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Under construction

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Gabrielle H. Williamson

Gabrielle H. Williamson is managing partner of the Brussels office of Heuking Kühn Lüer Wojtek. She is also a resident in the firm's Düsseldorf office. She has practised law for 30 years in the US and Europe, and specialises in EU and German competition law, merger control, state aid, EU and WTO international trade law, as well as EU and German environmental and health and safety regulation.

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UNDER CONSTRUCTION

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Summary

In Germany, private antitrust enforcement is still in its infancy. In particular, the question of how a full indemnification of aggrieved parties can be granted by avoiding overstressing the financial liability of perpetrators remains unresolved. German courts and the German legislature are still trying to develop legally and economically sound solutions to this problem.

The German Federal Court of Justice (*Bundesgerichtshof* – BGH, Judgment of 28 June 2011, KZR 75/10)¹ held that both direct and indirect purchasers at any level of the distribution chain may file antitrust actions for damages. At the same time, defendants of antitrust actions for damages are given the right to claim that the damage suffered has been passed on to indirect purchasers on the lower market level (so-called passing-on defence).

Only a few weeks after this decision, the German Federal Ministry of Economics and Technology (*Bundesministerium für Wirtschaft und Technologie* – BMWi) proposed an amendment to the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* – GWB)², *inter alia*, allowing qualified trade and consumer associations to skim off cartel-related profits, which would otherwise remain unclaimed due to the low level of damages. Other cornerstones of the amendment are the adjustment of merger control to the EU model, a revision of the abuse provisions and some changes for summary proceedings and regulatory offences.

In a nutshell, the BGH's ruling is likely to produce an increase of actions for damages by indirect purchasers. The passing-on defence will not be a severe obstacle, since cartelists willing to invoke it will face significant difficulties with the burden of proof. Apart from that, antitrust enforcement at consumer level is not expected to see a breakthrough in Germany soon.

Background to the passing-on defence in Germany

The negative effects of a cartel-related price arrangement are usually not only felt by the direct purchasers. Frequently, the indirect purchasers of the distribution chain are equally affected. Direct purchasers can suffer losses due to the contractual obligation to pay overcharged prices, which, as a consequence of the cartel, are higher than the hypothetical price on the market. However, they often seek to reimburse themselves by passing the prices on to the next market level.

For instance: A cartel member and a wholesaler have a sales agreement with the wholesaler purchasing directly by the cartel member. Prices are overcharged because of the cartel arrangement. The wholesaler then partially hands down these cartel-related prices to a retailer on the next lower market level. The retailer partially passes on the remaining overcharges to the end of the distribution chain, i.e. the customer. Parts of the damage, therefore, lie at the wholesale level, while other parts remain with the indirect purchasers and, finally, with the customer. From level to level, the damage can be reduced, since perhaps only parts of the price overcharges are passed on. Thus, defendants against damages claims frequently intend to invoke the passing-on defence, since it reduces the amount for which they are liable.

In general, the amount of compensation in a cartel case results from the difference between the cartel-related price overcharge and the hypothetical market price. In this regard, the passing-on defence generally creates an economic and legal balance. On the one hand, it reduces the financial risk for cartelists, since they would otherwise be liable for multiple damages awards. On the other hand, it prevents the unjustified enrichment of direct purchasers, insofar as they have not suffered any financial harm. Otherwise, it would be possible to pass on the price overcharge and to file an action for damages against the cartelists.

While the European Commission argued in its 2008 White Paper³ for the legitimacy of the passing-on defence, prevalent German legal literature denied its implementation in German law. One of the main questions has been, whether Art. 33 (3), GWB (which reads in part: *If a good or service is purchased at an excessive price, damages shall not be excluded on account of the resale of the good or service*) excludes the passing-on defence. This is, however, not the case. The provision says only that the occurrence of damages is not excluded by the resale of goods. Furthermore, the literature argued that the exclusion of the passing-on defence would undermine the efficiency of antitrust enforcement and the preventive function of compensation law.

