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COMPETITION / ANTITRUST

FINANCIALRIGHT CLAIM VEHICLE BREAKS DOWN IN TRUCKS CARTEL

With its judgment of 7 February 2020 (case 37 O 18934/17), the Munich I Regional Court dismissed a "class action" brought by financialright claims GmbH concerning allegedly assigned cartel damages claims of more than EUR 600 million. The Court found that the plaintiff lacked capacity to sue since the underlying assignments were invalid due to violations of the Act on Out-of-Court Legal Services. The decision set the stage for other recent first instance decisions barring attempts to introduce American-style class actions into German procedural law

The Financialright model

The plaintiff before the Munich I Regional Court, financialright claims GmbH ("Financialright"), was a company registered as a collection service provider pursuant to section 10(1), no. 1 of the Act on Out-of-Court Legal Services (*Rechtsdienstleistungsgesetz*, "RDG") which describes itself as a legal services provider specialising in the IT-based enforcement of mass damage claims. The trucks cartel refers to an infringement – which lasted from 1997 to 2011 – by the leading truck manufacturers Daimler, MAN, Volvo/Renault, Iveco and Scania of European rules of competition for which the European Commission, with its decisions of July 2016 and September 2017, imposed fines totalling around EUR 3.8 billion. Based on the European Commission's findings, in several European countries civil actions have been brought by customers of the truck manufacturers requesting compensation for alleged cartel-related excessive truck prices. In this connection, Financialright is publicly advertising that, together with specialised lawyers and competition economists, it will enforce such claims provided that they are appropriate and likely to succeed. Financialright not only handles, inter alia, the entire management of the claims, more importantly it also assumes the cost risk for the affected parties as the latter initially do not incur any costs at all arising from the pursuit of the claims. Only in the case of success does Financialright keep a commission in the form of a percentage of the compensation sum actually awarded, while distributing the rest to its customers in accordance with their respective share of the enforced claims. In order to participate, the truck customers conclude litigation agreements with and assign their claims to Financialright. Financialright then bundles the assigned claims of the truck-customers (hereinafter also "assignors" or "customers"), thus functioning as a claims vehicle for the judicial enforcement. The costs arising in connection with the claim enforcement are financed by a litigation funder, which in return receives – if the case is won – a share of the proceeds.

The decision of the Munich I Regional Court

With the judgment outlined here, on 7 February 2020 the Munich I Regional Court dismissed – as unfounded – such a "class action" brought by Financialright bundling around 85,000 trucks for over 3,200 assignors and asserted a total claim for damages of more than EUR 600 million plus interest. The Court found that the plaintiff lacked capacity to sue, i.e. the authority to assert the rights at issue, claiming that the agreements on which the assignments were based were invalid due to a violation of sections 3 and 4 RDG and that the protective purpose of the RDG demanded that the assignments be deemed invalid as well.

Services that, from the outset, are geared towards bringing an action are not collection

Pursuant to section 3 RDG, the independent provision of out-of-court legal services is prohibited unless it is permitted by the RDG or by/based on other acts (so-called "preventive prohibition with permit reservation"). According to the Regional Court, the plaintiff's services were, in particular, not permitted by the criteria of 10(1),

sentence 1, no. 1 RDG – the only criteria that comes into consideration – according to which registered collection service providers may render collection services pursuant to section 2(2), sentence 1 RDG on the basis of special expertise. The Court held that the services no longer constituted such a collection service, claiming that they were not aimed at out-of-court legal services while the RDG was, however, according to section 1(1) RDG, limited to such out-of-court services. The Court concluded on the basis of, among other things, an overall assessment of the plaintiff's general terms and conditions of business, its method of approaching customers, the information material used and its website that the plaintiff's services were, from the outset, solely geared towards judicial enforcement of the claims. According to the Court, the variant of – where appropriate – an out-of-court assertion formally provided for in the agreements with the customers was, on the other hand, judged as being pointless from the very beginning since it must have already been clear to the plaintiff when concluding the agreements that, based on a realistic assessment, such an out-of-court enforcement of the claims was, from the start, not likely to be successful and therefore not "appropriate". This is the case since, as a result of the large number of difficult and, frequently, unresolved legal issues both in connection with the assignments and in the area of the law governing antitrust damages, the plaintiff could not have reasonably expected that the cartel members would already pay in response to an out-of-court assertion.

