Kluwer Competition Law Blog

Draft German law implementing EU Damages Directive

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On Friday, 1 July 2016, the German Federal Ministry of Economic Affairs finally published its draft law implementing the European Union directive governing actions for damages for infringements of competition rules ("***Damages Directive"***).

The drafting process by the German Federal Ministry of Economic Affairs, which was formally in charge of drafting the law, took place in close cooperation with the German Federal Ministry of Justice. The draft law still has to be approved by the German government (which is only a formality) and will afterwards be presented to the German parliament, which will very likely make a number of modifications to the draft. While the Federal Ministry of Economic Affairs – at least officially – keeps repeating that it expects the draft law to be passed by both houses of the German parliament (*Bundestag and Bundesrat*) by the end of the year, this timing appears quite ambitious. In any event, Germany has to implement the Damages Directive by 27 December 2016.

DAMAGES DIRECTIVE

In November 2014, 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 anyone can claim compensation for any harm caused by a competition law infringement. Accordingly, the Damages Directive establishes certain minimum requirements that the EU member states have to implement by 27 December 2016, such as:

- The right to full compensation, *i.e.*, the member states have to ensure that anyone having been harmed by a competition law infringement can claim and obtain full compensation;
- Binding effect of antitrust decisions, *i.e.*, while decisions by the European Commission finding a competition law infringement are already binding on the courts of the member states, the Damages Directive now also makes decisions by national competition authorities finding an antitrust infringement binding on the civil courts in that country;
- Disclosure of evidence, *i.e.*, the courts have to be able to order the claimant, defendant, or third parties to disclose relevant evidence to either claimant or defendant if the party requesting disclosure presents a reasoned justification containing reasonably available evidence sufficient to support the plausibility of the plaintiff's damages claims;
- Extended limitation periods, *i.e.*, the regular statute of limitations has to be five years from the time the infringement has ceased and the plaintiff knows or can reasonably be expected to know (i) the relevant behaviour and the fact that it constitutes an infringement of competition law, (ii) that the infringement caused harm to plaintiff, and (iii) the identity of the infringer; the statute of

limitations is also suspended pending an investigation by the European Commission or a national competition authority;

- Joint and several liability, *i.e.*, enterprises infringing competition law are – with a narrow exception for immunity applicants and small or medium-sized companies – jointly and severally liable;
- Passing-on defence, *i.e.*, cartel members can defend themselves by arguing that claimants have passed on the cartel overcharge to their own customers;
- Standing for indirect customers, *i.e.*, indirect customers can also claim antitrust damages on the basis of a rebuttable presumption that their suppliers have passed on the cartel overcharge to them if it can be shown that (i) the defendant committed an infringement, (ii) the infringement resulted in an overcharge for the direct purchaser, and (iii) the indirect purchaser purchased the good or services that were the object of the infringement.
- Easier quantification of harm, *i.e.*, the Damages Directive establishes a rebuttable presumption that the infringement of antitrust law caused harm, and requires national courts to be able to estimate the amount of harm suffered.

DRAFT GERMAN LAW

German law as well as its interpretation by the courts has become increasingly claimant-friendly in recent years. Accordingly, German law already largely is consistent with the standards established by the Damages Directive. Nonetheless, German law in certain respects still lags behind the requirements of the Damages Directive.

The draft law now sets out to bring German law fully in line with the Damages Directive, but also includes changes to other aspects of German competition law (such as merger control thresholds as well as the question of legal succession regarding fines for competition law infringements). This alert memo, however, is limited to outlining the main changes and noteworthy points regarding cartel damage claims.

Right to full compensation

Under the draft law, the new Section 33a (1) of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, "***GWB***") sets out – as does current German law – the right to full compensation for competition law infringements.

