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German Competition Law Newsletter

News

Courts

Hanover Court Dismissed Claims In Sugar Cartel For Lack Of Standing

On February 1, 2021, the Hanover Regional Court dismissed a claim brought by special purpose vehicle Retail Cartel Damage Claims SA ("CDC") against sugar manufacturers Nordzucker AG, Südzucker AG and Pfeifer & Langen GmbH & Co. KG, on the basis that the CDC had no standing to sue.[1]

In February 2014, the Federal Cartel Office ("FCO") had imposed fines on sugar manufacturers for concluding anticompetitive agreements regarding so-called industrial and retail sugar.[2] The decision was followed by approximately 90 damages actions brought against sugar manufacturers throughout Germany with a total volume of around € 1 billion. As part of a bundling of claims, the CDC claimed a record sum of € 186 million for REWE Group and 62 other retailers and food manufacturers based on excessive sugar prices.

The court concluded that the assignments of the alleged claims to CDC violated the German Legal Services Act (*Rechtsdienstleistungsgesetz*) and consequently deemed them null and void. The court found that the transfer and legal enforcement of the alleged claims amounted to the independent provision of "extrajudicial legal services", which is generally prohibited under the Legal Services Act. Further, the Hanover Court stressed that the bundling of assigned claims from purchasers at different levels of the supply chain inevitably leads to impermissible conflicts of interest. This can be illustrated by way of the passing-on-defense: While the plaintiff had to argue—in favor of the direct purchasers—that they did not pass on the overcharges, it required—in favor of the indirect purchasers—a contrary argumentation, sometimes with regard to the same specific delivery.

FCJ Reaffirmed Position On FRAND Defense

On November 20, 2020, at the request of Sisvel International Group ("Sisvel"), the Federal Court of Justice ("FCJ") granted a preliminary injunction against Chinese mobile phone manufacturer Haier Corporation Group ("Haier").[3] The injunction is another victory for Sisvel in its patent disputes with Haier following a preliminary injunction issued in May 2020.[4] The FCJ used the recent decision as an opportunity to further elaborate on the obligations of patent holders and potential patentees under the *Huawei/ZTE* jurisprudence of the Court of Justice of the European Union ("CJEU").[5]

[1] See Hanover Regional Court decision (18 O 34/17) of February 1, 2021, not yet published.

[2] See FCO's Press Release of February 18, 2014, available in English here.

[3] *FRAND-Einwand II* (KZR 35/17), FCJ judgement of November 24, 2020, available in German here.

[4] *FRAND-Einwand I* (KZR 36/17) FCJ judgement of May 5, 2020, for a commentary please see Cleary's Alert Memorandum of July 23, 2020, available here.

[5] *Huawei/ZTE* (C-170/13), CJEU judgment of July 16, 2015, available in English here.

Holders of standard-essential patents ("SEP"), *i.e.*, patents that protect technology that is essential for a set standard, may be required to grant licenses to those SEPs under competition law. In its *Huawei/ZTE* judgment, the CJEU detailed that such an obligation prevents a patent holder from obtaining an injunction against users of the patent (i) who are willing to license, unless (ii) the patent holder has made a fair, reasonable and non-discriminatory ("FRAND") offer, and (iii) the patent user has not diligently responded to the offer.[6] In patent injunction proceedings, the defendant may rely on the failure to follow these steps (the so-called FRAND defense).

Haier used several of Sisvel's SEPs relating to mobile telecommunications in the manufacture of mobile phones and tablets sold in Germany. The present case concerns a patent relating to the re-establishment of mobile radio connections. Sisvel contacted Haier about the patent in late 2012, but Haier did not show a willingness to negotiate a license until late 2013. After inconclusive negotiations, Sisvel sued Haier for infringement of the patent. The companies continued to negotiate in parallel with the court proceedings. In particular, Sisvel made several offers, to which Haier made counteroffers subject to the condition that the patent be declared valid and infringed in a court ruling.

As in the parallel proceedings, the Düsseldorf Regional Court had found Haier in breach of the patent,[7] but was largely overturned by the Düsseldorf Court of Appeal ("DCA").[8] The DCA found that Sisvel had abused its dominant position on the market for the licensing of the patent by not complying with the *Huawei/ZTE* process and by offering discriminatory contract terms.

