COMMEO Rechtsanwälte und Notar

Meeting Competition

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Rail track cartel VI: The lump-sum damages booster

The Federal Court of Justice further backs claimants in follow-on damages litigation in ruling on contractual lump-sum clauses for cartel damages in supply agreements applying antitrust-specific standards for the assessment of such clauses

In its now sixth land mark ruling dealing with the German rail track cartel, the Federal Court of Justice ('FCJ') held that contractual lump-sum clauses stipulating compensation for damages in case of an antitrust infringement of up to 15% of the total order amount (5% in the case at hand) may be valid. Despite the fact that the FCJ quashed the Higher Regional Court's judgment as the lower court applied an incorrect standard when assessing the defendant's arguments that the claimant actually incurred lower damages than set contractually, the ruling in essence is to be considered claimant-friendly by further facilitating the pursuit of damages.

Facts of the case

In July 2013, the German Federal Cartel Office imposed fines on rail track manufacturers for taking part in the German 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 for damages suffered from alleged cartel related price increases.

Since 2018, the FCJ issued several judgments in relation to the rail track cartel providing guidance for lower courts concerning frequent points of contention in follow-on damages claims, including the standard of proof for the occurrence of cartel related damages (r*ail track cartel I*[1] and *II*[2]), joint and several liability among cartel participants (*rail track cartel III*[3]), umbrella pricing and the passing-on defence (*rail track cartel IV*[4] *and V*[5]).

In the most recent judgment published in April 2021[6], the FCJ ruled on the case of a claimant, a public transport operator, that acquired railway materials from the defendant. Each underlying supply contract contained a 5% lump-sum clause for damages in the event of anticompetitive conduct. The court of second instance, the Higher Regional Court of Berlin, found that – based on the lump-sum clause – the claimant was entitled for damages in the amount of approx. EUR 26,000. The FCJ upheld the judgment for the most part, but referred the case back to the lower court for a re-assessment of the parties' arguments.

Validity of the lump-sum clause

According to the FCJ, the lump-sum clause is valid under the rules for general terms and conditions, as it does not lead to an unreasonable disadvantage for the supplier/cartelist. When weighing the parties' interests, the FCJ took account of particularities and functions of cartel damages proceedings, including

- the high hurdle to reliably quantify cartel related damages given the large number of relevant factors and the information deficit of the claimant;
- the requirement of an efficient enforcement of the competition rules under EU law and the lump-sum clause's contribution to an efficient system of sanctions with a significant deterrent effect; and
- the defendant's interests being less worthy of protection given that the defendant unlawfully and intentionally committed a cartel infringement und thus triggered the need to specify damages in the first place.

[1] FCJ, decision of 11/12/2018, KZR 26/17.
[2] FCJ, decision of 28/01/2020. KZR 24/17; see Commeo Newsletter of March 2020.
[3] FCJ, decision of 19/05/2020, KZR 70/17.
[4] FCJ, decision of 19/05/2020, KZR 8/18.
[5] FCJ, decision of 23/09/2020, KZR 4/19.
[6] FCJ, decision of 10/02/2021, KZR 63/18.

Lump-sum damages up to 15 % – reference to meta-studies on antitrust damages

The FCJ emphasized that for lump-sum clauses to be valid they must not exceed the estimated damage in the usual course of events. However, when assessing the appropriate amount of lump-sum damages in cartel damages proceedings, the assessment must be adapted to the specific context of the estimation of antitrust damages. Therefore, if there is no sufficient empirical evidence for an industry-specific expectation of the average loss, the claimant does not have to demonstrate such industry-specific average amount of damages – unlike in regular civil proceedings. Instead, the FCJ found that in cartel proceedings a reference to economic meta-studies on average cartel related price overcharges, such as the *Oxera study "Quantifying antitrust damages"* prepared for the European Commission in 2009, can be sufficient for the appraisal of the lump-sum.

On this basis, a lump-sum clause in the amount of 5 % of the total order amount like the one in the case at hand would not exceed the damage amount expected in the ordinary course of events. In an obiter dictum, the FCJ indicated that even a lump-sum clause up to 15 % could be considered appropriate.

Damages lower than the agreed lump-sum? Standard of proof for the defendant

According to the FCJ, based on the level of knowledge at the time the contract was concluded, there must be a balanced risk of damage over- and undercompensation. To avoid a potential overcompensation of the claimant's damage, the FCJ underlines that in a B2B context, a lump-sum clause must not preclude the defendant's right to prove that either no damage was caused by the cartel at all or that the actual damage incurred by the claimant is lower than the contractually agreed lump-sum.

To this end, the burden of proof then rests with the defendant. According to the FCJ, here the same (eased) standard of proof applies for a defendant as *vice versa* applies for a claimant demonstrating the damages amount in cases absent contractual lump-sum clauses. When considering the defendants arguments for damages below the lump-sum amount, the court in particular has to apply the instructions for the overall appraisal of evidence from the FCJ's former rail track cartel decisions.

Comment

The rail track saga continues. The FCJ's sixth ruling in this matter falls in line with its overall claimant-friendly case law in cartel follow-on damages proceedings. Acknowledging the particularities of these proceedings and the German and European legislators' will to facilitate private enforcement, the FCJ applies a less strict standard on lump-sum damages clauses compared to the standard applied in 'normal' damages cases.

This judgment may not only encourage customers to more frequently try to include lump-sum damages clauses in contracts with suppliers. The FCJ's reference to meta-studies, which are often employed by plaintiffs to quantify damages, could also impact other pending follow-on damages proceedings before German courts that do not involve such clauses. When it comes to the crucial question of quantifying the damage – the sticking point in almost any case without lump-sum clauses – the significance of the recent ruling may however be limited: The FCJ referred to meta-studies when weighing the parties interests as part of its assessment of the validity of the lump-sum clause. However, the test for the actual attribution of damages is different. Even though the FCJ earlier decided on the application of a facilitated standard of proof in that regard, courts nevertheless have to take account of the specific facts of each case within the overall appraisal of evidence. To that end, claimants cannot simply rely on economic meta-studies.

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