Conflicts of interest jeopardise proper legal service

Moreover, the Munich I Regional Court assumed that the Financialright model had violated section 4 of the RDG since the proper performance of the legal services vis-à-vis the customers was directly influenced and jeopardised by other performance obligations of the plaintiff.

Risk participation by bundling heterogeneous claims

The Court maintained that such an influencing and jeopardising resulted, on the one hand, from the litigation agreements in which Financialright undertook vis-à-vis the respective assignor to provide the best possible claim enforcement. According to the Court, the proper fulfilment of legal service obligations vis-à-vis the individual assignors was influenced and jeopardised by the performance obligations vis-à-vis the other assignors. It claimed that, by bundling a large number of heterogeneous claims, each with different prospects of success (for example, due to the varying quality of proof that could be supplied, different purchase dates and thus different limitation risks or purchase procedures at different market levels, which in turn triggered different presentation and proof requirements, etc.), in one action, the assignors with good prospects of success were participating in the risk of claims with lower prospects of success and vice versa. The Court maintained that this problem would also arise if a possible settlement were reached. It stated that, even if the action's prospects of success were a significant factor for a settlement of the claim, any settlement amount would be paid out solely according to the amount of the asserted claim and irrespective of the individual prospects of success of an assignor. Therefore, a possible settlement was advantageous for assignors with (individually) lower prospects of success and a high claim amount; but disadvantageous for assignors with (individually) higher prospects of success and assigned claims in a lower amount. The Court asserted that this was all the more true as the plaintiff's terms and conditions of business authorised it to conclude a settlement independently of the consent of the individual customers as long as the total amount of the settlement itself seemed sufficient from a commercial standpoint.

Opposing interests of the litigation funder and the customers

In addition, the Court held that the proper fulfilment of Financialright's legal service obligations vis-à-vis its customers was jeopardised by the plaintiff's performance obligations vis-à-vis the litigation funder. For example, when assessing whether additional cost-incurring measures (such as commissioning an additional expert report or filing an appeal) made sense, the plaintiff also had to take into account the financial interests of the litigation funder and its willingness to provide further litigation funding. With respect to a settlement, the litigation funder had extensive possibilities to exert an influence as well. According to the Court, this resulted in a problematic "conflict of interests" between the assignors and the litigation funder since, due to the cap limit with regard to the value in dispute and the costs, the litigation funder would profit from a settlement much earlier than the assignors. The Court found that, therefore, it was not possible to ensure the necessary alignment of interests between the assignors and the litigation funder – not even by means of the latter receiving a share of the proceeds, if the case were won.

Gleiss Lutz comments

With the outlined judgment, the Munich I Regional Court put a damper on the plaintiff's assertion "*Class actions don't really exist, do they? Well, they do for us.*" The judgment places high requirements on a successful bundling of claims by a legal services provider. Such a bundling is likely to be more challenging the more different the (prospects of success of the) bundled individual claims are.

Secondly, it will probably also be quite difficult to reconcile the conflicts of interest between the customers of the legal services provider and a litigation funder. However, in the case of mass damage claims, there is often no way around involving a litigation funder since, without one, there is again the risk of the assignments being declared invalid. This is because the Düsseldorf Higher Regional Court (judgment of 18 February 2015, VI-U (Kart) 3/14) had already emphasized that the claims vehicle must guarantee that it is able to bear its own litigation costs and the costs to be reimbursed to the defendants for all levels of appeal in the event that the case is lost. Thirdly, it seems hard to refute the objection that the out-of-court pursuit of the claims required for the permission criteria of section 10(1), no. 1 RDG does not have any prospects of success *per se*.

The requirements established by the Munich I Regional Court for a permissible bundling of claims may also have come as somewhat of a surprise given the relative sense of security felt based on the decision of the 8th Civil Senate at the Federal Court of Justice ("FCJ") (judgment of 27 November 2019, case VIII ZR 285/18) – which the FCJ itself just three months previously had described as a "landmark decision on the liberalisation of the Act on Out-of-Court Legal Services" – classifying the business model of the legal tech provider LexFox (www.wenigermiete.de) as "still covered" by the collection authority laid out in section 10(1), sentence 1, no. 1 RDG.

