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German Competition Law Newsletter

Highlight

— Munich District Court Dismisses €900 Million Claim Against Truck Cartel

— The FCJ Has Once Again Set The Scene For Cartel Damages Actions

Munich District Court Dismisses €900 Million Claim Against Truck Cartel

On February 7, 2020, the Munich District Court dismissed financialright claims GmbH's ("financialright") claim of approx. €900 million against members of the truck cartel.[1] The judges squashed litigation vehicle financialright's business model tailored to pursue a U.S. style class action in Germany, ruling that it lacked standing. Upon appeal, the Munich Court of Appeal is called to decide.

Factual Background

On July 19, 2016 and September 27, 2017, the European Commission fined the leading truck manufacturers €3.8 billion for fixing prices over a period of 14 years from 1997 to 2011.[2] While the 2016 decision is final, the 2017 decision is currently under appeal.[3] Financialright invited customers with (potential) damage claims against truck cartel members to assign their claims for a contingency fee of 33% plus tax. It bundled about 85,000 damage claims of more than 3,000 customers. A third-party litigation funder covered financialright's costs and the trial costs.

Legal Background

Financialright is a registered debt collection agency under the German Legal Services Act (*Rechtsdienstleistungsgesetz*, "RDG"). The permitted scope of activities of a debt collection agency under German law remained somewhat open following a recent decision of the German Federal Court of Justice ("FCJ") from November 2019 concerning debt collection agency Lexfox collecting claims of tenants against their landlords for a contingency fee. While the FCJ ruled in favor of Lexfox, it emphasized in its decision that "*general standards cannot be established*" and the details of each business model would need to be considered carefully.

[1] Munich District Court decision (37 O 18934/17) of February 7, 2020, only available in German here.

[2] *Trucks* (AT.39824), Commission decision of July 19, 2016, available in English here, and Commission decision of September 27, 2017, Press Release available in English here.

[3] *Scania and Others v Commission*, Case T-799/17, action brought on December 11, 2017, available in English here.

The Court's Decision

No Permitted Debt Collection Services

The Munich District Court held that debt collection services, as permitted by the RDG, require services to be tailored towards out-of-court activities. Financialright did not meet this requirement. Based on its online presentation, contractual agreements, terms and conditions, and its actual course of action, the court concluded that financialright only intended to pursue the claims in court.

Conflict Of Interests

Additionally, the court held that financialright violated Sec. 4 RDG, which prohibits out-of-court legal services in case of conflicts of interests.

Bundling Of Variety Of Heterogeneous Claims

First, the court found a possible conflict of interests between the large and heterogeneous number of customers whose potential claims were bundled.

While each customer's situation (sector, company size, time and place of purchase/lease of trucks, purchase from manufacturer or dealer, *etc*.) and its claims' prospects varied, the court found that bundling more and less promising claims could adversely affect the prospects of customers with higher chances of success.

As a lawsuit's prospects are essential for settlement negotiations, the bundling would also benefit customers with less promising claims to the detriment of customers with more promising claims in a settlement. Additionally, any settlement sum would be distributed on a pro rata basis irrespective of each customer's individual prospects of success. Finally, financialright had the right to conclude a settlement at its own discretion if the settlement offer as a whole appeared economically reasonable although the offer may not be economically reasonable for each individual customer.

The court also found the bundling to compromise efficient legal enforcement of the individual claims. Even if bundling would result in a small efficiency advantage because general legal or fundamental economic questions were to be decided on only once, the additional work required to evaluate each of the assignments to financialright would outweigh any such efficiency advantage. The judges therefore specifically did not follow financialright's claim that it would be more efficient to have one court decide all claims rather than occupying different courts with the follow-on damage claims.

Third-Party Litigation Funding

Second, the court found the involvement of the third-party funder to give rise to potential conflicts of interests because financialright would need to consider the funding party's interests both with respect to cost inducing procedural steps (*e.g.*, expert opinions) and with respect to a potential settlement. These interests may clash with the customers' interests. The court considered it irrelevant whether customers would have claimed their damages at all had they not participated in financialright's model.

