

German Federal Supreme Court clarifies controversial question on statute of limitations for cartel damages

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Since 2005, the limitation period for cartel damages is suspended under certain conditions. Particularly, claims for damages by companies allegedly affected by a cartel do not become time-barred for as long as investigation proceedings are pending. Does this also apply to claims for damages because of an antitrust violation that happened before the new law came into force and that were at that time not yet time-barred? The German Federal Supreme Court (*Bundesgerichtshof* – *BGH*) has now decided on this issue.¹

Background

A building materials dealer is claiming damages from a cement manufacturer due to excessive pricing for cement during 1993 to 2002 because of the manufacturer's participation in a cartel (*Grauzementkartell*). The defendant had entered into territorial and quota agreements with other cement manufacturers. The cartel members, including the defendant, were fined in 2003. This decision became final in 2013.²

In the follow-on proceedings, the parties disputed whether potential claims for cartel damages had lapsed due to a new limitation rule introduced in July 2005 (Sec. 33 (5); now Sec. 33h (6) of the German Act against Restraints of Competition - *GWB*). This new rule suspends the limitation period for cartel damages for as long as administrative offence proceedings regarding this particular cartel infringement are pending. The suspension ends, however, six months after the conclusion of these proceedings. It was highly disputed whether this rule applies to claims that were based on a cartel infringement that took place before the introduction of the new limitation rule in July 2005 and that were not time-barred at that time. The *BGH* has now clarified the scope of this limitation rule.

Limitation rule also applies to old cases

The Court has now decided that the suspension of the limitation period applies to claims for damages based on antitrust violations committed prior to the entry into force of the limitation rule on 1 July 2005, which had not been already time-barred. The Court argued that it is a general legal concept that changes to the limitation periods apply to claims from the time of their entry into force, if the claims have not become time-barred by that time.

¹ *BGH*, 12.06.2018 – KZR 56/16 – *Grauzementkartell* II. The detailed ruling has not yet been published.

² *BGH*, 26.02.2013 – KRB 20/12.

Implications on antitrust claims for damages

Many significant cartel cases (e.g. the rail cartel, the truck cartel, the sugar cartel) date back well before 2005, which is why yesterday's decision is having a major impact on all of these cases and beyond. Dozens of lawsuits pending before German courts can therefore not be set aside simply based on the statute of limitations. Nevertheless, the wording of the decisive limitation rule seems to refer only to damage claims that have arisen since July 2005. The BGH, however, prefers a historical and systematic interpretation and thereby applies a general rule of law, which has a legal basis only in the Introductory Act of the German Civil Code (*EGBGB*). As the reasons of the judgment are not yet available, it will be interesting to see how the Court justifies giving priority to a general principle, which, moreover, is regulated in another more general legal act over a more specific regulation in the *GWB*. In any case, the BGH's current decision finally creates legal certainty with regard to this controversial issue.

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