Case C-253/23

Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court

Date lodged:

20 April 2023

Referring court:

Landgericht Dortmund (Germany)

Date of the decision to refer:

13 March 2023

Applicant:

ASG 2 Ausgleichsgesellschaft für die Sägeindustrie Nordrhein-Westfalen GmbH

Defendant:

Land Nordrhein-Westfalen

Subject matter of the case in the main proceedings

Competition – Cartel – Directive 2014/104/EU – Compensation – Assignment of claims for compensation for harm caused by a cartel – Legal standing to bring proceedings – Collection by group action

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1. Is EU law, particularly Article 101 TFEU, Article 4(3) TEU, Article 47 of the Charter of Fundamental Rights of the European Union, and Articles 2(4) and 3(1) of Directive 2014/104/EU to be interpreted as precluding an interpretation and application of the law of a Member State which has the effect of prohibiting a person who may have suffered harm by an infringement of Article 101 TFEU –

established, with binding effect, on the basis of Article 9 of Directive 2014/104/EU or the national provisions transposing that article – from assigning on a fiduciary basis his or her claims for compensation – particularly in cases of collective or scattered harm – to a licensed provider of legal services, so that that provider can claim together with the claims of other alleged injured parties, by means of a follow-on action if other equivalent legal or contractual possibilities for consolidating claims for damages do not exist, in particular because they do not allow a judgment requiring performance [of payment of damages] to be sought, of if they are not practicable for other procedural reasons or are objectively unreasonable for economic reasons, with the consequence, in particular, that it would be practically impossible, or in any event excessively difficult, to bring an action for damages for a small amount?

2. Is EU law in any event be interpreted in this way if the claims for damages at issue have to be pursued without a prior decision on the alleged infringement from the European Commission or national authorities that has a binding effect within the meaning of national provisions based on Article 9 of Directive 2014/104/EU (known as a 'stand-alone action'), if other equivalent legal or contractual possibilities for consolidating civil law claims for damages do not exist for the reasons already set out in question 1, and, in particular, on the contrary, an action based on an infringement of Article 101 TFEU would not be brought, either via public enforcement nor via private enforcement?

3. If at least one of those two questions is answered in the affirmative, must the relevant provisions of German law remain unapplied if an interpretation which complies with EU law is ruled out, which would have the consequence that assignments [of claims for compensation] are in any event effective from that point of view and would render effective enforcement of law possible?

Provisions of EU and international law cited

Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, particularly Articles 2, 3 and 9

TFEU, Article 101

TEU, Article 4(3) and Article 6

Charter of Fundamental Rights of the European Union, Article 47

ECHR, Article 13

Provisions of national law cited

Rechtsdienstleistungsgesetz (Law on out-of-court legal services; 'the **RDG**'), particularly:

Paragraph 1 of the RDG (Scope)

'(1) This Law regulates the authorisation to provide out-of-court legal services in the Federal Republic of Germany. It serves to protect persons seeking justice, legal relations and the legal system against unqualified legal services. […]'

Paragraph 2 of the RDG (Definition of legal service)

'(2) [...], the collection of third-party claims or claims assigned for the purpose of collection for the account of a third party is a legal service if the debt collection is conducted as a stand-alone business [...].'

Paragraph 3 of the RDG (Authorisation to provide out-of-court legal services)

'The independent provision of out-of-court legal services is permissible only to the extent provided for under this Law or by or pursuant to other laws.'

Paragraph 10 of the RDG (Legal services on basis of special expertise)

'(1) Natural and legal persons [...] registered with the competent authority (registered persons) may provide legal services in the following fields on the basis of special expertise:
1. 1. collection services (first sentence of paragraph 2 (2),'

Paragraph 11 of the RDG (Special expertise, professional titles)

'(1) Those providing collection services must have special expertise in the fields of law which are important for the collection activity for which an application is being made, [...].'

Rechtsdienstleistungsverordnung (Ordinance on out-of-court legal services; 'the **RDV**'), particularly paragraphs 2 and 4

Gesetz gegen Wettbewerbsbeschränkungen, (Law against restrains of competition, 'the **GWB**'), particularly paragraphs 32, 32b and 33

Bürgerliches Gesetzbuch (BGB), (German Civil Code, 'the **Civil Code**'), particularly paragraphs 134 and 398

Succinct presentation of the facts and procedure

1 By the action brought on 31 March 2020, the applicant is claiming antitrust damages, pursuant to a right assigned to it, for a total of 32 sawmill companies

from Germany, Belgium and Luxembourg ('the assignors'). It accuses the defendant of having harmonised the prices of unwrought coniferous timber ('roundwood') for itself and other owners of woodland in North Rhine-Westphalia during at least the period from 28 June 2005 to 30 June 2019 in contravention of Article 101 TFEU. The owners of woodland did not offer their goods on the market independently, but commissioned the defendant to take over the marketing of roundwood for them. The defendant thus negotiated prices with customers not only for its own roundwood, but also for the roundwood of the other participating owners of woodland, and offered them on the market.