On appeal, the FCJ reversed the DCA's ruling and, in most respects, reinstated the decision of the Düsseldorf Regional Court. As in its judgment of May (which related to a different patent), the FCJ held that a patent user must clearly and unambiguously declare its willingness to enter into a licensing agreement, and that Haier's initial response—which came a year after Haier was contacted about the patent—was insufficient, as Haier only stated that it would consider entering into negotiations. In the present case, the FCJ further clarified that the willingness to license does not have to exist only when the patent user first contacts the patent holder, but is a longer-term condition. According to the FCJ, a definitive refusal by the patent user to enter into a license agreement does not have to be proven, since a party using tortious delaying tactics typically does not refuse to enter into an agreement, but rather pretends to be interested in an agreement. The inconclusive negotiations did not indicate a willingness to license, but rather were elements of Haier's delaying tactics. Since Haier had at no time shown its willingness to conclude a license agreement, the FCJ considered it irrelevant whether Sisvel's various offers to license were actually FRAND.

FCJ Clarifies Scope of Binding Effect of Cartel Settlement Decisions and Confirms Existence of Presumption of Damages

On September 23, 2020, the FCJ handed down its much anticipated first judgment in relation to damages claims resulting from the trucks cartel and provided helpful clarifications on some key questions regarding cartel follow-on damages actions.[9]

Background

In 2016, the European Commission had found that several truck makers had infringed EU antitrust rules by agreeing on prices at "gross list" level for medium and heavy trucks, the timing for the introduction of emission technologies, and on passing on the costs of compliance with stricter emission rules, for 14 years. Most of the truck makers acknowledged their involvement and agreed to settle the case with the European Commission.

[6] A more detailed description of the process can be found in Cleary's Alert Memorandum of July 23, 2020, p. 2.

[7] Düsseldorf Regional Court judgment (4a O 93/14) of November 3, 2015, only available in German here.

[8] DCA judgment (I-15 U 66/15) of March 30, 2017, only available in German here.

[9] *Truck Cartel* (KZR 35/19), FCJ judgment of September 23, 2020, only available in German here.

The FCJ Decision

The FCJ has set aside a decision of the Stuttgart Higher Regional Court and refers the case back to the lower instance. The FCJ has taken a position on a number of critical issues, which must now be taken into account by the Stuttgart Court, when rendering its decision:

BROAD SCOPE OF BINDING EFFECT ALSO IN SETTLEMENT CASES

First, the FCJ stressed the binding effect of all factual and legal findings of the European Commission decision. It rejected the defendants' argument that this binding effect should be excluded or limited in the present case because the decision was issued in the context of settlement proceedings. The FCJ clarified that the defendants had agreed to the findings on the antitrust infringement as part of the settlement.

FACTUAL PRESUMPTION FOR DAMAGES EXISTS BUT NEEDS TO BE APTLY APPLIED

Second, the FCJ confirmed the existence and potential relevance of a factual presumption for damages in cartel follow-on cases. According to the FCJ, there is a high probability of cartel-induced overcharges in the present case, as the infringement found by the European Commission went beyond a mere exchange of information.[10] Even if the truck makers only agreed on gross list prices (and not on final net prices, i.e., prices minus all discounts and rebates), it would have to be assumed that the agreement on the gross list prices also had some influence on the final net prices. However, the FCJ held that the Stuttgart Court had not sufficiently taken into account all factual circumstances when assessing whether the conditions for a factual presumption existed in the present case. Instead, it had relied on abstract considerations and thus—erroneously—shifted the burden of proof to defendants.

SUSPENSION OF LIMITATION PERIOD IS ALREADY TRIGGERED BY INITIATION OF INVESTIGATION

Third, the FCJ clarified that a suspension of the statute of limitations is already triggered by the initiation of the European Commission's investigation, and not—as was regularly argued by defendants in follow-on damages cases—only by the formal decision to initiate cartel proceedings.

FCO

FCO Safeguards Competition In Mobile Communication Cooperation

On January 19, 2021, the FCO announced that it would closely monitor cooperation agreements between Deutsche Telekom, Vodafone, and Telefónica (operating in Germany under the "O2" brand), aimed at closing gaps in their mobile networks and improving network coverage in Germany as a whole.[11]

Deutsche Telekom and Vodafone had already agreed to cooperate in this area last year, but the FCO had insisted that the agreements must also include Telefónica, to prevent a competitive disadvantage for individual operators. The three incumbent mobile network operators will grant each other access to their 4G networks in comparatively low-traffic areas in order to close smaller dead spots in areas that would often not be economically viable for an operator to roll out its own networks, but that are otherwise already covered by other operators. The FCO will continue to monitor the specific design of the cooperation agreements to ensure that they do not unnecessarily restrict competition in the mobile communications market.

