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Cartel Damages Without Economic Experts? The Implications of the German Federal Supreme Court Decisions Trucks III & IV

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Introduction

Cartel damages proceedings are a highly interdisciplinary endeavour between lawyers and economists in many jurisdictions, including Germany. Lawyers and courts in such proceedings must, among other things, answer a fundamentally economic question—namely, what would have been the price in a market absent the infringement? In addition, the European Damages Directive of 2014 has set a goal of avoiding under- and overcompensation. The price absent an infringement is non-observable, and can only be estimated. However, as the German Federal Court of Justice ('FCJ') has stated in its judgments Paper Wholesale (para. 12) and Liquid Gas I (para. 67), the goal is *'to get as close as possible to reality through probability considerations'*.

The interdisciplinary collaboration is not frictionless, however. German courts have, at times, struggled with the economic expertise put forward by the parties. To date, most court judgments mainly focused on the existence (if) of damages and not (yet) the quantum. After more than ten years and probably a sizable four-digit number of follow-on damages proceedings in Germany, only a little more than a handful of judgments have dealt with the quantum of damages. In many cases, economic reports dealing with quantification of damages have played a successful role in settlement discussions between parties. However, in those cases that have gone to court there has been a degree of uncertainty and frustration about how the courts should evaluate these reports, especially where there are 'expert report battles' with conclusions that are far apart. There is also a lively debate in the literature, see for recent examples Klumpe/Paha (2024), Schliffke (2024), Kirchhoff (2024), Klumpe (2024), Tolkmitt (2023), Bornemann/Suderow (2023), Haucap/Heimeshoff (2022), Schweitzer/Woeste (2022), with several calls to, sometimes radically, simplify the requirements to establish cartel damages in Germany.

With the FCJ judgments Trucks III and Trucks IV, one can get the impression that those calling for a simplification are prevailing. In Trucks III, the FCJ has made it (almost) impossible to rebut an existing factual presumption of (some) harm. In Trucks IV, the FCJ has further clarified that claimants do not need to put forward an economic expert report. Rather, they only need to bring evidence which is readily available to them. This can be as little (or as much) as the summary decision by the cartel authority and, for example, the Oxera (2009) study which presented data from meta-studies on cartel overcharges to establish that most cartels cause damages.

Trucks IV, especially in combination with Trucks III, also has major implications for the work of economists. After all, they might not be needed any more. As I will explain below, things might be a little more complicated, however. Most importantly, any expert report put forward by the defendants is still evidence which needs to be taken into account in an appropriate manner.

The Trucks III decision and the impossibility of proving no damages

The impact of the Trucks IV judgment cannot be understood without considering the previous judgment, Trucks III, as well as earlier decisions (especially Steel Abrasives and Schlecker). As a starting point, there is a long-established factual presumption of harm in favour of claimants in cartel damages proceedings in Germany (see FCJ judgment Schienenkartell, para. 55). The burden of proving the absence of damages does not rest with the defendants (see FCJ judgment Schienenkartell V, para. 27). Yet, for a claim to be dismissed, the defendants must convince the court that in an overall weighting of all the evidence for and against damages, the probability of damages in the case at hand is not sufficiently large. Over time, the FCJ has made clear that rebutting the factual presumption is hard. In particular, in the Steel Abrasives and Schlecker judgments, the FCJ ruled that the mere possibility of a counterfactual without damages is not enough to rebut the factual presumption. Following these judgments, it appeared that only very robust empirical evidence could convince the court of the absence of damages. A hard-to-meet standard from the defendant's perspective, but justified on the basis that most hardcore cartels do cause harm.

In Trucks III, the FCJ confirmed the above and ruled that defendants who want to rebut the 'if' of any damages will need to provide a 'theory of no harm', i. e. a qualitative explanation for why a specific unlawful conduct did not cause damages (paras. 37, 40). The FCJ ruled further that a regression analysis with a statistically insignificant result cannot positively prove the absence of damages. Rather, statistical insignificance only means that the expert cannot rebut zero with a – for him/her – large enough probability. The FCJ goes on, with reference to Hürten (2022) and Inderst/Thomas (2021), to state that a statistically insignificant result may even support a statistically significant result (see below). In consequence, according to the FCJ, courts are also not obliged to carry out an in-depth analysis of defendants' regression analysis, but only need to *'take a look'* (para. 41).

I consider (here) that this ruling has made it practically impossible to rebut the 'if' of damages. Defendants can neither put forward a theory of no harm that courts will take into account, nor do more than a regression analysis with a statistically insignificant result.

