Newsletter, 24 March 2020

Cartel Damages: Rail Track Cartel II

The Federal Court of Justice adjusts its previous ruling in the rail track cartel adapting to current decisions of the European Court of Justice.

Following recent EU case law, the German Federal Court of Justice (FCJ) on 28 January 2020[1] revoked in part its landmark ruling of 11 December 2018 in the Rail Track Cartel I decision[2]: Proving the mere suitability of a cartel agreement to cause direct or indirect harm is now held sufficient to give rise to the cartelist's liability in principle – a test that will be easily passed by most claimants. If so, the exact effect of the cartel infringement is then a question of the quantification of the damages incurred. In this respect, the German Code of Civil Procedure (CCP) provides for a facilitated standard of proof that German lower instance courts, however, are only reluctantly applying. To this end, the FCJ's ruling contains additional guidance that will impact the German follow-on damages litigation practice far beyond the rail track cartel.

Background: FCJ – Rail Track Cartel I

In July 2013, the German Federal Cartel Office imposed fines on rail track manufacturers for taking part in a rail track cartel. The participants had allocated quotas and customers in public tenders for railway materials from 2001 to 2011. In consequence, several public transport operators sought compensation of damages suffered from cartel related price increases.

In December 2018, the FCJ issued its decision in the Rail Track Cartel I case. It ruled that due to the lack of typicity in cartels, claimants cannot rely on *prima facie evidence* to establish that (i) individual orders underlying the action for damages were affected by the cartel and (ii) damages were suffered in consequence. The FCJ nevertheless acknowledged the existence of a *factual presumption* with strong circumstantial evidence speaking in favour of both criteria, however it did not release the courts of taking into account the specifics of each cartel and its impact on competition on a case-by-case basis, i.e. requiring a more thorough analysis while providing for more room for an effects-based defence of the defendants.

FCJ – Rail Track Cartel II

In the most recent Rail Track Cartel II decision, the FCJ does not revert its course with respect to the denied prima facie evidence but revisited the standard set for a claimant to establish that the cartel did, in fact, affect his business.

According to previous case law, a claimant was only entitled to damages if he was able to show to the satisfaction of the court that the individual orders underlying his claim were affected by the cartel. The standard of proof for this issue is stipulated in Sec. 286 CCP. On the contrary, with respect to the question of whether a specific cartel infringement resulted in harm, Sec. 287 CCP applies. This provision facilitates the detail of proof required as it is sufficient that the claimant provides specific evidence establishing the clearly predominant likelihood that damage was inflicted.

In Rail Track Cartel II, the FCJ explicitly departs from its earlier judgment. Under the strict standard of Sec. 286 CCP the claimant only has to prove that the cartel agreement is *suitable* to cause direct or indirect damage. In the case at hand, these prerequisites were met since the claimant purchased goods that were subject of the cartel agreement. It is no longer required that the cartel agreement has *actually* had an effect on procurement transactions on which the claimant based its claim for damages. Instead, this aspect rather concerns the question of whether and to which extent damages were incurred, to which the lower standard of proof of Sec. 287 CCP applies.

Primacy of EU Law

The FCJ's change of approach is to be seen in connection with three landmark rulings of the

[1] FCJ, decision of 28 January 2020, KZR 24/17.
[2] FCJ, decision of 11 December 2018, KZR 26/17.

ECJ: One evergreen (*Manfredi*[3]) and two recent cases (*Skanska*[4] and *Otis*[5]). In these cases the ECJ made abundantly clear that core components of the right to claim damages suffered in result of an infringement of Art. 101 TFEU are dictated by EU law, while only details governing the exercise of such right are a matter of national law (confined by the principle of effectiveness of EU law). According to the ECJ, EU law governs (i) the persons eligible to claim damages (*Manfredi*), (ii) the persons liable to pay compensation (*Skanska*) as well as (iii) the concept of causality between infringement and damage (*Otis*).

The FCJ acknowledges in particular the ECJ's decision in *Otis* – that was issued after its Rail Track Cartel I decision – stating that a causal link between the infringement of Article 101 TFEU and the damage is required but also sufficient to give rise to the right for compensation under Art. 101 TFEU.

FCJ Sailing Instructions

The FCJ refers the case back to the second instance court as it had backed its findings on prima facie evidence. In doing so, the FCJ provides noteworthy "sailing instructions" for lower courts regarding the consideration of evidence (in particular expert opinions) and the common court practice to issue interlocutory judgements on the merits of the claim (holding that there is sufficient reason for a claim but not yet deciding on the amount of damages incurred). It is to be considered that both judge and economic expert can estimate the counterfactual (prices without cartel) only on basis of circumstantial evidence rather than direct evidence. German procedural rules give judges leeway when weighing circumstantial evidence, in particular within the facilitated standard of proof under Sec. 287 CCP. Judges are not necessarily required to request or follow expert opinions solely based on circumstantial evidence. In any event, the judges' overall assessment cannot be fully outsourced to economic experts.

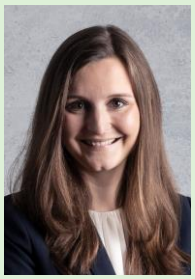
With regard to the issuing of partial judgments, the FCJ reminds the courts to adhere to the principle of procedural economy: An interlocutory judgement on the merits of the claim can only be issued in case there is certain probability that damages to some extent were incurred. Since this question and the assessment of the actual amount of damages are closely related, splitting the proceedings will often be inexpedient and confusing.

Comment

The FCJ's Rail Track Cartel I decision was much debated and – due to the dismissed prima facie evidence – seen as a less claimant-friendly approach. In practice, the impact remained limited as lower instance courts shifted to rendering judgments based on factual presumptions that were recognized by the FCJ as a weaker but nevertheless difficult to invalidate piece of circumstantial evidence.

The decision still left a lot of room for a defendant to argue that the claimant's business was not affected by the cartel. The FCJ's decision in Rail Track Cartel II largely resolves this bone of contention to the benefit of the claimants, transferring details of this issue to the judges' overall assessment of the amount of damages. With this adjustment, the FCJ is falling in line with the recent case law of the ECJ on the content and scope of the right to claim damages under Art. 101 TFEU and its priority over national rules.

The FCJ also provides guidance for lower courts with respect to the consideration of evidence, in particular in the form of expert opinions. It may also set an end to the currently common practice of courts to render partial judgements on the merits of the claim, while postponing the assessment of the amount of damages to the subsequent proceedings.



Christoph Weinert **Franziska Lange-Schlüter**

Commeo LLP
Rechtsanwälte und Notar
Speicherstraße 55
60327 Frankfurt am Main
www.commeo-law.com

Commeo LLP is an independent law firm specialized in competition law. We are an established team of experienced lawyers advising clients on all aspects of German and European competition law.

[3] ECJ, decision of 13 July 2006, ECLI:EU:C:2006:461.
[4] ECJ, decision of 14 March 2019, ECLI:EU:C:2019:204.
[5] ECJ, decision of 12 December 2019, ECLI:EU:C:2019:1069.