RegCORE Client Alert

Refund of fees and charges following the ruling of the German Federal Court of Justice (BGH) on financial services providers' general terms and conditions

February 2023

Financial Services

Overview of relevant points from the BGH judgment and its further implications

Steffen Kamprolf
Tel: +49 30 2636-4728
steffen.kamprolf@pwc.com

Dr. Martin Beckmann
Tel.: +49 30 2636-1566
martin.j.beckmann@pwc.com

Dr. Roman Dörfler
Tel.: +49 30 2636-4390
roman.doerfler@pwc.com

Stefan Gentzsch
Tel.: +49 69 9585-3477
stefan.gentzsch@pwc.com

Dr. Michael Huertas
Tel.: +49 160 973 757-60
michael.huertas
@pwc.com

Contact RegCORE Team
de_regcore@pwc.com

On 27 April 2021, the German Federal Court (*Bundesgerichtshof* – **BGH**) delivered its landmark ruling (ref. XI ZR 26/20) (the **BGH Ruling**), in which it held that the use of deemed consent (also often referred to as fictious consent) clauses are not a permitted means of amending general terms and conditions (**GTC**s). As a result, financial services providers now have to receive actual active consent from their clients when they amend their GTCs. In particular, this applies when changing conditions applicable to fee levels. Consequently, financial services firms operating in Germany that have deemed consent language in their GTC not only are required to amend their documentation but equally must change their processes of how they obtain consent going forward. They are equally at risk of a wave of lawsuits from affected clients, primarily those classified as "retail clients", which includes consumers but also certain microenterprises and small-to-medium sized enterprises (**SMEs**). Many of the claims may go back to 2019.

The number of claims has stepped up as 2022 drew to a close and 2023 seems to be no different. A number of these claims are also being advanced by tech-powered automated and mass claims platforms. Such platforms seek to assist claimants in assessing their eligibility, but also in providing them with step for step guides of what to do, what and where to check in respect of specific products, how to gather necessary information required so that eligible claims can proceed to challenge and recoup the amount of increased fees that were charged as a result of what is now an invalid means of amending GTCs.

The German Federal Financial Supervisory Authority (**BaFin**) has also waded into the debate and promptly published its own supervisory expectations on how financial services firms should comply with the BGH Ruling. The BaFin has expressed its views on the need for appropriate provisioning to account for possible repayments and how changes to GTC should be made on a going forward basis.[1] The BaFin is equally clear that it expects transparent communication with clients, immediate reimbursement of what are now illegal fees and no terminations of customer relationships. Given its consumer protection mandate, the BaFin has advised customers to file possible claims with their bank as soon as practicable in light of limitation periods. The BaFin estimates the volume of possible repayments to customers may amount to as much as half a year's profit for the entire banking sector in Germany. That projection has piqued the interest of the European Central Bank,

[1] Available (in German only) here.

acting in its role as the head of the Banking Union's Single Supervisory Mechanism, which has expressed its own views from a prudential regulatory perspective. This is equally noteworthy as the argumentation in the BGH Ruling could conceptually go much further than just banks and possibly extend beyond "just" retail clients and SMEs in Germany. Financial services firms may need to allocate higher levels of provisioning in light of a wave of claims.

What should financial services firms, in particular banks and savings banks operating in Germany prepare for? Where is case law heading? Are there risks for other EU Member States or any lessons to be learned? This Client Alert assesses the road ahead and how affected financial services firms may wish to prepare in light of mass claims that may be heading their way.

Summary of the BGH Ruling

Prior to the BGH Ruling, many German law governed GTCs, used across a variety of financial products, by a multitude of German as well as non-German headquartered financial services providers, included some variation of language whereby GTC amendments (including fee levels) were concluded by reliance on deemed consent. This meant that clients received correspondence (including, where permitted, by digital means) stating some variation of: "We have changed our general terms and conditions. If we do not hear from you [by date xyz], your consent is deemed to have been given." This allows for a cost-efficient means of communicating and effecting changes to GTC and thus is a practice that also exists in a number of other EU Member States and one that is adopted by a number of financial services providers, including well beyond the banking sector and those transacting with "just" retail clients and/or consumers.

