

Securing and enforcing damage claims against cartel members

Guidelines

Managing directors and board members are fundamentally obliged to avert damage to their company. This also includes claiming compensation for damages suffered, if this makes economic sense.

This decision generally requires careful examination and consideration, which may take some time. However, you should bear in mind that damage claims cannot be asserted for an indefinite period.

Cartel damage claims are subject to a standard five-year statute of limitations, which begins to run when the company gains knowledge or has the possibility to gain knowledge of the circumstances establishing the claim. As a rule, the statute of limitations is triggered by the press release issued by the cartel authorities informing about the imposition of a fine, the existence, scope and duration of the cartel as well as its members. A peculiarity exists for claims that arose before 26 December 2016: for them, the five-year limitation period only applies if the claims were not yet statute-barred on 9 June 2017. They otherwise become statute-barred within three years of gaining knowledge or the possibility of gaining knowledge of the circumstances establishing the claim.

Irrespective of this, cartel damage claims become statute-barred at the latest 10 years after they arise, irrespective of knowledge. Especially in case of cartels that were founded a long time ago, the 10-year maximum period can create a need to act quickly after becoming aware of the cartel.

In all events, immediately after becoming aware of a cartel you should take provisional measures to secure relevant (electronic and physical) documents (invoices, orders, correspondence, etc.). Moreover, you should make sure that you do not destroy any documents after the expiry of the 10-year storage period.

1. Who is damaged by a cartel and thus entitled to assert claims?

Firstly, a company that has directly purchased goods or services from cartel members or – in case of a purcha-

sing cartel – sold goods or services to them, is entitled to assert a claim. However, companies that have purchased products impacted by the cartel from third parties that are not cartel members (for example, intermediaries), i.e. indirect customers, can also have a damage claim against the companies participating in the cartel. In this case, the legislator has even provided for a refutable presumption to the effect that the price mark-up caused by the cartel has been passed on to the indirect customer.

2. Securing claims/enforcing claims out of court

Several extrajudicial options are available to secure your claims against the statute of limitations. A proven means of securing a claim is, for example, to have the opposing party submit a waiver of the statute of limitations. During the term of the waiver, the claims against the waiving party are protected against the statute of limitations. A waiver of the statute of limitations prevents the need to rush into legal action in order to suspend the statute of limitations.

The commencement of (written or oral) settlement negotiations also suspends the statute of limitations for the duration of the negotiations plus a three-month grace period. Additionally, the focus of the settlement talks need not always be on the payment of damages. The (confidential) negotiation of better purchasing conditions can, in individual cases, have greater prospects of success than an attempt to enforce “real” damage payments.

Alternatively, the initiation of an out-of-court conciliation procedure at an officially recognised conciliation body has often proven successful in practice.

In this procedure, provided that the other party agrees to it, a neutral mediator works toward reaching an out-of-court settlement.

This option, which is less expensive than a lawsuit, is particularly suitable if purely bilateral settlement talks have no prospects of success.

Since the initiation of the conciliation procedure also suspends the statute of limitations, it simultaneously serves to secure your claims.

You should fundamentally make use of this time to process and document the amount of damage. You must identify, secure and process the documents and evidence (invoices, delivery bills and possibly also letters and e-mails) required to determine and prove the purchase volume of the product impacted by the cartel during the duration of the cartel.

3. Judicial enforcement of claims

If settlement talks fail or if a waiver of the statute of limitations or its extension is refused, the only remaining option is often to take judicial action.

However, this does not necessarily always lead to a decision procured through litigation. Experience shows that a lawsuit is a good way to bring your counterpart back to the negotiating table. Many court proceedings end with a (judicial) settlement.

Regardless of this, the time of filing the lawsuit should be chosen strategically. Cartels often trigger a wave of civil lawsuits. In this case, the following applies: those who take legal action earlier usually receive a title sooner and are able to enforce it (sooner).

In some constellations, however, it may be advisable to wait for the outcome of legal proceedings of other parties injured by the cartel. This is the case, for example, if you can expect a lawsuit to place an undue burden on your existing supply relationships. Prerequisite for this, however, is that there is no fear of the claims already becoming time-barred and/or that your claims are secured against the statute of limitation.

4. Who do I sue?

When you secure and enforce claims, bear in mind the fact that all cartel members are jointly and severally liable for the damages incurred. Hence, your company not only has a damage claim against your direct supplier, but also against the other cartel members.

Since the damage claims against each cartel member become statute-barred separately, you should consider taking measures to prevent the statute of limitations from running against the other cartel members and as well as your own supplier.

5. How do I determine my damage?

Since the implementation of the EU Cartel Damages Directive in the summer of 2017, German law contains a legal presumption to the effect that a cartel has basically caused damages. The cartel members must furnish proof to the contrary (reversal of the burden of proof). However, this presumption only applies to claims that arose after 26 December 2016.

Furthermore, the plaintiff always has to represent and prove the amount of the cartel damage.

The damage is usually the difference between the excessive price induced by the cartel and the price that would have been formed in the market without the cartel. It is often advisable to commission an economic expert opinion for the concrete calculation of the damage. In court, such an expert opinion is accorded greater value than your own calculation. Further essential prerequisites for calculating the damage incurred are invoices and receipts for deliveries of the product impacted by the cartel during the cartel period, which should be as complete as possible.

6. What are the prospects of success?

The success of a lawsuit can only be assessed on a case-by-case basis. However, both case law and the legal situation in Germany have developed in a plaintiff-friendly manner over recent years. This means that plaintiffs can largely rely on the investigation results of the anti-trust authorities and do not have to prove the infringement of antitrust law again. In addition, the German legislator implemented the EU Cartel Damages Directive in the summer of 2017, therewith providing further plaintiff-friendly tools to enforce damage claims. For example, there are now increased possibilities of demanding the surrender of evidence and provision of information from cartel members in order to strengthen your own damage claim.

7. How can I use resources effectively?

In order to use your resources optimally, it may make sense to communicate with other potentially injured companies in your industry. Jointly commissioned expert opinions save costs. Synergies can also be generated and thus costs saved if several affected companies retain the same law firm. In individual cases, it may also be advisable to cooperate with a litigation financier. We would be happy to put you in touch with an appropriate contact.

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