Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

15th Summerschool on European Business Law, Düsseldorf, Germany

Private Antitrust Enforcement

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Structure of the lecture

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Private Antitrust Enforcement in Germany

A) Introduction

B) Antitrust Damage Actions – Aspects and Problems

C) Evidence

D) Disclosure

E) Cost/Risk-Analysis

F) Questions/Discussion

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Introduction

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Introduction

- law infringements
- levels of administration
- typical cases,
- experiences with public and private enforcement

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Law Infringements and Levels of Administration

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Introduction

Where an undertaking
- breaches the prohibition on cartels
- abuses a dominant market position
=> infringement of Artt. 101, 102 TFEU (Treaty on the Functioning of the European Union) or
=> infringement of Member State's law on Restraints on Competition

• (traditionally) public law sanctions
• most dominant in the media: fines
• imposed by the European Commission or also by the National Competition Authorities (NCAs)

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Introduction

Two levels of administration:

- European Comission vs National Competition Authorities („NCA“)

- If the offence affects the European single market: EU Comission
- If the offence does not affect intra-(Member) State trade: NCA

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Typical Cases and Experiences

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Typical Cases

- horizontal arrangements: cartels, collusion, conspiracy, predatory pricing, price discrimination, price fixing
- vertical arrangements: exclusive dealing, market restrictions, refusal to deal/sell, resale price maintenance, tied selling
- alternatively abuse of dominant market position
- result: obtain higher prices (than when competition undistorted

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Typical Cases

=> here we will mainly talk about „hardcore-cartels“

=> „agreements between competitors on the same market level regarding prices or production volumes and the division of sales areas or customer groups“

(Definintion by Bundeskartellamt)

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Typical Cases

discovery by competition authority or whistle blowing

- fine by the competition authority
- majority of participants admitted this (to be eligible for leniency programs)

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Introduction

On European level: substantive fines in 2017, approx € 2 billion

- price fixing of air cargo carrier: € 780 million
- trucks cartell: € 880 million
- car batteries: € 68 million
- thermal systems: € 155 million
- light systems: € 27 million
- Co-Driver protection systems: € 34 million

National Competition Authorities (NCAs)

- Germany: € 60 million
- (small) Austria: € 10 million

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Introduction

Not only hefty fines and other public law sanctions but also:
civil law consequences!

• brought by enterprises and other non-state, i.e. private,
persons who have sustained losses as a result of anticompetitive conduct

• reparative or preventive injunctions and

• compensation for damage sustained

=> follow-on cases: following an existing decision of the European Commission or an NCA

=> stand-alone cases: no decision by the European Commission or an NCA

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Civil Law Remedies

• significant and dominant in the anti-trust debate: Germany; The Netherlands; United Kingdom
• pursuit of private anti-trust actions in numerous other Member States: in the past difficult, if not impossible
• European Commission: only 25% of all competition law infringements upheld in its decisions (2006–2012) resulted in follow on actions
• stand alone actions (no prior finding of a breach by a competition authority): extremely rare
• damage: € 5.6–23.3 billion p.a.
=> still a good idea to build up a cartel….?!

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Directive 2014/104/EU

Idea

- creating a uniform European approach
- avoidance of any exaggerated interference with the national procedural and liability laws
- primary aim of the DADA (“Directive on Antitrust Damages Actions”):
- give victims effective means of action to obtain full compensation (viz. actual loss & loss of profits)

=> especially new for Germany: Discovery!

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Antitrust Damage Actions – Aspects and Problems

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Daily-life Antitrust Cases

- Sugar
- Beer
- Coffee
- Sausages
- Spectacel lenses
- Cement
- Rails
- Trucks

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Should I raise a lawsuit?

Cartels affect all of us!

- sugar, beer, coffee, sausages: obvious!
- cement, rails, trucks???

=> private person: can think about raising a lawsuit

=> manager of a company has the duty to consider wether to file a lawsuit („Business judgement rule“)

=> he has to check the prospects of success

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Who can be sued?

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Who can be sued?

• all (associations of) “undertakings”
• established European technical term; introduction into liability, competition & procedural law of the Member States
• discussion about application CJEU in Akzo (ECLI:EU:C: 2009:536)?
• liability of a parent company for cartel practices by subsidiary; undisputed: liability must be assumed when the parent company has a controlling influence on the subsidiary
• CJEU in Akzo: rebuttable presumption of controlling influence when parent owns 100% of the capital of the subsidiary/largely follows instructions of parent company
• future parent companies cannot avoid civil liability by allowing their subsidiaries to become insolvent

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Who can be sued?

