ALERT MEMORANDUM

Germany implements the EU Antitrust Damages Directive

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On March 10, 2017, the German Parliament adopted the 9th amendment to the German Act against Restraints of Competition ("9th Amendment"). While many of the revisions are of a declaratory nature, some changes should make cartel damages actions in Germany more attractive – in particular the new disclosure regime, which is unprecedented in German law.

To transpose Directive 2014/104/EU of November 26, 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union ("EU Antitrust Damages Directive") into national law, the German Parliament has adopted the 9th Amendment and revised the law governing cartel damages actions (the German Federal Council's approval and the promulgation in the Federal Law Gazette are still outstanding). Entry into force is expected before the summer.

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The EU Antitrust Damages Directive's overall aim is to remove practical obstacles to compensation for victims of infringements of EU competition law and to fine-tune the interplay between private damages actions and public enforcement of the EU competition rules by the European Commission and national competition authorities. Notably, the German legislator was required to implement the directive by December 27, 2016.

Given the relatively well developed German law governing cartel damages actions, most of the amendments are of a rather declaratory nature. Many principles that are already established in German case law are now codified in written law. Yet, some of the amendments will likely have an impact on the German cartel litigation landscape and are likely to keep Germany – together with the UK and the Netherlands – among the main forums within the European Union where cartel victims choose to bring their damages actions.

Major changes brought about by the 9th Amendment

Primarily, the 9th Amendment serves to implement the requirements set out in the EU Antitrust Damages Directive with respect to private cartel damages proceedings, though the amendment also brings about changes related to administrative cartel proceedings. Some of these requirements, especially with regard to the binding effect of decisions by cartel authorities, did not require any changes to the law. Before and after the 9th Amendment, decisions of the European Commission, the German Federal Cartel Office ("FCO") and of competition authorities of other Member States were and remain binding on the adjudicating national court. However, amendments with respect to the following aspects were indeed required in order to comply with the EU Antitrust Damages Directive.

Disclosure of evidence

The central and probably most controversial aspect of the EU Antitrust Damages Directive regards the possibility of obtaining disclosure of evidence through court orders, a legal concept that was (and still is) largely uncommon in German and continental European civil litigation. Contrary to the situation under UK disclosure, let alone US discovery rules, it is generally difficult under German law to obtain documents or other forms of evidence in the opposing party's possession. While certain tools already existed in order to enable a claimant to seek information or documents from a defendant, such tools were so far reluctantly applied by the courts in cartel damages proceedings.

Under the revised law, anyone in possession of evidence required to establish a (potential) damage claim – including the defendant – is obliged to disclose such pieces of evidence upon request of the claimant. Conversely, anyone in possession of evidence required to defend against a cartel damage claim is also obliged to disclose such evidence (this is particularly important with regard to the so-called "passing-on defense", see below). In an attempt to avoid fishing expeditions, the revised law requires the requesting party to reasonably specify such evidence.

Whereas infringers may only demand disclosure of evidence once a damages action against them is pending, potential claimants may request disclosure even before initiating an action for damages by separately suing for disclosure. Going beyond the requirements of the EU Antitrust Damages Directive, they can even request interim relief in order to gain immediate access to final and binding decisions of competition authorities (the revised law leaves room for interpretation whether the infringer may insist on redactions before disclosing such decision).

Following heated debate as to the scope of documents and information that must be disclosed upon request, the revised law includes some blanket prohibitions on courts ordering disclosure ("black list"). In particular, leniency statements (including transcripts of witness statements made by individuals cooperating with the FCO) and settlement submissions are exempt from any form of disclosure in order to safeguard the effectiveness of public enforcement. Other documents prepared for administrative proceedings by a party to the proceeding and/or by the authority will only be disclosable once those proceedings have been terminated ("grey list"). All other relevant documents, including pre-existing (contemporaneous) documents, are – in principle – disclosable ("white list"). However, the scope of disclosure has to be determined by the court, balancing relevance, proportionality, and legitimate interests of confidentiality in each individual case. The scope of disclosure is likely to become a key area of dispute between the parties, requiring the courts to break new ground, particularly when conducting the required balancing exercise with respect to evidence falling within the scope of the white list.

Further, it is worth noting that the revised law obliges the requesting party to reimburse the disclosing party for "reasonable costs" associated with disclosure. The EU Antitrust Damages Directive does not contain any such obligation which might prove helpful to prevent excessive disclosure requests.

Finally, the new legislation also entitles German courts – again, upon request of the claimant – to request that the FCO transfers evidence included in its case file to them. However, this possibility only exists during a pending cartel damages action and is subject to restrictions on relevance and proportionality of requested disclosure.

Damages – scope and passing-on

As already acknowledged *prima facie* by several German courts, the 9th Amendment explicitly stipulates a rebuttable presumption that a cartel causes harm. However, this only concerns the *occurrence* of any harm, not the *quantum* of damages.

While the EU Antitrust Damages Directive does not entail changes to the current legal framework as far as the determination of potential overcharges are concerned, the new regime does change the setting with respect to the passing-on of any such overcharges. Passing-on of overcharges occurs where an infringement led to price increases that were, in whole or partially, passed along the distribution chain by a customer. Passing-on can be used both as a "shield" and a "sword": When facing a damages action by a direct customer, an infringer can invoke the defense that the claimant has passed on the whole or part of the overcharge to its customer(s). In contrast, in order for an indirect customer to establish that it suffered harm and is entitled to claim compensation from the infringer, it must prove that the overcharge paid by the direct customer was passed on to it.

