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Düsseldorf Court Dismisses CDC Damage Claims in Antitrust Follow-on Action

In a landmark judgment of December 17, 2013, the Düsseldorf District Court (*Landgericht Düsseldorf*) dismissed cartel follow-on damage claims by a Belgian special purpose vehicle, Cartel Damage Claims (“CDC”), which had sought to bring a collection of damage claims against various German cement producers.

While it is too early to say whether this development will cause a significant obstacle to such collective cartel follow-on damage actions in Germany, it is nonetheless a blow to the business model of companies like CDC.

I. Background

In 2003, the German Federal Cartel Office (“FCO”) imposed a record fine of approximately EUR 660 million on German cement producers for their involvement in a price-fixing cartel between 1988 and 2002.

In the aftermath of the FCO’s decision, CDC began acquiring and bundling damage claims from various alleged victims who had purchased cement from the affected cement manufacturers – such that, between 2003 and 2005 (and again in 2008 and 2009), various cement purchasers assigned their claims to CDC. As consideration for the assignments, CDC paid the cement purchasers a fixed €100 fee and undertook to share between 65% and 85% of any damages obtained in damage actions with the purchasers.

In 2005, CDC, through a minimally-funded special purpose vehicle, proceeded to bring an action for damages against the cement producers before the Düsseldorf District Court. In its lawsuit, CDC alleged that the combined damage claims that it had acquired equaled €176 million (USD 242 million), and thus sought compensation of at least 75% of these estimated damages, *i.e.*, a total of €131 million (USD 181 million).

The cement manufacturer defendants initially sought to dismiss CDC’s lawsuit as both inadmissible and unfounded. In 2007, the Düsseldorf District Court issued an interlocutory judgment finding CDC’s lawsuit to be admissible, a ruling that was then upheld by the Düsseldorf Court of Appeals and eventually the Federal Court of Justice in 2009 (with a remand to the Düsseldorf District Court for assessment of the merits).

II. The Decision

On remand, on December 17, 2013, the Düsseldorf District Court dismissed CDC's lawsuit on the merits. The court's reasoning was two-pronged:

1. The assignments of damage claims to CDC were in violation of German law (to the extent they were assigned prior to June 2008) and
2. in breach of public policy (with respect to claims assigned after June 2008).

1. Assignments Prior to June 2008 Were in Violation of German Law

The court held that the assignments that took place prior to June 2008 were invalid as they violated the German Legal Consultation Act (*Rechtsberatungsgesetz*). The Act, which was in force until June 2008, prohibited the commercial collection of third party claims without a license. The District Court held that CDC's business model involved precisely such a commercial collection of damage claims, and, because CDC lacked a license to do so, the District Court found the collection and assignments to be in violation of the Act and declared them to be null and void.

2. Assignments Post-Dating June 2008 Were in Breach of Public Policy

Recognizing the issue under the Act, CDC had as a matter of precaution solicited a new assignment of the same claims later in 2008 and 2009. The District Court similarly held these new assignments to be invalid.

While these assignments did not violate the Legal Services Act (*Rechtsdienstleistungsgesetz*) which had replaced the Legal Consultation Act in July 2008 because CDC had in the meantime obtained a license to act as a collector of damage claims, the District Court found these assignments to be invalid as in violation of public policy. Under the German loser pays provisions of the Civil Procedure Code, the defeated party in a civil action is required to pay the court fees and must reimburse the winning side for its costs, including lawyers' fees. CDC's business model, however, did not, in the event of a loss, allow for such costs to be covered by the CDC special purpose vehicle bringing the case since the vehicle was only minimally funded. In fact, CDC itself acknowledged early in the litigation that the plaintiff special purpose vehicle would not be in a position to pay court and defense fees should it lose the litigation unless (despite its significant damage claims) the District Court set the value of litigation at the artificially low level of €5 million.

Given that the Court ultimately set the value of litigation at €30 million, and given that CDC had already admitted that it would not be able to pay court and defense fees that would be incurred in a case valued at €30 million, the District Court concluded that CDC was impermissibly seeking to shift the financial risk of litigation without taking any

of the risk of loss on its own. This, the District Court found, amounted to a violation of public policy.

3. Obiter dictum on the Statute of Limitations Period

The District Court's decision also interestingly contains an *obiter dictum* on the commencement of the statute of limitations period. Under German civil law, the statute of limitations for damage claims under tort law is three years, commencing at the end of the year in which the claim arose or (if later) in which the claimant obtained knowledge of the circumstances giving rise to the claim and of the identity of the defendant (or in which it would have obtained such knowledge absent its own gross negligence). While the FCO did not publish its fining decision, the District Court held that the extensive press coverage of the FCO's decision was sufficient for plaintiffs to obtain the necessary knowledge for the statute of limitations to commence.

III. Implications

It remains to be seen whether the Düsseldorf District Court's decision, if upheld, will have a serious impact on CDC's business model in Germany, which was hailed as a creative new way of circumventing the prohibitions on contingency fees and class actions under German law.

CDC may in any event appeal the District Court's decision to the Düsseldorf Court of Appeals, which even if it upholds the decision will not create a binding legal precedent for other German courts.

If the Düsseldorf District Court's decision were to be upheld, CDC could, of course, continue to operate, but it would need to ensure that all its special purpose vehicles are sufficiently funded to cover court and defense costs in cases that it brings. It remains to be seen whether that alone will ultimately discourage CDC from bringing cases in Germany going forward and cause it to shift its efforts to other European countries (CDC currently has cases pending before courts in the Netherlands and in Finland).

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