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Federal Court of Justice Specifies The Requirements For The (Pretrial) Disclosure of Evidence in German Cartel-Damage-Proceedings

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Introduction

In the latest Judgement by the German Federal Court of Justice (FCJ) regarding Section 33g of the Act against Restraints of Competition (“ARC”) in *BGH, Urt. v. 4.4.2023, KZR 20/21 – Vertriebskooperation im Schienenpersonennahverkehr* (“Judgement”), which was added by the 9th Amendment of the ARC in 2017 and revised by the 10th Amendment of the ARC in 2021, the FCJ provided insights on the hitherto controversial feature of *prima facie* evidence in Section 33g (1) of the ARC and concluded that it requires an independent interpretation. It is adequate for the plaintiff to have a certain probability of being the owner of a cartel claim for damages based on concrete indications; an overwhelming probability is not necessary. Therefore, the FCJ continues the plaintiff-oriented approach previously established in the Cartel-Damages-Directive 2014/104/EU.

In addition, the FCJ explains that decisions regarding commitments under Section 32b of the ARC, along with comments from the German Federal Cartel Office (FCO) in those decisions, may serve as evidence to establish the *prima facie* case of conduct that violates cartel law, as required under Section 33g of the ARC.

Background

By enacting the Cartel-Damages-Directive 2014/104/EU in 2016, the German legislature established a substantive right to information under Section 33g of the ARC as part of the 9th Amendment to the ARC. This Amendment was heavily criticized at the time for being unclear and vague in many respects. Germany’s decision to introduce an independent right to information was an unusual move. Over six years since the introduction of the claim for information within cartel damages, there have been very few published rulings on this topic. This is most likely due to the initial assumption that it lacked temporal applicability. One of the rare court rulings on the matter, issued by the Regional Court of Hannover in the *Altbatteriekartell* (Scrap battery cartel) case, simply affirmed the main issue of *prima facie* evidence without addressing its characteristics in detail. Two of the primary criticisms, namely the applicability of the disclosure regime to historical claims and the definition of *prima facie* evidence, have been resolved by the FCJ in this case.

Factual part

The most recent published Judgement on Section 33g of the ARC by the FCJ was presented in the case of sales cooperations in local rail passenger transport (Vertriebskooperationen im Schienenpersonennahverkehr). The basis of the Judgement is the system for tariffs and distribution in local rail passenger transport.

In January 2014, the FCO initiated proceedings against Deutsche Bahn AG (“DB AG”) on suspicion of abuse of a dominant position in connection with the sale of rail passenger tickets. In the course of the proceedings, DB AG issued commitments. In one of the commitments DB AG and its “relevant group companies” committed, among other things, to offer its contract partners a basic sales cooperation at a maximum commission rate of 8.5%, starting from July 1, 2016. With these commitments made by DB AG in accordance to Section 32b ARC, the FCO declared these commitments as binding and discontinued the proceedings by decision of May 24, 2015.

The Transdev Group (“plaintiff”) has brought an action against subsidiaries of DB AG (“defendants”) and has asserted a claim against the defendants under assigned disclosure, surrender of evidence and compensation for cartel-related damages allegedly incurred as of 2008. The plaintiffs are private railroad companies and operate regional railroads. As the parent company, the plaintiff is asserting claims against DB subsidiaries on behalf of seven of its subsidiaries that offer regional rail transportation services (“cedents”), namely firstly against a provider of regional rail transportation services (“defendant 1”) and secondly against the provider of ticket distribution services (“defendant 2”). The action is based on the allegation that the conclusion of a tariff cooperation agreement with the defendant 1 was not only tied to the use of necessary sales services for the cedents. Rather, at the same time, “excessive sales services” were forced upon them at excessive prices.

When the action was filed in November 2018, the plaintiff already quantified the resulting damage at least 18.569.048 Euro plus interest.

The initial claim was that the defendants abused their dominant position prior to the implementation of the commitments. They imposed unwanted and overpriced distribution services on cedants by improperly linking the conclusion of the tariff cooperation agreements to the simultaneous conclusion of the distribution cooperation agreements. The sales service commissions charged were excessively abusive. There was also discrimination because the commissions for DB AG’s own companies were lower without any objective reason.

However, since a change in the application in April 2019, the legal focus has been on the upstream claim for disclosure of evidence and information under Sections 33g (1)(10) ARC. The plaintiff requests from the defendants, among other things, the disclosure of information about the costs and income of its sales activities and the handing over of the evidence to be specified after the information has been provided.

The court of instance denied the claim for disclosure under Section 33g ARC, as the plaintiff did not substantiate an abuse of dominance. It stated that the standard of Section 294 of the German Code of Civil Procedure (“CCP”) should be used for *prima facie* evidence. Accordingly, it said, it is adequate for the court to be convinced with an overwhelming likelihood of the factual requirements for a claim of damages. There is no *prima facie* evidence that arises from a potential

indeterminate effect of the FCO's commitment decision.

Main examination points of the Judgment

The feature of "credibility" (demonstrating plausibility)

According to the wording of Section 33g (1) ARC, the claimant is entitled to the disclosure of evidence and information if he can credibly demonstrate that he has a claim for cartel damages. Ever since the 9th Amendment to the ARC in 2016, there has been a debate about the meaning of "establishing credibility". Simplified, there were two perspectives on interpreting the term "establishing the credibility of the claim for damages" ("glaubhaft machen") in Section 33g (1) of the ARC: a procedural view and a substantive view. The FCJ has recently examined these two dominant positions.

