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# Bad prospects for antitrust damage claims and collective redress in Germany

## Collective redress models in the context of antitrust damage claims continue to face considerable hurdles in German courts as recent case law shows

**In a recently published decision, the Hannover Regional Court dismissed a cartel damage claim brought by Kaufland on behalf of its allegedly injured distributors ruling that Kaufland, acting under a debt collection license was not permitted to assert the assigned claims under the German Legal Services Act (*Rechts-dienstleistungsgesetz,* "RDG").[1] The Hannover Regional Court thereby followed a decision of the Munich Regional Court, in which a cartel damage claim brought by the litigation vehicle Financialright was rejected on similar grounds.**[2]

### *The Hannover Regional Court's Decision*

In 2014, the German Federal Cartel Office ("**FCO**") fined three sugar manufacturers for anticompetitive behavior. Following the FCO's fining decision, Kaufland, a German food retailer belonging to the Schwarz Group, sued the sugar manufacturers for damages based on claims assigned to Kaufland *inter alia* by its distributors. The Hannover Regional Court ("**Hannover Court**") dismissed the claim on the ground that the assignments were not valid. By asserting the claims of its distributors, Kaufland provided a legal service without having the permission required under the RDG to do so.

By way of background: The RDG aims at protecting persons seeking legal assistance against unqualified legal services. German law therefore states that the provision of legal services are prohibited unless they are rendered by lawyers or persons that have a special authorization.

The Hannover Court assessed, in a first step, whether Kaufland's activity, *i.e.* the assertion of claims for its distributors, qualified as legal service under the RDG.

The RDG defines legal services as activities that relate to the concrete affairs *of others* and that require a legal assessment of the individual case.[3] Kaufland argued that it did not act on behalf of *others* but in its own interest, as the distributors transferred their claims against the sugar manufacturers to Kaufland. However, according to the Hannover Court, the mere assignment of the claims is not sufficient: Kaufland failed to show that the distributors' claims were *irreversibly* transferred to Kaufland and that it therefore bore the full economic risk of collecting such claims.

The Hannover Court also found that Kaufland could not invoke the statutory exception, according to which legal services provided to an affiliated company are not to be regarded as legal services within the meaning of the RGD.[4] The Court stressed that the exception only applies to "affiliated companies", a term defined by German corporate law[5], and could also not be applied by analogy to companies that are somehow linked to each other. Since the distributors were not affiliated to Kaufland, the Hannover Court rejected the exception in the case at hand.

The Hannover Court thus concluded that in order to assert its distributors' antitrust damage claims, Kaufland required a special permission for providing legal services under the RDG.

In a second step, though, the Hannover Court found, that Kaufland lacked such permission. More specifically, according to the Hannover Court the assertion of the assigned claims by Kaufland were not covered by its debt collection license. The Hannover Court reasoned that the concept of "debt collection"

[1] Hannover Regional Court, Decision of 4 May 2020, Case 18 O 50/16 (not publicly available yet).
[2] Munich Regional Court, Decision of 7 February 2020, Case 37 O 18934/17.
[3] Section 2 (1) RDG.
[4] Section 2 (3) n° 6 RDG.
[5] Section 15 German Stock Corporation Act.

pursuant to the RDG[6] typically does not apply if it can be assumed that an out-of-court settlement will not be successful and the claim thus will only be enforceable in court. Having regard to the complexity of legal issues in cartel damage claims and the numerous legal objections raised by the sugar manufacturers, the Hannover Court emphasized that Kaufland was in essence providing litigation services that were not covered by its debt collection license.

### *The Munich Regional Court's Decision*

Already in February 2020, the Munich Regional Court ("**Munich Court**") dismissed on similar grounds an antitrust damage claim that was brought by the litigation vehicle Financialright following the truck cartel. Financialright, specialized in enforcing mass claims, sought compensation from several truck manufacturers for around 3,000 allegedly injured parties, which had their claims assigned to Financialright.

The Munich Court held that the assignments were invalid since they were contrary to the RDG. In particular, the Munich Court reasoned that the services provided by Financialright cannot be qualified as "debt collection" as the services were designed from the outset to be enforced in court.

Furthermore, the Munich Court found that the bundling of numerous individual claims by Financialright would entail a potential risk of conflicting interests as the claims differed significantly from each other.

Finally, the Munich Court considered it problematic that Financialright was financed by a litigation funder that bore the full cost risk. According to the Munich Court, this funding agreement may create a dependency of the claimant to its litigation funder and may entail the risk that the claimant would not act in the sole interests of the assignors, *i.e.* the alleged injured parties.

### *Comment*

German law is generally reluctant towards collective redress mechanisms. Even though the German legislator, driven by the Volkswagen Diesel scandal, introduced model case proceedings, the so-called "*Muster-feststellungsklage*"[7], this procedure is of limited use in antitrust litigation as it is only available to consumers. Similarly, the European Commission's proposed directive on *"representative actions"*[8] will not be helpful either since it is not intended to apply in cartel cases.

Consequently, in order to claim compensation collectively in German courts, the parties need to resort to alternative models: in the majority of antitrust litigation cases, injured parties assigned their claims to a litigation vehicle operating under a debt collection authorization that then brought the claims collectively before a court.

Whereas the assignment of claims was approved by the Federal Court of Justice in the context of tenancy law[9], recent case law on regional level indicates that the assignment model tends to fail in antitrust damage claims in view of the strict application of the RDG by lower courts. This is clearly different where a company is asserting the claims of its affiliated companies. In theory, no concern would arise either if the claimant bought the claims of the injured parties, thereby in particular assuming the *del credere* risk, given that consequently the claimant would then bear the entire economic risk of the claims – a risk however that in practice no litigation vehicle will be willing to bear.

Even though the Hannover and Munich Court decisions are not yet binding, this case-law clearly shows a trend that with no doubt favors the defendants' position in any ongoing and future antitrust damage claims before German courts.

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[6] Sections 10 (1) n°1, 2 (2) RDG.
[7] Sections 606 *et seq*. German Civil Procedural law.
[8] European Commission, COM/20218/0185 final.
[9] German Federal Court of Justice, Decision of 27 November 2019, Case VIII ZR 285/18, ("*weniger-miete*").