In past and pending cases, while passing-on was in principle available both as a shield and a sword, it was largely used by defendants as a shield. However, the landmark *ORWI* decision of the German Federal Court of Justice imposed a high threshold on defendants to meet their burden of proof. The revised law now entails certain alleviations for defendants to meet that burden.

What is more, it also provides for a passing-on presumption to the benefit of the indirect customer where such indirect customer is able to 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 customer has purchased goods or services that were the object of the infringement, or has purchased goods or services derived from or containing them.

The burden for rebutting such a passing-on presumption will be on the infringer. The fact that the revised law, in accordance with the EU Antitrust Damages Directive, provides for both a presumption of harm to the benefit of the direct customer, and a presumption of passing-on to the benefit of the indirect customer gives rise to concerns, as it may lead to overcompensation to the detriment of the infringer. The concept of overcompensation, even if for purposes of deterrence, is not acknowledged under German law and explicitly aimed to be avoided under the EU Antitrust Damages Directive. At least, the presumption of passing-on does not extend to a particular passing-on rate. Just like the presumption of harm, it only relates to the *occurrence* of passing-on as such.

Joint and several liability

Even before the 9th Amendment, under the general principles of German civil law, the parties to anti-competitive behavior were jointly and severally liable for the damage caused. This means that a claimant can seek full compensation from any of the infringers and that it is, as a subsequent step, incumbent on the infringer to claim compensation from the other infringers in respect of the share of the harm for which they are responsible.

The 9th Amendment now provides for three exceptions to this general principle, notably in respect of an infringer that (i) settled with the claimant, (ii) is an immunity recipient, or (iii) is a small or medium-sized enterprise ("SME").

First, if the infringer has settled with the claimant, the settling infringer will in principle be released from liability in respect of the share of the harm for which it

is responsible, except where the other infringers are unable to pay damages (*e.g.*, in the event of insolvency). The non-settling infringers are precluded from bringing a contribution claim against the settling infringer by way of contribution. This change further facilitates settlements.

Second, if the infringer is an immunity recipient, it will in the future be liable only for damage caused to its own direct and indirect customers (or suppliers), except where the claimant is unable to obtain full compensation from the other infringers (*e.g.*, in the event of insolvency).

Third, if the infringer is an SME, it is liable only for the damage caused to its own direct and indirect customers, provided that:

— The SME's share of the relevant market was below 5% at any time during the infringement period;

— Applying the general principle would irretrievably jeopardize the SME's economic viability and cause its assets to lose all their value;

— The SME did not lead the infringement;

— The SME did not coerce other undertakings to participate in the infringement; and

— The SME has not previously been found to have infringed competition law.

Statute of limitation

The standard limitation period for cartel damages claims was extended from three to five years. Further, the 9th Amendment brings about a change in the starting point of such limitation periods. The limitation period does not commence until the end of the year in which (i) the claim arose, (ii) the claimant knows, or can reasonably be expected to know, of the infringer's conduct, the fact that the acts in question actually amounted to an antitrust infringement, and the identity of the infringer, and – as a new requirement – (iii) the infringement has ceased. Irrespective of any knowledge, the maximum limitation period under the amended law is ten years, starting to run once a claim has arisen and the infringement has ceased.

Further, it is now stipulated that the limitation period for claims by which a jointly and severally liable infringer seeks to recover contribution from the other infringers does not commence before the infringer seeking contribution has paid damages to the claimant. This provision is appropriate, since under the old regime, a situation could arise whereby contribution claims became time-barred before damages claims had actually been brought.

Limitation of claimants' cost risk

One aspect of the 9th Amendment that might prove valuable for potential claimants is a limitation of their cost risk. Up to now, under the German "loser pays" system, a losing claimant had to reimburse the defendant(s), as well as all additional third parties that the defendant(s) impleaded in order to secure possible contribution claims, for their legal costs, albeit limited to the statutory rates. The 9th Amendment now limits the reimbursement of such legal fees of all impleaded third parties combined to no more than one hypothetical defendant's legal fees.

Temporal application

The 9th Amendment contains a specific provision for the temporal application of the revised law. In principle, its rules only apply to claims that arose after December 26, 2016.

However, the extended limitation periods will also apply to claims that already existed at that time, provided that they are not time-barred once the 9th Amendment enters into force. That said, the rules regarding the later commencement of the limitation period and the extended suspension of limitation periods are explicitly excluded from this retroactive application of the revised law.

Finally, the new provisions on the disclosure of evidence will apply only to damages actions initiated after December 26, 2016.

Conclusions

The 9th Amendment brings German competition law in line with the requirements of the EU Antitrust Damages Directive. Apart from several rather

cosmetic changes and written codifications of established case law, the new provisions on discovery are quite revolutionary and bring about a significant change to German civil law. It remains to be seen how German courts will interpret the provisions on relevance and proportionality of requested disclosure under the white list, and how they will balance these aspects against the other party's legitimate interests of confidentiality. In any event, with the new possibilities under the revised law – primarily the tools to gain access to evidence, but also the limited cost risk in cases where multiple third parties are likely to be impleaded, or the extended limitation periods – the incentives for cartel victims to pursue cartel damages claims in Germany have further increased. That said, in particular the new disclosure regime may lead to even longer proceedings.

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