system of mixed courts, the panels at commercial courts consist solely of lay judges.⁵⁹ Instead, court clerks (*greffiers*) are also involved, especially in drafting the decisions, and they also assist commercial judges in legal matters.⁶⁰ This stems back from the long French tradition of having commercial disputes solved solely by peers from the economic community.⁶¹ In addition to economic and commercial expertise, the legitimacy and communication function is cited as the main reason for involving only lay judges in the decision-making process.⁶² In other mixed-court systems, the focus lies solely on the expertise: commercial lay judges should provide the bench with a better understanding of economic contexts and business practices.⁶³ Commercial lay judges are expected to assess a case based on their particular professional qualifications and business experience, allowing for a practical and appropriate judgment in commercial disputes.

⁵⁴ §§ 108 and 109 of the German Judicature Act; Art. 203 of the Judicial Code Belgium, Art. 723-4 of the French Commercial Code.

⁵⁵ § 15(3) of the Austrian Jurisdictional Rules, § 108 of the German Judicature Act; Art. 85, 203 of the Judicial Code Belgium; Art. 722-6 of the French Commercial Code.

⁵⁶ § 15(1) of the Austrian Jurisdictional Rules.

⁵⁷ § 107 of the German Judicature Act; Art. L722-16 of the French Commercial Code; see also Brunner (n 48) 430.

⁵⁸ § 7(2) of the Austrian Jurisdictional Rules; § 105 of the German Judicature Act; Art. 85 of the Belgian Judicial Code; § 39(2) of the Law on the Organisation of Courts and Authorities in Civil and Criminal Procedure Zurich.

⁵⁹ Artt. 721-1, 722-1 of the French Commercial Code; exceptions exist for Alsace–Moselle, where instead of commercial courts, commercial chambers similar to the German system exist, which are mixed courts (Art. 731-3 of the French Commercial Code); and for the overseas departments, who also have mixed courts (Art. 732-3 of the French Commercial Code).

⁶⁰ Fleischer/Danninger (n 51) 549, 555.

⁶¹ On the historical developments: Étienne Regnard, *Les tribunaux de commerce et l'évolution du droit commercial* (Arprint 2007); Amalia D. Kessler, *A Revolution in Commerce: The Parisian Merchant Court and the Rise of Commercial Society in Eighteenth-Century France* (Yale University Press 2007); Fleischer/Danninger (n 51) 549, 550; Stolowy/Brochier (n 51) 2 – 11; Drummen (n 51) 103.

⁶² Stolowy/Brochier (n 51) 12; Chaput, 'Objectifs en France' in Brunner/Monferrini (n 48) 96.

⁶³ The expertise is specifically mentioned in § 39(2) of the Law on the Organisation of Courts and Authorities in Civil and Criminal Procedure Zurich; Lindloh (n 52) 60, 61; Fleischer/Danninger (n 52) 205, 207, 208; Stolowy/Brochier (n 51) 1, 20; Neumann/Bovelett (n 52) 3499; Podszun/Roher (n 52) 133; Leuenberger (n 53) 23; Krenn (n 49) 435.

In summary, expert lay judges are a well-known concept in civil justice in Europe. They are consistently used primarily because of their specific expertise.

2. Existing forms of lay participation in private enforcement of competition law

In private enforcement of competition law, expert lay judges have so far been the exception and can only be found in very few systems in Europe. In some states, private actions for competition law damages fall into the jurisdiction of commercial courts, which entirely or partly consist of commercial lay judges. Still, except for the Commercial Court of Zurich (*Handelsgericht Zürich*) with its special allocation mechanism that considers the particular knowledge and focus of the judges, also these systems do not necessarily pay attention to competition law expertise of the lay judges.

2.1. France

In France, commercial courts generally have jurisdiction over any litigation between traders or companies concerning commercial acts,⁶⁴ which usually includes actions for damages for breaches of competition law.⁶⁵ Not all commercial courts have jurisdiction over cartel damages actions; such proceedings are concentrated in eight specific commercial courts.⁶⁶ These courts should, in theory, be specialised in competition matters, amongst other areas falling within their jurisdiction.⁶⁷ As mentioned above, the judges at French commercial courts are entirely laypersons coming from the business community. However, neither the selection process of commercial judges nor their further training pays any specific attention to their competition law expertise.

Nevertheless, at least at the larger commercial courts, above all in Paris, chambers are formed for particular areas of law.⁶⁸ For example, at the Paris Commercial Court (*Tribunal de Commerce de Paris*), there is a chamber for competition law.⁶⁹ In this particular chamber, one can thus expect a certain

⁶⁴ Art. L721-3 of the French Commercial Code.

⁶⁵ For the rare actions of a non-tradesperson against a tradesperson, the non-tradesperson can choose between a commercial or civil court, Stolowy/Brochier (n 51) 15.

⁶⁶ Artt. L420-7, R-420-3, Annex 4-2 of the French Commercial Code.

⁶⁷ Critical David Bosco, *La spécialisation judiciaire française en matière de concurrence dans l'impasse*, (2011) 1 *Concurrences* 236.

⁶⁸ Stolowy/Brochier (n 51) 17; Fleischer/Danninger (n 51) 556.

