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Lump-sum Cartel Damages in Germany: Recent Developments

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The 2014 Cartel Damages Directive substantially facilitated cartel damages actions across the EU – the rising number of damages actions ever since its entering into force is a good indication of this development. Nevertheless, the quantification of harm remains the main challenge for claimants, who hold the burden of proof for the amount of harm. The involved calculations often require expensive, lengthy expert opinions, which discourages claimants. New developments in German case law could help them in that regard.

Recently, the Federal Court of Justice (case KZR 63/18) ruled on the legitimacy of lump-sum damages clauses in supply contracts. Germany's highest court allowed a lump-sum of 5% of the purchase price but was also generally receptive to clauses between 5 – 15%. Last year, in a much-debated judgment, the Regional Court Dortmund went even further and used its own free estimation method instead of relying on economic experts to arrive at a 15% overcharge. In February of this year, the Regional Court Dortmund once again confirmed this approach and arrived at a 10% overcharge. However, higher instance courts still have to back the Dortmund solution yet. In any case, these developments show that Germany is becoming an attractive forum for antitrust damages actions.

The Federal Court of Justice and lump-sum damages clauses

Lump-sum damages clauses could be an effective means to avoid lengthy and costly damages calculation. According to such clauses, an undertaking that violates competition law is obliged to pay a lump-sum amount of damages to their contracting partner. Clauses usually correspond to the following: "If it can be proved that the supplier has entered into an agreement concerning a product of this supply contract which constitutes an unlawful restriction of competition, he shall be liable to the purchaser for lump-sum damages in the amount of [5 – 15%] per cent of the net invoice amount of this contract, unless the damage is proven to be in a different amount."

In the last decades, lower instance courts and academics in Germany took different stands on lump-sum damages clauses in purchasing and supply contracts (German-speakers, have a look at the brilliant book by *Sirakova*). If exceptionally, the clauses are negotiated individually in the contract, effectiveness was generally assumed. However, mostly, these clauses can be found in general terms and conditions. Discussions jurisprudence and academia mainly circled around (1) the appropriateness of the amount of the lump-sum damage clause and (2) the question of who bears the corresponding burden of proof.

Like the previous instances, the Federal Court of Justice, with regard to (1), decided that the lump-sum damages clause of 5% does not unreasonably disadvantage the cartelists. 5% does not exceed the damage that would occur in the ordinary course of events. On the contrary, the clause corresponds to an average overcharge of cartels. The Federal Court of Justice, in an *obiter dictum*, even went further and held that higher amounts, any amount up to 15%, would be appropriate. For the latter, questionably and just like the Regional Court Dortmund discussed below, the Federal Court of Justice relied on studies on cartel overcharges, primarily the *2009 Oxera Study* for the European Commission. The *Oxera Study* found that in 93% of the sample cases, cartels result in overcharge, which led to the presumption that cartels cause harm in Article 17(2) Damages Directive. Moreover, the study found that the means of cartel overcharge corresponds to roughly 20% and the medians to 18% of the cartel price. As for the burden of proof (2), the Federal Court of Justice unsurprisingly held that the cartelists hold the burden of proof that the cartel damage was, in fact, less than the agreed lump-sum. Usually, due to the otherwise typical information asymmetry in cartel damages claims, cartelists are also better positioned to prove the actual amount of damages. Cartelists have direct access to internal documents that can substantially facilitate damages calculation.

The free estimation method of the Regional Court Dortmund

Article 17(1) Damages Directive (and § 287 German Code of Civil Procedure) allow courts to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available. The Regional Court Dortmund, in two cases, roughly followed a proposal by Higher Regional Court Düsseldorf Justice *Kühnen.* It exhausted the possibility to estimate damages by using its own free estimation method instead of relying on well-known methods from the Commission Guide on Quantifying Harm and economic experts. According to the Dortmund court, the usual methods were not suitable for this case, particularly because the related costs for economic experts would be disproportionate to the possible harm. As an alternative, in last years case, the court took the facts of the case, a contractual lump-sum damage clause, as well as just-mentioned economic studies and comparisons to other Member States' courts into account and arrived at a 15% overcharge. In the judgment of February 2021, a lump-sum damages clause was not available. Nevertheless, the court arrived at a 10% overcharge solely due to a reliance on the facts of the case and the studies. In case of a possible appeal, the appeal court will likely back the Dortmund solution, particularly if the *Kühnen*-Chamber will decide the case. The recent judgment of the Federal Court of Justice also indicates a certain sympathy to the questionable studies that the Regional Court Dortmund relied upon – let's see what the future brings!

Comment

The Federal Court of Justice judgment brings much-needed clarity after a decade of discussions on the legitimacy of lump-sum damages clauses in private enforcement of competition law – something that I already predicted in my first-ever academic article. Since the relevant provisions in the German law on general terms and conditions can be traced back in part to European Directives (the Directive 93/13/EEC on unfair terms in consumer contracts and the Directive 2011/83/EU on consumer rights), the discussions and now the ruling of the Federal Court of

Justice, can at least in part also be transferred to the other Member States.

In contrast to legal presumptions of a specific amount of overcharge, like the 10% presumption in Hungarian or Latvian and 20% presumption in Romanian competition law, lump-sum damages clauses, even included in general terms and conditions, are agreed upon between the parties. Therefore, they are covered by party autonomy. Moreover, parties have a better insight into the respective market and transaction conditions and, thus, the amount of possible damages, which are heavily case-specific. Yet, the reasoning of the Federal Court of Justice concerning the overcharge studies is slightly problematic – more on this in a minute. After all, the Federal Court of Justice did not use the studies completely uncritically as the basis for its decision. Moreover, it placed the studies in the context of the appropriateness-question by assuming that anything between 5 and 15 % was, according to reports, in the absence of better evidence, a reasonable and appropriate value to estimate the damages.

Just like the legal presumptions of a specific amount of overcharge in Hungary, Latvia and Romania, the Regional Court Dortmund's decision, which effectively amounts to a presumption of an amount of harm through the back door, is more problematic. It led to several critical articles, mostly in the December 2020 edition of the German Journal NZKart, which is quite unusual for a first-instance judgment (naturally, I also had to be part of this discussion). Presumptions relating to the amount of harm do not necessarily sit well with recital 47 and Article 3(3) Damages Directive. According to recital 47, a presumption should not cover the concrete amount of harm. Article 3(3) Damages Directive does not allow overcompensation. Thus, also the German legislator explicitly refrained from introducing a presumption of a specific (minimum) amount of harm. Yet, such presumptions are often considered to be claimant-friendly.

The studies that supporters rely on to argue in favour of such presumptions and that the Regional Court Dortmund referred to, be it the above-mentioned *Oxera Study* or the *Connor*, *Smuda* or *Boyer and Kotchoni* studies, lack typicality concerning the amount of harm. The means of the overcharge in the studies range from 20 – 49 % and the medians from 11 – 28 %. The studies, thus, do not give rise to a typical overcharge. Moreover, they do also indicate that a, for example, 15% presumption could lead to either under- or over-enforcement. Not every claimant will therefore be happy about them. For those interested, more on damages calculation and presumptions of harm in my upcoming presentation at the International Jean Monnet Module Conference on EU and Comparative Competition Law Issues (May 13th, Session 3 from 15:00 – 15:15 – conference program will be updated soon), for which an open-access paper will follow.

In conclusion, lump-sum damages clauses based on party autonomy = yea, (legal) presumptions relating to the amount of harm or free estimation that result in the same outcome = nay!

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This entry was posted on Friday, April 30th, 2021 at 3:30 pm and is filed under Source: UNCTAD“>Damages, Germany
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