

Newsletter, 30 August 2019

German Federal Court of Justice quashes another cartel decision of the Dusseldorf Higher Regional Court

It cannot be called a trend yet, but the recent decisions of the German Federal Court of Justice in the confectionery and liquefied petroleum gas cartels show that the Dusseldorf Higher Regional Court's decisions are under strict scrutiny and by no means the final word in cartel proceedings

On 21 June 2019, the German Federal Court of Justice (FCJ) quashed a decision rendered by the Dusseldorf Higher Regional Court in the confectionery cartel case¹. The FCJ found that the judgment² – which had increased the fines imposed on confectionery companies operating an information-sharing cartel – contained a fundamental error of law in its assessment of evidence. As with its October 2018 ruling concerning the liquefied petroleum gas (LPG) cartel case, in which the rejection of a request for hearing a witness was found to be unsubstantiated and unlawful, the FCJ once again annulled a decision of the Dusseldorf Higher Regional Court and remanded the case back for a new ruling.

Confectionery cartel

In January 2013, the Federal Cartel Office (FCO) – Germany's antitrust watchdog – imposed fines on ten confectionery companies and one industry association for taking part in an information-sharing cartel between 2003 and 2008. In January 2017, the Dusseldorf Higher Regional Court ruled on the appeals against the FCO's decision and decided to confirm and partially increase the total amount of fines imposed against the cartellists.³

On appeal of points of law, the FCJ reasoned that the findings made by the Dusseldorf court were incomplete and were not based on a sound appraisal of evidence, as the judgment did not properly reproduce and assess the

defendants' testimonies. As a consequence, the FCJ found itself unable to review whether the Dusseldorf court had correctly considered the defendants' testimonies and whether the findings were based on an exhaustive assessment of the facts of the case. The FCJ therefore upheld that it would only be in a position to check the Dusseldorf court's assessment of evidence for any factual and legal errors in complex cases as the one at hand if the ruling had included a reproduction of at least the main parts of the defendants' testimonies.

Additionally, the FCJ maintained that, in order to establish the existence of a conduct contrary to competition law, the Dusseldorf court could not have relied only on the incriminating testimonies of witnesses who, like the defendants, participated in the cartel meetings, without also taking into account and assessing the content of the defendants' testimonies. According to the FCJ, the Dusseldorf court should have also dealt with the motivation behind the testimony of the witnesses who were themselves involved in the meetings, as their testimonies could have contained false accusations or could have been oriented towards their own interests (e.g. to bring their own proceedings to an end or to be subject to lower fines themselves). At last, the FCJ made clear that, when assessing the evidence, testimonies of witnesses in principle do not carry more weight than (partially contesting) testimonies of defendants simply by virtue of their procedural role – rather, it is the substantive value of a testimony that is decisive.

For the reasons above, the FCJ annulled the judgment and remitted the case back to another Cartel Division of the Dusseldorf Higher Regional Court for a new ruling. The annulment was also extended to those parties who had not lodged an appeal, more specifically two

¹ German Federal Court of Justice, [Decision KRB 10/18](#), 21 June 2019.

² Dusseldorf Higher Regional Court, [Decision V-4 Kart 6/15](#), 26 January 2017.

³ Since the Dusseldorf Higher Regional Court can apply a different method of fine calculation, it is not uncommon for fining decisions of the FCO to be increased on appeal.

individuals and the industry association, as they were also affected by the violation of the law.

Liquefied petroleum gas cartel

Similarly to the scenario in the confectionery cartel case, the FCJ has recently quashed another decision of the Dusseldorf Higher Regional Court, namely in October 2018 in the context of the LPG cartel case.

In 2007, the FCO fined seven LPG suppliers which were found to have participated in a customer sharing cartel. The Dusseldorf court ultimately increased the total amount of fines from €180 million to €244 million against five of the seven suppliers that lodged appeals against the FCO's decision.⁴

On appeal to the FCJ, one of the companies put forward a procedural complaint based on the alleged illegality of the Dusseldorf court's repeated rejections to hear the company's long-standing head of sales with general power of attorney as a witness. The FCJ backed the company's argument that procedural errors were made and found the Dusseldorf court's rejections of these requests for evidence to be unlawful.

