

# Ninth Amendment to German Act on Restraints of Competition Further Strengthens Position of Claimant

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On 31 March 2017, the German Bundesrat (German Federal Council) approved the long-awaited ninth amendment to the Act against Restraints of Competition.

The amendment was already passed by the German Bundestag on March 9, 2017, and will enter into force on the day after it has been published in the German Federal Law Gazette. This is expected to take place by mid-April.

The amendment became necessary *inter alia* to implement the Cartel Damages Directive (Directive 2014/104/EU) that was approved by the Council of the European Union in November 2014. The aim of this directive is to enable all victims of infringements of EU antitrust law to claim compensation for the damages they suffered.

German law has already been quite claimant friendly since the seventh Amendment to the Act against Restraints of Competition entered into force in 2005. The ninth amendment to the Act against Restraints of Competition now strengthens the position of claimants further:

- **Decisions in which a competition authority finds a breach of German or European competition law have a binding effect on German courts in follow-on damages proceedings.** Such a binding effect was already provided for under previous German law. This binding effect does not only apply to decisions of the European Commission or the Federal Cartel Office, but also to decisions of competition authorities of other Member States. The binding effect means that an infringement of German or European competition law is proven and cannot be contested in court. In follow-on damages proceedings the plaintiff only has to prove damages due to the defendant's infringement of competition law.
- **The new law introduces a statutory presumption that a cartel leads to damages.** Such a presumption had already been acknowledged by German courts and has now been codified. The presumption can be rebutted, but it is for the cartelists to prove that their cartel did not cause damages. While there is no presumption as to the amount of damages suffered by a claimant, German courts are entitled to estimate the amount of damages based on points of reference presented by the claimant.
- **A broad right to disclosure of evidence is introduced.**
  - Both claimants and defendants are entitled to demand disclosure of evidence, from the other party as well as from third parties. While the right to disclosure does not apply to leniency applications and settlement submissions, it does encompass pre-existing documents that were submitted to a competition authority together with a leniency application.

- The right to disclosure can be enforced either in a separate proceeding or as part of damages proceedings. Disclosure of the competition authority's fining decision can even be enforced by way of interim injunction. Courts no longer have discretion on whether to order disclosure or not, but are bound to do so unless a disclosure request is disproportionate. Since reasonable disclosure-related costs must be reimbursed by the party demanding disclosure, it will be difficult for courts to reason that disclosure is disproportionate due to high costs (however, it is questionable whether such a reimbursement of costs is compatible with the EU Damages Directive).
- **Cartelists are jointly and severally liable for the damages caused by a cartel.** As has already been the case under previous German law, plaintiffs in principle can claim the whole damages amount from one of the cartelists, who in turn can demand compensation from the other cartelists in accordance to their share in causing the damages. There is an exception from this rule for small and medium-sized companies (SMEs) and leniency applicants. SMEs and leniency applicants are in general only liable to their direct and indirect customers. However, if companies that suffered damages due to the cartel cannot recover these damages from the other cartelists, they are entitled to compensation from SMEs and leniency applicants.
- **Individual settlements become more attractive for cartelists under the new law.** The new law provides that in case of a settlement between the claimant and an individual cartelist the overall damages claim is reduced by the share of the settling cartelist in causing the damages. The other cartelists can no longer demand compensation from the settling cartelist for the remaining claim. Thus, the new law solves the problem that a settling cartelist still had to face potential compensation claims of the other cartelists in the past.
- **The normal limitation period is extended from three years to five years.** The regular limitation period begins to run at the end of the year in which (i) the claim arose, (ii) the claimant obtained or – without gross negligence – should have obtained knowledge of the circumstances giving rise to the claim, the identity of the infringer(s) and the fact that the circumstances amounted to an antitrust infringement and (iii) in which the antitrust infringement ended. The new law also changes the conditions under which the absolute limitation period of 10 years (independent of any knowledge of circumstances) applies: It only begins to run once the antitrust infringement has ended. This condition makes the application of the absolute limitation period a lot less likely, especially since many antitrust infringements only end because a competition authority opens an investigation. During an investigation by the European Commission, the Federal Cartel Office or the competition authority of another Member State the limitation period is suspended. Under the new law, the suspension only ends one year after the decision becomes final. The new limitation rules are applicable to all claims that are not time-barred when the new law enters into force.
- **The position of indirect purchasers in cartel damages proceedings is strengthened.** The new law introduces a presumption in favor of indirect purchasers that the direct purchasers passed on the overcharge to them in case the indirect purchaser proves (i) that the defendant infringed Art. 101 or Art. 102 TFEU or the corresponding provisions of the Act against Restraints of Competition, (ii) the infringement resulted in an overcharge for the direct purchaser and (iii) the indirect purchaser bought products that were affected by the infringement. The presumption can be rebutted, but the defendant bears the burden of proof in this regard. It should be noted that only indirect purchasers, but not the defendants benefit from the pass-on presumption.
- **If defendants want to rely on the passing-on defense, they must prove that an overcharge was passed on by the direct purchasers wholly or in part to their own customers.** The German Federal Court of Justice already accepted the existence of such a defense in the past, but set high requirements for proving passing-on. Since the new law simply states that a passing-on defense is available, but does not contain any explanations on how passing-on needs to be proven, there are good arguments that the requirements set by the Federal Court of Justice still apply.
- **The new law considerably reduces the cost risk of litigation for the claimant.** Under German procedural law, plaintiffs who (partly) lose a case must pay the statutory fees for the defendant(s). These statutory fees are dependent on the amount claimed and can be up to EUR 270,000 per defendant in the first instance alone. Suing all cartelists could

thus mean a high cost risk for the claimant. While in the past some plaintiffs tried to advert that risk by suing only one or a few member(s) of a cartel for the full amount of damages, the defendants then joined the other cartelists to the proceedings by impleading them to be able to claim compensation from them later. Some courts found that in case the plaintiff lost, all intervenors were entitled to the same statutory fees as the defendant. The new law limits the risk exposure for the plaintiff by stipulating that the overall amount of statutory fees all intervenors (independent of their number) may demand if the case is lost may not exceed the amount of statutory fees to be reimbursed to one defendant.

It is expected that the new law will further increase Germany's attractiveness as a place of jurisdiction for cartel damages claims.

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