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Suum cuique? Remarks on collective private antitrust litigation in Germany

Thomas Thiede (Spieker & Jaeger) · Tuesday, April 20th, 2021

The recent adoption of the Collective Consumer Redress Directive has reignited the discussion on collective private antitrust litigation – any 'bundling of claims' – once again. Even though collective redress on an EU level was first seriously discussed in the context of the Damages Directive, competition law does not fall into the scope of the new Collective Consumer Redress Directive. Nevertheless, collective private antitrust litigation is possible in a number of European Member States. In Germany, at the moment, any such collective action usually fails due to a number of reasons. This might change soon. Lately, the German legislature is currently intensively discussing the introduction of collective redress instruments, also for competition law.

Joinder of parties

In any case of private antitrust litigation, a factual connection between several independent cases (i.e. a wrongful act, that is the violation of competition law) is available. Hence, injured customers may proceed by way of simple joint litigation/joinder of parties under sections 59 and 60 of the Code of Civil Procedure ('Zivilprozessordnung' or 'ZPO'). Thereby costs are saved as only one legal representative has to be mandated for the respective court proceedings – and the statutory legal fees incurred are degressive: The higher the (collective) amount in dispute, the lower the respective fees.

The problem of such a joinder of parties is the operation of said parties on different market levels, as, for instance, a 'bundling' of claims of consumers and retailers is not possible as they have (potentially) different interests. Moreover, different claims with regard to the date of purchase of the cartelized item often result in different legal questions, for instance, with regard to the statute of limitations.

Finally, the courts are at discretion to separate the joined proceedings under section 145 ZPO. And, of course, this possibility is used somewhat extensively by German judges (see judges' performance rating, infra).

Model Declaratory Action ('Musterfeststellungsklage')

Alternatively, customers of cartelists – notably, only consumers – may file for a model declaratory action pursuant to section 606 et seq. ZPO. In principle, these rules provide for specifically qualified entities to seek a declaration of the existence or non-existence of factual or legal preconditions for the existence or non-existence of claims between (only) consumers and an undertaking. However, if a settlement is not reached in the model declaratory action, the consumer is referred to subsequent individual proceedings to enforce his or her claims.

Special Purpose Entities

Finally, claims could be 'bundled' by way of assignment to Special Purpose Entities ('Zweckgesellschaften'). Fearing 'American style class actions', German courts impose considerable requirements on these entities. Not only are they required to be registered under section 10 (1) no. 1 Act on Out-of-Court Legal Services ('Rechtsdienstleistungsgesetz' or 'RDG') to provide legally for 'debt collection services' and to have an 'independent business', but they must also be financially equipped to bear their own legal costs and the defendant's claims for reimbursement of costs overall instances.

Much quoted in that regard is a judgement by the Higher Regional Court ("Oberlandesgericht", "OLG") Düsseldorf in 18.02.2015 – VI- U (Kart) 3/14. The court argues that the respective assignments may be contrary to public policy because the change in the person of the claimant may be used to present a 'broke' claimant. Any transferred claim may only be judged by the court seized when the legal successor – that is the Special Purpose Entity – can also present financial viability, that is, sufficient financing to cover all following instances and the respective costs of the defendants. The OLG Düsseldorf held:

> *With regard to the assignment of claims and the authorisation to take legal action and the resulting shifting of the risk of reimbursement of legal costs, the BGH has established standards for assessing whether the aforementioned acts may be contrary to public policy. In the starting point it must be taken into account that in principle no defendant has a right to be sued by a solvent plaintiff … . However, assignments of claims as well as authorisations to institute proceedings may not be misused to deprive the opposing party as well as the state of the possibility to realise their legal claim for reimbursement or payment of the costs of the proceedings …. In principle, such abuse is to be assumed if an incapable party is used as a pretext for the judicial enforcement of claims and the purpose of this is to reduce or exclude the cost risk to the detriment of the defendant.*

To counter the latter assumption, the financial means of any Special Purpose Entity must be demonstrated. To be sure, the necessary financial resources for a Special Purpose Entity can only be secured in cooperation with litigation financiers. However, German courts essentially disdain any such commercial model involving third-party finances. As a result, a number of hurdles were erected to keep financiers from the German litigation market: Firstly, the Special Purpose Entity must be used in general for the extra-judicial collection of claims; any judicial proceedings by such an Entity must be the exception. In addition, the judicial prosecution of the asserted claims must be fully promising, that is, critical or disputed claims cannot be part of any litigation. Thirdly, the

litigation financiers must not influence the proper performance of the legal services of the Special Purpose Entity. In particular, the litigation financier's intention to make a profit must not in any way affect the litigation conducted.

As a result, the current – ongoing – attempts seem to have reached higher levels of legal design: Currently tested, for example, are Special Purpose Entities incorporated and entered in the commercial register as well as the register of legal services. Within the framework of this Special Purpose Entity, victims' claims are 'bundled' by means of assignment between the victim and the Special Purpose Entity. In order to secure the Special Purpose Entity's capitalisation within the meaning above, the Special Purpose Entity needs the financial means to enforce the claims of the injured parties and to bear all legal costs as well as, in particular, any claims for reimbursement of costs by the defendants, as well as court fees for all instances **beforehand**. As the Special Purpose Entity should have a corresponding amount at its free disposal, the money is held in trust by a German notary in a notarial escrow account. It must be noted, that all of this is technically executed in reverse order, that is, the escrow account and the registration is followed by the assignment and is, quite obviously, very risky (no assignors) and rather expensive (notary's and registration fees).

Self-financed individual litigation

German courts quite clearly prefer the self-financed individual lawsuit to any third-party financed bundling of claims. According to the German judiciary, injured parties should file a lawsuit individually in German courts.

'Performance rating' of German judges and political developments

In conclusion, there are two comments on German legal policy to be made: The German judiciary is exceptionally free to organise their daily work. The only indicator that is used to assess the work performance of an individual judge is the number of cases he or she has dealt with. Against this background, German judges seem exceptionally unwilling to even consider 'bundling' of claims as their workload would increase without a corresponding increase of case numbers: 5,000 individual claims are better than a single ('bundled') action.

The German legislature is currently intensively discussing the reform of legal services. Observers had hoped that the bundling of claims would now find its way into German law proper. This hope has recently been thoroughly disappointed. The second chamber of the German Parliament ('Bundesrat') has expressly spoken out against such 'bundling'. A development in this regard, therefore, remains to be seen but is unlikely.

Without a doubt, private competition enforcement has a long tradition in Germany and is among the preferred jurisdictions for private cartel damages actions in Europe. This is, however, not true for collective actions where small claims are 'bundled'. The consistent failure to provide properly for these claims may result in a steep decline of private cartel damages in Germany: Victims may find other more favourable fora in the future.

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