Evaluation And Outlook

The ruling sets high hurdles for bundling claims in German courts and demands a detailed analysis in each specific case. Whereas the RDG is not applicable for intra-group assignment of claims , bundling of third-party claims under the RDG will likely be more difficult the more heterogeneous the claims are. While lawsuits supported by third-party funders also remain permissible, the court rejected a system in which their influence may interfere with the assignors interests.

Financialright has appealed the decision.

In the meantime, companies that suffered damage from a cartel should carefully evaluate the risks associated with assigning their claims to a legal services provider, including the risk of a claim being time-barred if a court dismisses a service provider's complaint. A large number of claims pursued by financialright will be subject to the statute of limitations and can no longer be pursued by the assigners if the courts ultimately deny financialright standing.

The FCJ Has Once Again Set The Scene For Cartel Damages Actions

On January 28, 2020, the German Federal Court of Justice ("FCJ") handed down another judgment concerning the Rail Cartel ("*Rail Cartel II*").[4] In line with its earlier judgment concerning the Rail Cartel ("*Rail Cartel I*")[5], the FCJ confirmed that claimants cannot rely on *prima facie* evidence to prove causal damages; at least in price, quota and customer sharing cartels. At the same time, it further aligned the requirements under German tort law with the European Court of Justice's ("ECJ") case law and in this context partially overruled its judgment in *Rail Cartel I*.

Background

Under German law, claimants can base their follow-on damages claims on Sec. 33(3) GWB (now Sec. 33a(1) GWB) if they are *affected* by the infringement. The relevance and scope of the requirement of *being affected* has caused controversy among German legal scholars and practitioners.

In its *Rail Cartel I* judgment, the FCJ overruled the Karlsruhe Court of Appeal. The Karlsruhe Court of Appeals had relied on *prima facie* evidence that the cartel affected plaintiffs' purchases and that plaintiffs had suffered a damage. The FCJ raised the evidential bar for plaintiffs and held that *prima facie* evidence was not applicable. Due to the diversity and complexity of agreements restricting competition, it rejected the assumption that a cartel per se affects the purchases in the relevant time frame. Instead, the court allowed plaintiffs to rely on a *factual presumption*, which requires an overall assessment of the circumstances and therefore requires plaintiffs to satisfy a higher burden of proof to show that they are affected. Lower courts immediately criticized the FCJ and either continued to rely on *prima facie* evidence or based their findings on both *prima facie* evidence and a factual presumption.[6]

Being Directly Affected Is No Longer A Requirement

In *Rail Cartel II*, the FCJ reversed its position and held that an evidential requirement to show that each individual purchase was *affected* would unduly limit the right to claim compensation. Instead, it suffices to show that the anticompetitive conduct is *capable* of causing directly or indirectly damage to the plaintiff. The regular standard of proof applies, *i.e.*, the judge must be convinced to a degree of certainty which silences doubts without necessarily ruling them out entirely.[7] Applying this new rule, the FCJ held that the requirement was readily satisfied because the plaintiff had purchased goods from the defendants that were subject to the rail cartel.

Change Of Course Followed ECJ *Otis* Judgment

The FCJ's change of course was likely caused by the ECJ's *Otis*[8] judgment concerning the elevators and escalators cartel, delivered six weeks before the *Rail Cartel II* judgment on December 12, 2019.[9] The ECJ clarified that, according to the case law of the ECJ, any loss which has a *causal connection* with an infringement of Article 101 TFEU can give rise to compensation.[10] National law limiting the scope of persons to claim compensation is incompatible with EU law. Instead, a national

[4] *Rail Cartel II* (KZR 24/17), FCJ decision of January 28, 2020, only available in German here.

[5] *Rail Cartel I* (KZR 26/17), FCJ decision of December 11, 2018, only available in German here.

[6] See German Competition Law Newsletter March – April 2019, p. 3 *et seq.*, available in English here.

