Anticompetitive information exchange presumed to cause damage

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On 29 November 2022, the German Federal Court of Justice (*FCJ*) announced its eagerly awaited ruling on the follow-on lawsuit regarding the so-called "drugstore products cartel" (Case No. KZR 42/20). The full-text version of the judgement was published today. With this judgement, the FCJ explicitly clarifies that in the case of an anti-competitive exchange of information, there is a factual presumption that such information exchange caused a damage.

A total of 15 manufacturers of branded drugstore products were involved in the "drugstore products cartel". From at least 2004 to 2006, they regularly exchanged information on gross price increases and the status of negotiations with mutual customers within the framework of the "Body Care, Detergents and Cleaning Agents" working group of the trademark association Markenverband e.V. (*German Brands association*). In 2013, the Federal Cartel Office imposed fines summing up to EUR 63 million (Case No. B11-17-06). By way of private enforcement, the insolvency administrator of *Schlecker* – a retailer affected by the drugstore cartel – seeks compensation amounting to EUR 212.2 from several cartel participants.

Background

The proceedings before the FCJ are part of a series of follow-on actions which have gained increasing importance over recent years - a development fostered by the regulators: The European Commission pushed for a strengthening and Europe-wide harmonization of private enforcement within the EU with the Cartel Damages Directive 2014/104/EU, which national legislators have since then implemented.

For cartel victims, private antitrust enforcement is substantially facilitated by several legal provisions, which significantly reduce the evidentiary burdens associated with claiming cartel damages. For example, courts are bound by the administrative findings of cartel authorities. Moreover, there is a rebuttable presumption that cartels cause damages: According to the case law of the FCJ, there is an empirical principle in favor of the customer of a cartel participant according to which prices set in the context of a cartel arrangement are on average higher than in the absence of an anti-competitive agreement.

Proceedings

In the *Schlecker*- proceedings, it was disputed whether such an empirical principle also applies in the case of an anti-competitive information exchange (i.e. no hardcore price fixing). The lower courts had ruled against an assumption and found that, in the case of a mere information exchange, a direct effect on prices could not be assumed.

Decision of the FCJ

The FCJ, on the other hand, now expressly confirmed that in cases of anti-competitive information exchange, there is an empirical principle (as well), according to which prices increase as a result of such infringement. Where non-public information on current or planned pricing behavior is exchanged among competitors, there is a "high probability" that the companies involved will subsequently use this information and achieve higher price levels. It is part of economic experience and in line with economic rationality that companies take into account information on a competitor's intended or contemplated market conduct when determining their own market conduct.

The FCJ further ruled that the empirical principle has a "strong indicative effect". Of course, it can be refuted in individual cases. But it is up to the courts to examine, within the framework of their overall assessment, whether the evidence at hand confirms or invalidates the empirical principle. Criteria to take into account are, for example, the specific market conditions, the market structure and the purpose of the information exchange.

Outlook

The ruling fits into the FCJ's series of plaintiff-friendly clarifications adopted in the recent past. It can be read as a clear call to the lower instance courts to contribute to effective private antitrust enforcement. In its most recent rulings on follow-on actions, the FCJ has been striving to continuously eliminate ambiguities in the interpretation of antitrust damages law, especially with regard to clarifying questions on liability as such, with the explicit aim to clear the way for judgements on the amount of liability. Clearly, the FCJ expects lower courts to finally begin addressing questions of *quantum*.

The extension of the empirical principle to anti-competitive information exchange in the most recent ruling is consistent with the FCJ's previous practice, as its consequences can be similarly harmful as those of hardcore restrictions, such as price fixing. Thus, it does not come as a surprise that the FCJ considers the scope of the rebuttable presumption to be dependent on the *type of information* that was exchanged.

With its new judgment, the FCJ continues to ensure that the interpretation of national cartel damages law is in line with both its own case law and that of the European Court of Justice. It has long been recognized that the exchange of sensitive information not only constitutes a restriction of competition law by effect, but also a by-object-restriction, and is therefore subject to particularly strict cartel prosecution.

It remains to be seen how the Frankfurt Higher Regional Court will adopt and implement the FCJ's judgement in its following decision.

BLOMSTEIN is closely following further developments in private enforcement as well as administrative practice. If you have any questions, Anna Blume Huttenlauch, Marie-Luise Heuer and the entire antitrust team will be happy to answer them at any time.