- ***Liability of parent companies***. It is noteworthy, however, that the draft law is silent on the question of whether a parent company is liable for a competition law infringement (directly) committed by a subsidiary. It is generally accepted – and has repeatedly been stressed by European Commission officials – that the Damages Directive establishes the liability of a parent company for antitrust infringements by subsidiaries under European law forming part of the same undertaking.[1] It is understood that while the Federal Ministry of Economic Affairs shares this view, the Ministry of Justice was concerned about the repercussions such a parental liability may have on other areas of German civil law – for fear of uprooting the long standing principle of the separation of corporate entities, forbidding the piercing of the corporate veil, that is at the heart of German corporate law. The draft law thus would leave the clarification of this important question to the German courts (and ultimately the European Court of Justice).
- ***Binding effect of antitrust decisions***. As is already the case under current law, Section 33b GWB of the draft law provides for a binding effect not only of European Commission and FCO decisions, but also of decisions by other national competition authorities (or courts acting as

such). German law thus would go beyond the Damages Directive, which only requires that decisions of other national competition authorities serve as *prima facie* evidence of an antitrust infringement, but does not require giving such decisions a binding effect.

- ***Quantification of damages***. The draft law does not lead to any noteworthy changes regarding the quantification of damages. While the draft law now stipulates an express (rebuttable) presumption that a cartel causes harm, this was already generally recognized by the lower German courts. The German courts also would remain free – as they are under current law – to estimate the actual amount of damages suffered.

Disclosure of evidence

Under the draft law, new Section 33g GWB provides for the disclosure of specific documents under German law. Disclosure can be requested from cartel members/defendants as well as from third parties. In addition, cartel members/defendants can request disclosure from claimants. Disclosure can be requested during a pending damages proceeding. In addition, a claimant could also request disclosure before a damages claim has been brought in court.

- ***Broad disclosure***. Surprisingly, the draft law goes beyond the requirements of the Damages Directive. While even under current law the German courts can – in their discretion – order the disclosure of certain documents, the courts were reluctant to do so in practice. The draft law would establish a right to disclosure under German substantive law (even though the Damages Directive only requires member states to enable the courts to order disclosure in the courts' discretion). Accordingly, the courts would no longer have wide discretion whether to order disclosure, but could only refuse to do so if the disclosure request is disproportionate.
- ***Documents exempt from disclosure***. Amnesty/leniency statements as well as settlement submissions are excluded from disclosure. The draft law considers transcripts of witness statements given by individuals that either cooperate directly or on behalf of a company with the FCO under its leniency program as leniency statements and thus as protected from disclosure. In contrast, pre-existing documents submitted as annexes to a leniency application would – in contrast to the German Federal Cartel Office's ("***FCO***") current enforcement practice – no longer be protected from disclosure. Other documents[2] could only be disclosed after the relevant competition authority has closed its investigation.
- ***Cost reimbursement***. According to Section 33g (7) GWB in the draft law, the party requesting disclosure has to reimburse the disclosing party for reasonable costs associated with disclosure. As the Damages Directive does not explicitly allow the member states to impose the costs associated with disclosure on the requesting party, there are good arguments that the draft German law's respective provision is not in line with the Damages Directive. However, this provision could also be to the advantage of claimants as cartel members/defendants likewise would have to bear the costs of their discovery requests against claimants. In addition, this provision would make it very difficult for German courts to refuse disclosure based on the costs associated with it – after all, the requesting party would have to bear reasonable costs in any event.

Statute of limitations

In line with the Damages Directive, the draft law in § 33h GWB extends the current statute of limitations under German law.