[7] (III ZR 139/67), FCJ decision of February 17, 1970, only available in German here.

[8] *Otis and Others* (Case C-435/18), ECJ decision of December 12, 2019, available in English here.

[9] *Otis and Others* (Case C-435/18), ECJ decision of December 12, 2019, available in English here.

[10] *Otis and Others* (Case C-435/18), ECJ decision of December 12, 2019, para. 30; available in English here.

court is limited to examine whether damages are factually attributable to the competition law infringement under domestic procedural rules.

No *Prima Facie* Evidence For Causal Damage

The FCJ confirmed its ruling in *Rail Cartel I* insofar as it squashed a *prima facie* evidence for a causal damage at least in price, quota and customer sharing cartels. Instead, plaintiffs may be able to rely on a factual presumption which, in contrast to a *prima facie* evidence, requires an overall assessment of all circumstances of the case.

Economic Expert Opinions Do Not Replace Overall Assessment By The Judge

The FCJ provided additional guidance on the necessity of court expert opinions in cartel damage litigation. To establish a causal damage, *e.g.*, an overcharge as a result of the infringement, plaintiffs usually rely on circumstantial evidence because the hypothetical prices in absence of the cartel are unknown. Economic reports can approximate such a hypothetical competitive price but cannot replace the overall assessment by the court. According to the FCJ, judges are not obliged to appoint a court expert if it is sufficiently likely that the infringement caused damages based on the available circumstantial evidence. Judges must consider parties' expert opinions, taking into account the accuracy and validity of the factual observations on the cartelized market and on comparative markets. However, the submission of a party expert opinion does not require a judge to appoint a court expert to validate the party expert's observations.

Likely End Of Declaratory Judgments ("*Grundurteile*")

Notably, the FCJ has likely terminated the lower courts' practice to issue declaratory judgments without quantifying the amount of damages to be awarded. Between 2014 and 2019 alone, German courts have issued 55 declaratory or interlocutory judgments. The FCJ now clarified that declaratory judgments equally require an overall assessment of all circumstances of the case. Thus, splitting the damages claim into a procedure on the causal damage and a separate procedure for the quantification of damages will in most cases lead to an unjustified delay of the proceeding.

Conclusion

The FCJ aligned the requirements for the claim of compensation under national law with EU law principles. Arguably, this was already overdue since the ECJ's Kone[11] ruling in 2014. In Kone and Otis, the ECJ made it relatively clear that the only relevant criterion to claim compensation is a causal relationship between infringement and damage.

[11] *Kone AG and Others* (Case C-557/12), ECJ decision of June 5, 2014, available in English here.

News

FCO

FCO Discontinues Proceedings Against Sky And DAZN

On April 15, 2020, the German Federal Cartel Office ("FCO") discontinued its proceedings against pay TV broadcaster Sky Ltd. and online streaming service provider DAZN Group Ltd. ("DAZN") over alleged collusion during the award of the German broadcasting rights to UEFA Champions League matches for the seasons 2018/2019 to 2020/2021 for discretionary reasons.[12]

The investigation was launched in 2018, a year after Sky Ltd. had acquired the media rights for all matches of the upcoming seasons and sublicensed the rights for part of the matches to DAZN. The FCO investigated whether Sky Ltd. and DAZN had agreed to split the German broadcasting rights prior to the UEFA tender procedure.

In its decision to discontinue the proceedings, the FCO considered in particular the COVID-19 crisis. According to the FCO's president, Andreas Mundt, the unpredictable impact of the coronavirus crisis on the development of the market for football media rights in the near future made it "particularly difficult to assess the effects of an intervention under competition law".

The FCO's decision is the first example of how the COVID-19 crisis directly influences competition law and the FCO's decision-making practice. It remains to be seen whether the FCO—as well as other competition authorities—will apply a similar reasoning also in other cases and industries and use any discretion they have in order to assess the impact of this health and economic crisis on the future development of the markets in question.