⁶⁹ Tribunal de Commerce de Paris, 'Chambre de Contentieux' (2022), available at: <https://www.tribunal-de-commerce-de-paris.fr/fr/chambres-de-contentieux> (accessed on 09.05.2022).

expertise of the commercial judges in competition law and, since the commercial judges are members of the business community, some economic expertise is also assumed. Moreover, already in 2010, an English-speaking International Chamber was established at the Paris Commercial Court,⁷⁰ which also lists competition damages actions in cases involving an international dimension amongst their competencies⁷¹. However, since other legal matters concerning international affairs also fall within its competences, it can not necessarily be assumed that these commercial judges have special expertise in competition law and competition economics. Without specific statistical data for competition law actions being available, though, the success rate of French commercial courts is quite high. *Stolowy and Brochier* have shown that ‘the rate of appeals against decisions by commercial courts is lower than the rate of appeals against district court decisions’, and ‘the rate of commercial court rulings overturned on appeal is much lower than the rate for other courts of the first instance’.⁷² At the same time, *Stolowy and Brochier* have shown that the duration of procedures of commercial courts, with an average of 5 months per procedure in 2015, is much shorter than in ordinary civil courts.⁷³

2.2. Switzerland

In Switzerland, notably at the prominent Commercial Court in Zurich, competition law disputes, including private damages actions, fall into the jurisdiction of the commercial court.⁷⁴ There, special emphasis is placed on the expertise of the commercial judges. In that respect, the allocation mechanism of commercial judges according to their individual expertise is particularly noteworthy,⁷⁵ which is also referred to as the so-called ‘pool solution’⁷⁶.

The Commercial Court Zurich is staffed with two professional and three commercial judges. This composition with a majority of commercial judges

⁷⁰ Bernard Auberger, ‘La chambre internationale du Tribunal de Commerce de Paris’ (2010) 10 *Juriste d’Entreprise Magazine* 61; Christoph A Kern, ‘English as a Court Language in Continental Courts’ (2012) 5 *Erasmus L Rev* 187, 195; Giesela Rühl, ‘Auf dem Weg zu einem europäischen Handelsgericht?’ [2018] *JZ* 1073, 1076; Alexandre Biard, ‘International Commercial Courts in France: Innovation without Revolution?’ (2019) 12 *Erasmus L Rev* 24.

⁷¹ Tribunal de Commerce de Paris, ‘La Chambre Internationale: Les Domaines de Compétence’ (2022), available at: <https://www.tribunal-de-commerce-de-paris.fr/fr/domaines-de-competence-tribunal-de-commerce-de-paris> (accessed on 09.05.2022).

⁷² *Stolowy/Brochier* (n 51) 19.

⁷³ *Ibid.*

⁷⁴ § 44 lit. a) of the Law on the Organisation of Courts and Authorities in Civil and Criminal Procedure Zurich, Art. 5(1) lit. b) of the Swiss Code of Civil Procedure.

⁷⁵ *Leuenberger* (n 53) 30, 31.

⁷⁶ *Fleischer/Danninger* (n 52) 208; *Podszun/Roher* (n 52) 133, 134.

also underlines the focus on the economic expertise of the panel.⁷⁷ The commercial judges ‘are designated taking into account their expertise’.⁷⁸ In practice, the commercial judges are distributed among chambers according to their own industry affiliation and legal expertise.⁷⁹ This includes a chamber for ‘competition and intellectual property law’.⁸⁰ Within the chambers, the president of the higher court selects three most appropriate, knowledgeable, and competent commercial judges from all commercial judges of this chamber by virtue of his authority to manage the court.⁸¹ The Zurich Commercial Court particularly emphasises that they have commercial judges who are competition law experts.⁸² However, no information is provided on the profession of these commercial judges, particularly, whether they are economists or not.

Generally, not specific to competition law, the Zurich Commercial Court is praised for its fast, relevant and cost-effective handling of cases, especially because expensive expert opinions can be avoided.⁸³ It is often taken as a model for a reorientation of courts, primarily commercial courts, in terms of their specialisation.⁸⁴

2.3. Austria

The Austrian system yields a mixed picture. On the one hand, it generally follows a positive approach with regard to the inclusion of expert lay judges in general competition proceedings before the Austrian Cartel Court (*Kartellgericht*).⁸⁵ Expert lay judges must have longer professional experience in the legal or economic field and a corresponding law, business or economics degree.⁸⁶ In theory, due to the expertise that they bring to the bench, these expert lay judges of the Austrian Cartel Court could well serve as a model for other jurisdictions, as this paper will explore further below. However, in

⁷⁷ Brunner (n 48) 429.

⁷⁸ § 39(2) of the Law on the Organisation of Courts and Authorities in Civil and Criminal Procedure Zurich).

⁷⁹ Fleischer/ Danninger (n 52) 208; Leuenberger (n 53) 30, 31.

⁸⁰ Isabelle Monferrini ‘Vergleichsverhandlungen vor dem Zürcher Handelsgericht, Beiträge aus den zehn Kammern des Handelgerichts’ in Brunner/Nobel (eds) (n 53) 134.

⁸¹ § 77(1) of the Law on the Organisation of Courts and Authorities in Civil and Criminal Procedure Zurich.

⁸² Zivil und Strafrechtspflege Zürich, ‘Handelsgericht: Aufgaben’ (2022), available at: <https://www.gerichte-zh.ch/organisation/handelsgericht/aufgaben.html> (accessed on 09.05.2022).