It is of course true that hardcore cartels are formed to earn money (which causes damages) and that almost all of them succeed in at least causing some overcharge. Rational, profit-maximizing agents will not engage in ineffective cartels. Yet, some hardcore cartels without damages do exist. In economic theory, this is possible if and only if one or more of the usually made assumptions turn out to be untrue in a specific case. Economists know well that agents are not always profit-maximizing. They may as well maximize revenues or sales, or take social preferences into account. Also, the cartel members themselves are unaware of the counterfactual price. They may suffer from hubris, and have the illusion that prices under competition would be lower. The probability that there is any truth to such explanations is remote, but a small possibility remains. The probability that any court will ever accept such an explanation likely goes to zero, however, as the

alternative explanation cannot be separated from purely protective claims. In this sense, defendants cannot succeed in providing a theory of no harm.

Logically, it is also impossible to positively prove the absence of something. Thus, the most defendants can do from an empirical perspective is to put forward a robust (regression) analysis with a small effects coefficient which is statistically insignificant, i.e. indistinguishable from zero by accepted statistical terms. As far as the FCJ refers to insignificant results which may support damages, the underlying case discussed in the literature is fairly specific. The articles by Hürten (2002) and Inderst/Thomas (2021) cited by the FCJ both refer to an article in Nature from Amrhein et al. (2019) who discuss two studies: one shows a positive effect which is precisely estimated and significant, and the other estimates the same positive effect in terms of quantum, but very imprecisely such that it is insignificant (as the lower bound of the so-called confidence interval is below zero). In that case, there is a point in saying that the insignificant result does not imply 'no effect', but in fact supports the positive effect found in the other study. Most situations in damages proceedings are fairly different, of course, as the defendants' analysis will have a much lower coefficient than the claimants' analysis. Potentially, this lower effect, which in addition might be indistinguishable from zero, i.e. insignificant, is the result of a much better analysis than the one put forward by the claimants. However, according to Trucks III, the courts do not need to take this into account, nor go into the details of the defendants' analysis when dealing with the 'if'.

The Trucks IV decision

In the claim leading up to the Trucks IV decision, the claimant had put forward a list of the allegedly affected trucks with underlying proof of purchase, made reference to the case decision by the European Commission, and calculated their alleged damages with reference to the meta-study data shown in Oxera (2009) and median damages of 18%, actually applying 15% to calculate their damages. The claimant did not put forward a case-specific economic expert report. The regional court dismissed the claim. The higher regional court ruled that it is convinced that damages exist, though also dismissed the case arguing that referring to Oxera (2009) is not enough to substantiate the alleged damages. In Trucks IV, the FCJ overturned that decision and referred the case back to the higher regional court.

The core reasoning of the FCJ starts by stating that the claimant must put forward sufficient evidence to substantiate their alleged damages. The damages can be estimated and can differ from its true value, but the estimation should aim to be as accurate as possible. The court can only refrain from estimating minimum damages if there is almost nothing the court can rely upon. If the court has sufficient evidence to conclude the 'if' of damages, then it will usually have enough evidence to estimate minimum damages (para. 15).

The FCJ goes on to refer to damages typically being estimated by applying comparator methods. Comparator methods are not necessarily superior, as other recognized methods exist as well (para. 19). However, according to the FCJ, claimants typically have neither the data nor the knowledge to solely carry out a damages assessment of this kind. This is especially true for the otherwise recognized methods. Based on general requirements for proof (as set out in earlier paragraphs), claimants are not obliged to put forward an expert report. If necessary, the court can rely on experts (para. 20). The FCJ follows that it is sufficient if the claimant puts forward the evidence that is readily available to them. Damages assessments based on the usual method can be used as

evidence, but other evidence may suffice as well – especially evidence based on the case decision (para. 21).

Therefore, the FCJ ruled that the higher regional court set the standard of proof too high, and that it erred in assuming that the claimant must put forward a damages assessment based on a comparator method. Bringing such an analysis is only possible with an economic expert, and the claimant is not obliged to hire one. If the court thinks it needs such an external independent expert report, it can request it on its own (para. 24). Further, the FCJ states that the argument by the higher regional court that the Oxera (2009) study does not support damages of 15% or some other minimum damage is faulty. The court concluded that the trucks cartel does not belong to the 7% of ineffective cartels. Therefore, it cannot conclude that it has too little evidence to assign minimum damages, as this is either contradictory or it misunderstands the freedom that the court has regarding the estimation of (minimum) damages, according to the FCJ (para. 25).

Damages without experts after Trucks IV?

An interesting question after Trucks IV (and Trucks III) is if it will now be possible to obtain compensation without putting forward an economic expert report in Germany. Assume a claimant files their claim putting forward the value of commerce (with evidence), the summary decision by the authority, and the Oxera (2009) study, but no further evidence. Assume further that the defendants put forward an economic expert report containing (i) a general section disputing that the Airtours' criteria for a stable cartel are met and arguing that there have been shifts in market shares indicating competition, and (ii) an econometric analysis showing damages of 3%, but which is statistically insignificant. A potential course of action runs as follows:

- the claim is not dismissed for not being substantiated (by Trucks IV);
- the general arguments in the defendants' expert report are dismissed as they only establish the possibility of no damages (by Trucks III and previous decisions);
- the regression analysis by the defendants is dismissed, even without going into detail, as it does not positively prove the absence of damages (by Trucks III');
- if the court concludes that there are damages, since the evidence by the defendants is not enough to outweigh the factual presumption, then it also has enough evidence to estimate at least minimum damages (by Trucks IV).

