Kluwer Competition Law Blog

# If And Only If: The ECJ Rules on Collective Actions Through the Assignment Model (C-253/23 – ASG 2/Roundwood)

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In Tuesday's judgment C-253/53 – ASG 2, the European Court of Justice (ECJ) provides some clarification on the compatibility of German rules restricting the fiduciary assignment of cartel damage claims to a provider of legal services with the principle of effectiveness and the right to effective judicial protection in EU law.

The ECJ took a lot of but, ifs and whens to say in essence: the assignment model must be the only (!) procedural mean to effectively (!) assert the right to compensation to be warranted by primary Union law (para 87).

While the decision seems supportive of claimants' rights, at least at first glance, it leaves the crucial questions open to be decided by the German courts and gives little EU law guidance but for a very clear subtext: collective actions in competition law *can* be enshrined in the principle of effectiveness of EU law but they are not without alternative. The Damages Directive abandoned earlier endeavours and does not contain a procedural preference towards collective actions (para 70 of the judgment and recital 13 of the Damages Directive) – although it clarifies that collective redress can be one possibility (amongst others) for Member States to establish effective means to claim damages (para 69 of the judgment and Article 2(4) Damages Directive). Rather, the decision makes one thing painfully clear: proper (i.e. effective!) European Union rules on collective actions for competition law violations are still (!) missing, even after the 2020 Representative Action Directive (RAD).

**Background of the case**

In the case at hand, 32 sawmills established in Germany, Belgium and Luxembourg assigned their claim to compensation against the Land Nordrhein-Westfalen for an alleged competition law violation in the roundwood cartel case (the public enforcement proceedings ended with a commitment decision of the German FCO) to the legal service provider ASG 2, which brought a bundled action for damages in its own name and at its own expense, but on behalf of the sawmills, in return for contingency fees (*quota litis*). The referring Regional Court Dortmund essentially wanted to know whether the principle of effective enforcement of Article 101 TFEU and the Damages Directive and the right to effective judicial protection under Article 47 of the Charter of

Fundamental Rights precludes an interpretation of the German rules on the legality of the assignment to legal services (*Rechtsdienstleistungsgesetz – RDG*) that has the effect of preventing the assignment model in follow-on and stand-alone cartel damages actions (see on the facts of the case, the referring questions and the national background also here and here).

**The continuous dominance of the principle of effectiveness in the ECJ's reasoning**

The ECJ focuses rightfully on the principle of effectiveness, which limits the procedural autonomy of the Member States to determine the procedures for claiming cartel damages not regulated by the Damages Directive – such as collective competition actions missing from the Damages Directive. It does not deal with arguments from the literature relating to a possible relevance of the principle of equivalence, which have already not been taken up by the Advocate General opinion (critically on this here). The principle of effectiveness relating to Article 101 TFEU is complemented by Article 47 of the Charter (and, at times Article 19 TEU, para 65), which does, however, not go beyond the guarantees provided by the established jurisprudence on the principle of effectiveness that the ECJ explicitly refers to (see e.g. paras 61, 71, 74).

**The limited scope of the ECJ's clarifications**

The ECJ limited its answer to *stand-alone actions* – the question on follow-on actions was hypothetical and thus inadmissible – and set out a number of *conditions* further to be clarified by the national court (para 94). According to the ECJ, it is for the national court to enquire:

- If the RDG actually must be interpreted in a manner that prevents the assignment model,
- If there is no other alternative effective collective action mechanism available under national law, and
- If pursuing an individual action is practically impossible or excessively difficult.

Only if all these questions can be negated, there is a violation of the principle of effectiveness and the right to effective judicial protection.

Although the Court underlines that it cannot give a final ruling on these preconditions, it is interesting to see how much room it devotes to the critical arguments of the parties concerning these criteria (paras 78 – 81). The Court makes explicitly clear that *no* strict obligation to implement collective redress can be drawn from the principle of effectiveness, as the mere complexity and costs of individual actions for damages do not presuppose in itself that such individual actions would always, in all situations, be impossible or excessively difficult ways to make use of the claims for damages enshrined in EU law (para 86). Therefore, the national courts will always need to carefully check the alternative options to claim damages *on a case-by-case basis*, through individual or collective actions, before they could decide that national laws prohibiting one specific way to claim damages (here: the assignment model) was irreconcilable with EU law.

**Looking into the crystal ball**

*On the first precondition: interpretation of the German RDG*

The referring court is under the impression that the assignment model might be in violation of the German RDG. For competition law cases, a possible misuse of the debt collection authorisation or conflict of interest, especially against the background of litigation funding under the RDG, is questioned. However, this is highly disputed amongst German first and second instance courts as well as legal literature (see already here or in more detail in German here). There is no decision from the German Federal Court of Justice (BGH) in the area of competition law yet – it already decided positively on the assignment model in other areas of law, such as property rental disputes or air passenger compensation. Still, it is likely that the BGH will hear a case on the legality of the assignment model in competition law under the RDG in the course of 2025, as the other roundwood cartel case decided by the Higher Regional Court Stuttgart might reach the highest German court level.

