

# Groundbreaking Judgment of the German Supreme Court on Damage Claims in Cartel Cases of June 28, 2011

Antitrust & Competition; Dispute Resolution, Germany

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## Newsletter

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## Liability for Damages to Indirect Purchasers and Passing-On Defence Confirmed by Supreme Court

### German Supreme Court Set Ground For Cartel Damage Litigation in Germany

By judgment of 28 June 2011, the Senate for Cartel Disputes of the German Supreme Court for Civil Matters (BGH) rendered its first major decision on the material rules for damage claims pursued against members of a cartel. This judgment sets the ground for future cartel damage litigation in Germany, both with regard to several major cases already pending before German courts and with regard to future disputes, which may now be viewed under a different strategy.

While the full wording of the decision has not been published yet, the main statements of the Supreme Court can already be found in the court's press release. For once, the Supreme Court confirmed that indirect purchasers, who had acquired their goods at an inflated price from wholesalers who had themselves become the victims of a price cartel, can raise direct damage claims against the members of the cartel. Secondly, the Supreme Court confirmed that the members of a cartel can defend against a damage claim by using the argument that the purchasers had actually been able to pass on the overcharge to their customers and thus did not have to bear the full pecuniary damages triggered by the cartel (so-called "passing-on defence"). Third, the Supreme Court confirmed that a member of a cartel can also be held liable for damages that the customers of wholesalers suffered because they had purchased goods of other cartel members from those wholesalers.

### The Background

The plaintiff in the underlying litigation case is reported to be a savings bank that had pursued the damage claims of an insolvent printing firm on the basis of an assignment of claims. The printing firm had purchased carbonless paper of various papermakers from four different wholesalers, one of which was a full subsidiary of defendant Papierfabrik August Koehler AG.

According to plaintiff, the insolvent printing firm had suffered damages of EUR 223,540.26 due to an inflated purchase price caused by the carbonless paper cartel until at least February 1996. The claims were mainly based on the findings of the European Commission, who had fined several papermakers for a price fixing cartel in the carbonless paper industry in the years 1992 until 1995 (Commission Decision 2004/337/EC of 20 December 2001). Defendant Papierfabrik August Koehler AG had been fined with an amount of EUR 33.07 million and was unsuccessful in the appeal before the European Court of Justice (Judgment of the Court (Third Chamber) of 3 September 2009, C 332/07 P et al.).

The court of first instance, the District Court of Mannheim, had dismissed the civil damage claim based on the argument that damage claims in cartel litigation have to be limited to direct purchasers of a cartel member. The District Court further had doubts about the amount of damages, since the printing firm might have passed on the increased paper prices to its customers.

In the appeals proceedings, the Court of Appeals of Karlsruhe generally followed the argument that indirect purchasers are not entitled to pursue damage claims against members of a cartel, which is a view that has been shared by some major authors in Germany as well. The Court of Appeals made an exception, however, for those purchases that had been concluded with the wholesaler who had been a 100 % subsidiary of defendant. The court justified this exception with the argument that a cartel member could otherwise easily avoid liability by placing one of its subsidiaries into the distribution chain, since the cartel member could expect not to be sued for damages by its own subsidiary.

On the passing-on defence, the Court of Appeals of Karlsruhe shared the view that had already been expressed by the Court of Appeals of Berlin in its decision of 1 October 2009 in the Berlin ready-mix concrete cartel. Both the Court of Appeals of Berlin and the Court of Appeals of Karlsruhe concluded that it would be contrary to the purpose of private enforcement of damage claims in cartel cases to allow a passing-on defence, since European law requires that such private damage claims can be pursued efficiently. If the member of a cartel was allowed to escape liability if its customer had passed on the overcharge to the next level in the distribution chain, liability for cartel damages would lose much of its deterrent effect, since the cartel member would no longer be liable to its direct customer, who is typically in the best position and has the most accurate information required for raising a damage claim.

The Court of Appeals of Karlsruhe therefore came to the conclusion that plaintiff could claim only that part of the damages that had been caused by purchases from the 100 % subsidiary of defendant, but that those damages could not be reduced by the fact that the printing firm might have actually passed on the overcharge to its customers. By heavily relying on the obiter dicta of the European Commission in its decision on the fines and by applying a provision in German civil procedure that allows a court to estimate the amount of damages (section 287 of the German Code of Civil Procedure), the Court of Appeals ultimately granted a damage claim of EUR 100,000 to plaintiff.