The above reasoning follows directly from Trucks III and Trucks IV. Yet, one essential aspect is not considered. The defendant's expert opinion not only makes a statement about the 'if', but first and foremost a statement about the quantum. That quantum statement, e.g. 3%, is also completely independent of the question of statistical significance.

The quantum statement in the expert report is an indication which must be included in the overall weighting of all the evidence presented, assuming that such an overall weighting is also necessary regarding the quantum (see judgment Schienenkartell II (para. 36)). In the context of the 'if', the FCJ emphasizes that circumstantial evidence must be taken into account with the weight that may be given to it. In my understanding, this statement also applies to the determination of the quantum.

There is a considerable qualitative difference between an empirical expert report tailored to the specific individual case, if it is sound, and a meta-study on cartel damages that is completely

detached from the individual case. This is evident in Oxera (2009, p. 90), which states that damages from hardcore cartels have a very high variation. There is also no reliable evidence that the proportion of violations with minor damage decreases noticeably the longer a cartel lasts or the greater the market coverage, as pointed out by Hellmann/Schliffke (2022).

Intuitively, the case-specific expert opinion should have a much greater weight and outperform the meta-study in the overall weighting of evidence. To accurately determine the weighting of the evidence, however, the court must be convinced that the analysis in the defendants' empirical report is sound. That is, the court needs to engage with the expert report and determine that it meets the criteria set out in the FCJ judgment in Trucks II, i. e. that it is based on a reasonable data basis, is methodologically correct and has reliable results.

But an in-depth investigation of offered evidence is not mandatory in each case, as the FCJ has made clear in Schienenkartell II (para. 36). This is because the court only has to take evidence if the offered evidence is also potentially material to the decision. It is therefore conceivable that a court assumes without examination that the (insignificant) 3% presented by the defendants in the example is correct, but nevertheless concludes that there are damages, and that those are greater than 3% based on the fact that most cartels cause higher damages (as shown by the Oxera (2009) study) and an assessment of the severity of the conduct as described in the case decision.

Therefore, there is now a potential way of handing down a quantum judgment without ever going into the details of an empirical analysis put forward by the defendants, and the claimants need not put forward such an analysis either.

What remains unclear is whether and to what extent a court could go above the 3% from the example. To avoid dealing with the regression analysis in detail, the court must consider it to be correct, and will therefore be in a situation where case-specific and accepted evidence states that 3% is correct in this case, and the only other evidence regarding the potential quantum is a case-unspecific meta-study. If this does indeed limit the quantum that the court could potentially rule, there will remain an incentive for defendants to put forward regression analyses. In order to shield themselves against the likely low figure put forward by the defendants, claimants in turn will almost certainly offer (the unspecified) proof by expert opinion that damages are, in effect, larger compared to the defendants' view. Such an offer of evidence might indeed force courts to commission an independent court expert's report since there is a material difference between, for example, 3% and 15% and the assessment of which estimation is closer to the true damage requires independent economic expertise. Also, there remains an incentive for claimants to hire external economic experts, either to put forward their own analysis to counter the (likely) low figures presented by the defendants, or, at least, to not fully subdue to the court expert and the court's interpretation of her or his report.

It is also unclear whether a small alleged damages quantum exist below which a court could take note of the defendants' analysis and assume it to be mathematically correct, but still dismiss it as simply implausible—thereby escaping being bound by it and possibly escaping the need to appoint a court expert as well. Only follow-up decisions will bring clarity to these open questions.

Final Remarks

The Trucks IV judgment is likely to have a huge impact on the future of cartel damages

proceedings in Germany. The exact nature of that impact is uncertain as of now. But one possible future scenario that arises from the decision is that claimants will aim to obtain some (maybe not even very small) minimum damages without putting forward expert evidence, and defendants trying to put forward the lowest possible number that the court will not simply dismiss—with the result that courts only obtain evidence based on such strategic considerations. In that scenario, no one is trying any longer to estimate the actual damages caused in the specific case at hand. This result is quite strange when benchmarked against the goal to get as close as possible to reality through probability considerations, a goal the FCJ actually acknowledges in its Trucks IV judgment again (para. 15). It is also strange from the perspective of the EU Damages Directive and the obligation therein to avoid under- and overcompensation, and at least trying to be as accurate as possible.

Disclaimer: *The author works as an economic expert on numerous cartel damage proceedings on both claimants and defendants side. He has acted as an expert for claimants in the trucks cartel before joining Oxera in 2023. The views expressed are those of the author and not necessarily those of Oxera Consulting LLP.*

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