⁸³ Brunner (n 48) 429; Leuenberger (n 53) 23.

⁸⁴ Fleischer/ Danninger (n 52) 208; Podszun/Roher (n 52) 133, 134.

⁸⁵ §§ 59, 64–72 of the Austrian Competition Act (*Kartellgesetz*), see also Elfriede Solé and Anneliese Kodek and Sabine Völkl-Torggler, *Das Verfahren vor dem Kartellgericht* (2nd edn Verlag Österreich 2019) 11.

⁸⁶ § 66 of the Austrian Competition Act.

practice, it cannot be guaranteed that the expert lay judges at the Austrian Cartel Court will actually have profound knowledge of competition law economics. Moreover, those expert lay judges are not involved in private damages actions for the violation of competition law. It is the ordinary civil courts, and not the Austrian Cartel Court, that have jurisdiction over private damages actions.⁸⁷ In ordinary civil courts, lay judges are not part of the judicial bench.

Only in exceptional cases will the Cartel Court, with its expert lay judges, become – lightly – involved in private enforcement of competition law. In principle, any undertaking or association of undertakings, which has a legal or economic interest in the decision, has a right to apply to the Cartel Court under Section 36(4) No. 4 Austrian Competition Act (*Kartellgesetz*). Further, in case the anticompetitive conduct has already been seized, and there has been no other final decision of the Cartel Court regarding this infringement, the Cartel Court may, upon request, issue a declaratory decision of a violation of Austrian competition law, but not that of the EU,⁸⁸ insofar as there is a legitimate interest, for example, future damages actions.⁸⁹ A decision of the Cartel Court has a binding effect on private actions for damages.⁹⁰ Yet, the binding effect only encompasses the competition law violation, as the decision of the Cartel Court does not contain any calculations of damages.⁹¹ Consequently, the expert lay judges at the Cartel Court involved in the declaratory decision cannot use their expertise to calculate damages for specific violations of competition law.

In addition, under certain circumstances, the Vienna Commercial Court (*Handelsgericht Wien*), or the commercial senates of the regional courts, may also have jurisdiction over private damage claims. Therein, commercial expert lay judges share the panel with two professional judges. The Vienna Commercial Court and the commercial senates of the regional courts do not normally have jurisdiction over private damages actions for the violation of competition law under the Austrian Competition Act^{92,93} However, a competition law violation can also constitute an infringement of § 1 Austrian Unfair Competition Act (*Gesetz gegen den unlauteren Wettbewerb*) if

⁸⁷ Friedrich Rüffler and Robert A Steinwender, 'Allgemeines Wettbewerbsrecht' in Michael Holoubek and Michael Potacs (eds) *Öffentliches Wirtschaftsrecht* (4th edn Verlag Österreich 2019) 651, 686–688; Solé/Kodek/Völkl-Torggler (n 85) 36.

⁸⁸ Axel Reidlinger and Isabella Hartung, *Das neue Österreichische Kartellrecht* (4th edn Verlag Österreich 2019) 230; Rüffler/Steinwender (n 87) 711, 712; Norbert Gugerbauer, *Kartellgesetz und Wettbewerbsgesetz* (3rd edn Verlag Österreich 2017) 424.

⁸⁹ §§ 28 and 36(4) of the Austrian Competition Act.

⁹⁰ § 37i(2) of the Austrian Competition Act (*Kartellgesetz*); Gugerbauer (n 88) 527.

⁹¹ 'Declaration of the infringement' in § 28(1) of the Austrian Competition Act.

⁹² §§ 37a – 37m of the Austrian Competition Act.

⁹³ § 51 of the Austrian Jurisdictional Rules.

the infringement is capable of giving the infringer a competitive advantage, which will regularly be the case.⁹⁴ Disputes concerning unfair competition fall within the jurisdiction of the Vienna Commercial Court and the commercial senates of the regional courts.⁹⁵ At least at the Vienna Commercial Court, the allocation of the commercial expert judges follows a similar procedure as the aforementioned Zurich court.⁹⁶ Nevertheless, the competition-expertise of the expert lay judges in commercial matters should not be overestimated, as the actions for unfair competition practices based on a competition law infringement only occupy a small part even in the law of unfair competition. Moreover, the jurisdictional fragmentation in competition matters does not necessarily contribute to an increased understanding of competition law and competition economics on the bench.

2.4. Germany

In Germany, a negative trend can be observed as to lay participation in the judiciary. Private enforcement of competition law, including actions for damages, used to be a commercial matter.⁹⁷ In commercial cases, the claimant generally has the choice to have the case heard by a chamber of the usual civil division, consisting of three professional judges in the normal composition, or a chamber belonging to the commercial division.⁹⁸ In their usual composition, commercial chambers are composed of two lay judges and one professional judge⁹⁹, but there is also the possibility of excluding lay judges and having the professional judge decide on her own.¹⁰⁰

In the 8th amendment of the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*), the Federal Government has succeeded in its drive to abolish the jurisdiction of commercial chambers for competition law damages claims.¹⁰¹ Actions for injunctive relief and the levying of benefits may still be transferred to the commercial chambers at the claimant's request.¹⁰² The German Federal Government cited, as reasons for this amendment,

⁹⁴ Gugerbauer (n 88) 59; Rüdfler/Steinwender (n 87) 688; Solé/Kodek/Völkl-Torggler (n 85) 36.

