Draft German law implementing EU Damages Directive

**German Competition Law Blog**
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**Withdrawal, unavailability, uncorrected version**

Please note that this is the unofficial English version of the Draft German law implementing EU Damages Directive. The final version may differ.

On Friday, 1 June 2016, the German Federal Ministry of Economics finally published its draft law implementing the European Directive providing for damages for infringements of competition law ("Damages Directive").

The Damages Directive (Council Directive 2014/104/EU, hereinafter referred to as “the Directive”) is a regulation of the European Union.  This directive is due to be implemented in 2018.  It was designed to harmonise national law with the requirement that anyone can claim compensation for any harm caused by a competition law infringement.

In November 2015, the Council of the European Union approved the long awaited Damages Directive after more than ten years of intense debate in the EU.  The purpose of the Damages Directive is to ensure that damages for competition law infringements are paid within a reasonable period of time and that claimants are granted fair access to national courts.  The Damages Directive thus establishes the right to full compensation for antitrust infringement.

The Directive establishes the mandatory application of court-ordered disclosure in all cartel cases.  The Directive also includes a number of important changes in case of classical hard-core cartels, but could lead to a later start of the statute of limitations for damage claims by claimants that were not direct or indirect customers of the infringer.

The draft law to be passed by both houses of the German parliament ("Reichstag") by the end of the year.  This time frame appears quite ambitious.  In any event, Germany has to implement the Damages Directive by 27 December 2016.

### Draft law

**Article 1**

The draft law sets out to bring German law fully in line with the Damages Directive, but also includes changes to other aspects of German competition law.  In the current German law, the right to full compensation for antitrust infringement is limited to cartel members/defendants.

**Article 2**

Under the draft law, the new Section 10 (1) of the German Act against Restraints of Competition (Competition Act, "GWB") cuts out – or at least modifies – the right to full compensation for cartel infringements.

### Legal framework

**Article 3**

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### Discussion

**Article 4**

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### Disclosure of evidence

In the Draft Directive, the draft law in 193(2) sets out to bring German law fully in line with the Damages Directive, but also includes changes to other aspects of German competition law.  In the current German law, the right to full compensation for antitrust infringement is limited to cartel members/defendants.  Discussion can be requested during a pending damages proceeding.  In addition, a claimant could also request disclosure before a damages claim has been brought to court.

**Article 5**

Examples of documents that might be subject to disclosure include (i) decisions by a competition authority; (ii) information that the competition authority has obtained in the course of its proceedings; (iii) documents relating to leniency programs; (iv) documents that were prepared by a natural or legal person that either cooperated directly or as a leniency applicant with the competition authority; (v) documents that were obtained by the competition authority under a leniency program and were produced to the leniency applicant; and (vi) documents that the competition authority disclosed to the leniency applicant.

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of limitations in case of a mere information exchange or an abuse of a dominant position. While the long-standing status of limitations would remain 30 years, the limitation period would be longer only in case of a suspension of an antitrust violation.

Suspension. As is the case under current German law, the statute of limitations would be suspended upon an investigation by the European Commission, the EC, or another relevant competition authority or simply

Joint and several liability

Companies violating competition law would continue to be jointly and severally liable.

...Exemption for immunity applicants and SMEs. However, under the new law – in line with the Damages Directive – immunity applicants as well as small and medium-sized companies would under certain conditions be exempt from joint and several liability only, liable to their direct and indirect customers. While the exemption for small and medium-size companies will likely still play a significant role in practice, the limitation of an immunity applicant’s liability in the future would have important implications for class-action strategies. In general, immunity applicants are in the future only liable to their direct and indirect customers (and suppliers). In contrast, an immunity applicant will continue to be liable to other upstream parties (if they cannot derive a full compensation from the downstream customers).

Contribution claims. Enterprise jointly and severally liable could claim contribution from each other, based on their respective liability for the infringement. The draft law also provides that the (three-year) statute of limitations for contribution claims begins to run only at the time that the enterprise demanding contribution has paid damages to the claimant. This retains the problem under current German law that there is a significant risk of contribution claims among the enterprises involved in an antitrust infringement because of time-limited even before damages are paid to the claimant.

Standing of indirect customers/paying on behalf

The draft law also contains provisions on the standing of indirect customers as well as on the paying on behalf.

...Standing of indirect customers. Draft Section 33c (3) GWB stipulates that indirect customers have standing to claim damages. While the standing of indirect customers has already been recognized under current law by the German Federal Court of Justice in its landmark ruling in the SMB case, the draft law contains a new article that provides an explicit legal basis in order to avoid any doubt on this matter. Moreover, the draft law would also impose a legal risk for indirect customers if they continue to pay the price increase on the overall market (the law’s reasoning repeatedly refers to such claims, even stating that a cartel “regularly” leads to higher prices). The draft law would thus be the first to introduce a standing of indirect customers. However, it is important to note that this provision only works for the indirect customers’ advantage, but could not be invoked for defendants under a damages action brought by direct customers.

...Passing-on defence. While the Federal Court of Justice has already recognized under current law that defendants can invoke the passing-on defence, they noted the burden of proof. The draft law contains to recognize the passing-on defence, but does not stipulate the exact requirements that defendants have to meet for a passing-on to succeed. The requirements for a passing-on established by the German courts are currently quite stringent and extremely difficult to meet. As this significantly increases the adverse cost risk of claimants, many potential claimants have tried to limit this cost risk by bringing a damages action based on joint and several liability (now also possible under current law). This would mean that the claimant has to show: (i) that the market conditions in general (in particular elasticity of demand, price developments and product characteristics) are such that a passing-on of damages is very likely; (ii) that the direct customers’ price increase was not offset by any negative effects, such as a decline in demand; and (iii) how value added by the direct customer (if any) relates to the direct customer’s price increase. The draft law would thus make it easier for indirect customers successfully to claim damages by establishing a lower standard of proof.

...Standing of indirect customers. While the draft German law does not contain any specific provision on umbrella claims, it is interesting that the tax agency repeatedly refers to such claims, even stating that a “suitable” risk to its higher price if the cartel member that was not sued is impleaded by the defendants) can demand reimbursement of total legal fees of EUR 270,000 (instead of 9x EUR 270,000) if claimant were to bring a damages action only against a single cartel member and if the other cartel members were to join the proceedings as interveners, the nine intervening cartel members could only claim reimbursement for if the claimant were to lose. In the example, this would mean that if demand reimbursement of legal costs of EUR 270,000. Appeals has held that all intervening parties (in particular other cartel members that were not sued, but decided to join the proceeding because they were impleaded by the defendants) can demand reimbursement of at least costs of EUR 270,000. In case of a cartel consisting of 10 companies, the adverse cost risk would thus be EUR 2.7 million in the first instance proceeding if the claim was brought against all cartel members. While the draft German law makes it easier for indirect customers successfully to claim damages by establishing a lower standard of proof, the adverse cost risk of claimants would thus increase if the claim was brought against all cartel members. As this significantly increases the adverse cost risk of claimants, many potential claimants have tried to limit this cost risk by bringing a damages action based on joint and several liability (now also possible under current law). This would mean that the claimant has to show: (i) that the market conditions in general (in particular elasticity of demand, price developments and product characteristics) are such that a passing-on of damages is very likely; (ii) that the direct customers’ price increase was not offset by any negative effects, such as a decline in demand; and (iii) how value added by the direct customer (if any) relates to the direct customer’s price increase. The draft law would thus make it easier for indirect customers successfully to claim damages by establishing a lower standard of proof, but it is unclear whether the draft law’s defence on this point has to be understood as a test for the threshold (EUR 270,000).