Independent substantive interpretation of the FCJ

In result, the FCJ follows the substantive understanding and makes an interpretation that – despite the identical wording – deviates from the classical understanding of procedural law. According to the FCJ, it is now also sufficient in the context of Section 33g (1) ARC that there is a certain probability of the existence of the envisaged claim for damages on the basis of concrete indications.

In doing so, it aims to lower the requirements for *prima facie* evidence compared to the classical German concept. According to the FCJ, the bases for this are in Article 5 (1) and recitals 14 and 15 of the Cartel-Damages-Directive as well as in the comparable low-threshold constellations for obtaining information in industrial property protection, which require only a "sufficient probability" of an infringement.

Rejection of different opinion: Accordance with standard of 294 CCP

At the same time, the FCJ rejected another opinion interpreting the criterion of probability prognosis under Section 294 CCP, citing a stricter standard in German law. This opinion demanded "overwhelming probability" as a standard, and there was a dispute regarding the application of provisions on establishing *prima facie* evidence under Section 294 (1) CCP. Thus, the option of simplifying the presentation of evidence, such as utilizing all available means of evidence (like the affirmation in lieu of an oath pursuant to Section 294 (1) of CCP), as outlined in Section 294 of CCP, is precluded.

Temporal applicability of Section 33g ARC

The question regarding the temporal applicability of Section 33g of the ARC to old cases was also disputed for a long time. As the legislator has now expressly clarified in Section 187 (4) ARC (Section 186 (4) ARC old version), this provision applies irrespective of when the claims arise and

also to actions which – as in this case – were filed before the new provision of Section 187 (4) ARC came into force on January 19, 2021. In line with the legislator, the FCJ reaffirmed the view of the court of instance and clarifies that if an action is brought after December 26, 2016, Section 33g ARC is applicable irrespective of the time at which the claims for damages to be prepared arise. In particular, it convincingly rejects a violation of the prohibition of retroactivity (under EU law), since the provision of the Directive on which Section 33g ARC is based is of a procedural nature.

The role of commitments pursuant to Section 32b ARC in the context of the credibility test

Whereas the lower court still assumed that commitments had no binding effect, the FCJ regarded commitments as appropriate evidence of a practice that had been in violation of antitrust law up to that point. It reasoned that the FCO would only commence proceedings if there were certain indications and that the commitment of the potential cartel member could not be interpreted as an admission of guilt but could be seen as reinforcing and strengthening the conviction. According to the FCJ, nonetheless, this incidental impact ought to be assessed by the circumstances of the individual case, presumably to maintain sufficient room for judging the credibility of the case.

Comment and Outlook

What does this Judgement mean for practice?

The key message of this Judgement is the plaintiff-oriented interpretation of Section 33g ARC by the FCJ. This will aid future plaintiffs in Germany to file disclosure claims in order to obtain the necessary information to quantify their damages claims. The FCJ emphasizes the significance of not over-extending the requirements for information requests from purported cartel victims and thus follows the European model outlined in the directive. The FCJ has chosen a unique approach by lowering the obstacles to *prima facie* evidence for the first time. From now on, during disclosure proceedings following Section 33g ARC, courts will only need to be persuaded of the probability of a claim using the standard of proof established in Section 286 CCP.

What are we left with?

The FCJ has provided at least some legal certainty in regard to the dispute surrounding the understanding of *prima facie* evidence in Section 33g ARC. However, the chosen approach does not seem to be the most favorable. Rather than clearly distancing itself from the standard understanding of “establishing the credibility of the claim for damages” as in Section 294 CCP, it may have been more appropriate to interpret “establishing the credibility of the claim for damages” in accordance with EU law, which would have had the same outcome, just by going a different path.

The critics will persist. Even though this legal evaluation is comprehensive, it appears that this interpretation contradicts the legislative intent, as the German legislator intentionally chose the procedural term. Separating the concept of *prima facie* evidence from the traditional procedural

understanding jeopardizes the consistency of Germany's legal system. Also, it is currently unclear what the precise lower standards entail, aside from being less rigorous than the traditional procedural comprehension, as the FCJ has not provided any concrete guidelines for plaintiffs.

On the other hand, the cited concerns regarding the inconsistent application of legal terminology are largely unfounded. Firstly, the Judgement exclusively pertains to the interpretation of Section 33g (1) ARC and the likelihood of its extension to other legal areas is minimal. Secondly, it is inherent to cartel-damages-claims to be distinctive, given that there is a specific tort law tailored to the special circumstances of cartel cases due to the 9th Amendment of the ARC. The entire regime concerning Section 33g ARC has its own special characteristics. Therefore, the emergence of a new interpretation of "*Glaubhaftmachung*" is not unexpected and fits in seamlessly as another distinctive feature.

After all, there is no significant change in direction anticipated since this factor was previously assumed without elaboration by the courts of instance. However, it is likely that Germany will once again become a stronger venue for legal proceedings, as the court's bias towards plaintiffs has not diminished, but has now been further reinforced by the FCJ.

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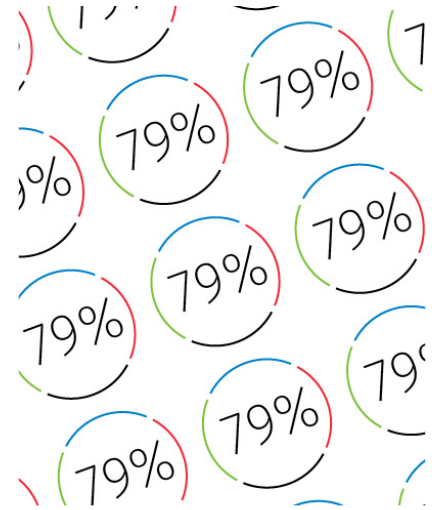
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