Kluwer Competition Law Blog

Recent Developments in German Collective Private Antitrust Litigation – Unicorns or Ponies?

Thomas Thiede (Spieker & Jaeger) · Wednesday, August 10th, 2022

The collective private antitrust cases in the so-called timber cartel keep many German courts busy. At the beginning of the year, the Stuttgart Regional Court rejected any claims for cartel damages in a rather blunt manner [Link]. Now, the Regional Court of Dortmund has heard the case. As Dortmund is located in Germany's Westfalia region, a local saying comes to mind: When asking for a unicorn, be happy to get a pony!

Joint marketing of timber

Sawmills are rather often in a highly unfavourable economic situation: On the one hand, they buy round timber locally due to high transport costs. In the upstream market, they experience significant competitive pressure ('high prices in purchasing'). On the other hand, they typically sell their products (mainly boards, which can be transported rather easily and at lower prices) globally. In the downstream market, they are therefore also experiencing competitive pressure ('low prices in sales').

The timber cartel operated in the upstream markets, that is, timber procurement. At least from the early 1980s onwards, various German Federal States did not only distribute timber from their own, i.e. state-owned forests. They also sold timber from private and municipal forests, making up for more than half of their territories' market. State forestry authorities established a 'joint timber marketing' and sold timber from various forests at identical prices. Within the framework of these contracts, an annual plan was drawn up that determined the quantities, assortments and times of possible timber deliveries. In essence, the competition on the supply market for round timber was almost completely thwarted.

(First) Intervention of the German Federal Cartel Office

The agreements between the German Federal States and forest owners are likely to have violated competition law as hardcore restraints. To be sure the bundled distribution at uniform, as well as the exchange of information on future and current market-relevant information between the Federal States and forest owners as competitors in the marketing of timber, with regard to the quantity offered, the offer price, the offered assortment as well as the offer period is in this respect a further

violation of competition law, which incidentally reinforces the original violation of competition law, that is, the bundled distribution.

Accordingly, the German Federal Cartel Office started investigations in 2001 and conducted official proceedings from 2003 onwards. This procedure ended with the Federal States making commitments, for example, to stop the joint timber marketing above certain forest sizes. In addition, the commitments stipulated that new marketing systems would not be hindered and that the forestry sector would be enabled to act independently on the market.

Reopening of the proceedings by the German Federal Cartel Office

Indeed, such commitments influencing the structure of a sector are not unusual. However, the aforementioned commitment did nothing of the sort – or the federal states did not keep their commitment; it will have been a mixture of both. The German Federal Cartel Office, therefore, reopened the matter again in 2012 and yet again investigated quite extensively. The Federal States then negotiated for about 2 years but failed to reach a result. Consequently, the German Federal Cartel Office prohibited the joint marketing of timber in its entirety [Link].

Judicial review

Legal action was then taken against the Federal Cartel Office's order before the Düsseldorf Higher Regional Court. The Düsseldorf Higher Regional Court upheld the decision of the Federal Cartel Office [Link]. To be sure, the German Federal States appealed to the German Federal Court of Justice. In its decision, the Federal Court of Justice referred to the reopening provision of Section 32b of the Act against Restraints of Competition, which provides for reopening after prior commitment only in narrowly defined cases [Link]. Although the Düsseldorf Higher Regional Court had comprehensively examined that provision and affirmed the admissibility of the reopening, the German Federal Court of Justice took a different legal view and simply annulled the Federal Cartel Office's decision referring to the inadmissibility of the reopening of the case.

Cartel damages

Sawmills have very slim margins and are certainly not in a position individually to take legal action against the federal states, which are their only suppliers. However, the sawmillers share a common fate as they purchased timber from a cartel and (probably) paid inflated prices for said timber. And since they are many, they join forces. So-called claims Special Purpose Entities – one per involved German Federal State – are founded, and the sawmills assign their claims for compensation due to the cartel to said Special Purpose Entities in a rather elaborate procedure. In short: they bundle their claims.

