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Legal Update
April 2015

EU Antitrust Private Damages Actions

The Impact of the Directive on Antitrust Damages Actions in Germany

In our last Legal Update in a series of commentary pieces by Mayer Brown about the directive on private antitrust damages actions[1] (the **"Directive"**), we focused on the impact of the Directive in England.[2] In the present Update we turn to antitrust damage claims in Germany and the impact of the Directive on German law. In the coming weeks we will comment on the position in France.

1. What is the current climate for private antitrust damages actions in Germany?

Throughout recent years a number of follow-on actions have been filed with the German courts, based on cartel decisions of the European Commission (such as the carbonless paper cartel, the hydrogen peroxide cartel and the airfreight cartel) as well as cartel decisions of the German National Cartel Authority (*Bundeskartellamt*) (such as the ready-mix concrete cartel and the cement cartel). In these antitrust damages actions the German courts clarified important legal questions, for instance with regard to the passing-on defence as well as the possibilities of bundling together a number of claims in one court proceeding.

German law is favourable to follow-on actions as it binds the German courts not only to the final cartel decisions of the European Commission and the *Bundeskartellamt*, but also to those of the National Competition Authorities ("NCA") of the other EU Member States. So if for instance the English NCA determined that certain individuals or entities had engaged in a cartel, the German courts would accept such finding as binding in damages actions brought before them. In that regard, German law is even friendlier to cartel victims than required by the Directive. Also the rules governing the limitation periods are supportive to follow-on actions. Any limitation period is suspended when the Commission, the *Bundeskartellamt* or a NCA of any other Member State initiates cartel infringement investigations.[3]

On the other hand, standalone actions do not play a significant role in the German jurisdiction. This is because of the very limited disclosure opportunities provided by German civil procedural law, which makes it difficult for claimants to prove a cartel law infringement. Also small consumer claims are rarely pursued in Germany as no procedures for collective redress exist, neither opt-in nor opt-out.

Damages actions may be brought against business entities as well as against individuals no matter where they are located as long as the infringement occurred (also) on the German market. Cartelists are jointly and severally liable for the damages provoked by the infringement. German law provides for full compensation of any direct and indirect loss. Hence, not only direct purchasers but also indirect purchasers are entitled to claim for damages against the infringers of competition law. To avoid over-compensation, cartelists are allowed to raise the passing-on defence.

2. How will the Directive affect German law?

2.1 Access to evidence

To date, plaintiffs in German civil proceedings have only very limited access to documents in possession

[1] Directive 2014/104/EU on antitrust damages actions

[2] See: http://www.mayerbrown.com/files/Publication/025d7e56-7ddd-4994-b66a-00ab9e37fe72/Presentation/PublicationAttachment/f3a9dffe-b166-47ef-ba9b-2019bab46b7f/Update_eu_antitrust_private_damages_actions_feb15.pdf

[3] The time limit on making a claim in Germany is explained in more detail below.

of the defendant. There are no discovery or disclosure proceedings comparable to those in the US or UK. Moreover, German courts have proven to be hesitant in granting access to the files of the *Bundeskartellamt* in order to obtain information in support of an anti-cartel damages action. Enacting the Directive in Germany will require considerable change in this regard. The German legislator will have to ensure that, pursuant to section 5 of the Directive, a court may order the adverse party or even third parties to disclose documents, if:

- the request for production is sufficiently justified, containing reasonably available facts and evidence sufficient to support the plausibility of the claim for damages;

- the request specifies sufficiently the item of evidence or the relevant categories of evidence, circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts;

- the disclosure is proportionate, taking into consideration the legitimate interests of all parties and third parties concerned and, among others, the scope and cost of disclosure and whether the content to be disclosed is confidential.

In remains to be seen if the legislator will implement these rules into the Code of Civil Procedure making the provisions applicable to all kinds of civil litigation, or if the disclosure duties will be restricted to cartel damage claims.

It will also be interesting to observe, how strictly or widely the courts will apply the new disclosure provisions once they are enacted and what kind of evidence will be protected from disclosure by privilege. So far, as a matter of course privilege has played an insignificant role in German civil proceedings. However, German law acknowledges that external lawyers can refuse to testify and disclose information received from their client. Case law is not consistent on the issue of whether this privilege also applies to in-house counsel. In addition, business secrets are protected under Art. 12 (professional freedom) and Art. 14 (property) of the German Constitution and, therefore, may also be privileged.

With regard to access to the files of the *Bundeskartellamt*, the legislator will also have to enact new law which will transfer the concept of Section 6 of the Directive into German law, according to which:

- leniency statements and settlement submissions are not disclosable (Section 6(6) in connection with Sections 2(16) and 2(18) of the Directive), in order to protect leniency programs, which play a key role in antitrust enforcement (the so-called black list),

- documents contained in the file of a national competition authority shall only be disclosable after the investigations have been concluded, in order to protect ongoing investigations and the surprise effect of dawn raids (Section 6(5) of the Directive – the so-called grey list),

- where the above is not applicable and no party or third party is reasonably able to provide the requested evidence, national courts may request disclosure from a competition authority (Section 6 (10) – the so-called white list).