2 The Bundeskartellamt (Federal Cartel Office) conducted investigations into that approach over a number of years and, in a 2009 decision, established specific thresholds for timber marketing collaborations as well as market-position reduction measures for the *Land* involved as defendant in the present case.

3 The sawmill companies are claiming compensation for the harm they claim to have suffered since 28 June 2005 as a result of purchasing roundwood from North Rhine-Westphalia at prices which they claim were inflated by the cartel. The claim is based on hundreds of thousands of individual payments by the assignors.

4 Each of them instructed the applicant, which is licensed as a provider of legal services under the RDG, to enforce their claims and assigned those claims to the applicant for the purposes of enforcement. The applicant is asserting the claims in its own name and at its own expense, but in consolidation for the account of the assignors, first out of court and now, with legal representation, before the Landgericht Dortmund (Regional Court, Dortmund). In return, the assignors have promised it a fee in the event of success. In all of this, the applicant is represented by a 'qualified person' listed in the Legal Services Register, a fully qualified German lawyer (*Volljurist*) who has successfully passed both state law examinations, is qualified for judicial office and is licensed to practise at the bar. The applicant has explained and provided evidence of its area of activities and expertise to the licensing authority in detail.

5 The defendant requests that the action be dismissed; it asserts that the consolidated sale of timber even reduced prices and thereby promoted the sawmill industry. Above all, however, the defendant relies on the assertion that the claims for damages were assigned to the applicant in breach of the RDG and those assignments are therefore void, for which reason the applicant does not have legal standing to bring proceedings.

Succinct presentation of the reasoning in the request for a preliminary ruling

6 In Germany, especially in cases of collective and scattered harm, claims are joined via the medium of assignment models (*Abtretungsmodelle*), also known as collection by group action (*Sammelklage-Inkasso*), and then asserted by way of legal action. Under these models, injured parties assign their presumed claims to a legal service provider licensed under the RDG, which asserts them in

consolidation in its own name and at his own expense, for the account of the assignors, in return for a fee (contingent on success).

7 This approach is accepted in the case-law of the Bundesgerichtshof (Federal Court of Justice) in various areas of law, namely in tenancy law, in respect of the assertion of air passenger rights as well as in actions for damages in connection with the diesel/emissions scandal. However, in the area of antitrust damages law, and particularly in stand-alone cases in that area, the case-law of the courts of first instance holds the assignment model to be inadmissible; in that respect, the Federal Court of Justice has not yet had the opportunity to rule on this.

8 Under the general provision of Paragraph 398 of the Civil Code, a claim for damages, like other kinds of claim, can be assigned to, for example, a collection service provider for the purpose of collection. Collection service providers in this context are licensed legal service providers who have been granted collection authorisation. By virtue of that authorisation, they are allowed to collect claims (assigned for the purpose of collection) for the account of persons seeking justice (first sentence, no. 1, of Paragraph 10(1) of the RDG, read in conjunction with the first sentence of Paragraph 2(2) thereof). In the absence of collection authorisation, collection of the debt is prohibited and any assignment is therefore void. Collection authorisation is granted by state licensing authorities upon application, following the conduct of a licensing procedure on the basis of expertise of which proof is provided (Paragraphs 11 and 12 of the RDG).

9 The collection authorisation thus granted covers out-of-court collection of debts. In the case-law of the highest courts, however, it is acknowledged that collection service providers are in principle also allowed to collect debts by means of legal proceedings, as long as they do so with legal representation. Collection service providers are in principle also allowed to collect claims in consolidation for the account of several injured parties in one and the same set of legal proceedings (Federal Court of Justice, judgment of 13 June 2022, reference VIa ZR 418/21, in *juris* database, paragraphs 11 et seq. and 51 et seq. – *financialright*; Federal Court of Justice, judgment of 13 July 2021, reference II ZR 84/20, in *juris* database, paragraphs 20, 49 et seq. – *Airdeal*). This regularly arises in connection with models in which the collection service provider assumes the costs of debt collection and only receives remuneration for its activity if it is successful; this is also considered permissible by the Federal Court of Justice (Federal Court of Justice, judgment of 13 July 2021, reference II ZR 84/20, in *juris* database, paragraph 48 – *Airdeal*).

