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Damage claim against Dornbracht and its managing director for restrictions of online sales

OLG Düsseldorf grants damages for vertical stand-alone infringement and clears the way for holding company managers personally liable for redress.

On 13 November 2013, the Düsseldorf Higher Regional Court ("OLG Düsseldorf") issued a judgment on an action for damages following restrictions of online sales.[1] The judgment is noteworthy for several reasons: It concerns a stand-alone damage claim for a vertical infringement, which was terminated in a settlement between Dornbracht and the German Federal Cartel Office (*Bundeskartellamt*, "FCO"). The judgment provides also guidance on the standards of proof for plaintiffs claiming lost profit following a competition law infringement. And, lastly and most remarkably, the OLG Düsseldorf clears the way for holding managers personally liable for compensating losses caused by competition law infringements of a company. The complaint by the defendant was recently rejected by the German Federal Court of Justice ("BGH").[2]

Facts of the case

Plaintiff is Reuter, a German retailer of bathroom fittings with two physical as well as several online stores. Reuter claims damages from a manufacturer of bathroom fittings ("Dornbracht"), and one of its managing directors ("Managing Director") for restrictions of online sales. Reuter sells Dornbracht products which it obtained not directly from the manufacturer but from wholesalers.

In 2008, Dornbracht amended its wholesaler contracts in the course of a so-called "Action against online marketing" and a so-called "Strengthening of specialist retailing"-campaign, respectively. Dornbracht introduced new conditions granting its wholesalers additional rebates if they supply retailers that fulfill certain quality criteria. These criteria could only be met when selling to specialized trade with a physical presence (Fachhändler). Namely, retailers were required to offer a quality level of service that comprised the consulting of costumers, installation, after sales care, etc. Online retailers could not meet these criteria with the consequence that wholesalers would only supply them at higher prices. Dornbracht's campaign was caused by the Managing Director being responsible for the distribution of the company's products.

Following several complaints of online retailers, the FCO opened a proceeding against Dornbracht in 2010 for restrictions of online sales on the basis of dual pricing. After Dornbracht had agreed to amend its contracts with its wholesalers, the FCO terminated its proceeding against Dornbracht in December 2011 and published its reasoning in a case report.[3]

In the action at hand, Reuter claimed that it had lost more than €2 million following Dornbracht's rebate system, due to higher purchase prices (losses of margin) as well as the loss of future businesses that could not have been realized by Reuter. The court of first instance, the Cologne Regional Court ("LG Cologne"), dismissed the claim holding that the plaintiff failed to substantiate its alleged damages.[4] The OLG Düsseldorf annulled the judgment of the LG Cologne and granted the plaintiff the sum of € 820,000 for losses of margin but dismissed the remaining part concerning the loss of future businesses. On 7 October 2014, the BGH rejected Dornbracht's complaint relating to non-admission, and the judgment of the OLG Düsseldorf became final.

Reasoning of the Court

Due to the lack of a prohibition decision by the FCO, the OLG Düsseldorf had to establish whether Dornbracht's rebate contracts infringed

1 OLG Düsseldorf, Judgment of 13 November 2013, VI-U (Kart) 11/13.
2 BGH, Judgment of 7 October 2014, KZR 88/13.
3 FCO, case report of 13 December 2011, B 5 – 100/10.
4 LG Cologne, Judgment of 15 February 2013, 90 O 57/12.

Art. 101 of the Treaty on the Functioning of the European Union ("TFEU").[5] The court followed the position of the FCO and the European Commission according to which monetary incentives in order to de facto exclude online distribution is seen as dual-pricing that is prohibited under both European and German competition law.[6] The OLG Düsseldorf held that the practices restricted competition by object[7] and could not be exempted[8].

In contrast to the LG Cologne, the OLG Düsseldorf affirmed that Reuter suffered damages due to reduced rebates granted by Dornbracht to its wholesalers. The court stressed that Reuter, having the burden of proof insofar, satisfied the requirements for the assumption of lost profit pursuant to Sec. 252 sentence 2 of the German Civil Code ("BGB").[9] According to this provision, the injured party only has to state the facts based on which the loss of profit "could probably be expected". Consequently, it was sufficient for Reuter to show that it purchased the products at higher prices than in the preceding period and did not pass on the higher prices to its costumers.[10]

The OLG Düsseldorf established the personal liability of Dornbracht's Managing Director for the damages suffered by Reuter. As the person responsible for the distribution of the company's products, he not only initiated the introduction of the conditions in question but also endorsed them in several press releases.[11] Since the Managing Director is not an undertaking, he is not an addressee of Sec. 33 (3) of the German Act against Restraints of Competition in conjunction with Art. 101 (1) TFEU. Thus, the OLG Düsseldorf derived the liability of the Managing Director from general tort law and held that he is to be seen as a contributor to the company's infringement.[12] As such, Dornbracht and its Managing Director were jointly and severally liable to Reuter.

5 The LG Cologne left open the existence of an infringement.

6 See European Commission, Guidelines on Vertical restraints, OJ 2010 C 130/1, para. 52, 64.

7 OLG Düsseldorf, Judgment of 13 November 2013, VI-U (Kart) 11/13, para. 48 et seq.

8 OLG Düsseldorf, Judgment of 13 November 2013, VI-U (Kart) 11/13, para. 72 et seq.

9 OLG Düsseldorf, Judgment of 13 November 2013, VI-U (Kart) 11/13, para. 88.

10 OLG Düsseldorf, Judgment of 13 November 2013, VI-U (Kart) 11/13, para. 93.

11 OLG Düsseldorf, Judgment of 13 November 2013, VI-U (Kart) 11/13, para. 149.

12 OLG Düsseldorf, Judgment of 13 November 2013, VI-U (Kart) 11/13, para. 143 et seq.

Comment

As to the substantiation of the damages, the court's ruling seems convincing. The standards of proof required by the LG Cologne were too high and could hardly be met by Reuter. In contrast, the reasoning of the OLG Düsseldorf is in line with the lower standards of proof foreseen by Sec. 252 sentence 2 BGB.

With regard to the personal liability of the Managing Director, the judgment raises dogmatic concerns. Since, according to German civil law, the legal person as such is not able to act, the actions of a natural person have to be attributed to the company. Therefore, it is inconsistent if the very same natural person on the one hand has conducted the infringement that is attributed to the company and on the other hand is seen as a contributor to this infringement. It seems that the OLG Düsseldorf circumvented this issue in order to be able to hold the Managing Director liable for the infringement in any case, i.e. if not as the actual infringer then – a maiore ad minus – as a contributor.

Despite these dogmatic concerns, the courts seem to be willing to accept damage claims against individuals so they should be aware of their potential personal liability for damages following participation in an infringement.

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