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The suspense has an end - Highest German court adopts decision with major impact for ongoing damage claims

Daniel von Brevern (McDermott Will & Emery) · Tuesday, June 12th, 2018

In July 2005, Germany adopted a new law providing that the limitation period for damage claims is suspended during the investigation of a competition authority ("**Suspension Provision**"). Ever since, it was unclear whether the Suspension Provision applies only to infringements committed after the new provision came into force, or whether it has retroactive effect. In a decision of 12 June 2018, the German Federal Supreme Court ("**BGH**") confirmed that the Suspension Provision applies to damage claims relating to infringements committed prior to July 2005. The decision will be of particular relevance for follow-on damage claims with respect to cartels which ran prior to July 2005 - most importantly the "truck cartel", which ran from 1997 to 2011.

Background

Damage claims are subject to the statute of limitation. Under German law, the "standard" limitation period is five years. The five year period starts once the infringement has ceased and the claimant knows or can be reasonably expected to know of his claim. In addition, there is an "absolute" limitation period of ten years. The ten year period expires regardless of whether the claimant knows about the infringement or not. Cartels are, per definition, secret and not known to the claimant. Even if the cartel is being investigated by the European Commission, the German Federal Cartel Office or any other authority, the claimant may not know about the infringement until a decision is being adopted. And if a decision is adopted, but appealed by the cartelists, the decision only has a binding effect once the decision is final and can no longer be appealed. It is therefore quite likely that the period between cartel infringement and final decision exceeds ten years. As this could in practice prevent follow-on damage claims, Germany introduced in July 2005 the Suspension Provision into the German competition law. The Suspension Provision stipulated that the limitation period for bringing damage claims is suspended during the investigation by competition authorities (similar to Art. 10(4) of the Damages Directive, which, however, had to be implemented by Member States only by 26 December 2016). The suspension begins with the competition authority initiating proceedings and ends six months after the final decision has been adopted. For example, if the European Commission investigates an infringement for four years before adopting a decision, and the subsequent appeals process takes another three

and a half years, the limitation period is suspended for eight years.

Ever since the Suspension Provision was adopted, its scope of application was unclear. Does the suspension only apply to infringements committed after the new law was adopted in July 2005? Or does the Suspension Provision have a retroactive effect? Not surprisingly, cartelists and their legal representatives argued in favor of the former, while damage claimants insisted that the latter is the right approach. The courts were equally divided. The District Court in Mannheim and the Higher Regional Court in Karlsruhe held that the suspension did not apply retroactively, and that infringements committed prior to July 2005 were therefore time-barred. The District Courts in Berlin, Dortmund and Hannover, as well as the Higher Regional Court in Düsseldorf, adopted a claimant-friendly position and considered the Suspension Provision applicable to all claims, subject only to the condition that the claim was not yet time-barred in July 2005.

The Decision

The BGH has now resolved the dispute in a decision adopted on 12 June 2018. The case involves a cement cartel investigated and fined in 2003 by the Federal Cartel Office. The plaintiff claims damages for infringements committed between 1993 and 2002. The lower courts, including the Higher Regional Court in Karlsruhe, rejected the claims. They argued that the Suspension Provision does not apply as the infringements were committed prior to July 2005, and that the claims are therefore time-barred.

In its decision of 12 June 2018, the BGH disagrees and confirms that the Suspension Provision does apply to infringements committed prior to July 2005. The decision is not yet published, but the BGH's main arguments can be inferred from the BGH's [press release](#). The BGH essentially relies on a long-established general principle of German law. Under this general principle, if the limitation period of a claim is amended, the new provision applies as of its entry into force, as long as the claim is not yet time-barred at the time. The situation would only be different if the amended limitation period was accompanied by fundamental changes in substantive law, or if the legislator had clearly stated that the general principle does not apply. However, neither was the case with respect to the Suspension Provision.

Impact

The BGH's decision has a major impact for all follow-on damage claims involving claims for infringements committed prior to July 2005. The most prominent example is the truck cartel, which ran from 1997 to 2011. The European Commission's investigation took almost six years, from at least September 2010 (when MAN submitted a leniency application to the European Commission) until July 2016 (when the European Commission adopted a settlement decision against all but one cartelist). During this time, the statute of limitation was suspended, effectively extending the statute of limitation from ten to more than 16 years. Following the BGH's decision, it is now settled that this suspension applies to potential damage claims for the entire cartel period, including the period from 1997 to 2005.

But the decision's impact is not limited to the truck cartel. The cement, sugar and rail cartels are further examples of cases which are already litigated and where the BGH's decision will become relevant. And there may well be others. The suspension of the statute of limitation ends with the final decision, i.e. once a decision by a competition authority is no longer subject to further appeal. The appeal process for decisions by the European Commission, the Federal Cartel Office and other authorities often spans over many years. There are therefore a number of cases where claims for infringements which ended long ago may still not be time-barred.

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