Porsche Faces New Hedge Fund Cartel Claim in Legal Battle

Bloomberg reports:

Porsche SE faces a new legal maneuver from hedge funds seeking to recoup billions of euros they say they lost amid the former sports-car maker's aborted bid to buy Volkswagen AG. (VOW)

The funds, which include Elliott International LP and Perry Partners LP, are suing Porsche for 1.81 billion euros ($2.4 billion) over claims it manipulated Volkswagen shares by denying interest in a deal before it made a bid. After other investors lost two similar claims at a German tribunal last year, the funds added antitrust claims against Porsche to their suit, forcing a move to a court that specializes in cartel suits.

"It's a litigation tactic sometimes used to get rid of a particular court," an antitrust lawyer at Oppenlaender Rechtsanwaelte in Stuttgart who isn't involved in the dispute, said in an interview. "It can be part of a lawyer's tactic to add arguments that shift jurisdiction to another court at which you might expect better results."

Even if the new court, in Hanover, rejects the antitrust claims, it will take its own look at the market manipulation allegations, giving the funds a new chance with the argument.

Porsche, hounded for years by investor suits, has so far been successful in defending against allegations it manipulated Volkswagen shares. The company ended most related U.S. litigation by winning their bid to have the cases moved to

Germany. Last month, it won a ruling in an effort to block a new legal claim in the U.K.

The investor suits argue that Porsche lied when it denied through much of 2008 that it wanted to buy Volkswagen, only to shift direction on Oct. 26 that year when it disclosed that it controlled 74.1 percent of Volkswagen, partly through options, and was seeking a takeover. The shares surged while short sellers ran to close their positions.

Volkswagen now owns the Porsche auto-making business. The defendant in the case is a holding company whose only asset is Volkswagen shares.

Most of the cases, seeking more than five billion euros combined, are now pending in the Regional Court of Braunschweig, Germany. The judges in September rejected two suits brought by individual investors claiming market manipulation. Two months later, lawyers for Elliott and the other funds added the antitrust claims to their case.

As a result, the Braunschweig tribunal sent that case to the Hanover Regional Court in June, which has exclusive jurisdiction in lawsuits over cartel allegations in VW's home state, Lower Saxony.

The funds claim Porsche led a cartel because it made a bank it worked with agree to restrictions on how many Volkswagen shares it could buy. They also argue Porsche misused a dominant position on the market for the stock.

The German Cartel Office, the nation's antitrust regulator, hasn't received any complaints against Porsche over the issue, Kay Weidner, the agency's spokesman, said. The regulator hasn't looked into a similar matter before, he said.

"The hurdles for such a claim are very high," said Andreas Fuchs, a law professor at Germany's Osnabrueck University. "The suit isn't without a chance, but it raises a lot of open questions."

The hedge funds would have to convince the court that Volkswagen shares did make up a market of their own under antitrust rules, at least for a short period of time, and so could be viewed apart from all the other stock traded, a finding for which there is no precedent in German law. Investors can choose from a variety of securities, so as a rule a single stock doesn't constitute an individual market, Fuchs said.

"That could be the case if market participants can't use other securities as a substitute -- especially if a takeover is at stake and a considerable number of investors went short on a significant amount of the stock," said the law professor. "Such an extraordinary situation seems to have existed here."

Whether the tactic is solely a way to move the case to another court isn't clear, Bach said. The antitrust claims may have been added later because they were overlooked at the beginning of the lawsuit, he said.

"So there aren't necessarily sinister intentions behind all of this," Bach said.

A representative for the funds declined to comment. Albrecht Bamler, a spokesman for Porsche, declined to comment on the case. Porsche is seeking dismissals of the suits and denies

In its June judgment, the Braunschweig court said the funds didn't add the antitrust arguments just to force a change of tribunals, "but earnestly raise such claims."

Even if the funds manage to prove Volkswagen shares did constitute a definable market at the time, they'll still have to show that Porsche also misused its position by causing a price jump.

The funds argue the price of Volkswagen common stock at the time would have been 43.72 euros if it weren't for Porsche's flawed information which pushed it to hit 999.19 euros at its peak on Oct. 28, 2008. They also claim that Porsche made profits of 5.2 billion euros by settling call options that week, according to the June judgment.

Since the stock is traded on an exchange, Porsche wasn't setting the price and the funds didn't necessarily buy Volkswagen shares directly from the carmaker, making it difficult to argue Porsche was able to dictate prices, Fuchs said. That makes it unclear whether a German court would grant damages, he added. The case is likely to be appealed all the way to Germany's highest civil court, he said.

"Whether it will be successful, however, is totally unclear," Fuchs said. "The outcome is pretty open."