⁹⁵ § 51(2) No. 10 of the Austrian Jurisdictional Rules.

⁹⁶ Fleischer/ Danninger (n 52) 208.

⁹⁷ On legislative changes: Jürgen Keßler, 'Was lange währt, wird endlich gut? – Annotationen zur 8. GWB-Novelle' [2013] WRP 1116, 1121; Achim Gronemeyer and Dimitri Slobodenjuk, 'Die 8. GWB-Novelle – Ein Überblick' [2013] WRP 1279, 1284.

⁹⁸ §§ 96 and 98 of the German Judicature Act.

⁹⁹ § 105 of the German Judicature Act.

¹⁰⁰ § 349(3) of the German Code of Civil Procedure.

¹⁰¹ BT-Drs. 17/9852, 54.

¹⁰² § 95(2) No. 1 of the German Judicature Act.

that competition law damages actions are factually, economically and legally complex and should, therefore, be assigned to collegiate panels of professional judges in general civil chambers, instead of commercial chambers, which are only staffed with one professional judge.¹⁰³ However, as we will see more in detail below, it is precisely because of the complicated nature of economic damages calculation why private damages actions for the violation of competition law should be decided by mixed panels that include lay judges, as economic experts, on the bench.

Nevertheless, the changes brought about by the 8th amendment of the German Competition Act might not necessarily be based on a complete legislative misunderstanding of economic realities in cartel damages actions but result, instead, from the generally problematic state of German commercial chambers.¹⁰⁴ Case numbers are declining and the case allocation system is outdated.¹⁰⁵ Cases are randomly allocated to a commercial chamber to which the commercial judges belong, and there is no allocation according to the particular skills and specialised knowledge of the commercial judges, the benefit of which is consequently lost.¹⁰⁶ Therefore, in practice, the mentioned possibility of having the case decided solely by the professional judge, without the participation of the commercial lay judges, is used in 90% of the cases.¹⁰⁷ Special competition lay judges, for example, economists with special knowledge of cartel damages calculation, did not exist anyway. The change brought about by the 8th amendment of the German Competition Act may, therefore, rather be a reaction to these grievances for private damages actions. The discussion of the involvement of lay judges in competition law disputes could also be taken as an opportunity to rethink the function and organisation of the chambers for commercial matters in Germany.¹⁰⁸

This section has shown that expert lay judges are not completely unknown in private damages actions for competition law violations. However, the existing areas of application still suffer from several weaknesses, even though individual aspects certainly could have a model function.

¹⁰³ BT-Drs. 17/9852, 38.

¹⁰⁴ Graf-Peter Calliess and Hermann Hoffmann, 'Effektive Justizdienstleistungen für den globalen Handel' (2009) 42(1) ZRP 1; Christian Wolf, 'Zivilprozess versus außergerichtliche Konfliktlösung – Wandel der Streitkultur in Zahlen' [2015] NJW 1656, 1659; Gerhard Wagner, *Rechtsstandort Deutschland im Wettbewerb* (CH Beck 2017) 199; Fleischer/Danninger (n 52) 207; Podszun/Roher (n 52) 132.

¹⁰⁵ Wagner (n 104) 202; Podszun/Roher (n 52) 132.

¹⁰⁶ Fleischer/Danninger (n 52) 207.

¹⁰⁷ Fleischer/Danninger (n 51) 549, 553.

¹⁰⁸ Generally, on the specialisation of courts and involvement of lay judges in German civil procedure law, Graf-Peter Calliess, 'Der Richter im Zivilprozess – Sind ZPO und GVG noch zeitgemäß?' [2014] NJW-Beil. 27, 29.

III. Advantages and disadvantages of competition-expert lay judges

While the previous part has illustrated that expert lay judges are indeed a familiar concept in Europe, possibly one that could be expanded further, the following section examines the theoretical foundations and explores the advantages and disadvantages of involving expert lay judges in private competition law damages actions. At this point, the practical details of such involvement are not discussed in detail, but this paper proposes the use of competition economists as expert lay judges.

1. The advantages of specific expertise as to cartel damages and the accompanying consequences

The previous section has already demonstrated that the civil justice system mainly involves lay judges in the judicial decision-making process in order to benefit from their expertise. As mentioned above, lay labour, agricultural, technical and commercial judges are used because they provide the bench with specific expert knowledge that the professional judges do not possess or possess to a lesser degree. In the case of competition-expert lay judges, too, it would be precisely and above all their economic expertise that could be an advantage and have several positive implications for cartel damages actions.

First, the judicial expertise on the part of the expert lay judges would make other expertises redundant. In addition to legally challenging questions, economic questions, especially the calculation of cartel damages and pass-on, are the main challenge in private damages litigation. As already mentioned, these calculations are often provided through outside expert evidence, either through party, or court appointed experts, or both. Competition-expert lay judges can decide based on their own expertise, making external expert opinions obsolete. Generally, civil procedural law allows the court's own expertise to replace expert evidence. In German civil procedural law, for example, a party's request to submit an expert opinion can be rejected on the grounds that the court itself has the necessary expertise.¹⁰⁹ At German commercial chambers, in particular, the court may, with the involvement of expert lay judges, decide on the basis of its own expertise and knowledge, for the assessment of which a commercial appraisal by the lay judge is sufficient, without obtaining an expert opinion.¹¹⁰ Only when the bench's own expertise is insufficient must an

¹⁰⁹ See, for example, German Federal Court of Justice, 26 April 1989, Ivb ZR 48/88.

