

Cartel Damage Litigation in Europe - Changing Frontiers?

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Antitrust & Competition

On February 18, 2015, the Düsseldorf regional court upheld a 2013 ruling against Cartel Damages Claims (CDC), an antitrust claims aggregation vehicle. The court found that CDC's mechanism for assigning and collecting claims was illegal, as CDC did not have funding to pay the defendants' costs if the claim failed. While this ruling is good news for prospective defendants in that it makes group actions in Germany more difficult, it must be measured against the general European picture of increasing litigation and the increasing attractiveness of other venues like England.

Cartel damage litigation in the European Union (EU) is undergoing important and rapid changes, with initiatives being driven both at the EU and Member State levels. Presently, most damages claims are brought in Germany, England and the Netherlands, which are perceived as "plaintiff-friendly" venues. That said, the recent ruling of the Düsseldorf regional court against CDC may well decrease the attractiveness of Germany for antitrust claimants.

CDC is a special purpose entity that "buys" and aggregates cartel damage claims, then litigates them, often on a contingency basis. CDC and similar entities (also known as "claimant vehicles") have developed this model in an attempt to overcome some of the perceived hurdles to pursuing damage claims in Continental Europe, particularly for smaller businesses or consumers, who have low value claims where unaggregated. Indeed, while England offers plaintiffs broader evidence disclosure than in any other EU jurisdictions, it is typically much more costly to litigate antitrust damage claims in England than in Germany (and Continental Europe in general). Accordingly, Germany can be quite attractive to antitrust plaintiffs that have low means and/or feel they do not need broad discovery to support their claims, particularly where aggregation is possible using CDC's approach.

On February 18, 2015 the German higher regional court confirmed that CDC's €131 million damage claim regarding a domestic cement cartel was illegal because CDC, which had acquired and aggregated 36 claims on a pure contingency basis, did not have sufficient funding to pay for defendants' legal costs should it lose its claim. To be clear, the ruling does not outright ban collective claims as such in Germany, but it raises the bar for claimant vehicles *à la* CDC to successfully bring damage actions, requiring a re-think of financing structures/funding before filing suits (e.g., through recourse to more sophisticated third party financing). This is thus likely to translate into higher financing costs for these vehicles to mount actions.

That being said, greater difficulties in bringing collective claims in Germany are unlikely to reduce damage litigation EU-wide *per se*.

First, European antitrust claimants often have a choice of jurisdictions in which to pursue their claims. Thus, the German ruling may simply lead to more claims being brought in England, the Netherlands or other national courts. England, a longtime popular jurisdiction for cartel damage

claims, is developing additional features that may further attract claimants with a choice of venues -- especially now that its litigation cost “handicap” to Germany has narrowed. In particular:

- A recent English judge order in the Air Cargo damage litigation effectively widened the scope of evidence disclosure -- ordering defendants to disclose evidence submitted to foreign antitrust regulators (such as the US DoJ, the Korean Fair Trade Commission and the Canadian Competition Bureau). This is a potentially powerful development -- and certainly one that defendants should pay close attention to -- as it could allow claimants or claimant firms to use such evidence to broaden their claims, fuel other claims or push for global settlements; and
- England is expected to shortly introduce an opt-out collective redress system.

Second, the trend in Europe is of increasing numbers of cartel damages claims. Activity is likely to further increase due to policy-makers’ efforts to stimulate claims, one example being the freshly adopted [EU directive on antitrust damages claims](#).

In sum, the recent German ruling is good news for defendants that are only facing claims in Germany, but it is no comfort for those that could be sued in other jurisdictions, particularly against the backdrop of increased antitrust litigation. In this constantly changing EU landscape, defendants (and potential defendants) should proactively consider their exposure and accordingly devise a comprehensive regulatory and defense strategy. Defendants should consider jurisdictions that are preferred by claimants, in particular England, the Netherlands -- and Germany, which is likely to remain active. In preparing a strategy to tackle civil exposure, defendants should equally consider risks of claims beyond Europe, especially in very active jurisdictions like the United States, and how to devise, coordinate and implement a trans-Atlantic/global defense.

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