2.2 Joint and several liability and leniency recipients

The rule of joint and several liability for infringers of competition law is provided for in Section 11(1) of the Directive. This rule already exists in German law. However, pursuant to Section 11(4) of the Directive, joint and several liability shall not apply to leniency recipients, which are thus only liable for their own participation in the antitrust infringement and with regard to their direct purchasers or providers only. Only if other injured parties cannot obtain compensation from other cartelists can immunity recipients be forced to compensate their damage. This rule does not exist currently in the German legislation and will have to be implemented accordingly.

2.3 Coordination of actions for damages by plaintiffs from different levels in the supply chain

Not only direct customers of cartelists may suffer damages but also indirect customers if and to the extent the direct customers are able to pass on the price increase to the next market level. In order to avoid the cartelist having to compensate both direct and indirect customers for the same damage twice, the cartelist may invoke the so called passing on defence. According to Section 13 of the Directive, the passing on defence shall be accepted by the courts of the Member States. Sections 14 and 15 of the Directive contain further procedural and

material provisions regarding the coordination of damages actions by plaintiffs from different market levels.

While the passing on defence and the standing of direct as well as indirect customers are already accepted by the German courts, some of the provisions of Sections 13, 14 and 15 of the Directive will require changes in the law. Section 15 states that in order to avoid contradicting decisions as to whether the overcharge was passed on or not, national courts shall be informed of all damage claims brought before other courts. National law must determine the method of compliance with this provision. It is unclear which method will be used to implement this coordination in the German legal system. As of today no central claims register or court docket exists. It also remains to be seen if a possible claims register will be publically accessible, encouraging other victims of a certain cartel to file claims, or if only the courts will have access.

3. What are the funding options and costs implications for parties involved in antitrust damages claims in Germany?

In German civil litigation the costs are foreseeable to a large extent. This is because the courts fees as well as the statutory minimum lawyers' fees are not based on the amount of work involved in handling the matter but on the value in dispute. German law follows the loser pays all approach. So the losing party has to bear the full amount of the court fees. In addition, the winning party can claim compensation for its counsel costs. However, this compensation claim is limited to the statutory minimum lawyers' fees. Therefore, each party can calculate in advance the cost risk it is facing in a worst case scenario in addition to its own counsel costs. Moreover, costs in German litigation are usually significantly lower than in the US and the UK given the absence of expensive disclosure proceedings and barristers. As a result, third-party funding plays a less prominent role in Germany than in the US or UK. However, third-party funding is possible and has increased in the last decade.

Cartel victims can also share their costs by bundling their claims together in one court proceeding. It is also possible to transfer the claims to another entity, which will pursue them in its own name. However, such entity must have sufficient funds to compensate the defendant in case the claims are dismissed.

Contingency fees are generally not permissible and in court proceedings lawyers may charge their clients not less than the statutory minimum lawyers' fees.

4. Is there a time limit on making a claim in Germany?

The limitation period for anti-trust damage claims in Germany is currently 3 years. It starts running at the end of the year when the victim becomes aware of the facts that justify the claim, the identity of the infringer and the incurred damage, or when it should have become aware of these elements but for gross negligence. The limitation period is suspended if the *Bundeskartellamt*, the European Commission or the NCA of another Member State initiates an investigation of the competition law infringement. The Directive will require minor changes to this set of rules. In particular, the limitation period will have to be extended to 5 years.

5. What is the standard of proof and what evidence is admissible in Germany?

Given that the courts are bound to a final decision of the Bundeskartellamt, the Commission and the NCAs of the other Member States, the plaintiff can establish the existence of a cartel and the participation of the defendant in the cartel by reference to the respective decision. Far more challenging is the proof of the amount of damages suffered. Here the hurdles are high, although sec. 287 of the German Code of Civil Procedure grants the courts authority to estimate the amount of damages at its free conviction, taking into consideration all circumstances of the case. In order to establish a sufficient basis for an estimation of the amount of damages by the court, expert evidence is required. The court appoints its own neutral expert who will prepare an expert report and will defend such report in an oral hearing. Party appointed experts do not constitute evidence in the meaning of the German Code of Civil Procedure. However, the parties need their own experts to enable them to assist the court appointed expert with information as well as to assess and – as the case may be – challenge his or her findings.

The Directive will alleviate the burden of proof for indirect customers if the defendant raises the passing

on defence. In this case, the indirect customer has only to prove that the defendant committed an infringement of competition law, that it resulted in an overcharge for the direct purchaser, and that plaintiff purchased goods from this direct purchaser (Section 14(2) of the Directive). This shall not apply if the defendant can demonstrate credibly to the satisfaction of the court that the overcharge was not, or was not entirely, passed on to the indirect purchaser.

6. What steps should you take at this stage?

The implementation of the Directive in German national law will no doubt foster private cartel damages actions. An increasing number of businesses in the German market are no longer prepared to accept disadvantages suffered by a cartel but take an aggressive approach to litigation. One example is Deutsche Bahn AG, which established a whole group of experts in their legal department, who successfully focus on litigating cartel damage claims.

Defendants to anti-trust damages actions will have to closely observe how the disclosure duties in Art. 5 and 6 of the Directive will be transferred into national law. So far, businesses, which are not active in the Anglo-Saxon jurisdictions, are not experienced in discovery and disclosure proceedings and, hence, have little awareness of the pitfalls connected to them. For those it is will be crucial to implement document retention policies at an early stage in order to be able to meet their future disclosure duties and to avoid any disadvantage due to contempt of court.

Our international and cross-jurisdictional team will be glad to assist you with regard to any question you might have. For more information please contact your usual Mayer Brown contact or:

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