FCO Fines Technical Building Services Providers For Collusive Tendering

On March 27, 2020, the FCO announced that already in December 2019 it had concluded its proceedings against 11 providers of technical building services.[13] The FCO imposed fines totaling approximately €110 million for collusion in tenders for large building projects.

The proceedings were initiated by a leniency application in November 2014, which was made in light of upcoming media reports on alleged collusion during the award of technical building services for two coal-fired power plants in Germany and in the Netherlands. Shortly after, additional providers demonstrated their willingness to cooperate with the FCO and the FCO initiated investigations in close cooperation with the Munich I Public Prosecution Office.

The investigations revealed that between 2005 and 2014, the technical building services providers had colluded during 37 different award procedures concerning the design and installation of technical equipment for large building complexes (in particular power plants, but also industrial installations, shopping malls, and office buildings *etc.*). Service providers mainly allocated projects and submitted "cover bids" in return for subcontracts, direct financial compensation, or the offer to place a cover bid in another tender.

Six companies cooperated and eight companies settled with the FCO. The fines imposed on these companies are final. The leniency applicant received full immunity and escaped a fine. Four cartelists appealed the FCO's decision to the DCA. While on one appeal, the Düsseldorf Court of Appeal ("DCA") discontinued the proceeding for lapse of time, the Düsseldorf Chief Public Prosecution Office appealed the DCA's decision and the matter is currently pending before the FCJ.

[12] FCO Press Release, April 15, 2020, available in English here.

[13] Case B11-21/14. FCO Press Release, March 20, 2020, available in English here; FCO Case Summary, March 27, 2020, only available in German here.

FCO Approves DFL Tender Model For Bundesliga Media Rights

On March 20, 2020, the FCO approved the German Football League's (DFL Deutsche Fußball Liga, "DFL") model to tender media rights for first and second-division Bundesliga matches for the seasons 2021/22 to 2024/25.[14] To address the FCO's concern, the DFL had offered various commitments, including a so-called "no single buyer" rule.

The "no single buyer" rule ensures that no single bidder can acquire all live media rights exclusively and therefore act as a monopolist without incentive to keep prices stable, improve the quality of its products, or to innovate. While the FCO generally acknowledges that the joint selling of football media rights carries specific advantages for consumers[15] and can thus be exempted from the cartel ban, according to the FCO, the "no single buyer" rule is indispensable to ensure vital competition between different broadcasting and streaming providers.

The FCO had first asked the DFL to implement the "no single buyer" rule to strengthen innovative competition for the 2016/17 tender model. Under the pre-2016/2017 tender model, Sky used to be a quasi-monopolist that acquired all live media rights.[16] Since then, increasing competition has resulted in new products offered by new as well as incumbent providers.

Under the present tender model, media rights are bundled into four different packages, each covering all transmission channels (satellite, cable, and internet), but the rights cannot be acquired on an exclusive basis. However, consumers do not need to purchase different subscriptions to view all matches. For example, where the DFL intends to grant all of the auctioned media rights to one single bidder, it has to grant two of the four packages to a second acquirer for online coverage on a co-exclusive basis. It remains to be seen whether the "no single buyer" rule will also establish itself as the future standard for the tendering of media rights for other sports events.

FCO Conditionally Clears CinemaxX/ Cinestar Merger

On March 2, 2020, after an in-depth investigation, the FCO approved cinema operator Vue Nederland B.V. ("Vue Group")'s acquisition of its competitor Edge Investments B.V., 2015 First Holding GmbH, and Greater Union International GmbH.[17] The approval is subject to the divestment of cinemas in six regions. The Vue Group operates 31 cinemas in Germany, 30 under the brand "CinemaxX". The targets operate 53 cinemas in Germany, 51 under the brand "Cinestar".

The merger would create a leading cinema operator in Germany. The FCO found that in most of the relevant markets, strong rival cinemas would continue to constrain the merged entity post-transaction, except for six regions.[18] To remedy the FCO's concerns, the parties committed to divest a cinema in each of these regions. The FCO ruled out competition concerns in the procurement market. The FCO held that film distributors are still more concentrated than the cinema operators, despite the merger creating the leading cinema operator in the market for the demand for films in Germany.