10 According to various German courts, however, that possibility of collection service providers asserting claims pursuant to rights assigned to them does not apply to claims for antitrust damages. In a parallel case to the case in the main proceedings, the Landgericht Stuttgart (Regional Court, Stuttgart) justified this by pointing out that, in part because of the continuing development of European antitrust legislation, antitrust damages law was particularly complex and typically apt to lead to conflicts of interest. In addition, it held that collection service

providers were typically not knowledgeable in this area, despite the statutory provision of proof of expertise (see, inter alia, **Regional Court, Stuttgart, judgment of 20 January 2022, reference 30 O 176/19**, in *juris* database, paragraph 88 et seq. – *Rundholzkartell BadenWürttemberg*; **Regional Court, Mainz, judgment of 7 October 2022, reference 9 O 125/20** – *Rundholzkartell Rheinland-Pfalz*, in *juris* database).

11 According to the referring chamber, that position is in any event correct when the situation in question is, as in the present case, a stand-alone case. This is because such a stand-alone case requires complex examination of numerous aspects which do not primarily fall within the scope of civil law. In such cases, the limit of the out-of-court activities conceivable as collection services within the meaning of Paragraph 2(2) of the RDG, namely the legal assessment and advice provided in relation to the collection of debts by an expert within the meaning of Paragraphs 11 and 2 of the RDG, read in conjunction with Paragraphs 2 and 4 of the RDV, appears to have been clearly exceeded.

12 Given that, under Paragraph 134 of the Civil Code, a legal transaction that violates a statutory prohibition is void, the consequence of this would be, inter alia, that the assignments themselves are void. On those grounds, the present action for antitrust damages would have to be dismissed on the merits without further examination because of the absence of legal standing to bring proceedings.

13 No other lawful and equally appropriate means of enforcing claims for compensation for collective or scattered harm caused by a breach of antitrust law in Germany. In particular, the Representative Actions Directive – not yet transposed into law in Germany – is not applicable to claims for antitrust damages (Article 2(1) of Directive 2020/1828, read in conjunction with Annex I thereunto), and the action brought by associations that is provided for in national legislation, namely Paragraph 33(4) of the GWB, is not applicable to claims for damages.

14 Scattered harm is generally characterised by each injured party having suffered only small-scale harm, but the harm suffered by all the injured parties adding together to a large sum; the harm to each party is so minor that economic rationality in combination with the unfavourable ratio of cost risk to benefit mean it is not pursued. Even for such parties who have suffered possible harm costed at between 200 000 and 300 000 euros, for example, collection by group action is the only economically sensible and practicable option for demanding compensation for that harm, because of the particular cost and risk structures within the antitrust damages process in Germany.

15 However, given the provisions of the RDG, the referring chamber considers itself bound, at least in stand-alone cases such as the present case, to assume that the assignments are void. The outcome of the present case therefore crucially depends on the answers to the questions referred. If the Court were to conclude that EU law does not preclude the interpretation of the RDG set out above, that

interpretation would result in the nullity of the assignments and, consequently, the dismissal of the action in its entirety.

16 If, on the other hand, the Court concludes that the questions are to be answered in the affirmative and that EU law does preclude the interpretation of the RDG described, then, since an interpretation in conformity with EU law, being *contra legem* in relation to national law, is ruled out in the view of the chamber (see, to that effect, CJEU judgments of 4 July 2006, *Adeneler and Others*, C-212/04, EU:C:2006:443, paragraph 110; of 4 March 2020, *Bank BGŻ BNP Paribas*, C-183/18, EU:C:2020:153, paragraph 67; and particularly of 6 October 2021, *Sumal*, C-882/19, ECLI:EU:C:2021:800, paragraph 72), the RDG would have to be disapplied in the present case and the assignments would have to be regarded as valid in that respect.

17 The chamber has considerable doubts as to the conformity with EU law of the prohibition against collection on claims for antitrust damages, particularly in stand-alone cases. In the view of the chamber, the prohibition against collection on claims for antitrust damages that follows from the RDG under the case-law of the German courts hearing antitrust-damages cases infringes (1.) Directive 2014/104, (2.) the principle of effectiveness of EU law and (3.) the principle of effective judicial protection.

