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German Federal Court of Justice Confirms Factual Assumption of Harm in case of Anticompetitive Information Exchanges and Clarifies Scope of Liability in Multi-Product Cartels

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On 5 January 2023, the German Federal Court of Justice (Bundesgerichtshof, BGH) published an important judgment in relation to follow-on damage actions relating to the so-called German drugstore products cartel (Case KZR 42/20). In its ruling, Germany's highest civil court also confirmed a factual presumption of harm in the case of anticompetitive information exchanges. This is an important clarification as the BGH had thus far only acknowledged such factual presumptions in cases of price-fixing and market-sharing practices. In addition, the BGH clarified that cartel participants are jointly and severally liable for damages caused in relation to products they do not manufacture themselves if they were aware that the anticompetitive practices extended to the other products.

Background

The case concerns a damage action by the insolvency administrator of the drugstore chain Schlecker against the members of the German drugstore products cartel. This cartel involved a total of 15 manufacturers of branded drugstore products, including Colgate-Palmolive, Beiersdorf, Johnson & Johnson, L'Oréal, Procter & Gamble, Sara Lee, Gillette, and Reckitt Benckiser, that – from at least 2004 to 2006 – regularly exchanged information on gross price increases and the status of negotiations with mutual retail customers within the framework of the 'Body Care, Detergents and Cleaning Agents Working Group' of the German Brand Association (Markenverband). In 2013, the German Federal Cartel Office (FCO) fined the manufacturers as well as the Brand Association a total of EUR 63 million for their anticompetitive information exchange (Case No. B11-17-06). In a follow-on damage action, the insolvency administrator claimed that, depending on the affected product group, net prices paid by Schlecker were raised between 4.13% and 18.38% due to the cartel, resulting in a total damage claim of EUR 212.2 million plus interest.

Factual presumption of harm in case of anticompetitive information exchange

One of the most disputed questions in the civil proceedings was whether the plaintiff could rely on a factual presumption that the anticompetitive information exchange resulted in damage. The first and the second instance courts in Frankfurt denied such factual presumption. They argued that there was no sufficient probability of damage in the case at hand, particularly as the information exchanged was highly aggregated and concerned a broad range of products. According to the Frankfurt Court of Appeal, due to the ambiguity of the information exchanged, it was not inevitable that the practice had a negative effect on price competition.

The BGH did not follow this argument. In an obiter dictum, it held that "*an exchange between competitors of secret information on current or planned price-setting behaviour […] gives rise to the empirical principle […] that the subsequent prices are on average higher than those that would have been formed without in the absence of the restriction of competition*".

The BGH based its conclusions in particular on the findings of the FCO, which under German and EU law are binding in civil proceedings. According to the fining decision of the FCO, the subjects of the information exchange were the intended gross price increases across customers and the implementation of the announced gross price increases.

In line with the case law of the CJEU in Anic Partecipazioni and T-Mobile Netherlands, the BGH concluded that, as it is presumed that the undertakings participating in anticompetitive coordination take into account the information exchanged with their competitors when determining their market conduct, an influence on the market mechanisms is also highly probable in the case of a pure exchange of information.

At least in the case of disclosure of secret information, the BGH argued, it is also highly likely that the market behaviour of the cartel participants does not correspond to the hypothetical market behaviour that would have resulted in the absence of the restraint of competition. If such secret information concerns the current or planned price-setting behaviour, the BGH argued that there is also a high probability that the competitors are involved in achieving a common higher price level as a result of this behaviour.

The BGH, therefore, concluded that "*in the case of an exchange of secret information between competitors in breach of competition law, which concerns the current or planned price-setting behaviour vis-à-vis a common customer, the high probability of such an event also gives rise to the factual presumption – in the sense of a rule of experience – that the prices achieved vis-à-vis this customer […] are on average higher than those which would have been achieved in the absence of the restriction of competition"*.

Scope of joint and several liability

Another important part of the judgment concerns the scope of the liability of the individual cartel member for the damage caused by the anti-competitive practice. This is particularly relevant where the practice concerns multiple markets and/or products, such as toothpaste, shower gel, and dishwasher detergents in the case at hand.

The BGH reiterated that, because a cartel is a jointly committed tortious act, all cartel participants are in principle liable as joint and several debtors for the damage caused. According to the case law of the Bundesgerichtshof, individual agreements that merely substantiate a basic anticompetitive

agreement do not regularly constitute independent acts. Therefore, they do not constitute multiple violations but are rather combined into a single statutory infringement. The consequence of the existence of such a basic agreement is that the participating cartel members are jointly and severally liable for all damages caused by the entire infringement.

According to the BGH, which relied in its argumentation on the findings of the FCO, the separate restrictive agreements and practices, although concerning different products and customers, constituted the realization of a single perpetrator's will. Thus, the BGH concluded that all meetings and agreements listed in the fining decision of the FCO served to implement the basic agreement made for the regular exchange of sensitive information. It was also foreseeable for the defendant that the other cartel members would take the information exchanged into consideration when acting on the respective product markets and when entering into negotiations with Schlecker, even in relation to products the defendant did not manufacture. Therefore, the BGH held that, insofar as joint and several liability exist, the defendant's liability is not limited to the respective competitive relationships and the product areas belonging to them. Rather, the liability relates to all products affected by the respective anti-competitive practices.

Conclusion

The judgment is consistent with the overall rather claimant-friendly approach of the Bundesgerichtshof in the field of private enforcement. Germany's Supreme Court aims to provide guidance on fundamental questions of liability and substance, paving the way for more effective compensation of victims of competition law infringements. In doing so, the BGH takes due account of the jurisprudence and legislation at the EU level, ensuring that German case law is in line with EU law. This approach makes this judgment relevant beyond Germany, particularly as questions of the presumption of harm as well as the scope of joint and several liability of cartel members for their anticompetitive practices are frequently at the heart of competition damage cases across the EU.

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** This piece was first published on the contributor's own CDC blog post, find link here.*

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