FCO Has No Objections To Agricultural Online Trading Platform

On February 5, 2020, the FCO announced that it has no competitive concerns regarding the launch of the agricultural online trading platform operated by unamera GmbH ("Unamera").[19] The FCO pointed out that while digital platforms can make trading much more efficient, it must be ensured that they must not restrict competition:

[14] Case B6-28/19. See FCO decision of March 20, 2020, only available in German here; FCO Press Release, March 20, 2020, available in English here.

[15] Such as the simplified organization of the league's matches or the provision of high-quality league-related products, *e.g.*, the conference coverage of simultaneously played matches, or the timely coverage of highlights.

[16] See also National Competition Report April - June 2017, p. 15 *et seq.*, available in English here.

[17] Case B6-80/18. See FCO decision of February 28, 2020, only available in German here; FCO Press Release, March 2, 2020, available in English here.

[18] Augsburg, Bremen, Bielefeld/Gütersloh, Magdeburg, Mülheim, and Wuppertal/Remscheid.

[19] See FCO Press Release, February 5, 2020, available in English here and in German here.

Digital platforms must not be subject to price-fixing agreements, they must be non-discriminatory and there must not be excessive transparency. In particular:[20]

— Unamera must ensure that "Chinese Walls" are in place to prevent the information flow between its financial backers and shareholders which are competing agricultural traders and will thus become active on the platform themselves. The operation of the platform must be strictly separated from its shareholders in terms of organization, technology, and personnel. Further, these shareholders must waive their rights under German law to access company information.

— Platform users must register to Unamera as suppliers or customers, but will at first only gain access to anonymous prices. Unamera must ensure that the contracting party is only disclosed shortly before the imminent conclusion of the contract. In addition, prices shown in Unamera's market statistics must be average prices based on price data from at least five independent suppliers.

FCO Clears Ciscos's Acquisition Of Acacia Communications

On November 11, 2019, the FCO approved the acquisition of Acacia Communications, Inc. ("Acacia") by Cisco Systems, Inc. ("Cisco").[21] The FCO had asked the merging parties to withdraw their notification to have more time to define the relevant markets but cleared the transaction in phase 1 after the parties had resubmitted their notification one month later.

Cisco sells, among other things, IT hardware (*e.g.*, routers and switches) and services for digital infrastructure platforms and corporate networks, while Acacia manufactures optical interconnects for use in network products that facilitate high-speed transmission of data, including semiconductor products like coherent digital signal processors ("DSPs") and silicon photonic circuits ("PCIs"), as well as so-called transceivers. Based on Acacia's product portfolio, the FCO defined separate—worldwide—product markets for DSPs, PCIs, and three different categories of transceivers, as well as downstream markets for optical networks and switches/routers.

The FCO did not have horizontal concerns for a lack of an overlap between the merging parties. The FCO eventually did not raise vertical concerns either. Even though the FCO found that Acacia had a strong position in the DSP and transceiver markets and Cisco was strong in the downstream market for routers, the FCO deemed the risk of foreclosure to be low. In relation to DSPs and transceivers, the FCO considered anti-competitive effects unlikely to occur, given the substantial number of competitors in both markets. With respect to transceivers and optical networks, the FCO found that the merging parties had no foreclosure incentives, because their respective market shares were low and numerous competitors present. Finally, in relation to transceivers and switches/routers, the FCO determined that while the merging parties might have an incentive to foreclose competitors in light of Acacia's technological edge in transceivers, their competitors and new entrants in transceivers would exert sufficient competitive pressure to prevent anti-competitive effects from occurring.

[20] The FCO's guidelines are based on its experience in its 2018 review of XOM Metals, an online trading platform for steel and steel products; see Case B5-1/18-01. FCO Case Summary, March 27, 2018, only available in German here; see also FCO Press Release, March 28, 2018, only available in German here.

[21] FCO Case Summary, February 6, 2020, available in English here.

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