[10] The FCJ deliberately left unanswered the question of whether a factual presumption would also apply in cases with only a mere exchange of information.

[11] See FCO's Press Release of January 19, 2021, available in English here.

FCO Conditionally Clears Acquisitions In The German Food Retail Sector

Kaufland/Real and Globus/Real

On December 22, 2020, the FCO cleared the acquisitions of up to 92 "Real" retail stores from SCP Retail S.à.r.l. ("SCP") by Kaufland Immobilien & Co. KG and Kaufland Dienstleistung GmbH ("Kaufland")[12] and of up to 24 stores by Globus Holding GmbH & Co. KG ("Globus").[13] The clearance of Kaufland's acquisition was subject to Kaufland foregoing the acquisition of nine of the originally planned 101 stores to address concerns in individual local sales markets. Further, SCP undertook to sell Real stores with a total procurement volume of € 200 million p. a. to medium-sized retailers.

Kaufland belongs to the largest food retailer in Europe, the Schwarz Group (which also comprises Lidl). Globus is a German retail chain of hypermarkets, DIY stores and electronics stores. SCP, which is controlled by the Russian investment company Sistema, had taken over the ailing retail chain with its roughly 270 stores from Metro in the spring of 2020 with the aim of breaking it up and selling on the majority of the stores.

The concentration was originally notified to the European Commission. The European Commission referred the case to the FCO in light of the affected German markets—both on the sales and procurement side.

SALES MARKETS

The FCO considered self-service department stores, superstores as well as (organic) supermarkets to form part of the same market, but excluded specialist shops, like bakeries and drugstores. The FCO defined the relevant geographic markets as the catchment areas around the stores concerned in which 90% of all customers of the respective Real store are resident. Within these catchment areas, the FCO took a closer look at those "core areas" around each store in which it achieves two thirds of its sales. The FCO relied on data that was obtained through the "PAYBACK" loyalty program.

The FCO found that Kaufland's acquisition would have significantly impeded effective competition with respect to only 9 stores as the number of available alternatives in the relevant local sales markets would have been severely restricted and the Schwarz Group as a whole would no longer have been sufficiently restrained by competitors. To remedy the FCO's concerns, Kaufland offered to forego the acquisition of these nine stores and not to acquire them within the next two years.

Similar concerns on the sales side, however, did not arise in relation to Globus which only operates 47 retail stores throughout Germany.

PROCUREMENT MARKETS

On the procurement side, the FCO defined sixteen product groups (such as meat, fruits & vegetables, delicacies, or alcoholic beverages), each forming a distinct product market. All of these markets were found to be national in scope.

The FCO was concerned that the transaction would allow the Schwarz Group to further expand its strong market position in these already highly concentrated markets in which Edeka, REWE Group, Schwarz Group and Aldi represent about 85% of demand. In order to remedy these concerns, SCP undertook to sell stores with a total food procurement volume of € 200 million p. a. to medium-sized retailers such as the members of the Retail Trade Group, which includes Globus, as well as to foreign retailers or new market entrants.

Edeka/Real

On March 17, 2021, the FCO partially and conditionally cleared Edeka's planned acquisition of Real stores. The FCO conditionally approved Edeka's acquisition of 51 Real stores subject to the condition that Edeka give up sales space to other food retailers or close other Edeka stores in the

[12] FCO decision (B2-83/20) of December 22, 2020, only available in German here.

[13] See FCO's Press Release of December 22, 2020 (relating to both Kaufland's and Globus' acquisitions), available in English here.

relevant core area of six Real stores for a period of at least ten years after the acquisition. However, the FCO blocked the acquisition of 21 additional stores due to competition concerns on the sales side which could not have been rectified through remedies.[14]

"Wedding Rebates"

The FCO also intervened against Edeka's as well as the Schwarz Group's requests for so called "wedding rebates" (*Hochzeitsrabatte*), *i.e.*, requests for additional advantages from suppliers in connection with the acquisition of the Real stores for violating for violating the ban on demanding unjustified advantages from suppliers (Section 19(2) No. 5 German Act against Restraints of Competition). After the FCO had initiated proceedings, Edeka already abandoned its demands for such rebates.[15]

[14] See FCO's Press Release of March 17, 2021, available in English here.

[15] See FCO's Press Release of March 17, 2021, available in English here.

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