Under German law, such a Special Purpose Entity must fulfil a whole range of requirements as described earlier in this blog [Link]. This includes not only an entry in the legal services register as a debt collection agency (which was done), but also a very substantial financial endowment. This full provision of financial means goes back to an earlier case law of the Higher Regional Court of

Düsseldorf, which had required that the defendants may not be confronted with an insolvent plaintiff on the basis of assignments [Link], so since then, Special Purpose Entities have to have the financial means available for the entire legal proceedings, that is, the costs of the proceedings and the court costs plus the costs of expert opinions, including all costs of the litigants, both for the proceedings before the all potential appeal courts and for the proceedings before the Federal Supreme Court.

Injured parties can rarely afford this out of their own pocket, so the Düsseldorf Higher Regional Court made it necessary to call in litigation financiers. This was also the situation in the case at hand. The Special Purpose Entity deposited the necessary sum and concluded a corresponding (irrevocable) custody agreement, which provides for a pay-out in the event of a loss in court. In addition, there was a guarantee agreement on the corresponding sums with a litigation financer.

Proceedings before the Stuttgart Regional Court

The first Special Purpose Entity brought a first case against the Federal State of State of Baden-Württemberg before the Regional Court of Stuttgart [Link] – which was lost. It is noteworthy that the Regional Court of Stuttgart did not discuss questions of competition law but dismissed the action solely based on the arguably inadmissible bundling of the claims. The Regional Court of Stuttgart held that the Special Purpose Entity was not entitled to act because the transfer of the sawmills' claims by way of assignment was void due to violations of the German Legal Services Act. The Stuttgart court argued that, firstly, the Special Purpose Entity had acted outside its authority as a debt collection agency because it had not planned to provide debt collection services but to enforce claims in court. Secondly, antitrust damages claims could not be the subject of a permitted debt collection service due to their complexity. Thirdly, there would be conflicts of interest on the part of the sawmillers because the bundled claims would have different chances of success. Similar conflicts of interest, according to the Stuttgart Regional Court, arose in view of the litigation financing. The respective prospects of success of the sawmills would differ from the prospects of success of the class action as a whole and the overall return, as a litigation financier would have in mind.

In his case note, the Cologne legal scholar *Deckenbrock* [Link] clearly identified the weaknesses of the Stuttgart decision. Firstly, it is true that debt collection agencies, i.e. also, the Special Purpose Vehicle, are not allowed to litigate. As long as they involve a lawyer, however, they are, of course, allowed to enforce claims in court. Secondly, there is no legal basis for the assumption of the Regional Court of Stuttgart that claims for damages under competition law are not the subject of a permitted debt collection agency. In any case, the expertise of the lawyer involved had to be considered so that any complexity could be managed by that lawyer. In addition, the legislator had only recently expressly rejected the demand of the German Federal States to exclude competition law from the scope of debt collection agencies in the future. Thirdly, the bundling does not result, *Deckenbrock* argues, in a conflict of interests as the court hearing the case is at liberty at any time to separate the bundled action into individual proceedings corresponding to the prospects of success. Finally, the influence of the litigation financer could at most be affected if considerable rights of influence were granted.

Proceedings before the Dortmund Regional Court

Deckenbrock concludes his case note by stating that the judgement of the Stuttgart Regional Court is not likely to stand so that all eyes are now turned towards Dortmund and the hearing of a similar case there.

The oral proceedings in Dortmund initially revealed that the representatives of the Special Purpose Vehicle had considered the different prospects of success of the bundled claims. Differentiated motions were filed depending on the likelihood of success of the respective bundled claims. Incidentally, the Dortmund Regional Court – quite unlike the Stuttgart Regional Court – essentially focused on the specific issues of competition law. The Regional Court of Dortmund stated that despite the corresponding, multiple findings of the German Federal Cartel Office and despite the judgement of the Higher Regional Court of Düsseldorf, this was no follow-on, but a stand-alone case. However, the Dortmund Regional Court also indicated that a violation of Article 101 of the Treaty on the Functioning of the European Union (TFEU) or Section 1 of the Act against Restraints of Competition (ARC) was quite likely. Nevertheless, the Special Purpose Vehicle was ordered to specify the legal infringement by the joint marketing of timber once again.