¹¹⁰ § 114 of the German Judicature Act, see hereto Jürgen Blomeyer, 'Der Ruf nach dem spezialisierten und sachverständigen Richter' [1970] ZRP 153, 155; Fleischer/ Danninger (n 52) 2011; Neumann/Bovelett (n 52) 3499.

external expert be involved.¹¹¹ Practice at the German Federal Patent Court, the agriculture and commercial chambers has shown that expert opinions can usually be avoided due to the involvement of technical judges.¹¹²

This reasoning is transposable to private damages actions for competition law violations. Professional judges do not have any training in economics themselves, albeit they have often gained experience in competition matters, especially if they serve on competition-specific chambers. However, special economic expertise with econometric models is required when calculating cartel damages,¹¹³ which professional judges do not have. Even if economics classes should rightfully be included in the curriculum of law schools or if further economics training is offered for judges to increase their economic competences,¹¹⁴ the acquired expertise would certainly not compare to those of an experienced competition economist. Accordingly, economic expertise on the bench can only be meaningfully exercised by competition-expert lay judges.

Consequently, procedural efficiencies could be created. As mentioned above, both parties often provide differing expert opinions for the damages calculation in cartel damages claims, which makes a court-appointed expert necessary. This approach ramps up procedural costs and prolongs procedures. The use of competition-expert lay judges, on the other hand, would make expert evidence obsolete altogether and is therefore cost-effective and fast.¹¹⁵ In general, specialisation is usually considered a key factor for judicial efficiency from a legal economy point of view.¹¹⁶ General economic expertise relevant in competition proceedings is increased by the competition-expert lay judges, which can lead to further procedural efficiencies.¹¹⁷ The expert judge can educate the other bench members, the professional judges, on the respective economic matter so that the entire bench can accurately grasp the economic issues relevant to the decision within a reasonable time and effort.¹¹⁸ It is

¹¹¹ Similar reasoning for technical judges in patent courts and providing practical examples Stephan Neuhaus, 'Der Sachverständige im deutschen Patentverletzungsprozess' [1987] GRUR Int. 483, 484.

¹¹² For technical judges in particular Beyer (n 45) 329, 329.

¹¹³ See European Commission (n 4).

¹¹⁴ Critically Fleischer/Danninger (n 52) 211.

¹¹⁵ See Jürgen Blomeyer, 'Der Ruf nach dem spezialisierten und sachverständigen Richter' [1970] ZRP 153, 155; similar reasoning for technical judges in patent courts Sedemund-Treiber (n 45) 1004, 1009; for German commercial judges, Neumann/Bovelett (n 52) 3498, 3499.

¹¹⁶ Lawrence Baum, *Specializing the Courts* (University of Chicago Press 2011); Stefan Voigt, 'Determinants of judicial efficiency: a survey' (2016) 42 Eur J Law Econ 183, 191; Podszun/Roher (n 52) 133; general discussion Holger Fleischer, 'Spezialisierte Gerichte: Eine Einführung' [2017] RabelsZ 497.

¹¹⁷ Fleischer/ Danninger (n 52) 207.

¹¹⁸ Generally Machura (n 14) 235, 240; similar reasoning for technical judges in patent courts Sedemund-Treiber (n 45) 1004, 1008; for commercial courts Fleischer/Danninger (n 52)

reported that the expert lay judges at Austrian, French and Swiss commercial courts or the technical judges at patent courts, for example, generally use their practical expertise to provide accurate, timely and cost-saving information as well as orders to expedite and cheapen proceedings.¹¹⁹ As mentioned-above, French commercial court proceedings, in particular, are much shorter than ordinary civil proceedings.

Like in commercial courts used today, expert lay judges in private damages actions for the violation of competition law could be sparring partners or a counterweight for the legally trained professional judges. They could bring a different, non-legal but practically relevant and economically sound perspective into the proceedings.¹²⁰ In addition, they can use their expertise to oppose and challenge the highly specialised competition lawyers and economists in a manner that a professional judge will not be able to do because of her limited economic knowledge.¹²¹ The expert judge thus also contributes, through his presence on the bench, to preventing possible communication problems between the professional judges and the parties with their highly specialised lawyers and economists.¹²² The management of such negotiations by the expert lay judges could then also improve court settlement negotiations and, thus, end cartel damages proceedings consensually.¹²³ This, in turn, saves time and resources and could lead to greater acceptance of the outcome by the parties. Figures from Swiss commercial courts have shown that the involvement of expert lay judges resulted in a settlement rate of around 70% in the first instance.¹²⁴

In general, the expertise provided by the lay judges on the judicial bench can lead to a more relevant, pragmatic, practice-oriented and innovative damages calculation and overall decision in competition law damages proceedings.¹²⁵

211.

¹¹⁹ Brunner (n 48) 429; Stolowy/Brochier (n 51) 15, 18; Krenn (n 49) 431, 434; Leuenberger (n 53) 23; Sedemund-Treiber (n 45) 1004, 1008.

¹²⁰ Machura (n 14) 235, 239; Podszun/Roher (n 52) 133.