18 1. First of all, there are doubts as to whether the prohibition against collection on claims for antitrust damages is compatible with Article 3(1) of Directive 2014/104, read in conjunction with the third variant in Article 2(4) thereof. Those provisions, applicable *ratione temporis* in the present case, confirm the right of injured parties to full compensation for harm caused by a cartel, as recognised by settled case-law, and extend it to persons 'that succeeded in the right[s] of the alleged injured part[ies], including the person that acquired the claim[s]'.

19 Article 3(1) of Directive 2014/104 requires that 'any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.' That right to full damages also belongs to persons to whom injured parties assign their claims. The third variant in Article 2(4) of Directive 2014/104 explicitly defines an action for damages as 'an action under national law by which a claim for damages is brought before a national court by [...] a natural or legal person that succeeded in the right of the alleged injured party, including the person that acquired the claim'.

20 In the view of the chamber, the very fact that the third variant was added later to Article 2(4) of Directive 2014/104 suggests that the European legislature did consider assignment models such as the one at issue in the present case and inserted them as a means of effectively enforcing claims, in addition to the provision for applicants to act in their own name on behalf of someone else (*Prozessstandschaft*) which is covered by the second variant.

21 Moreover, it appears necessary for Directive 2014/104 to protect the assignment model in order to achieve the objectives of the Directive, given that it is intended ‘to ensure that throughout Europe, victims of infringements of the EU competition rules have access to effective mechanisms for obtaining full compensation for the harm they suffered’ (Commission, proposal for Directive 2014/104, COM (2013) 404 final, p. 5).

22 Assignment models are recognised as an option for enforcing claims in other Member States such as the Netherlands, Austria and Finland. A prohibition persisting in Germany in that respect would hamper the effective and uniform application of competition law and could at the same time encourage undesirable forum shopping.

23 Almost simultaneously with the publication of Directive 2014/104 in the Official Journal, the Advocate General at the Court of Justice in *CDC Hydrogen Peroxide* underlined that the emergence of a collection service provider as the applicant, ‘whose aim it is to combine assets based on claims for damages resulting from infringements of EU competition law, seems [...] to show that, in the case of the more complex barriers to competition, it is not reasonable for the persons adversely affected themselves individually to sue those responsible for a barrier of that type’ (Opinion of Advocate General Jääskinen of 11 December 2014, C-352/13, EU:C:2014:2443, point 29). The Advocate General thereby made it clear that there also appears to be a strong rational need to group actions by way of transferring collection rights.

24 2. There are also doubts as to whether the prohibition against collection on claims for antitrust damages claims is compatible with the principle of effectiveness under Article 101 TFEU and Article 4(3) TEU.

25 Article 101 TFEU produces direct legal effects in relations between private individuals and directly creates rights for them which national courts must protect. According to the settled case-law of the Court, the practical effect of the prohibition against agreements, decisions and concerted practices demands that it be open to ‘any person’ to claim full compensation for the harm he or she has suffered as a result of a breach of antitrust law. (settled case-law; CJEU judgments of 20 September 2001, *Courage*, C-453/99, EU:C:2001:465, paragraphs 23, 26-27; of 13 July 2006, *Manfredi*, C-295/04, EU:C:2006:461, paragraphs 90-91, 95, 100-101; of 12 December 2019, *Otis*, C-435/18, EU:C:2019:1069, paragraph 22; and of 6 October 2021, *Sumal*, C-882/19, EU:C:2021:800, paragraph 32).

26 According to the settled case-law of the Court, the national courts responsible for applying EU antitrust law in the exercise of their jurisdiction must ensure that the exercise of the rights conferred by EU law is not rendered impossible or excessively difficult in practice; in that respect, the procedural autonomy of the Member States may also be limited by the higher-ranking provisions of EU law. In that respect, the national courts must not only ensure that EU law takes ‘full effect’ and protect the rights which Article 101 TFEU confers on the individual,

but also prevent the full effectiveness of EU law from being weakened, narrowed or even jeopardised in any way (CJEU judgment of 13 July 2006, *Manfredi*, C-295/04 to C-298/04, EU:C:2006:461, paragraph 89; see also, outside antitrust damages law, judgments of 19 June 1990, *Factortame*, C-213/89, EU:C:1990:257, paragraph 20, and of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, paragraphs 21-24; see also Advocate General Pitruzzella, Opinion of 8 September 2022, *Repsol*, C-25/21, EU:C:2022:659, point 84). In this context, individual elements must not be considered in isolation; instead, to ensure effectiveness, the question to be asked is whether the national rules concerning the options for joint enforcement of claims for antitrust damages, 'assessed as a whole', render the exercise of the rights conferred by EU law impossible or excessively difficult in practical terms (CJEU judgment of 28 March 2019, *Cogeco*, C-637/17, EU:C:2019:263, paragraph 45; Advocate General Kokott, Opinion of 17 January 2019, *Cogeco*, C-637/17, EU:C:2019:263, point 81, and Opinion of 14 October 2004, *Berlusconi and Others*, C-387/02, EU:C:2004:624, point 109).