A case-by-case assessment might be also the outcome under national law. Having a look at lower instance court's reasoning and taking account of the BGH non-competition law precedents, competition damages cases do not necessarily have to be so complex to warrant comprehensive legal advice reserved for lawyers, which a registered debt collection legal service provider could not undertake. Of course, this might depend on the underlying anticompetitive conduct, the nature of the claim, especially the question of follow-on or stand-alone action, or further factual or legal questions arising, such as damage quantification. Yet, legal service providers might be particularly familiar with mass damage phenomena. Besides, the legal service providers themselves will usually be represented by lawyers specialised in competition law (as it was the case for ASG 2). On the other hand, a possible conflict of interest in the context of litigation funding appears rather artificial, as both the litigation funder and the legal service provider acting as the claimant are either interested in winning the case or, should a settlement be reached, in the best possible quota for all parties involved.

*On the second precondition: alternative means for collective redress in Germany, which may secure effective cartel damages claims*

So, does Germany offer alternative and effective means for collective redress, so the principle of effectiveness does not warrant the assignment model? Typical lawyers answer: it depends. The decision already suggests other alternatives for collectivisation of claims, such as "genuine factoring, that is to say, not a simply fiduciary transfer, but a full transfer of a third-party claim in return for immediate payment of financial consideration by that person to the assignor, and the *litis consortium*, in the form of a joint action brought by a number of applicants" (para 80). But – taking into account of all the relevant factors (para 83) – do these alternatives stand up to the principle of effectiveness?

Genuine factoring might be theoretically possible but not a commercially viable business model and therefore practically not available. While the fiduciary transfer to a legal service provider in combination with litigation funding creates shared litigation risks between the injured party, service provider and funder, in cases of genuine factoring, the risks are fully transferred to the factoring provider (and funder), who need to pay upfront without awaiting the litigation outcome. In cases involving complex or novel anti-competitive conduct, stand-alone actions, or challenging damage calculations that create uncertainty about the outcome of the proceedings, neither the

service provider nor the litigation funder will engage in genuine factoring, effectively making it practically unavailable.

The same holds true for joint actions. They are often impractical when large numbers of claimants and claims need to be combined. Plus, there is always the risk of the claim being divided into separate individual lawsuits again. Joinders might offer "to have joint evaluations and expert opinions carried out in order to establish the amount of their respective loss" (para 80), but the benefits stop there. The claims stay essentially individual claims with the same possible risks for injured parties discussed further below.

While that might be it for the proceedings in the present case, the legal landscape for collective competition redress has in the meantime changed in Germany. Here we have to come back to the already mentioned Representative Action Directive, the 2020 collective consumer redress framework that was not mentioned at all by the ECJ (contrary to the Advocate General, see also here and here). Although competition law is not covered by the scope of the RAD, Germany has gold-plated the Directive by incorporating competition law into the scope of the new German RAD Implementing Act and Consumer Rights Enforcement Act. The new system now offers four main models for collective competition law (and DMA) enforcement: representative injunctions, disgorgement of benefits, model declarations, and redress.

Of course, one could now say: sure, with the new rules there is access to real collective redress in competition law in Germany, why do we still need the assignment model? But hold your horses – here, too, we have to ask ourselves the question: does the new system make it impossible or excessively difficult to exercise the right to compensation and, thus, undermine the right to effective judicial protection? Without being able to conduct a full assessment here (see here for further analysis), the new German collective redress system is limited. Redress is limited to consumers and certain SMEs – other businesses are out. Even those have to actively opt-in with a registration of their claims in the Federal Representative Action Registry, which they might not even know about or might not be willing to do, given possible low value claims and the effort involved for registration. In complex cases, the redress action will not be available anyway because of the lack of similarity of the claims. Added to this is the rather arbitrary limitation of litigation funding for the new consumer collective redress system in Germany, which may also rule out such actions in practice.

*On the third precondition: effectiveness of individual claims in specific scenarios*

The ECJ case law, Damages Directive, and German transposition obviously give the possibility to individually claim cartel damages – the many cases pending in Germany can vouch for that. Considering the described absence or limitations of collective redress in Germany, the necessity of the assignment model will largely depend on whether pursuing an individual action is "practically impossible or excessively difficult" (para 84).

The answer depends on factors such as

- The type of the claimant: companies, SMEs, or consumers
- The volume claimed: large amounts vs. low value claim, scattered harm
- The complexity of the case: follow-on or stand-alone action, type of competition law violations (e.g. new theories of harm), factual and economic analysis, damages quantification.