¹²¹ Michael Lotz, 'Qualitätssicherung im Zivilprozess' [2014] DRiZ 20; Martin Zwickel, 'Interdisziplinär besetze Richterbank als Chance für größere Bürgernähe' [2014] DRiZ 258, 259; similar reasoning for technical judges in patent courts Beyer (n 45) 329, 330; similar for lay judges at commercial courts Lindloh (n 52) 63.

¹²² Similar reasoning for technical judges in patent courts Sedemund-Treiber (n 45) 1004, 1008.

¹²³ Similar reasoning for commercial proceedings Stolowy/Brochier (n 51) 15, 16; Podszun/Roher (n 52), 'Die Zukunft der Kammer für Handelssachen' [2019] NJW 131, 133; Krenn (n 49) 431, 434.

¹²⁴ Brunner (n 48) 431; Roland O Schmid 'Vergleichsverhandlungen vor dem Zürcher Handelsgericht, Beiträge aus den zehn Kammern des Handelsgericht' in Brunner/Nobel (n 80) 235; Leuenberger (n 53) 24.

¹²⁵ Similar for lay judges in commercial proceedings Lindloh (n 52) 60; Fleischer/ Danninger (n 52) 213.

This can also lead to a higher acceptance of the decision by the parties and the public.¹²⁶ Where expert judges are already used, for example, in the commercial courts in France and Zurich, their rulings enjoy a high level of acceptance by the parties as demonstrated by low appeal rates and, in general, their good reputation.¹²⁷ In this context, the democratic participation function through the involvement of such lay judges, often peers from a similar industry as the parties, should also be mentioned.¹²⁸ From a rule of law perspective, the participation of such expert lay judges is also to be assessed positively. An expert decision certainly fulfils the expectations of the parties. The provided expertise and accompanying specialisation also ensure a certain quality of jurisprudence.¹²⁹ As an imperative of the rule of law, it is the task of the judiciary to resolve legal disputes with the necessary expertise and guarantee effective judicial protection.¹³⁰

The fact that expert lay judges are already used in other legal areas in many European states shows that in those states, the legislator has already made a fundamental decision in favour of the participation of expert lay judges in their legal systems.¹³¹ In other states, where the concept of (expert) lay judges does not exist, existing models found in other states can serve an exemplary, comparative function. This exemplary function applies especially to existing systems that already provide for competition-expert lay judges. The fact that expert lay judges are already used in many areas of civil justice, would also not lead to an unjustified privilege for private enforcement of competition law. Moreover, the introduction of competition-expert lay judges goes hand in hand with general, Europe-wide developments and the introduction of specific commercial courts for international commercial disputes¹³² – as such it could fulfil a crucial complementary function.

¹²⁶ Zwickel (n 121) 258; Olga Stürzenbecher-Vouk, 'Der den Gerichten beigegebene Sachverstand' (2016) 7 ZVG 3, 626, 627; Krenn (n 49) 431, 433, 435; providing empirical research on the issue of lay judges and their acceptance in general Stefan Voigt, 'The effects of lay participation in courts — A cross-country analysis' (2009) 25 Eur J Polit Econ 327.

¹²⁷ Stolowy/Brochier (n 51) 433.

¹²⁸ See Zwickel (n 121) 258; Stürzenbecher-Vouk (n 126) 239.

¹²⁹ Baum (n 116) 213.

¹³⁰ Similar reasoning for commercial courts Podszun/Roher (n 52) 131; in the context of special information technology courts Rupprecht Podszun, *QualityLaw: Zuständigkeitskonzentration für IT-Recht*, [2022] MMR 249.

¹³¹ Fleischer/Danninger (n 52) 211.

¹³² Rühl (n 70) 1073; Biard (n 70) 24; Burkhard Hess and Timon Boerner, 'Chambers for International Commercial Disputes in Germany: The State of Affairs' (2019) 12 Erasmus L Rev 33; Erik Peetermanns and Philippe Lambrecht, 'The Brussels International Business Court: Initial Overview and Analysis' (2019) 12 Erasmus L Rev 42.

2. Dispensing and mitigating concerns

Conversely, there are also disadvantages brought forward against the participation of expert lay judges, which, in theory, can be transposed to private enforcement of competition law. However, on closer examination, these do not prove to be valid as long as the procedural rules are adapted accordingly.

As mentioned above, private damages actions usually involve not only complex economic calculations but also legal questions. Lay judges are not trained to solve those legal questions; a professional judge is superior in this aspect. The fact that lay judges have no legal training is, as mentioned above, also the reason why in Germany, competition law damages actions no longer fall under the jurisdiction of commercial chambers and why a general decline of proceedings at those commercial chambers is notable. However, such concerns can be addressed by appointing expert lay judges in mixed courts and, if necessary, even for their numbers to exceed professional judges on the respective panel. Sound legal competence can be provided by the professional judge and practical, economic competence by the expert lay judge.¹³³ Furthermore, mandatory trainings could be introduced for expert lay judges, which would provide them with the basic knowledge of competition law and civil procedure. A basic legal understanding acquired through practice and their cooperation with lawyers is presumably already present among competition economists.

