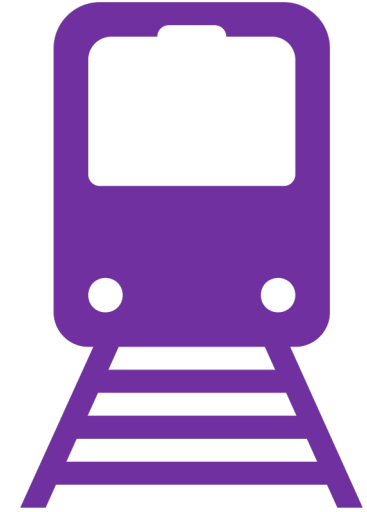


Compensation of cartel damages in Germany

Dr. Christina von Merveldt, LL.M. (NYU)
Regional Court of Munich I

Recovery of cartel damages in Germany

- ECJ judgement of 20.09.2001 – C-453/99 Courage/Crehan: full effectiveness of Art. 85 requires possibility of individual claim for damages
- Introduction of leniency systems in EU and Member States (Germany: 2000)
- Green Paper, White Paper (P: collective recovery of damages?)
- Damages Directive 2014/104 leading to 9th amendment of German Competition Law Act (GWB) in 2017
- 10th amendment of GWB (2021)



Trucks cases (1st instance)

Regional court
of Hanover



Regional court
of Stuttgart

Regional court
of Munich I

and others...

Proving damages (tort)

violation

of legally protected interests, statutory obligations (e.g. art. 101)

...

All disputed facts must be proven

- Witnesses
- Documents
- Experts

Courts must consider all (relevant) evidence presented by the parties

full proof

§ 286 ZPO*

damages

Court may estimate damages (occurrence & amount)

- Courts are free whether to consider evidence presented to it
- Courts may call and hear its own expert testimonies

estimate

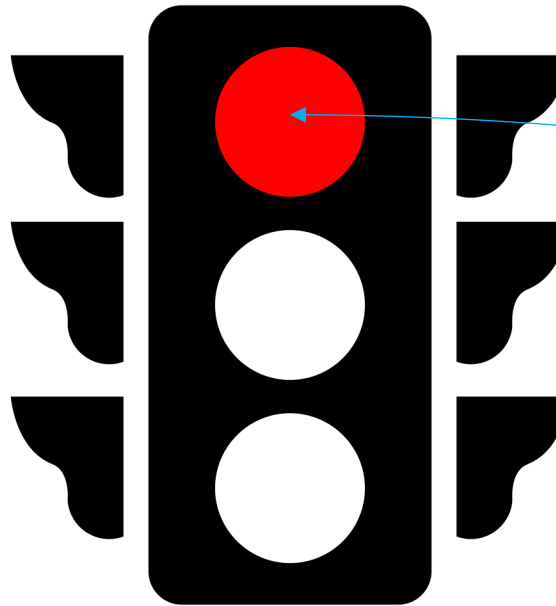
§ 287 ZPO

*ZPO = German Code of Civil Procedure

Proving damages (easy)



Proving cartel damages (not so easy)



art. 101 TEUF, § 1 GWB

Proving cartel damages

Approach of German courts so far:

- very few judgements awarding quantified damages
- mostly declaratory judgements / judgements on the merits of the case
(*Feststellungs- und Grundurteile*)
- based on the findings of
 - (a) an infringement
 - (b) prima facie evidence that cartels cause harm and that specific transactions were affected by the cartel

Proving cartel damages

German Federal Court of Justice:

Rails Cartel judgements I – VI



Trucks Cartel judgements I - II



Proving cartel damages

Full proof (§ 286 ZPO) only required for

- the **cartel infringement** (no problem in follow-on cases), AND
- the claimant must have been affected by this infringement, i.e. the violation – mediated by conclusion of a transaction – was **susceptible** to directly or indirectly cause damage to the claimant
= rough filter!

Proving cartel damages

Assessment of damages (§ 287 ZPO)

- occurrence & scope of damages to be determined under § 287 ZPO
- factual presumption \neq *prima facie* evidence – courts must still consider all facts & circumstances of the case
- weight of presumption depends on type of infringement and individual circumstances



Proving cartel damages

Due consideration of all facts & circumstances

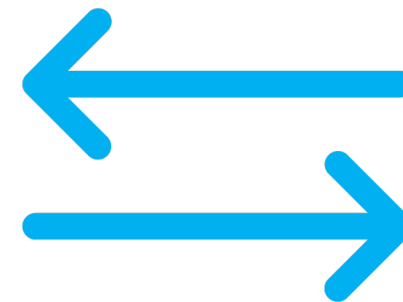
- Regional Court of Dortmund –free estimation of damages by the court
(30.09.2020, 8 O 114/15 (Kart) concerning rails cartel)
- Regional Court of Munich I – all relevant circumstances can only be duly considered with the aid of an **independent expert's opinion**
(19.02.2021, 37 O 10526/17 concerning trucks cartel)

Making it easier

FCJ recognizes standardized contractual penalties

- compensation must be “reasonable” (what can typically be expected), approx. 5-15% of contract value
- *effet utile*: courts to apply generous standard – reliance on meta studies possible (e.g. Oxera)
- defendants must retain right to prove that the damages were in fact lower than contractual penalty

Passing-on



Passing-on defence accepted in principle (defendants must prove it)

- defendants must prove the passing on
- passing-on accepted for publicly funded acquisition of cartel products

Passing-on defence not available

- in case of “dispersed damages”, e.g. consumer products
- if secondary buyer has assigned its claims to the plaintiff

Multiple claims

- 130 follow-on damages claims from the trucks cartel in Munich alone
- approx. 10,000 potentially injured parties
- Heterogeneous claims and different types of acquisitions, acquirers, national markets, markets levels ...
- approx. 250,000 trucks
- 6,000 pages submissions for one case (not counting annexes such as expert opinions)



Who signed the deed of assignment?

Has the chain of title been duly established?

Is the bundling contrary to public policy?

Does the assignor actually exist?

Is the assigned right sufficiently defined?

Was the signatory duly authorised to sign?

What law applies to the assignment?

Is the signature genuine?

Does the assignment cover all asserted claims?

Establishing the facts

Claimants must prove each individual transaction (if disputed)

- plaintiffs cannot rely on statutory disclosure obligation for lost or destroyed documents
- court cannot estimate the number of transactions or the purchase prices (rather, these figures are the basis for the ensuing estimation of damages)



“trucks”?



Keeping a secret

Disclosure of data

- experts **need confidential data** from defendants to assess cartel damages
- danger of disclosure of defendants' **business secrets** to plaintiffs
- German civil courts **cannot sanction** potential breach of confidentiality

Court fostered NDAs

- plaintiff voluntarily waive their rights to access data disclosed to the expert
- contractual penalties for breach of NDA

Thank you for your attention!

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