- Presumed costs of proceedings (e.g. foreseeable necessity for expert reports)

(see also considerations in paras 84 – 86)

In several situations there is a practical necessity for collective instead of individual competition law enforcement (similar also here, here and here). Especially for SMEs or consumers suffering low value and scattered harm and facing structural and power imbalances, collective actions are generally the only way to obtain compensation due to the lengthy, expensive, and uncertain proceedings. Unless the individual damage incurred is significantly high (see also para 81), affected parties often hesitate to pursue individual private enforcement actions (a phenomenon described as rational disinterest or rational apathy). Yet, there are no fixed amount above which there is no longer a rational disinterest either. The private enforcement actions in the Trucks cartel in Germany, for example, show both valuable individual and collective proceedings under the assignment model. In principle, after a dynamic consideration, an increasing success rate can be assumed with increasing legal certainty, which reduces the cost risk for plaintiffs and thus tends to favour recourse to individual actions. Overall, a strict approach does not appear to be appropriate, because a claimant cannot be expected to carry out an extensive preliminary examination in each case to determine whether an individual action is legally necessary or whether a class action would be admissible because an individual action would be ineffective. This almost cries out for a legislative solution.

## Conclusions

Expectations of claimants and their legal representatives were high and some of them saw welcome support of their arguments in favour of the legality of the assignment model for competition damages claims in the ECJs ruling. However, legal uncertainty on most relevant questions prevails.

The ECJ was right to underline that the questions about the interpretation of the German RDG and about effective alternatives to bring cartel damages claims under national procedural law must be examined by the national court – that is EU law 101. One may ask why the referring court has not done so right away and why it felt the need to receive guidance from the ECJ. The ECJ's task under the treaties is to ensure uniformity in application of EU law and not to give more weight or authority to national first instance courts when taking legally disputed positions on points of national procedural law. Following the presupposition by the LG Dortmund that the assignment model was in fact the only way to effectively assert damages in the given case, it can be expected that it will now rule in favour of the claimants. The preliminary ruling procedure before the ECJ did only delay this judgment without any major clarifications being obtained. Other national courts showed that it is in fact possible to admit claims for damages under the assignment model without prior reference to the ECJ (see prominently OLG Stuttgart or OLG Munich).

The proceedings under national law will likely continue after the final judgment of the LG Dortmund with two possible appellate courts (OLG Düsseldorf and BGH) needing to take their stand on the legal questions of national procedural law outlined above. However, it is uncertain whether this case will even reach the German BGH at one point as other pending cases in comparable litigation involving the assignment model for cartel damages claims had already advanced to the first appellate court instance and could overtake the litigation in the present case. A ruling setting precedence by the BGH is much needed in this area of law, given the absence of

conceivable amending legislation to the RDG.

One important question, which is decisive for effective private enforcement in Germany and the EU altogether, is not resolved in the judgment, but the answer can be seen between the lines. It goes one step further: would the assignment model even be effective competition law enforcement for all situations or don't we need something completely different? Or, to put it another way, what requirements does the principle of effectiveness under EU law impose on the design of collective competition damages actions? While this cannot be answered in full this blog post – more on this will follow – a few considerations with an outlook to consumers, specifically. An opt-in requirement for consumers, similar to the described new German consumer redress system, is likely to also fall victim to their rational disinterest. Consumers facing small, scattered harm – remember the beer or sugar cartels – are often unaware of ongoing proceedings or are reluctant to go through the efforts of an opt-in process (at least without a corresponding further development of competition law-specific legal tech models). And then there is the problem of financing: when consumers experience minor to moderate harm, the anticipated costs of legal proceedings may outweigh the potential benefits. Consequently, either consumer organizations must receive adequate (public) funding, or litigation financing must be permitted. However, public funding is often not available, legal frameworks often impose restrictions on the litigation funding, or disputes regarding its admissibility frequently lead to prolonged legal uncertainty.

To the contrary, we witness a rather disastrous state of collective competition (consumer) redress in the EU. Although some Member States, such as Portugal and the Netherlands, have modern opt-out systems and some litigation experience, collective competition (consumer) redress is not available at all, restricted or practically unavailable in many Member States. Further proceedings before the ECJ on these issues are therefore likely. A legislative response would also be appropriate. The EU legislator does not even have to look deep. During the development of the Damages Directive, the European Commission initially hinted at the possibility of collective actions in its 2005 Green Paper and the 2008 White Paper. By 2009, an early version of the Draft Damages Directive was leaked to the public, containing elaborate rules on group and representative actions, which were later abandoned in the final version. Maybe it's time to have the "*Courage*" to look back?

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