### **The Judgment of the Supreme Court**

Based on an appeal for legal grounds, the Senate for Cartel Disputes of the German Supreme Court now lifted the judgment of the Court of Appeals of Karlsruhe and remanded the matter back to the Court of Appeals for a further finding of the facts (judgment of the German Supreme Court of 28 June 2011, KZR 75/10).

Contrary to the Court of Appeals of Karlsruhe, the Supreme Court held that also indirect purchasers can raise direct damage claims against the members of a cartel. The Supreme Court based this result on the reasoning that the purpose of private damage claims in cartel cases very much requires that anyone who

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suffered damages due to an illegal cartel, including those indirect customers to whom inflated prices had been passed on by the direct customers, must have a right to restitution against the members of the cartel. According to the Supreme Court, this is also a requirement under EU case law (see, in particular, the judgments of the European Court of Justice of 20 September 2001, C 453/99 – “Courage”, and of 13 July 2006, C 295-298/04 – “Manfredi”).

In addition, and again contrary to the Court of Appeals of Karlsruhe, the Supreme Court dismissed the arguments of the Court of Appeals against a passing-on defence and explicitly held that a cartel member has a valid objection if the plaintiff had passed on the overcharge to its customers. The Supreme Court underlined that by allowing a passing-on defence, it is warranted that the cartel member cannot be held liable for more damages than the total amount of damages caused by the cartel, while the direct customer cannot obtain unjustified advantages by collecting damages that he had actually been able to pass on.

As a result of the judgment of the Supreme Court, plaintiff would no longer be limited to damage claims regarding the purchases from a 100 % subsidiary of defendant, but could also demand restitution of damages for the purchases from other wholesalers. In addition, the Supreme Court pointed out that the defendant could also be held liable for damages caused to plaintiff by purchasing paper at inflated prices from other paper manufacturers involved in the cartel.

### **Practical Effects of the Judgment of 28 June 2011**

The judgment of the German Supreme Court of 28 June 2011 is the first substantive judgment rendered by the highest German civil court in a cartel damage litigation case. It thus sets the grounds for cartel damage litigation in Germany in the future.

By allowing indirect purchasers to raise damage claims in cartel cases, the Supreme Court puts an end to the legal uncertainty whether such damage claims should be restricted to certain market participants or certain types of victims only.

Maybe even more importantly, the Supreme Court also stopped a rather unique legal development in the EU that Germany was about to take due to the increasing German case law on the exclusion of the passing-on defence. In 2005, the German legislator had even introduced a special provision into the German Act against Restrictions of Competition (“ARC”), according to which the damage incurred by a cartel victim due to an inflated price of certain goods or services “shall not be excluded by the fact that the goods or services have been resold” (section 33 subsection 3 sentence 2 ARC). This provision, which is only applicable for cartels that took place in 2005 or later and could thus not directly be used in the present case, was often interpreted in Germany as excluding a passing-on defence at least for cartels as from 2005. Most notably, the Supreme Court now explicitly mentioned that the legal situation would not be materially different if section 33 ARC had to be applied in the present case, so it can be expected that German courts will accept the passing-on defence in future cases as well.

This brings Germany back into line with the other EU jurisdictions, which broadly accepted the passing-on defence so far. It will also render it more difficult for

German courts to determine the amount of damages in such cases, as it will not be easy to determine which part of the damages claimed by a direct customer were due to the loss of turnover triggered by an inflated purchase price and which part of the inflated purchase price could actually be passed on to the next line of customers. Just recently, the European Commission has launched a public consultation on the best way to assess damages in cartel litigation cases, which also dedicated a chapter to the calculation of damages if the overcharge has been passed on. Any company, authority or citizen is free to submit comments until September 30, 2011 (see, for further details, the internet publication [http://ec.europa.eu/competition/consultations/2011\\_actions\\_damages/index\\_en.html](http://ec.europa.eu/competition/consultations/2011_actions_damages/index_en.html)).

### Summary and Outlook

In sum, the judgment of the Supreme Court may render German courts slightly less attractive for plaintiffs in cartel damage litigation cases. In particular if the damages have been passed on to a multitude of end customers, who typically have difficulties in pursuing claims on an individual or united basis, it may also become less likely that private damage claims will be raised at all. This might also increase the pressure on Germany to allow class actions in cartel damage litigation cases in the future.

On the other side, the fact that the highest civil court rendered a groundbreaking judgment on the rules for pursuing damage claims in cartel cases again puts Germany into the forefront of the European countries, where case law on cartel damage litigation is still, with a few exceptions, a rare event. As a result, it can still be attractive to bring such disputes before the German courts, where the first pillars of a reliable legal framework for damage claims in cartel cases have been set now.



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