The ability to rely on deemed consent under German law was anchored in the German Civil Code (§ 675g para. 2 BGB). However, according to the Court of Justice of the European Union (CJEU), this provision is not the only decisive factor when it comes to dealings vis-à-vis consumers (Case C-287/19), especially as a unilateral amendment of the framework contract must not unreasonably put the customer at disadvantage. EU law has long held (including in areas well outside the sole remit of financial services – such as notably in data protection rights) that deemed consent whereby consent is derived from a lack of reaction from individuals, does not deliver valid, unambiguous consent. It is not possible to ascertain without any doubt that individuals have agreed to the transfer from their lack of response.

The BGH was required to follow and apply the CJEU's ruling in Case C-287/19 which itself focused on the GTCs of a leading German retail bank. The decision in the BGH Ruling turned on the consideration that German contractual law, even for general terms and conditions, requires mutual consent to agree an amendment to an existing contract. Neither silence nor the use of deemed consent constitutes express or implied consent to the amendment of the contract, in particular as a client would be unfairly disadvantaged by that practice, especially if the changes worsen the situation of the client, which in the case of an increase in fees would be considered satisfied.

Consequently, all amendments based on the use of deemed consent are equally held as invalid. In applying the BGH Ruling it therefore follows that the fees agreed at the time of the respective conclusion of the contract continue to apply. Numerous retail customers are now demanding the repayment of all wrongfully paid fees, including compensation for use, as well as the reimbursement of pre-litigation lawyer's fees as damages for delay. As 2022 drew to a close, masses of lawsuits will have been filed again.

What claims do affected clients have?

In principle, all fees paid by clients on the basis of an ineffectively changed price agreement must be refunded by the bank. If the account was free of charge when the contract was concluded and if the introduction of an account maintenance fee was invalid, all fees must be refunded because the bank charged them unjustly (cf. § 812 para. 1 sentence 1 alternative 1 BGB).

In addition to the reimbursement of the fees, clients can also assert a claim for compensation for use, i.e. they can demand interest on the individual fees at a rate of five percentage points above the base rate (cf. § 818 para. 1 BGB). However, the client must state the amount of his claim for reimbursement, otherwise the bank is not in default. At least this is what the Regional Court of Stuttgart ruled in a more recent judgment of 24 March 2022 (Ref. 35 O 135/21 KfH).

Which objections can be taken into account?

In principle, banks and savings banks can object to customers that the current account agreement is a special current account agreement (cf. §§ 355-357 HGB). The fees would therefore only be refundable in the context of a balance adjustment, which would no longer be possible if there has been a considerable lapse of time.

Furthermore, a set-off against the counterclaim is possible according to the usual bank remuneration (cf. § 632 para. 2 BGB). The background to this is the principle that certain contractually agreed services can only be expected in return for remuneration.

To our knowledge, as at the time of writing hereof, no judgments have yet been published on these objections.

Which claims are time-barred?

Existing claims for reimbursement can however be time-barred with the defence of limitation periods. The limitation of claims begins with the knowledge of the facts giving rise to the claim, irrespective of the legal assessment. In the starting point, knowledge of the agreed amendment clause in the general terms and conditions is sufficient. The BGH had never confirmed this clause as effective, so that customers do not enjoy any protection of confidence in this respect.

In 2022, all claims for repayment of charges levied in 2018 and before became time barred. The date of the increase of fees is irrelevant. Thus, if a claim is filed in 2022, it will relate to fees from 2019.

It cannot be ruled out that the CJEU will demand effective enforcement of consumer protection rights and that the limitation period will have to be interpreted in conformity with European law. In any case, according to German laws, the longest applicable limitation for the paid fees would be ten years, regardless of knowledge.

Does the notion of the three-year solution apply?

Many legal academic commentators are advocating that the application of the so-called three-year solution applies and so far most courts of first instance are following this. The BGH has applied this solution to invalid price adjustment clauses in GTCs in order to maintain the contractual balance in the interest of the parties. Most recently, the BGH applied the three-year solution to energy supply contracts in its ruling of 1 June 2022 (Ref. VIII ZR 287/20).

The prerequisite for this is that the contractual relationships are long-term, are operated in bulk business, serve security of supply and the fee increases have not been objected to for more than three years.

This would mean that customers can only object to increases of fees that have taken place in the last three years and can only reclaim the excessive fees for this period. If customers object to the fee increases based on the BGH ruling of April 2021, the April 2018 prices will apply.

How have the German courts ruled after the BGH Ruling?

After the Bergisch Gladbach Local Court implicitly declared the three-year solution applicable in its ruling of 21 September 2021 (ref. 60 C 159/21), the Neuss Local Court rejected the application of the three-year solution in its ruling of 24 February 2022 (ref. 75 C 2027/21). Instead, the regular limitation period should apply, so that the bank would only have to refund the fees for the last three years. The Neuss District Court also recognised a factual presumption that a bank can draw benefits in the amount of the usual default interest and awarded the plaintiff compensation for use.