The BGH's decision

In the underlying case, a company bought carbonless paper at cartel-related overcharged prices from a wholesaler, which itself was a subsidiary of one of the members of the so-called *Carbonless Paper Cartel*. Subsequently, the European Commission imposed fines on the producers of such paper, *inter alia*, for illegal price arrangements. The company went into bankruptcy shortly thereafter and assigned its claim for damages to a German savings bank. This bank filed an action for damages against the wholesaler. The Court of First Instance (Regional Court of Mannheim) dismissed the claim. It held that customers of a cartel member's subsidiary are indirect purchasers and, consequently, are not allowed to file actions for damages. In addition, the Court ruled that the plaintiff had failed to clarify whether the wholesaler had passed on the price overcharges to its customers. Concerning the question whether indirect purchasers are allowed to file actions for damages, the Appellate Court (Higher Regional Court of Karlsruhe) affirmed this decision. It held that only direct purchasers are allowed to file damage claims under German Law, since otherwise the passing-on defence would have to be introduced into German law. However, if the indirect purchaser buys from a 100% subsidiary of a cartel member, the Court ruled that the purchaser is allowed to file for damages, since it is unlikely for the subsidiary itself, as the direct purchaser, to file an action for damages against the cartel member, its own parent company. Thus, the Court granted a reduced compensation since this exception was applicable in this case.

The case was appealed to the BGH, which then ruled that both direct and indirect purchasers at every level of the distribution chain must be allowed to file antitrust actions for damages. However, the defendants may invoke the passing-on defence to prevent multiple liability. This decision reflects the fact that the impact of cartel-related price arrangements does not necessarily affect the direct purchasers, since they are able to

pass on the price overcharges to the next market level. Due to the purpose of competition and compensation law, every market participant at any level of the chain should be allowed to file actions for damages, since the competition infringement is to their detriment. This also corresponds to the jurisprudence of the European Court of Justice, which allows every party to file damages claims if an illegal price arrangement is causal for the damage that has occurred.

Practical implications

However, using the passing-on defence may pose some problems. At first, the defence presupposes an adequate causal relation between cartel-related price overcharges and the payments received from purchasers. Although there is always an economic incentive to pass on higher costs to the next market level, success in reselling may result from own commercial efforts, not from the fact that overcharges were paid. This leads to the necessity to prove the causality in each and every case. Despite the fact that market participants will have no access to the business-related data of their purchasers, German law does not provide for discovery in this respect. Hence, it might be difficult to prove the causality.

Cartelists willing to invoke the passing-on defence will face significant difficulties with the burden of proof

The same problem arises for customers filing actions for damages. They will have to prove that the damage (the overcharged price) is caused by the fact that there has been an illegal price agreement between the cartel members. As plaintiffs, the customers bear the burden of proof for the causal

relationship between the illegal price agreement among the cartelists and their own damage.

Moreover, if the cartelists, as well as their direct and indirect purchasers, are fully or partially successful in raising the passing-on defence, parts of the damages may rest with the customer. Due to potentially low damages levels and difficulties of proof as to their origin, customers in Germany are facing difficulties in proceeding successfully in private damages claims. Also, class actions *per se* are still not permitted in Germany. To date, the basic principles of the German legal system strictly mandate that every claimant has to demonstrate his/its own damage and causation.

Proposal for an amendment

The German legislature concluded the only possible way to involve individual consumers in antitrust enforcement was the authorisation of consumer associations to act as nominal plaintiffs, that is, to call for the populace's rights in case of antitrust violations with potential massive and scattering losses. The BMWi paper of August 2011 provides that consumer

associations are entitled to sue cartel violators for surrender of the profits obtained. Damages claims, in contrast, remain reserved to individuals and individual companies. The draft paper refers to the “*proven system*” of legal protection by consumer associations, as specified in the recast of the German Act Against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb – UWG*) in 2004.⁴ Yet, a closer look shows that this model may not be the most efficient way to handle the situation, as, since its introduction, there have been only a couple of cases. It is far from being technically sophisticated and has not proved to be fit for practice.