27 In Germany, effective private enforcement of antitrust law where there has been scattered or collective harm is only possible by way of the assignment model at issue in the present case. Without this tool, potentially injured parties have no realistic option to enforce possible claims in a practicable and effective manner.

28 Asserting claims for antitrust damages is complex in terms of subject matter, economics and law and therefore protracted, expensive and risky. This high cost in time and money and the litigation risk are prohibitive for consumers in particular, but also for small and medium-sized enterprises, so that claims tend, with a rational apathy, not to be pursued (see Advocate General Jääskinen, Opinion of 11 December 2014, *CDC*, C-352/13, EU:C:2014:2443, point 29). That rational disinterest can be overcome only if claims are asserted in consolidation, with the concomitant splitting of the costs of experts and legal advisers as well as of the litigation and other risk (Advocate General Kokott, Opinion of 29 July 2019, *Otis*, C-435/18, EU:C:2019:651, point 88; Advocate General Jääskinen, Opinion of 11 December 2014, *CDC*, C-352/13, EU:C:2014:2443, point 29).

29 All these problems arise all the more in stand-alone cases, because individual alleged injured parties cannot even refer to the decision of the competition authorities – which would have a binding effect for the antitrust damages process. On the contrary, they even have to provide proof of the breach of antitrust law. The fact that this is subject to considerable difficulties in practice is empirically evident from the minimal number of stand-alone actions that are brought.

30 At the same time, in cases where the competition authorities do not intervene, private enforcement of the law is the only option for protecting the competitive market order and deterring potential members of cartels, an objective of EU law which is also in the public interest. Stand-alone cases are consequently indispensable, not least in view of the limited capacities of the authorities to enforce antitrust law, which is why the position of applicants bringing stand-alone actions vis-à-vis those bringing follow-on actions must not be further worsened

(see Advocate General Kokott, Opinion of 17 January 2019, *Cogeco*, C-637/17, EU:C:2019:32, point 52).

31 In particular, the consolidation of claims also prevents the same evidence gathering being done multiple times and avoids the risk of more than one court issuing divergent decisions on the same complex legal and factual issues in parallel proceedings.

32 When the interest in effective enforcement of EU law (Article 101 TFEU in the present case) is weighed against the objectives of the national rule restricting its effectiveness (the RDG in the present case), the interest in enforcing EU law clearly prevails.

33 3. Lastly, there are doubts as to whether the prohibition against collection on claims for antitrust damages which arises, at least for stand-alone actions, from the RDG does not violate the right of potential injured parties to effective judicial redress (Article 47(1) of the Charter of Fundamental Rights; Article 6(3) TEU and Article 13 of the ECHR).

34 The right to effective judicial redress requires an effective remedy that is actually suitable for enforcing the legal situation protected by EU law. The minimum content of the right to effective judicial redress includes the requirement that the remedy must satisfy the principle of effectiveness. One element of this is that those seeking justice must not be deterred from asserting their rights by excessive financial risks. National law must not therefore provide only remedies through which persons seeking justice risk finding themselves in a worse position as a result of bringing an action than they would have been had they not done so (CJEU judgments of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, paragraph 51; of 21 November 2002, *Cofidis*, C-472/00, EU:C:2002:705, paragraph 34; of 25 November 2008, *Heemskerk*, C-455/06, EU:C:2008:650, paragraph 47; and of 24 March 2009, *Danske Slagterier*, C-445/06, EU:C:2009:178, paragraph 63).

35 However, these requirements are not satisfied if potential injured parties are deprived of the assignment model and thus of the only effective remedy for pursuing collective and, above all, scattered damages, leaving them with the sole option of pursuing their claims by way of individual actions. Even were they to do this, overcoming their ‘rational disinterest’, they would have to face costs for economic experts and specialist legal advisers which are, as a rule, disproportionate to the value of the damages sought in the individual proceedings. In stand-alone proceedings, moreover, they would even have to first identify the breach of antitrust law as such, research it in every detail and lastly present and prove it in the proceedings, with all the costs this would entail.