

THE DAWN OF PRIVATE ANTITRUST LITIGATION –
GERMAN FEDERAL COURT CONFIRMS ADMISSIBILITY OF
BUNDLED CLAIMS FOR DAMAGES FROM CEMENT CARTEL

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To Our Clients and Friends:

The German Federal Court of Justice confirmed the admissibility of a bundled claim against six cement companies seeking at least €114 million in damages. The claimant, Cartel Damage Claims SA (“CDC”), is a Belgian company specifically set up to pursue antitrust claims.

In 2003, the German Federal Cartel Office fined the defendants a sum of €660 million for participating in a market allocation cartel, effectively allowing them to inflate cement prices. CDC acquired the damage claims of 36 customers of the alleged cartel participants. For the claims, CDC paid a fixed minimum price. Should CDC prevail, the minimum price would be increased by a variable component and CDC would be required to pay out 75% to 85% of the realized claim to the assignors.

In a first instance interim decision, the Regional Court of Düsseldorf ruled that the bundled claim brought by CDC was admissible. The court rejected the defendants’ arguments that CDC lacked standing, that the assignment of the claims to CDC was invalid and that the bundling of the claims would, in fact, be a circumvention of German procedural rules that generally do not permit the pursuit of class actions. Further, the defendants argued that CDC’s purchase arrangement with the assignors violated German rules that limit the availability of contingency fees between lawyer and client to only exceptional cases. Rejecting all these arguments, the court recalled that under German civil law, claims can be freely assigned to a third party, which in turn, can assert the claim in its own name. Therefore, CDC was just asserting its own rights. That the action may be lacking on the merits would not affect the admissibility. The Higher Regional Court of Düsseldorf rejected the appeal by the defendants. A motion of a defendant to the Federal Court of Justice to admit a further appeal was turned down on April 7, 2009 (decision KZR 42/08, not yet published). The proceedings will now continue on the merits before the Regional Court of Düsseldorf.

The CDC case is an indication that private antitrust litigation is likely to gain ground in Germany. In most EU Member States, competition law is mostly enforced by competition authorities, subject to review by the courts. So far, private damages actions for cartel infringements have been rare exceptions. In most EU states, high litigation costs, *i.e.*, the rule that the loser pays the winning side’s legal fees, court fees and costs of claim and damage substantiation, discourage plaintiffs from bringing stand-alone actions. The bundling and

collective enforcement of damages claims by third parties removes some of these obstacles by significantly improving the cost-risk ratio for such private actions.

The CDC case coincides with major efforts at the national and the EU level to foster a private antitrust litigation culture. These developments were initiated by decisions of the European Court of Justice that expressly recognized the rights of private litigants. In 2005, the German legislature amended the German Act against Restraints of Competition with the intention to strengthen the rights of private litigants. Among other things, the new law practically excludes the so-called passing-on defense, which allows defendants to claim that plaintiffs had reduced their losses by passing on inflated prices to their customers. Also, follow-on actions have been facilitated. Final decisions of EU competition authorities, which establish the existence of an infringement of German or EU antitrust rules, are now binding on German courts adjudicating a respective civil follow-on action. In such cases, plaintiffs must not prove an infringement, but only how and to what extent they have been damaged by it.

On the EU level, the European Commission published a White Paper in 2008 that presents a set of recommendations to promote private antitrust actions for damages. Key recommendations include representative and collective actions, disclosure of evidence and the binding effect of final decisions of competition authorities in subsequent damages actions. In March 2009, the European Commission's suggestions received support from the European Parliament. So far, however, no specific legislative measures have been announced.

Please feel free to contact us with any questions.

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