German Federal High Court of Justice rules on private enforcement in trucks cartel

Kluwer Competition Law Blog
January 12, 2021

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Please refer to this post as: Thomas Thiede, 'German Federal High Court of Justice rules on private enforcement in trucks cartel', Kluwer Competition Law Blog, January 12 2021, http://competitionlawblog.kluwercompetitionlaw.com/2021/01/12/german-federal-high-court-of-justice-rules-on-private-enforcement-in-trucks-cartel/

Despite best efforts of the European legislator as well as the CJEU, from a claimant's perspective, private enforcement litigation before German Courts in the trucks cartel [Link] must be an aggravating experience. Although the European Commission fined the members of the cartel extensively, an 'all-out'-approach of the cartelists and apparently flustered lower courts result in just a rather marginal number of successful private enforcement claims for that cartel. Hence, a word from Germany's highest civil law court, that is, the Federal High Court of Justice ('*Bundesgerichtshof*') was highly anticipated.

In the following, the decision's (23.09.2020, KZR 35/19 [Link]) main statements, its virtues and flaws (notably, under *pre*-Cartel Damages Directive based German law) are discussed.

Brief Summary of the Facts

In 2016, the European Commission held that European Truck manufacturers exchanged their gross price lists and information on prices and price increases as well as the timing of the introduction of new emission technologies over a period of about 14 years. The cartelists were fined approx. EUR 3 bn. The claimant in the case at hand had purchased numerous of said trucks during that period and sued for damages, that is, the cartel overcharge.

German legal magic: A tort without victims?

To be sure, the results of the investigations of competition authorities are binding for German courts. There are problems, however, where public authorities' decisions are not abundantly clear on facts that civil courts deem necessary for deciding a private enforcement case. For instance, the European Commission's finding in the trucks case was at times superficial in describing the cartelists' violation of competition law and the effect of said violation. Of course, – quite naturally – a lot of content is lost in translation.

True to their mandate, the defendant cartelists' legal representatives obstructed clear views on the findings of the European Commission. A number of lower instance courts took the bait and upheld that the European Commission did not find a violation of competition sufficient for a private enforcement case. See, for instance, the judgment of the Nuremberg-Fürth District Court (20.02.2020, 19 O 1506/19 [Link]). According to that court, the trucks case was a mere exchange of information; this (arguably innocent) exchange did not enable the cartelists to draw conclusions on competitors' prices; the cartelists did not agree to breach competition law and did not even exchange pricing information. The Nuremberg judges simply invalidated any detrimental effects on purchaser's procurement of trucks *per se*.

Quite a number of observers of that Nuremberg case were puzzled on that particular trick of German legal magic: Did the European Commission impose a stiff fine for violation of competition law, even though there was no harm to the purchasers of the cartelized goods? The German doyenne of competition law, Professor *Andrea Lohse* phrased the general astonishment succinctly (and cynically) as follows: *There are tortfeasors everywhere, but no victims anywhere.*

The Federal High Court's ruling at hand stops the deception and ends that particular magic trick. The Federal High Court holds explicitly that the truck manufacturers were involved in anti-competitive agreements, that is, a hard-core violation of European competition law. These agreements had enabled the cartelists to take into account the competitors' price increases and prices were agreed upon accordingly: Prices had been fixed. Truck manufacturers are, thus, liable for the overcharges of their customers.

Causation and Damage

Germans, unlike almost all other legal systems, split the test of causation. For a successful case, the violation of (competition) law must be the cause of an infringement of a legally protected interest ('*Kartellbetroffenheit*'). Moreover, there must be causation between the said violation of (competition) law and the damage sustained by the purchaser ('*Kartellbefangenheit*'). Usually, this distinction has hardly any effect. The violation of a legally protected interest and damage sustained provide for the intellectually identical starting point. Nevertheless, lower courts upheld the distinction viciously. In the judgement at hand, the Federal High Court (implicitly) rejects the first test for causation, that is, the '*Kartellbetroffenheit*'. Indeed, if the damage is caused by a violation of competition law, another test for a violation of a legal protected interest is superfluous.