The FCJ argued that, in legally and factually complex cartel proceedings, and especially when central issues are at stake, a court decision which rejects an application for evidence needs to provide reasons as to why such requested evidence is not necessary for the investigation of the truth, and that a mere general statement that the evidence is not necessary does not suffice in this regard. The FCJ found that the Dusseldorf court did not substantiate in the judgment why the additional request for the taking of evidence would not have changed the court's conviction and why it was unnecessary for the clarification of the truth. Moreover, the FCJ pointed out that such witness was a central witness for the company's defense and its hearing was absolutely necessary from the point of view of clarification, as it would provide direct information about the company's sales behavior.

Thus, the FCJ annulled the judgment and referred the case back to another Cartel Division

⁴ Dusseldorf Higher Regional Court, [Decision VI-4 Kart 2 - 6/10 \(OWi\)](#), 15 April 2013.

of the Dusseldorf Higher Regional Court for a new hearing and ruling.⁵

Comment

In the past years, companies have had an increasing degree of reluctance to lodge appeals against the FCO's fining decisions in cartel cases – or at least often withdrew their initial appeal in the course of the court proceedings.⁶ This can be explained by the fact that the Dusseldorf Higher Regional Court is entitled to use different methods of fine calculation than the ones used by the FCO, which can eventually lead to an increase of the amount of fines imposed on cartelists – the so-called “*Verböserung*” practice. In fact, it is not uncommon for fining decisions of the FCO to be increased on appeal.⁷ Thus, when lodging an appeal against a FCO fining decision, companies run the risk of higher fines from the Dusseldorf Higher Regional Court.

Yet, the FCJ decisions mentioned above concerning the confectionery and LPG cartels send a clear message that judgments delivered by the Dusseldorf Higher Regional Court can not only in theory but also in practice be annulled in case of an error of law, be it on the merits or for procedural reasons. Besides these two cartel decisions, it is also worth mentioning that in July 2019 the FCJ annulled another judgment delivered by the Dusseldorf Higher Regional Court, this time involving a resale price maintenance case concerning *Rossmann*, in which the court's delay in placing the ruling on file was found to be a procedural error.⁸ This recent series of FCJ decisions reiterate that defendants in competition law infringement cases do not need to put up with every decision from the FCO or the Dusseldorf Higher Regional Court, but should rather seriously assess whether to appeal on points of

⁵ German Federal Court of Justice, [Decision KRB 60/17](#), 9 October 2018.

⁶ For instance, in June 2018, beer producer Radeberger [withdrew](#) its appeal against the FCO's cartel fining decision one day before the start of the trial and agreed to pay its fine of €160 million. Likewise, in October 2015, Geze GmbH [withdrew](#) its appeal against the FCO's automatic door systems cartel fining decision after indications from the Dusseldorf Higher Regional Court that the company could expect a significant increase of the fines already imposed.

⁷ Most recently, in 2017 and 2018, the Dusseldorf Higher Regional Court increased the fines in the wallpaper cartel and in the sausage cartel, respectively. See Dusseldorf Higher Regional Court, [Decision V-2 Kart 1/17 \(OWi\)](#), 12 October 2017, and Decision V-6 Kart 6/17 (OWi), 2 October 2018.

⁸ German Federal Court of Justice, [Decision KRB 37/19](#), 9 July 2019.

law to the FCJ as not merely a theoretical but a realistic option for effective judicial review and a possible favorable outcome. It will hopefully also make defendants more confident in appealing infringement and fining decisions by the FCO in the first place. Otherwise, absent a judicial review practice, there is a risk of quality decay on the competition authority's level in soundly applying the legal framework to alleged infringements as well as complying with the applicable burden of proof rules.



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