- still rather big discussion in Germany
- Problem: separation principle

=> each legal entity must be considered separately

- sausage gap
- now: § 81 GWB n.F. vs § 33a GWB n.F.
- CJEU in Skanska (C-724/17 v. 14.03.19): Term „undertaking“ is the same in private and public enforcement; Art 101 TFEU; Art 288 TFEU
- but: applicable only if daughter is bankrupt?!?
- liability daughter for mother or daughter for daughter?!?
- LG Mannheim, 14 O 117/18 Kart: no liability daughter for daughter
- LG München, 37 O 6039/18: no liability daughter for mother

=> remaining problem anyway: how to construct it under german law

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Standing
-direct/indirect purchaser, pass on, bundling-

Standing

• “any individual” formula, c.f. CJEU in Courage (ECLI:EU:C:2001:465)

• all natural and legal persons that suffered harm due to infringement of European or national competition law

• including “indirect” victims:

cartel overcharges for goods - goods are sold on down a chain - direct purchaser (interim trader) passes on the anticompetitive price = indirect purchaser suffers pecuniary damage

• standing of indirect purchaser: accepted by BGH in ORWI (BGHZ 190,145);

Crucial notion: “passing on” of the overcharge

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Standing

Cartel 100
Euro overcharge
|
direct purchaser passes on 80 Euro (20 Euro remain)
|
Indirect purchaser passes on 50 Euro (30 Euro remain)
|
End-consumer (50 Euro remain)

Important: no overcompensation, no gain to the cartel!

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Passing On-Attack

- indirect purchasers only have a claim where the (interim) purchaser further up the chain passes on the anti-competitive price

- however: selling a good could be a very iterative process

=> “dispersed damages”

=> e.g. sugar-cartel

=> Problem: harm remains as gain for cartel?!

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Class Actions

Bundling of claims?

- e.g. CDC
- bought the claims of all purchasers in the cement cartel
- problem: OLG Düsseldorf – CDC had not sufficient resources in case of a lost action

=> assignment of the claim was invalid due to immorality

Class actions?

- European legislator: transformation into Member States' law voluntary
- Germany (among others) no such action available

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Passing On-Defence

• indirect purchaser only suffers loss where the (interim) purchaser further up the chain passes on the anti-competitive price

• where (interim) purchaser can pass his “loss” on – no actual

loss

=> what nullifies the claim of the direct purchaser at the same time justifies the claim of the indirect!

• burden of proof for passing on-defense: defendant!

• problem: legal presumtion for the indirect purchaser, but NOT for the defendant (for the same aspect!)

=> defendant may require disclosure by the claimant/third

parties

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Umbrella Claims

- purchaser is neither direct or indirect purchaser
- contract with a competitor of the cartel
- c.f. CJEU in KONE (ECLI:EU:C:2014:1317)
- market price generally rises
- result: even the non-contracting party has a claim against the cartel

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Umbrella Claims

Competitor — Cartel

Direct Purchaser — Direct Purchaser

Indirect Purchaser — Indirect Purchaser

End-consumer — End-consumer

=> difficult to substantiate such a claim

=> s. OLG Düsseldorf VI-U Kart 11/18 = NZKart 2019, 354

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Harm

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Harm

Claimants may seek full compensation; this includes:

- overcharge
- compensation of lost profit (lucrum cessans)
- plus interests from when the harm was sustained

(significant sums in long-running cartels!)

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Quantifying the Damage

=> nececarry to substantiate the claim!

- highly complicated: quantification of anti-trust damage
- complex economic models; specialists are essential; may take years; costs: 6-digit-number
- European legislator provides help
- “Practical Guide”: how to quantify harm caused by cartels
- uniform procedure by Member States

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Evidence

Conditions of the claim and burden of proof

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Evidence

§ 33a para. 1 GWB:

The plaintiff has to substantiate his claim (give the court the facts) and to provide evidence for:

- Defendant's participation in a cartel/Law infringement
- Cartel impact of the individual business
- occurrence of damage
- amount of damage

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Evidence

How can a plaintiff prove all that?

- Problem: hardly a chance to prove the occurrence of the damage with the plaintiff (expensive expert opinion required)
- Very difficult to prove the law infringement/participation at the cartel of the defendant (that is the reason for the lacking of stand-alone claims)
- Very difficult to prove the impact of the cartel on the individual business (that the arrangement aimed or at least included the individual business)

=> Big obstacles for the private enforcement!

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Evidence: Binding effects

- In follow on-claims: **binding effect** of authority/legal decisions, § 33 para. 4 GWB a.F./§ 33b GWB n.F.

⇒ Important for the Defendant's participation in a cartel/Law infringement (but basically not more)

- Based on: Decisions of EU Comission/NCA/court rulings
- But: only vis-a-vis the adressee of the fine notice
- Special problem: in case of settlements none detailed penalty notice

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Evidence: legal presumtions

- Following the directive there is as an amendment in the GWB the **rebuttable legal presumption** for damage occurrence (§ 33a para. 2 GWB n.F.)

⇒ presumption of damage; but only existence, no amount, (more than "one shilling.“)

⇒ cf. 88/C Hungarian Anti-Trust-Law: presumption of 10 % overcharge

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Evidence

Presumption will only apply to claims that arose after **26 December 2016**

Problem: What to do in “old cases” (especially Rails and Trucks)?

