ALERT MEMORANDUM

German Federal Court of Justice Raises Evidential Bar for Plaintiffs in Cartel Damages Claims

February 1, 2019

Plaintiffs in cartel damages litigation in Germany will no longer be able to rely on *prima facie* evidence to prove that a cartel has caused them to suffer loss and damage. This marks a significant reversal of recent case law. As a general rule, cartel victims must now provide evidence as to specifically how and why their business transactions were affected by a cartel and that they suffered loss as a result. It remains to be seen how this requirement will be applied by the civil courts in practice.

By way of background, in an administrative proceeding in 2006, the Federal Court of Justice noted that economic theories postulated that cartels are generally "profitable" from the perspective of the cartelists. As such, the Court noted that there was a high probability that cartels would lead to the price of products that are the subject of the cartel being inflated.

Following this ruling, the civil courts developed extensive case law on *prima facie* evidence that a plaintiff needs to put forward in cartel damages litigation. This line of case law enabled plaintiffs, in the case of a wide variety of "hardcore" cartels, routinely to rely solely on *prima facie* evidence presumptively to show that a cartel affected their business transactions and that they suffered loss as a result.

In the case of non-"hardcore" cartels (*e.g.*, pure information exchange), on the other hand, courts have rejected plaintiffs' reliance on such *prima facie* evidence.

The Federal Court of Justice has now reversed this line of case law, particularly with respect to "hardcore" cartels.

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Non-application of *Prima Facie* Evidence due to Lack of "Typicality"

The principle of *prima facie* evidence helps the party bearing the burden of proof. Its effect is to fill gaps in the presentation of facts and evidence through the application of generally accepted empirical propositions. Accordingly, the relevant party only has to demonstrate that the facts it submits engage the application of a generally accepted empirical proposition. It does not have to prove that the conclusion drawn from such empirical proposition also applies in the specific case.

In recent years, the civil courts accepted, on the basis of economic theories postulating that prices would typically be higher than they would otherwise have been absent a cartel, the empirical proposition that a cartel victim would have suffered at least some damage. Plaintiffs simply needed to show the existence of a "hardcore" cartel, typically by submitting infringement decisions of antitrust authorities, and that it had made business transactions during the cartel period in the relevant market. Even where the exact quantum of damages had not yet been determined, courts were prepared to hand down rulings establishing the cartel members' liability for compensation "in principle."

In its recent decision, however, the Federal Court of Justice rejected, "*in view of the diversity and complexity of agreements restricting competition*", the proposition that cartels could be said to "typically" cause damage.[1] The Court held that the "typicality" required for the principle of *prima facie* evidence could only be established where the underlying elements occur so frequently that there is a very high probability that they are present in every individual case.[2]

In particular, according to the Federal Court of Justice, it could not be established with the requisite very high probability that cartel agreements are always implemented successfully. This depended on numerous factors which may change over time, such as the number of market participants and the parties to the anti-competitive agreements, their ability to exchange the information necessary for the implementation of the agreements, "cartel discipline," and the ability of customers to switch to other suppliers.[3] As anti-competitive agreements were ultimately motivated by the selfish interests of the cartelists, which might lead to widespread deviation from the "agreements," it could not typically be assumed that prices would be inflated in all cases.

The Court, nevertheless, left open the possibility of *prima facie* evidence being appropriate in specific cases where additional "qualified" circumstances typically causing damage are present.

In addition, until recently, the civil courts did not even require the plaintiff to demonstrate and prove in detail that its business transactions with a cartel participant were specifically affected by the anti-competitive conduct. Rather, the courts, applying the principle of *prima facie* evidence, held that it was sufficient to demonstrate that the transactions fell within certain parameters in terms of the relevant products, period, and geographical scope of the cartel as typically described in infringement decisions of the antitrust authorities.

This line of case law has now also been reversed by the Federal Court of Justice. According to this decision, it is not sufficiently certain that anti-competitive agreements are actually implemented in respect of each customer. However, there might well still be cases where cartel victims could successfully invoke the principle of *prima facie* evidence in proving that their business transactions were affected by the cartel agreements. This might be the case, for example, in a lawsuit brought by a regular customer against his regular supplier in a "regular customer cartel."[4]

Practical Implications

The decision of the Federal Court of Justice is relevant for all current and future cartel damages proceedings.

[1] Federal Court of Justice, judgement of December 11, 2018 – KZR 26/17, margin no. 57.
[2] Federal Court of Justice, judgement of December 11, 2018 – KZR 26/17, margin no. 50.
[3] Federal Court of Justice, judgement of December 11, 2018 – KZR 26/17, margin no. 57.
[4] Federal Court of Justice, judgement of December 11, 2018 – KZR 26/17, margin no. 63.

