

Latest Reform of German Competition Law Brings Clarity

IN SHORT

The Situation: Germany comprehensively revised its antitrust laws (Act Against Restraints of Competition), with the changes expected to enter into force in May 2017 after publication in the official journal.

The Reason: The reform was triggered by the requirement to implement the EU Damages Directive into national law.

The Impact: The updated law facilitates private antitrust damages actions, closes loopholes with respect to cartel damages liability, and introduces a size-of-transaction threshold for merger control.

Facilitating Private Antitrust Damages Actions

German's reform of its antitrust laws clarifies the rules regarding the disclosure of evidence, the passing-on defense, and the joint and several liability of cartel members.

Disclosure of Evidence in Damage Actions. Since most damages cases in Europe concern follow-on actions, claimants would strongly benefit from access to evidence collected or held by competition authorities or defendants. Contrary to U.S.-style litigation, it is generally difficult under German law to obtain such evidence.

Under the new rules, the claimant can request from anyone, including the (future) defendant, the disclosure of information and evidence required to establish a damage claim, even before bringing an action. The requesting party must reasonably specify which evidence, in order to avoid the appearance of a "fishing expedition."

The right can be enforced through a separate action. When ordering disclosure, the court will balance the relevance of documents, proportionality, and the legitimate interest of confidentiality in each case. Leniency statements (including evidence created during the leniency proceedings, such as minutes of witness hearings) and settlement statements are protected from disclosure. Other documents prepared for administrative proceedings by a party or the authority cannot be disclosed until the proceedings are terminated.

The claimant can use interim relief proceedings for disclosure of a final decision by the European Commission or another competition authority within the European Competition Network.

The defendant can request disclosure of evidence required to defend against a cartel damages claim from anyone in possession of such evidence, but only once an action has been brought.

Extension of the Statute of Limitation from Three to Five Years. The limitation period for bringing cartel damages claims is extended from three to five years. It does not start before the end of the year in which the claim arose, the infringement ceased, and the claimant knows, or could be reasonably expected to know, the facts of the infringement, that these facts actually amounted to an infringement, and the identity of the infringer.



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Codifying the Passing-On Defense/Indirect Purchaser Claims. The new rules confirm that defendants can rely on the passing-on defense but bear the burden of proof.

When bringing an action against the cartel, indirect customers can rely upon a rebuttable presumption that the damages were passed on, if the indirect customer can show that:

- The defendant committed an infringement of competition law;
- The infringement resulted in an overcharge for the defendant's direct customer; and
- The indirect purchaser purchased goods or services that were the object of the infringement, or purchased goods or services derived from obtaining these.

Limitations on Joint and Several Liability of Cartel Members. Under general German tort law, cartels are already jointly and severally liable and any claimant can seek full compensation from any of the cartelists. The new rules limit joint and several liability, in order to protect leniency applicants:

- The liability of immunity recipients is in principle limited to damages caused to their direct or indirect purchasers or suppliers;
- In case of settlement, the settling infringer will be released from liability for the share of the harm for which it is responsible; and

Under certain circumstances, infringers that are small or medium-sized enterprises may also benefit from a limitation on their liability.

Merger Control—Introducing an Alternative Value-Based Threshold

The new rules introduce an alternative transaction-value-based threshold for merger filings. If the parties meet the combined worldwide turnover threshold (>€500 million), and one party meets the domestic turnover threshold (>€25 million), but neither the target nor any other party meets the second domestic turnover threshold (>€5 million), a transaction is nevertheless notifiable if the transaction value exceeds €400 million and the target has significant activities in Germany.

The transaction value includes the purchase price (including all assets and other monetary payments) and the value of any liabilities of the seller assumed by the purchaser. In complex M&A transactions, that calculation may not be easy, making it difficult for the parties to assess merger filing requirements.

Being "active" in Germany does not imply earning revenue in Germany. Rather, it depends on the location of the target's customers and, more specifically, the location of the designated use of the products. A target would be "active" in Germany where, for example, users in Germany would benefit from the services offered by the target.

Whether the target's activity in Germany is "significant" depends on a various criteria, such as the sector or the maturity of the market concerned. The condition is met where, for example, the target markets a free software product targeted at all consumers and used by more than one million users in Germany. On the other hand, where the target achieves considerable turnover worldwide but not in Germany, only the traditional turnover-based threshold should apply.

Closing of Loopholes with Respect to Liability for Cartel Damages

Previously, the parent company could be fined only if it failed to prevent the subsidiary's infringement and thereby violated its own supervisory duty. Under the new rules, both the subsidiary and the parent company can be fined and are jointly and severally liable.

The reform also closes a well-known gap in the current legislation that allowed companies to escape fines through restructuring, mainly regarding certain asset deals or internal split or spin offs, particularly where the addressee of the fining decision sold its assets and subsequently ceased to exist.

THREE KEY TAKEAWAYS

1. With the updated law, Germany will continue to be a preferred jurisdiction for follow-on private antitrust litigation.
2. The size-of-transaction threshold will expand the scope of German merger control and might be a precursor to similar changes in the EU.
3. The reform closes a loophole in the current legislation

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CONTACTS



Philipp Werner
Brussels



Carsten T. Gromotke
Frankfurt

that allowed companies to escape fines through restructuring.



Johannes Zöttl
Düsseldorf

*Bernhard Hofer and Lucia Stoican
of the Brussels Office assisted in
the preparation of this
Commentary.*

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