

## Guidance on securing and enforcing damage claims against cartel members

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### What should I do if I suspect my enterprise has become the target of illegal cartel agreements?

Managing directors and board members are obliged to ward off damages to their enterprises. This includes checking out possible damage claims and demanding compensation for damages incurred, if economically viable.

This decision generally requires careful consideration, which can be quite time-consuming. You should bear in mind that there is a limit to the period in which damage claims can be asserted. Cartel damage claims are subject to a five-year **regular limitation period**, which begins to run upon gaining knowledge, respectively the possibility of gaining knowledge, of the circumstances establishing the claim. The limitation period is usually triggered by the press release of the competition authority, giving notice of the imposition of a fine as well as the existence, parties, scope and duration of the cartel. **Claims** which accrue **prior to 26 December 2016** are subject to a peculiarity: the five-year limitation period only applies to them if they had not yet expired on 9 June 2017. In all other events, they become statute-barred within three years of gaining knowledge, respectively the possibility of gaining knowledge, of the cartel.

Independently of this, cartel damage claims expire irrespective of knowledge within a **maximum period of ten years** as of their accrual. Especially in case of cartels which were established many years ago, the 10-year maximum period can be grounds for swift action once knowledge has been gained of the cartel.

If your enterprise has been damaged by a cartel, the **first step** you should take is to instigate measures to **secure your claims**. These measures are generally associated with an attempt to reach an out-of-court settlement on the claims. The **judicial enforcement of your claim** is the **second step** and should only be considered if you have been unable to secure the claims and/or reach an out-of-court settlement.

#### 1. Who is the damaged party of a cartel and thus a rightful claimant?

First of all, an enterprise which has **directly** purchased goods or services from a cartel member is a rightful claimant. However, enterprises which have purchased cartel products from uninvolved third parties (e.g. intermediaries) (**indirect** customers) can also have a damage claim against the enterprises participating in the cartel. In this case, a refutable presumption decreed by the legislator actually exists to the effect that the cartel-based price mark-up was passed on to the indirect customer.

#### 2. Securing claims/out-of-court enforcement of claims

Several extrajudicial possibilities are available for securing claims against expiry. A tried and tested means of securing claims is, for example, having the opponent render a **declaration of waiver of**

**the statute of limitation.** During the period of the waiver, the claims against the waiving party are protected against expiry. A declaration of waiver of the statute of limitation prevents damaged parties from rushing into law suits in order to have the limitation period suspended.

Through the commencement of (written or oral) **settlement proceedings**, the limitation period is also suspended for the duration of the proceedings plus an additional three-month grace period. Additionally, settlement talks do not always focus on settling the damages incurred through the payment of compensation. The parties can, for example, also agree on improved delivery conditions for the future. The (confidential) negotiation of better purchasing conditions can have greater prospects of success than an attempt to enforce “real” compensation payments.

Alternatively, the instigation of out-of-court **conciliation proceedings** at an officially acknowledged conciliation office has also proven its worth in practice. In these proceedings – to the extent the opponent goes along with such a procedure – the parties work towards reaching an out-of-court settlement with the assistance of a neutral mediator. This option – which is cheaper than a law suit – is particularly useful when purely bilateral settlement talks have no prospects of success. Since the instigation of conciliation proceedings also suspends the limitation period, your claims are simultaneously secured.

Basically, the time should be used to process and document the amount of the damages. The **documents and proofs** required to determine and prove the purchase volume of the goods affected by the cartel during the cartel term (invoices, delivery notes, possibly also letters and e-mails) need to be identified, secured and processed.

### 3. **Judicial enforcement of the claims**

If settlement talks fail or the other side refuses to render or prolong a declaration of waiver of the statute of limitation, the claims can be secured and enforced by taking legal action.

However, this does not always have to end with a contested decision. Experience has shown that a law suit presents a good opportunity to bring your opponent back to the negotiating table. Many court proceedings end with a (court) settlement.

Irrespective of this, the **time of filing suit should be strategically chosen**. It is not uncommon for cartels to trigger a wave of civil law suits behind them. In this case: the sooner you take legal action, the sooner you generally obtain a title and (the sooner you) can enforce it. In some cases, however, it can also make sense to await the outcome of legal actions brought by other parties damaged by the cartel. This is the case, for example, if you can expect a law suit to excessively impact the existing supply relations. A prerequisite, however, is that the expiry of your own claims is not yet at risk and/or that the claims are secured against expiry.

### 4. **Against whom should I take action?**

To be borne in mind both when securing and enforcing your claims is the fact that all cartel members are liable as **joint and several debtors** for damages incurred. Hence, your enterprise does not only have a damage claim against your direct suppliers, but also against the other members of the cartel.

Since damage claims against the individual cartel members expire separately, measures to suspend the statute of limitation should not only be taken against your suppliers, but also against the other participants of the cartel.

### 5. **How do I determine my damages?**

Since the implementation of the EU Cartel Damages Directive in the summer of 2017 German law contains a **statutory presumption** to the effect that a cartel caused **damages on the merits**. Proof

to the contrary must be brought by the cartel members (reversal of the burden of proof). The amount of the cartel damage, in contrast, still has to be represented and proven by the claimants.

The damage is generally the difference between the cartel-based excessive price and the price which would have developed if competition had existed on the market. In order to estimate the damage it is advisable to commission an **economic expert opinion**. The courts value such an expert opinion more highly than your own calculations. Also in settlement proceedings, the substantiation of your own damages by economic experts will distinctly improve your own position. Furthermore, an essential prerequisite for calculating the damages incurred is ensuring the completest possible invoices and receipts for supplies of the cartel goods in the cartel period.

## 6. What are my chances of success?

The success of a complaint can only be appraised in the individual case. However, both case law and the legal situation in Germany has developed pro-claimant over the last few years. Thus, a claimant can essentially base its claim on the investigative results of the cartel authorities and does not have to prove the breach of antitrust law again. Furthermore, the German legislator implemented the EU Cartel Damages Directive in the summer of 2017 and therewith implemented further pro-claimant instruments to enforce damage claims. For example, there are now extended possibilities of demanding the **surrender of evidence** and the **provision of information** from cartel members in order to reinforce your own damage claim.

## 7. How can I effectively use resources?

It might make sense to communicate with other potentially damaged enterprises from your branch in order to deploy your own resources in the best possible way. Jointly commissioned expert opinions save costs. The retention of the same law firm by several affected enterprises can also generate synergies and thus save costs. We would also be pleased to discuss with you the involvement of a litigation funder.

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