In any case, a test for causation is necessary. Under the German law applicable to the case (notably, *pre*-Damages Directive) the burden of proof for that test lies with the claimant. This causes a plethora of problems, as secrecy is the very nature of a cartel. Obviously, a 'public' (illegal) cartel would lead to an immediate discovery and fines; customers would reject (quite rightly) the cartel's overcharge. Thus, the purchaser is usually entirely unaware of the mere existence of the cartel. The precise anti-competitive agreement is unknown and not readily available in authorities' decisions (see *supra*). As the burden of proof lies with the purchaser, that standard is hardly ever met.

Some lower instance courts acknowledged the claimants' dilemma by presuming that the purchaser's overcharge is based on the cartelists' anti-competitive conduct: The Higher Regional Court of Karlsruhe (31.07.2013, 6 U 51/12 [Link]) argued for *prima facie* evidence that cartels increase market prices. When market prices are increased, the price for the purchased good is increased accordingly and the claimant purchaser suffers damage. Hence, the defendant cartelist had to prove that the specific cartel did not result in a market price increase. The District Court of Dortmund (21.12.2018, 8 O 90/14 [Link]) took a different route and referred to the umbrella effect of the CJEU's famous Kone decision (ECLI:EU:C:2014:1317 [Link]): Where causation is established for a purchase even from non-cartelists due to umbrella effect, causation is all the more available for a direct purchase from the cartelists themselves. Finally, the Higher Regional Court of Düsseldorf (22.08.2018, VI-U (Kart) 1/17 [Link]) plainly resumed to the *post*-Cartel Damages Directive's legal regime and held that court experience and empirical evidence dictates that cartels cause damage. Claimants sustain damage where they purchase cartelized goods, that is, goods of the cartelists within the time and the market of the cartel ('*Erfahrungssatz*').

Surprisingly, the Federal High Court did not agree with the court's experience or the empirical evidence in the past. This view is upheld in the judgement at hand: According to the German Federal High Court, there is no presumption *per se* that cartels result in higher prices and, thus, damage. Although quite clearly outside of its competence (*c.f.* sec. 559 para 2 Code of Civil Procedure, '*Zivilprozessordnung*'), the Federal High Court presents quite lengthy instructions for lower courts on how evidence is to be addressed in the specific case of private enforcement. According to the Court, a long-forgotten presumption on the base of facts ('*tatsächliche Vermutung*') must be employed. It must be duly noted, however, that the literal translation is a misnomer: Technically, there is not presumption involved. Instead, the case is decided on the basis of circumstantial evidence to be presented by the claimant. Said claimant has to present and prove all the circumstantial evidence indicating an overcharge by the cartel. The weighing of that circumstantial evidence shall then indicate whether the respective court can establish the '*Erfahrungssatz*'.

The Federal High Court's 'upside-down notion' is of rather limited help for the claimants. They still have to present extensive factual circumstantial evidence, which is hardly available. Moreover, plain denial of cartel caused damage to the purchasers is still implausible. Indeed, the European Commission, the CJEU as well as numerous Member State's courts and economic luminaries have established that principle. A reversal of the burden of proof, that is, the defendants' obligation to prove that there was no overcharge is much more appropriate. Notably, such reversal of the burden of proof will be available for cases in Germany brought after June 2017.

The Higher Regional Court of Stuttgart

Although the Federal High Court has no competence to give orders to lower court judges on their procedure or on their perception or their presentation of evidence (which the Federal High Court did, see *supra*), the Federal High Court can decide a case on its merits when the facts submitted by the lower court are sufficient. If these facts are not sufficient, the case is referred back to the original court. In the case at hand, the case could have (quite easily) been decided on the facts laid out by the referring Higher Regional Court of Stuttgart. Nevertheless, just on the basis of errors in the presentation of evidence by the Stuttgart judges, the case was referred back.

In the end, the observers are left with a bad feeling: The Federal High Court has to be praised when putting a stop to the (deliberate) misunderstanding of the European Commission's decision in the trucks case and, as it were, streamlining the merits in cartel damages cases. On the other hand, the dubious German legal magic of lower courts is replaced by high-grade (Federal High Court) legal magic. The burden of proof for the cartelists' anti-competitive conduct and its effects is still with the unknowing claimant.

A first version of the post in German can be found here.