In contrast, the Gießen District Court ruled in its judgment of 7 April 2022 (case no. 38 C 337/21) that the three-year solution also applies to bank contracts, so that the plaintiff would only have been entitled to the difference in fees. As far as the customers do not pay the increased fee within three years after receiving the increased fee, the changed prices apply.

In its ruling of 4 May 2022 (case no. 21 C 825/21), the Steinfurt Local Court agreed with this view. On the other hand, it recognised in principle a claim for compensation for use because default interest had to be paid for the unjustified use of capital. The Weimar District Court also applied the three-year solution in its ruling of 3 June 2022 (Ref. 10 C 477/21).

In a recent case (ref. 7 C 325/22), the Plauen Local Court pointed out that in times of general low interest rates, the actual presumption of capital use in the amount of default interest does not apply and there is no entitlement to compensation for use.

Conclusion and outlook for Germany

There are good reasons for applying the three-year solution and German case law also seems to be moving towards this view. It remains to be seen whether banks and savings banks will have to pay their customers compensation for use in the amount of the default interest rate. After all, German case law established the legal presumption of profitable use of capital at the end of the 1990s. In the low-interest phase that lasted until recently, the basis for such a presumption seems doubtful.

Furthermore, both corporate banking and areas outside the banking sector, e.g. payment services, will have to keep an eye on the case law affecting the permitted use (and the resulting risk of using) deemed consent language in GTCs and its further development.

Outlook ahead

The use of deemed consent language in GTCs is widespread in how it is used in contracts in use across a number of other EU Member States – not just for GTCs of financial services firms but also for GTCs outside the financial services sector. While this does not mean that the BGH Ruling will automatically spill-over to risks arising in other EU Member States and/or circumstances beyond the financial services sector per se, it certainly raises questions for persons drafting GTCs on whether the risks that could arise when using deemed consent language would still outweigh its benefits, certainly when transacting with retail clients and in particular consumers. This latter point is important as while EU financial services law and supervisory practice prescriptively stipulates conduct of business requirements applicable to retail clients, neither contract law nor consumer protection law is (at least not yet and not foreseeably anticipated of being) harmonised at the EU level and thus jurisdiction-specific considerations matter in addition to relevant market practice with respect to differing market types.

As an example, in Austria, a number of cases similar to the BGH Ruling have debated the permitted use of deemed consent under Austrian law governed GTCs. In particular, the use of deemed consent as it relates to fees that are determined by price indexation tables have seen a flurry of landmark judgments change the way how the Austrian banking market engages with its retail clients. Similar cases exist in other jurisdictions notably when it comes to deemed consent language used for rollovers/renewals of contracts.

For those firms that continue to want to use deemed consent language, where permitted to do so, it may mean that they need to ensure their GTCs for use across multiple EU Member States are even more tailored to jurisdiction-specifics than ever before. Another longer-term horizon risk is that, as the number of cases in Germany grow, EU financial services policymakers, regulatory and supervisory authorities may themselves also step into clarify when deemed consent may or may not be permitted with certainty provided through legislative means. Ahead of that, the European Central Bank has already taken note of the BGH Ruling as it applies to the banking sector and the European Securities and Markets Authority on 16 January 2023 launched a common supervisory action, i.e., a set of targeted on-site inspections on assessing fees charged by financial services providers. This common supervisory action is conducted together with national competent authorities across the EU-27 and is aimed at non-bank financial services firms. While this may not be the death of using deemed consent, it does show a further clear direction of travel on the European System of Financial Supervision stepping in to remind supervised firms of treating their clients and customers fairly and communicating transparently.

About us

PwC Legal is assisting a number of financial services firms and market participants in forward planning for changes stemming from these developments.

One of the focal points of PwC Legal's Dispute Resolution practice is the representation of companies in the defence against class and mass actions, also using state-of-the-art legal tech solutions. In particular, the dispute team has extensive practical experience with the instrument of collective legal protection already provided for in German law - the model declaratory action. The same applies to the defence of representative actions under Germany’s Injunctions Act (UKlaG).

If you would like to discuss any of the developments mentioned above, or how they may affect your business more generally, please contact any of our key contacts or PwC Legal’s RegCORE Team via de_regcore@pwc.com or our website.

www.pwclegal.de