According to the Dortmund Regional Court, the question of the causation of the competition law infringement and the damage suffered is then of considerable importance. The court quite clearly revealed the core problem of such bundled claims from the perspective of judges: 230,000 invoices would have to be assessed on the merits. In this context, the Dortmund Regional Court refers to numerous inconsistencies disclosed by the defendant state's legal representatives and to the intention to use legal technology or experts for the assessment. For the question of the amount of damages, the public was to observe the usual game, as it were, between the plaintiffs' experts and the defendants' experts. While the former determines the amount of damage, the latter is often concerned with demonstrating the lack of damage. This was also the case in the proceedings before the Dortmund Regional Court, so that the court hinted that the experts involved could be summoned at the same time in order to clarify in speech and rebuttal their respective expert opinions ('hut tubbing'). The decisive factor in this respect is probably that the defendants have argued that the timber price would have been even higher without the joint marketing, as then there would simply have been less timber on the market. The argument is basically a variation of the efficiencies defense raised by defendants to negate a competition law infringement in the first place – which the Federal Cartel Office has rejected to the extent relevant to the cases (i.e. bundling is legal for small forest owners of up to 100 ha, as this may lead to efficiencies; for larger forest owners, this is not the case).

If the questions of competition law were thus addressed, the Dortmund court turned to the question of the admissibility of bundling. The Dortmund Regional Court made it quite clear that it would not follow the Düsseldorf Higher Regional Court with regard to financing. With reference to the German regulation on legal aid, which only covers one instance at a time, the court indicated that it also only required funding for one instance.

The remaining concerns entertained in Stuttgart's court were then probably less valid in Dortmund. Ultimately, according to the Dortmund court, bundling always benefits the injured parties because otherwise, scattered and minimal damages would not be pursued. In any case, the protective purpose of the German Legal Services Act is certainly not to protect the tortfeasor but the injured parties. However, according to the German legislative concept, this very protection of the injured party required considering whether the bundled action could be successful. And this was, at least

according to the Dortmund court, somewhat in question in the present case because there was no binding effect of the previous decision of the German Federal Cartel Office and the Higher Regional Court Düsseldorf. With the bonmot that there were no unicorns at the Dortmund Regional Court, but at best ponies, the chamber pointed out that questions in this respect would be submitted to the European Court of Justice (CJEU).

Unicorns instead of Ponies?

To be sure, it is commendable that the Dortmund Regional Court may now refer the question of the bundling of claims – which is highly controversial throughout Germany – to the CJEU. The publication of the corresponding questions is expected in the relevant specialist journals in the very near future. In that respect, it seems likely that the CJEU will clear the way for the bundling of claims in Germany.

It is doubtful, however, whether such a preliminary reference procedure before the CJEU is necessary at all. Firstly, the German Federal Supreme Court only recently held in a cross-border case of Swiss claims assigned to a Special Purpose Vehicle that the latter can (of course) assert the claim in accordance with the provisions of the German Legal Services Providers Act [Link]. Secondly, a view across the border reveals deep insights by the Amsterdam District Court in its latest judgement regarding the Truck Cartel [Link]. Whereas Dortmund judges lamented that the Dutch summary procedure might be ineffective [Link] quite the opposite seems to be the case: The Amsterdam court held that any nullity due to violation of the German Legal Services Act would benefit the Truck manufacturers and not the German claimants, while it is precisely the claimants whose interests the German Legal Services Act seeks to protect. Thus, in the Netherlands, bundled German claims are upheld.

As a result, a sort of ‘unwillingness’ of German instance courts vis-à-vis bundled claims becomes more and more apparent. Of course, the German Federal Supreme Court entertains a clearly different view. However, the lower courts proceed in cumbersome and slow multi-instance procedures in single cases to establish (mere) ponies, whereas ‘Unicorns’ should be available.

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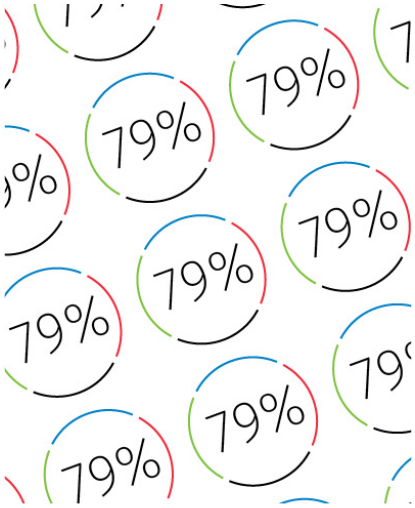

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