

## Antitrust Infringements: Cartel Damages Claims in Germany

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Cartel damages claims are increasingly spreading in *Europe*. In this rapidly evolving field of law, *Germany* has emerged to become the second most popular jurisdiction after the UK. It is too early to say whether this might be affected by the *Brexit* vote. Yet since the EU's directive on cartel damages claims (Directive 2014/104/EU) has to be implemented by all EU Member States until 27 December 2016, cartelists may soon face an even broader number of parallel claims in various European jurisdictions. Now, the Administrative Court of Dusseldorf added another claimant-friendly brick to the legal construction site of European cartel damages by its recently published judgment of 7 July 2016 in case 20 K 5425/15.

A public purchaser of rails, switches and railroad ties is suing one of the members of the so-called rail cartel in Germany (see press releases of German Federal Cartel Office/FCO of 23 July 2013, 11 July 2013, 5 July 2012). While German claimants can mostly rely on the cartel authorities' findings of an antitrust infringement, they still have to prove accrual, amount of damages and causation. The implementation of the damages directive will relieve the claimant's burden of proof to a certain extent but the difficult question on how to quantify damages and get access to relevant data remains.

Here, the claimant will most likely benefit from a fortunate coincidence. The defendant already sued former managers involved in the rail cartel for damages before German labour courts. The defendant was seeking compensation *inter alia* for its fine imposed by the FCO in the amount of EUR 191 million. Although the cases were dismissed to the extent the fine was concerned (see Landesarbeitsgericht Dusseldorf – 16 Sa 458-460/14; appeal pending before Bundesarbeitsgericht), the court files certainly contain full details of the defendant's statement of claim against its former employee, underlying reasoning and evidence.

The claimant applied for access to the labour court's file which was initially denied by the court's president. Though it appears exotic to involve administrative courts in civil proceedings, the denial of the court's president constitutes an administrative act. The claimant was successful to fight the labour court president's denial in first instance before the Administrative Court of Dusseldorf.

In essence, the administrative court balanced the claimant's interest of having access to the file with the defendant's need to protect business secrets, information covered by confidentiality agreements which are unrelated to the cartel and private data concerning its former employee. Except for such information which was considered worth protecting, full access was granted.

Although the Administrative Court's judgment has not become final yet, cartelists may now think twice in about the strategic consequences of suing their former staff for damages.

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