In addition, actual competition economics expertise of the expert lay judges would have to be effectively assured.¹³⁴ As mentioned above, German commercial chambers were, for example, criticised for not assigning commercial judges to cases according to their expertise and industry-specific knowledge. Any such criticism could be avoided with respect to competition-expert judges through appropriate allocation rules, for example, akin to the Zurich Commercial Court model, and further procedural guidelines. To additionally assure the aforementioned expertise, competition-expert lay judges would need to be effectively compensated. Otherwise, a lack of available competition economists, to fill open expert lay positions, could undermine the objective of actually increasing expertise on the part of the judicial bench. Especially for small EU Member States, it could be challenging in general to find enough suitable expert lay judges from their own nation. Cross-national pools of competition-experts, for example, provided through lists of suitable competition-experts drawn-up by the European Commission, could mitigate

¹³³ See Krenn (n 49) 431, 435; Leuenberger (n 53) 24.

¹³⁴ See Wolf (n 104) 1659; Fleischer/Danninger (n 52) 208.

those concerns. Having said that, national procedural and constitutional rules would need to allow appointing lay judges from other Member States.

Naturally, there is less flexibility in using such highly specialised lay judges in a large variety of cases. However, this specialisation is precisely the advantage of involving expert lay judges. Similarly, there are concerns that lay judges may not be able to prevail over dominating professional judges.¹³⁵ As a result, the advantage of their expertise would be lost. However, with appropriate training of professional judges on a mixed panel, and an appropriately balanced composition regarding the number of lay judges and professional judges, such concerns can also be mitigated.

Their expertise and industry knowledge are also sometimes held against expert lay judges. Above all, there have been concerns about bias and capture as well as the lack of impartiality and judicial independence of lay judges conflicting with Article 6(1) European Convention of Human Rights¹³⁶ (hereinafter: ECHR).¹³⁷ Nevertheless, also this concern can be mitigated since the normal conflicts of interest and confidentiality rules also apply to lay judges, as they do to professional judges.¹³⁸ This enables a lay judge who is too close to a certain industry to be excluded, if necessary.¹³⁹ Nevertheless, a balanced approach should be chosen here as well since it is industry knowledge that qualifies a lay judge for her position. Furthermore, it is also not sufficient in the sense of Article 6(1) ECHR that there is abstract or structural proximity of the lay judges to a party or to a certain subject matter of the proceedings; concrete conflicts between the subject matter of the dispute and the interest of the lay judges are necessary for a violation of Article 6(1) ECHR.¹⁴⁰ Incidentally, a mixed court with a balance between professional and lay judges can also be helpful in the sense that the professional judges can then devalue existing biases in an argumentative exchange with the lay judges.

Lastly, the use of expert lay judges for cartel damages actions is, of course, not the all-encompassing and only solution that will eliminate the

¹³⁵ Similar reasoning for technical judges in patent courts *Leise* (n 45) 470, 474.

¹³⁶ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <https://www.refworld.org/docid/3ae6b3b04.html> (accessed on 21.05.2022).

¹³⁷ Markus B Zimmer, 'Overview of Specialized Courts' (2009) 2 *International Journal For Court Administration* 4; Bernd Hirtz, 'Die Zukunft des Zivilprozesses' [2014] *NJW* 2529, 2531, early discussions Fritz Baur, 'Laienrichter – heute?' in Otto Bachof (ed) *Tübinger Festschrift für Eduard Kern* (Mohr Siebeck 1968), 49, 53.

¹³⁸ For example § 42 of the German Code of Civil Procedure.

¹³⁹ On such rules in French commercial proceedings *Stolowy/Brochier* (n 51) 13, in Swiss commercial proceedings, *Brunner* (n 53) 430.

¹⁴⁰ European Court of Human Rights, 22 June 1989, *Langborger v. Sweden*, Application No. 11179/84; 26 October 2004, *Kellermann v. Sweden*, Application No. 41579/98.

aforementioned problems existing in private enforcement of competition law, especially the calculation of cartel damages. Nevertheless, it is a step in the right direction, necessarily alongside other procedural means, such as the concentration of proceedings and specialisation of courts, to make private enforcement of competition law more effective.

IV. A possible way forward

Following the advantages of the use of expert lay judges in cartel law presented here, the question of the structure and organisation of such a concept arises. The paper makes some general but brief suggestions in the following part based on the models and examples provided above. However, the exact organisation for introducing lay judges to private enforcement of competition law will depend – outside of possible EU harmonisation efforts with a revised Damages Directive¹⁴¹ – on the civil procedure rules of the different Member States. Hence, only a broad overview and general concepts can be given here.

The systematic and legal policy results found here support the introduction of expert lay judges in cartel damages law. Their introduction should also be accompanied by an overall specialisation of courts and supposedly their concentration as to their location, similar to the French concentration provisions for competition damages actions.¹⁴² Otherwise, competition-expert lay judges would have to be appointed at each civil court, which in principle, have jurisdiction to decide on cartel damages action. This would entail an increased organisational effort. Any specialisation and concentration can be implemented, for example, through special competition law chambers at specific civil courts, where competition damages action will be concentrated

¹⁴¹ Article 20(1) Damages Directive foresaw a review of the Directive and its implementation by 27 December 2020. Article 20(3) particularly provides that, if appropriate, the report should be accompanied by a legislative proposal. On 14 December 2020, the Commission published a report and came to an overall positive conclusion, see European Commission, ‘Commission Staff Working Document on the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (14 December 2020)’ 14, available at: https://ec.europa.eu/competition/antitrust/actionsdamages/report_on_damages_directive_implementation.pdf (accessed on 09.05.2022). Due to the considerable backlog of most Member States transpositions, the report does not contain the envisaged in-depth analysis of the Directive or a legislative proposal. However, this might follow in the future.