In particular, it also applies to cartels that took place after 2016. Even though the latest amendment to the German Act Against Restraints of Competition implementing the EU Damages Directive introduced a statutory legal presumption of damage (applicable to damage suffered after December 26, 2016), this presumption does not extend to the determination as to whether a specific business transaction was affected by the relevant anti-competitive conduct.[5]

Plaintiffs Can Still Invoke Circumstantial Evidence in the Future

In view of the *effet utile* principle established by the European Court of Justice, the Federal Court of Justice nevertheless seems ready to introduce alternatives to alleviate the evidentiary burden facing cartel victims. Even though "typicality" cannot be assumed, the Federal Court of Justice allows for a softer "factual presumption" (*tatsächliche Vermutung*) that cartels would lead to higher market prices and held that such presumption was of "high indicative significance" in the context of the consideration of evidence by the court.[6]

The main difference between a "factual presumption" and *prima facie* evidence – as implied by the Federal Court of Justice – is that the former requires, in the form of circumstantial evidence, a greater effort on the part of plaintiffs to clarify and present the facts on an individual basis, a more intensive factual analysis, and a specific and comprehensive evaluation of the individual case.

Changes in the Procedural Situation for the Parties Involved

As a result of the decision, plaintiffs will likely face more difficulties pleading their case from now on. In most instances, it will no longer be sufficient to contend that a business transaction falls within the scope of the cartel in terms of the relevant products, period, and geographical scope that until now would have benefited from a "typical," abstract view on the case. Rather, plaintiffs must now present specific facts which, after a comprehensive evaluation, allow the conclusion to be drawn that, on the one hand, the concrete business transaction was affected by the cartel agreement and, on the other hand, the prices in their individual case were indeed inflated. The assessment of each individual case requires a higher burden of substantiation, which will often have to be supported by time-consuming and cost-intensive economic expert opinions in the future.

Conversely, the defendants' situation in this kind of proceedings improves – at least in theory. Essentially, defendants are no longer in the position of having to rebut *prima facie* evidence by advancing an alternative causal outcome that deviates from the "typical" one. The difference becomes relevant if, in the opinion of the court, neither of the potential causal outcomes can be definitively established (so-called "*non liquet*"). As long as *prima facie* evidence was accepted in such a situation, the defendant bore the burden of proving the contrary; by contrast, the plaintiff would now fail to prove its claim.

It remains to be seen whether and to what extent the decision will have a significant practical impact. In many cases, plaintiffs are already presenting specific facts and circumstances of their individual case. Defendants in such cases therefore already have to explain in concrete terms why business transactions involving the relevant products, period and geographical scope of a cartel were not affected by the cartel arrangements or why plaintiffs have not suffered any damages in any event.

Attribution of Knowledge

The Federal Court of Justice also commented on the issue whether knowledge of antitrust violations that certain employees may have had could be attributed to the plaintiffs. This is particularly relevant to the questions of contributory negligence and the commencement of the knowledge-dependent limitation period for damages claims.

Generally, knowledge of the statutory representatives (managing directors, executive board) is required. However, those individuals are often not involved in day-to-day business. In the opinion of the Federal Court of Justice, employees of a company can become so-called "knowledge representatives" if they are

[5] *Travaux preparatoires*, BT-Drs. 18/10207, p. 55 f.

[6] Federal Court of Justice, judgement of December 11, 2018 – KZR 26/17, margin no. 55, 56.

appointed to independently carry out certain tasks that bind the company as representatives of the company.

However, such attribution will be limited if the employee has either colluded with the cartel participants or tacitly consented to the cartel arrangements without his employer's knowledge.[7]

Interest on Damages as of the Time it Occurs

Finally, and despite widespread criticism, the Federal Court of Justice confirmed its position, already indicated in previous decisions, that damage occuring before July 1, 2005 are subject to interest at a rate of 4% p.a. and damage occuring after July 1, 2005 are subject to an interest rate of five percentage points above the base rate from the date on which the damage arose. The date of the contract for a specific delivery should be decisive.

Summary

The long-awaited judgment of the Federal Court of Justice requires plaintiffs to submit to the court detailed accounts of how their business transactions with cartelists were affected by the cartel and that they suffered damage as a result. The latter, however, is only relevant for those cases (albeit still pending for several years) in which damage occurred prior to the end of 2016, as the legislator has adopted a legal presumption of damage in the meantime. Despite this decision, plaintiffs will still be able to rely on a "factual presumption," which continues to ease their burden of proof to a certain degree.

Since determined plaintiffs with proper advice have generally not relied exclusively on *prima facie* evidence in any event, the most recent decision will mainly affect plaintiffs who hoped for damages with minimal effort and rested their case on a mere abstract economic analysis. Defendants would welcome the fact that the decision of the Federal Court of Justice affirmed the need to conduct a case-by-case assessment of cartel damages claims.

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[7] Federal Court of Justice, judgement of December 11, 2018 – KZR 26/17, margin no. 97.