1 Involvement of consumer associations in private antitrust enforcement – the Exchequer wins again?

The UWG of 2004, in its Section 10,⁵ stipulates that companies using an illegal commercial practice under the UWG can be sued for surrender of the profits obtained by previously registered and qualified entities for the protection of consumer interests. The money will, however, not stay with the claimant but will have to be released directly to the Federal Budget. On paper, this model closes a gap in legislation, since it ensures that

The association-Exchequer model cannot hide the fact that a surrender action altogether bears a punitive character

violators cannot keep their profits simply because competitors did not suffer any verifiable damage and individual consumer losses are too marginal to risk an action. By reducing the cartellists’ benefits to zero, the provision seems to have a preventive effect. In practice, however, a successful surrender action is rather unlikely. The provision does not generate any legal or economic motivation for a registered association to go to court at all. Such organisations are not *a priori* designed for litigation, but rather to inform and advise consumers about their rights and options on the market. A legal action in the field of competition law, however, binds manpower and other valuable resources. Any financial benefit obtained has to be passed on to the Federal Budget, yet there is no buffer against the financial risk of litigation in return. Furthermore, the elements of a claim for surrender under Article 10 are rather strict, and it is hard to calculate the profit that might be at stake – notably because other payments effected in connection to the infringement have to be deducted. It is unlikely that consumer associations would choose to pursue such a lawsuit under these conditions if it is to the exclusive benefit of the Exchequer. It may be preferable to open the gates to private or public foundations with the option for them to insure the claimants contractually against litigation risks and to pocket the possible winnings. The association-based model will forfeit its deterrent and preventive character if it turns out to have only minor practical relevance. To date, only two initially successful actions under Article 10, UWG initiated by consumers’ associations have been reported.

In the GWB, the grounds for the surrender model have been prepared beforehand: Article 34 allows for the German Federal Cartel Office (*Bundeskartellamt*) to order the surrender of profits in case of cartel violations.⁶ Also, the GWB was amended by Article 34a in 2005. This provision was originally designed for the same purpose as Article 10, UWG and meant to open the surrender action to consumer associations. In negotiations throughout the legislative process, however, these entities were deleted from the provision and only trade associations were authorised to file. If the BMWi paper aims to amend Article 34a according to its original purpose – parallel to the UWG – and open the floor to consumer groups, this might be significant. Given the difficulties mentioned above, it is, however, questionable whether this is a big step forward in private antitrust enforcement as it is unlikely

that the amendment will have any practical implications. Not least, the association-Exchequer model cannot hide the fact that a surrender action altogether bears a punitive character, even if it comes in the flimsy disguise of prevention. This brings up the question whether the rule of law principle allows for the transfer of such powers of the state onto private entities.

Apart from this questionable approach, the BMWi draft paper mentions several other aspects of the GWB that may be subject to amendment:

2 Merger control – conformity with EU mechanisms

The merger-control system of the GWB dates back to the 7th GWB Recast in 2005. At that time, it seemed inappropriate to adapt the German provisions to the newly-created EU system as foreseen in Regulation (EC) 139/2004 on the Control of Concentrations between Undertakings (ECMR), which had entered into force only in 2004 and accordingly was still untested. Therefore, formal and substantive differences between both models remain. Today, with sufficient experience and an established practice of the European Commission, the adaption of the GWB to the EU provisions does make sense.

While the Bundeskartellamt must prohibit a merger if it is likely to create or strengthen a dominant market position (Article 36 (1), GWB), the ECMR runs a more differentiated system: Therein, the criteria of dominant position is only one possible element of threats to competition (the so-called SIEC test, “*Significant Impediment of Effective Competition*”). The prohibition criteria of the GWB are now aligned with the SIEC test. It is also being examined whether the German merger-control system in terms of conditions for the release of a fusion should remain limited to structural commitments or include also behavioural conditions.

The introduction of a second domestic turnover threshold of five million euros in Germany (Article 35 (1), No. 2 of the GWB) in the year 2009 for mergers without substantial domestic impact has simplified notification requirements and reduced transaction costs for businesses. However, this threshold has been circumvented by splitting large transactions into several smaller projects. To avoid such strategies, as for the ECMR, the proposal includes an aggregation clause in case a plurality of transactions is planned.