=> Many German courts have relied on the concept of **prima facie evidence** (or a **factual presumtion**) in two distinct respects:

-- Whether the price at which the claimant purchased certain goods was affected by the cartel is determined on the basis of prima facie evidence: Where these purchases **in terms of products, geographic area and time** fall into the areas in which the cartel was implemented, there is prima facie evidence that the purchase at issue was **affected by the cartel** (because of a „theorem of live experience“)

-- A corollary application of the prima facie evidence concept assumes that the price at which the cartelized good was bought was inflated due to the effect of the cartel (overcharge)

=> So there was an assumtion for the cartell impact and the damage

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Evidence

Federal Supreme Court (Bundesgerichtshof, judgment of 11 December 2018 – KZR 26/18, BeckRS 2018, 33435; Rails) has **severely criticized this approach**:

- Defendant had argued and offered evidence that the particular purchases at issue were not affected by the cartel;

- support in the decision of the German Federal Cartel Office according: cartel had not been implemented uniformly and had been practiced with varying intensity as to time and region.
- In this situation the Federal Supreme Court reversed the judgment of the Higher Regional Court in Karlsruhe

⇒ The ultimate effects of this judgment on future case law are currently not clear.

⇒ Higher Regional Court of Düsseldorf **refused to follow the BGH**

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

conclusion

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Evidence

⇒ **Conclusion**: Big problems for the plaintiffs to provide evidence for their claim in the old law

⇒ Result: there have been virtually no successful claims for damages in the past, in particular no judgments awarding higher amounts of damages.

⇒ in Germany: 6 (!) judgements, that have awarded money at all from 2002-2017 (cf. Klumpe/Thiede NZKart 2019,136)

⇒ Still Problems with data for the amount of damage in the new law

⇒ Solution: **Disclosure of evidence**?

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Disclosure

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Disclosure

European legislator forces access to (relevant categories of) evidence in the hands of

- the defendants
- third parties
- competition authorities

by court order

=> penalise failure to provide existing evidence

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Disclosure

Not a „One Way Road“

=> note: defendant undertakings may require the disclosure of evidence held by the claimant

=> careful preparation proceeding of plaintiff (possible passing on defence)

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

„Disclosure/Discovery“ in the new german law

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Disclosure in the german law (in transformation of the directive)

§ 33g para. 1 GWB

- material-law-based claim! (rather unique in EU)
- Plaintiff could claim for information before starting the damage claim!
- Idea: promotion of consensual dispute resolutions
- § 33g para. 2 GWB: claim for defendant! (option of collecting information for passing on-defense)

⇒ anyway: it is not a very successful story until now…

⇒ There are reasons for it:

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Disclosure in Germany: many problems!

- § 33g para 7 GWB: biggest obstacle!

Following this rule, the claimant has to pay for the discovery beforehand! (e-Discovery!! Lawyer-fees!! Etc…)

- § 33g para 8 GWB: lame duck!

⇒ No proper way to penalise failure of providing existing evidence

⇒ Because of his burden of proof, the claimant would need the evidence, the defendant has not delivered…

⇒ Vicious circle!

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Discovery in Germany: many problems

⇒ To date, **no case is known** where disclosure of documents has been ordered by a German court on the basis of the new law

⇒ The Higher Regional Court Düsseldorf went as far as deciding that as a matter of intertemporal law § 33g GWB will not apply to cartels that took place before 27 December 2016, when the Directive had to be implemented in national law.

⇒ All cartels currently and in the near future being litigated in the German courts (and in courts of other countries for that matter) should have been ended well before that date.

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Disclosure in Germany – many Problems

Problem: Leniency Programs

⇒ public prosecution of anti-competitive conduct depends on voluntary cooperation; less likely for fear of later disclosure;

⇒ vital: some kinds of documents must be protected (“leniency statements” and “settlement submissions)

⇒ various rules that "protect" public enforcement but hinder private enforcement

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Discovery
Protection of confidential information

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Discovery: Protection of confidential information

⇒ Tools to protect information are not addressed in German law

⇒ German judges are in the rather rare situation to invent and shape the law!

EU-commission is working on some suggestions for guidelines

1. Confidentiality rings/data rooms
2. Redactions
3. Appointments of experts
4. In camera hearings

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Disclosure - Conclusions

- The current disclosure regulations are still inadequate.
- They are not yet suitable to provide the antitrust victim with the necessary evidence.
- Further action by the legislator is necessary.

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Cost/Risk-Analysis of Litigation

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Cost/Risk-Analysis

Lawsuit is worthwhile from a damage of € 500.000+:

=> Lawyer´s fees only be claimed in the amount of statutory rates

=> hourly rates of specialized law firmes: 380-700 Euro(!)

Example: claim 100.000 Euro

- legal fees: ca 5.000 Euro => 10 hours won´t be enough
- every Euro more would have to be covered by proceeds

Plus: internal costs, costs of documents to be submitted, expert opinions

=> so consumers and small undertakings better keep away...

Dr. Gerhard Klumpe
Vorsitzender Richter am Landgericht Dortmund
8. Zivilkammer/VI. Kammer für Handelssachen

Questions/Discussion