However, the FCJ's judgment did not grant registered legal services providers "carte blanche permission" to bundle claims. The FCJ instead had stressed not only that no generally applicable standards can be set for assessing whether the services fall within the authority to provide collection services pursuant to section 10(1), sentence 1, no. 1 RDG, but also that an assessment of the individual case – including an interpretation of the agreements made – in light of the protective purpose of the RDG is essential.

The judgment of the Munich I Regional Court consistently put this requirement into practice. There are in fact serious differences between the business models of LexFox and Financialright; to name just a few here: Whereas LexFox mainly focuses on out-of-court services in cases that are relatively straightforward from a factual and legal standpoint and calling in a lawyer is therefore merely an "option" in the event that litigation proceedings should actually become necessary, the business model of Financialright is, from the outset, focused on judicial enforcement of highly complex cases (both on the merits and in terms of the amount) with often disputed facts. There are serious structural differences as well: For example, LexFox provides assistance with the enforcement of individual claims of a modest amount (EUR 23.49 in the case decided by the FCJ) between a tenant and a landlord, whereas Financialright is, at the end of the day, attempting to introduce an American-style class action in Germany. However, German civil procedure law has so far deliberately not followed this course. Even the class action for a declaratory judgment just recently introduced as a result of the so-called "diesel scandal", by means of which specific qualified bodies can, in advance, clarify requirements for the (non-) existence of claims or legal relationships between consumers and businesses in a test case, requires the subsequent individual enforcement of the claims for damages.

This also applies at the European level. Although the EU Council of Ministers on 30 July 2020 agreed on the introduction of an EU group action to protect the collective interests of consumers, claims for antitrust damages do not fall within the scope of the directive. Besides that, in cartel damages cases, the plaintiffs will often not have the status of a consumer.

Finally, and to put the judgment into context, the Munich I Regional Court's decision is interesting because it marks the beginning of a series of recent judgments in which actions were dismissed due to a lack of capacity to sue since the underlying assignments were invalid as a result of a violation of the RDG.

For example, in a case concerning assigned claims of Kaufland-Warenhandelsgesellschaft and various distribution companies for damages in the sugar cartel (case 18 O 50/16), on 4 May 2020 the Hanover Regional Court dismissed an action brought by Kaufland-Stiftung, also registered as a collection service provider pursuant to section 10(1), no. 1 RDG, due to a lack of capacity to sue. Just as the Munich I Regional Court had previously done in the trucks cartel, the Hanover Regional Court regarded the services of Kaufland-Stiftung, among other things, as no longer covered by the permission to provide collection services set out in the RDG, claiming that "its services were – if not exclusively, then, when taking a realistic view, certainly primarily geared towards judicial enforcement of the claims". Moreover, the Hanover Regional Court found that, in view of the antitrust issue in dispute and the special expertise requirement pursuant to section 10 and section 11 RDG, the services were no longer covered by the permission to provide collection services. Referring to the above-mentioned FCJ's "lower rent" decision, the Hanover Regional Court assumed that the permissibility of a collection service was restricted to those legal areas for which the collection service provider had to prove special expertise and that antitrust law did not fall within these areas of law.

Outside of antitrust law, regional courts have also recently rejected a business model aimed at bundling a large

number of assigned claims into “class actions”. For example, in its judgment of 30 April 2020 (case 11 O 3092/19) in the “diesel scandal”, the Braunschweig Regional Court rejected an action brought by Financialright against Volkswagen also because of lack of capacity to sue, stating that the underlying assignments were no longer covered by the permission to provide collection services pursuant to section 10(1), sentence 1, no. 1 RDG et seq. and therefore invalid according to section 3 RDG in conjunction with section 134 German Civil Code. On 7 August 2020 the Ingolstadt Regional Court – according to its press release – dismissed one of Financialright’s largest diesel “class actions” of over 2,800 vehicle buyers against Audi and Volkswagen with bundled claims amounting to EUR 77 million. The Court found that the assignment agreements were no longer covered by the plaintiff’s authority to provide collection services in accordance with the RDG as a result of a provision according to which, in the case of a settlement revocation by a buyer, the entire legal action for that buyer was no longer free of charge. The Court claimed that this provision resulted in impermissible economic pressure on the respective vehicle buyer and created a conflict of interest between the buyer and the plaintiff. The unreasonable disadvantage at which this placed the buyers led to the invalidity of the assignment agreements.

In conclusion, the courts are rightly curbing recent attempts to establish collective legal protection emulating American class actions through the loophole of a liberalised Act on Out-of-Court Legal Services.

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