Certain German peculiarities are, however, retained: The presumptions for single market and oligopolic dominance remain unchanged, only the related market share levels will be updated. The draft also retains the highly controversial instrument of ministerial approval in Article 42 of the GWB, which allows the German Federal Minister of Economics to authorise a merger for macroeconomic reasons or reasons of public welfare, even if this merger was initially prohibited by the Bundeskartellamt for competitive reasons. German merger control will also continue to observe minority interests and the purchase of a competitively significant influence without the acquisition of control. Especially in the field of energy supply, this is crucial for the effective protection of competition.

3 Abuse of dominant position – relative market dominance in Germany

Article 3(2) of the Regulation 1/2003 (EC) on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty leaves member states a margin of discretion to implement stricter provisions for the abuse of a dominant market position than what is foreseen by the EU provisions as contained in Article 102 of the Treaty establishing the Functioning of the European Union (TFEU). Germany has made use of its discretion by establishing the legal concept of relative market dominance which refers to undertakings having a paramount market position. To a company with relative market dominance, the same behavioural duties in terms of competition will apply as to a market-dominant company. This

legal principle is meant to protect especially small and medium enterprises (SME) and will, therefore, be retained.

Unlike EU law, the GWB to date does not contain any explicit provisions for structural measures in case of anticompetitive conduct. The amendment proposal provides that such structural remedies and, for extreme cases, the instrument of unbundling, will be included in the GWB.

4 Summary proceedings and regulatory offences

The existing provisions for summary proceedings and for regulatory offences in cartel cases will be amended in order to improve the efficiency of antitrust prosecution and to adapt it to the increasing number of cases.

Some loopholes for the liability of legal successors of cartel participants will be closed. The conditions for a succession in antitrust liability are currently very strict under German law. Therefore, mergers and restructuring can save a company from being held liable after a cartel violation has occurred if the economic identity with the original perpetrator is given up.

It is also foreseen to restrict refusals to give evidence by entities charged with a cartel violation in terms of company- and market-related data. This is highly questionable, given that the right against self-incrimination is a basic element of the rule of law principles. This is also true for the proposal to restrict principles of immediacy and oral presentation, so that courts can consult written information (e.g. economic reports) easily and without consent of another party in a cartel procedure. ■

Gabrielle H. Williamson, J.D. is the Managing Partner of the Brussels Office of Heuking Kühn Lüer Wojtek and resident in the Firm’s Düsseldorf Office. She would like to thank her colleague RA Ines Litzberger, LL.M. for her valuable support in preparing this article. The views expressed in this article are personal to the author and do not reflect the view of Heuking Kühn Lüer Wojtek or any of its clients.

Footnotes

1 German Federal Court of Justice (BGH): Judgment of 28 June 2011 - KZR 75/10 - Press release No. 118/2011 of 29 June 2011. <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=13161d841345cb87b133ce8cdf8f4a70&nr=56711&linked=pm&Blank=1>

2 Bundesministerium für Wirtschaft und Technologie: Eckpunkte einer 8. GWB-Novelle, 1 August 2011. <http://www.bmwi.de/BMWi/Redaktion/PDF/E/eckpunkte-8-gwb-novelle.property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf>; the GWB is available in English at: http://www.gesetze-im-internet.de/englisch_gwb/index.html

3 Commission of the European Communities: White Paper on Damages actions for breach of the EC antitrust rules, Brussels, 2 April 2008, COM(2008) 165 final. http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf

4 Available in English at: http://www.gesetze-im-internet.de/englisch_uwg/index.html

5 Köhler, Helmut in: Köhler, Helmut/Bornkamm, Joachim: Gesetz gegen den unlauteren Wettbewerb, 29. Auflage 2011, § 10 UWG Rn 1 ff.

6 Emmerich, Volker in: Immenga, Ulrich/Mestmäcker, Ernst-Joachim: Wettbewerbsrecht, Band 2: GWB, 4. Auflage 2007, § 34a Rn. 1 ff.