¹⁴² See Fleischer (n 116) 497.

or through special courts for competition law, such as the British Competition Appeal Tribunal¹⁴³. However, the exact form of such judicial specialisation is beyond the scope of this paper.

In order to achieve the discussed balance between legal and economic expertise, mixed courts (such as the majority of commercial courts or chambers) are preferable. Expert lay judges and professional judges should share the bench. To ensure a decision-making function and capability, an unequal number of judges is appropriate. Professional judges should be predominant to perform the genuine judicial function, to counter the aforementioned criticism that expert judges lack legal knowledge and to be able to satisfactorily solve the difficult legal questions arising in competition damages law. Nevertheless, further legal training should also be mandatory for expert lay judges, as is usual for French commercial judges at the French commercial courts.¹⁴⁴

Furthermore, the overarching question arises, what kind of lay judges would generally be appropriate for private damages actions. As mentioned throughout this paper, difficulties in private damages actions arise specifically with regard to damages calculation. As this is nowadays usually provided by economic experts, competition economists are suitable candidates for the position of expert lay judges in competition law cases – that is, providing their expertise as part of the panel rather than as a party- or court-appointed expert. The general legal requirements can be based on those of commercial judges, namely a certain minimum age and a certain minimum period of time of practical economic experience in competition law.¹⁴⁵ The right to nominate and the election or appointment of lay judges must also be regulated accordingly. Expert lay judges should be appointed for a specific period of time, with the possibility of renewal, similar to existing provisions for commercial courts or chambers in Europe.

It is necessary to turn here to the issue of how the expertise of the lay judges can be as targeted as possible and, thus, most precise and appropriate for the specific dispute at hand. In order to ensure that the expert lay judges' special sectorial knowledge and their knowledge of certain industries are, respectively, adequately covered and assigned to specific cases, the mentioned pool solution from the Zurich Commercial Court, which has been generally proposed for

¹⁴³ On their involvement in private enforcement of competition law Anthony Maton, Simon Latham, Marc Kuijper and Timo Angerbauer, 'Update on the Effectiveness of National Fora in Europe for the Practice of Antitrust Litigation' (2012) 3 JECLAP 586, 591; Tom De La Mare, 'Private Actions in the Competition Appeal Tribunal: The Consumer Rights Act Giveth and the 2015 Competition Appeal Tribunal Rules Taketh away' (2015) 14 *Competition LJ* 219; David George, 'Reforms to Private Actions in the Competition Appeal Tribunal – Taking Stock One Year on' (2016) 15 *Competition LJ* 225.

¹⁴⁴ Stolowy/Brochier (n 51) 10, 11.

¹⁴⁵ See, for example, § 109 of the German Judicature Act.

commercial disputes¹⁴⁶, would also be suitable for private damages actions for violations of competition law. Accordingly, the appropriate lay judges for the case are appointed by the president from a pool of expert lay judges available to the court at the commencement of the proceedings. As mentioned above, especially small Member States should assess the appointment of competition-expert lay judges from other EU countries, possibly with the help of lists of experts drawn-up by the Commission.

Finally, certain procedural rules should be introduced, or existing rules applicable to other kinds of lay judges or to judges, in general, should be applied to competition-expert lay judges in order to ensure the proper administration of justice in accordance with the rule of law. This includes, for example, rules on confidentiality or conflicts of interest. At the same time, the aforementioned concerns towards impartiality and judicial bias of the expert lay judges would be mitigated.

V. Conclusion

This paper has shown that from a systematic and legal policy point of view, the introduction of competition-expert lay judges can advance the understanding of the economic realities of cartel damages calculation of the judiciary and thus lead to an improvement in the area of damages calculation and overall procedural efficiencies. The economic expertise of competition-expert lay judges serves as their main advantage. The expertise available on the bench through the expert judge can save costs and time and can lead to economically sound and thus substantively relevant administration of justice, the genuine task of the judiciary. Any concerns and disadvantages can usually be mitigated through the use of procedural rules.

Existing forms of expert lay judges in Europe, most notably commercial judges, and the positive examples of the already existing concept of expert lay judges for competition law, generally underline those findings and can be used as models for a further advancement of the concept. Comparative analysis has shown that the use of expert lay judges nowadays is the absolute exception in private enforcement of competition law and that systems such as Germany, which has abolished expert lay judges for private damages actions, need improvement. The use of expert lay judges, especially at commercial courts in France and Zurich, or the examples of technical judges at several patent courts have illustrated the successful use of lay judges, which can, in

¹⁴⁶ Fleischer/Danninger (n 52) 208; Podszun/Roher (n 52) 133, 134.

principle, be transferred to private enforcement of competition law. The high settlement and low appeal ratio show that decisions involving expert lay judges are largely accepted by the parties and generally improve the administration of justice.

The exact implementation of the concept could only be outlined here. This paper suggested the introduction of competition-expert lay judges, notably competition economists with a specific acquired and recognised expertise, in mixed courts, where the respective allocation mechanism should allow allocation according to industry knowledge. In order to ensure EU-wide harmonised (minimum) standards, the basic concept for competition-expert lay judges raised here could be taken up in a revision of the Damages Directive and supplemented by further refinements.

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