- ***Statute of limitations***. Under the draft law, the limitation period would no longer be three years

beginning at the end of the year in which the claim arose, and the claimant obtained the requisite knowledge of (i) the circumstances giving rise to the claim, and (ii) of the identity of the obligor, or would have obtained such knowledge had they not been grossly negligent, but rather five years from that point in time. In addition, the limitation period only begins under the draft law if the claimant knew – or absent gross knowledge would have known – that the acts in question actually amounts to an antitrust violation.[3] This additional requirement would most likely not lead to any significant changes in case of classical hard-core cartels, but could lead to a later start of the statute of limitations in case of a mere information exchange or an abuse of a dominant position. While the longstop statute of limitations would remain 10 years, the limitation period would no longer only start once the claim has arisen, but the start of the limitation period would require in addition that the antitrust infringement has ceased.[4]

- ***Suspension***. As is the case already under current German law, the statute of limitations would be suspended while an investigation by the European Commission, the FCO, or another national competition authority is ongoing.

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 (and only liable to their direct and indirect customers). While the exception for small and medium-sized companies will likely not play a significant role in practice, the limitation of an immunity applicant's liability in the future would have important implications for claimants' recovery strategies. In general, immunity applicants will in the future only be liable to their direct and indirect customers (and suppliers); in contrast, an immunity applicant will continue to be liable to other injured parties if they cannot obtain full compensation from the other enterprises involved in the antitrust infringement.
- ***Contribution claims***. Enterprises jointly and severally liable could claim contribution from each other, based on their relative responsibility 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 solves the problem under current German law that there is a significant risk of contribution claims among the enterprises involved in an antitrust infringement becoming time-barred even before damages are paid to the claimant.

Standing of indirect customers/passing-on defence

The draft law also contains provisions on the standing of indirect customers as well as the passing-on defence.

- ***Standing of indirect customers***. Draft Section 33c (2) 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 *ORWI* case, the draft law makes it easier for indirect customers successfully to claim damages by establishing a presumption that direct customers have passed on a cartel overcharge to the indirect customers. The German courts would then be free to estimate the extent of this pass-on.

However, it is important to note that this presumption only works to the indirect customers' advantage, but could not be invoked by defendants to counter 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 raise the passing-on defence, they bear the burden of proof. The draft law continues to recognize the passing-on defence, but does not stipulate the exact requirements that defendants have to meet to prove a passing-on. The requirements for a passing-on established by the Federal Court of Justice are quite stringent and extremely difficult to meet.[5] Some voices in legal doctrine have argued that the Damages Directive has somewhat lowered these requirements, but it is unclear whether the draft law's silence on this point has to be understood as a tacit approval of the stringent *ORWI*

Umbrella claims

While the draft German law does not contain any specific provision on umbrella claims, it is interesting that the law's reasoning repeatedly refers to such claims, even stating that a cartel "regularly" leads to higher prices on the overall market (*i.e.*, also of non-cartel members). This statement echoes economic theory and may well increase the German courts' willingness to entertain a presumption of umbrella effects.

Cost risk in case of intervener

The draft law also contains a very important provision that drastically reduces the cost risks of claimants.

- ***Significant adverse cost risk under current law***. Under current German law, a number of courts have held that a losing claimant has to reimburse intervening parties for their legal costs at the same rate as defendants. As this significantly increases the adverse cost risk of claimants, many potential claimants – in particular in case of cartels consisting of numerous cartel members – following these decisions have decided against bringing a damages action. In case of a damage claim of EUR 30 million, the adverse cost risk is approximately EUR 270,000 per defendant (in the first instance proceeding). 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 some claimants have tried to limit this cost risk by bringing a damages action based on joint and several liability only against one or a few cartel members, in particular the Düsseldorf Court of 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 legal costs of EUR 270,000.
- ***Solution under the draft law***. The draft law in Section 89a (3) GWB would limit the reimbursement of legal fees of all interveners combined to the amount of legal fees a single defendant could demand reimbursement for if the claimant were to lose. In the above example, this would mean that 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 demand reimbursement of total legal fees of EUR 270,000 (instead of 9x EUR 270,000) if claimant were to lose.

It will be interesting to see what changes the draft law will undergo in parliament. In any event, it is already clear that it will ultimately become easier to claim damages for competition law violations in Germany.

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