

Düsseldorf Court of Appeals Upholds Dismissal of CDC Damage Claims in Cartel Follow-on Action

Fourteen months after the Düsseldorf District Court (*Landgericht Düsseldorf*) had in a landmark decision dismissed cartel damage claims by Belgian special purpose vehicle CDC against various German cement producers, the Düsseldorf Court of Appeals (*Oberlandesgericht Düsseldorf*, the "Court") has now upheld the District Court's judgment.

With its decision dated February 18, 2015 – which CDC has decided not to appeal any further – the Court confirmed the District Court's findings that the assignments of damage claims to CDC were invalid. Moreover, the Court took the opportunity to rule on issues regarding the limitation of cartel damage claims which have so far been unresolved in German case law.

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 damage claims from alleged victims who had purchased cement from the affected cement producers. 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 EUR 100 fee and undertook to share between 65% and 85% of any damages obtained with the purchasers.

In 2005, CDC 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 amounted to EUR 176 million (USD 190 million), and sought compensation for at least 75% of these estimated damages, *i.e.*, a total of EUR 131 million (USD 140 million).

The defendants initially requested that the court 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).

On remand, the Düsseldorf District Court dismissed CDC's lawsuit on the merits on December 17, 2013. The court's reasoning was two-pronged: First – to the extent the damage claims had been assigned to CDC prior to June 2008 –, those assignments were in violation of German law, and second – with respect to claims assigned after June 2008 –, the assignments were in breach of public policy.

CDC appealed the decision and introduced additional “precautionary” assignments, by which 31 of the 36 assignors of damage claims again assigned their claims to CDC in 2014, in case the Court held the original assignments to be invalid.

II. The Decision

The Court of Appeals confirmed the Düsseldorf District Court's judgment that the assignments, both prior to and after June 2008, were invalid. Agreeing with the District Court, the Court found that:

- the assignments prior to June 2008 were in violation of German law, namely the German Legal Consultation Act (*Rechtsberatungsgesetz*) (see 1. below), and,
- the assignments post-dating June 2008 were in breach of public policy because they threatened to undermine the German “loser pays” principle (see 2. below).

The Court also ruled that:

- the renewed “precautionary” assignments in 2014 amounted to a procedurally impermissible amendment of the initial action (see 3. below).

Finally, the Court found that, in any case,

- all damage claims brought by CDC were time-barred. In this respect, the Court clarified the significance of press coverage for the commencement of the limitation period and expanded the scope of the rules suspending the statute of limitations considerably (see 4. a., b. and c. below).

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

Confirming the District Court's ruling, the Court held that the assignments that had taken place prior to June 2008 were invalid as they violated the German Legal Consultation Act. The German Legal Consultation Act, which was in force until June 2008, prohibited the commercial collection of third party claims absent a special license. The District Court had held that CDC's business model involved such a commercial

collection of damage claims, and, because CDC lacked the necessary license, the assignments were in violation of the German Legal Consultation Act and thus null and void.

On appeal, CDC argued that its involvement was basically limited to collecting the facts of the case (something that the assignors themselves would not have been able to do), while the actual legal advice had been outsourced to external lawyers mandated by CDC.

The Court, however, upheld the District Court's judgment and regarded CDC's arguments to be without substance. In particular, the Court highlighted that CDC was contractually obliged to provide legal advice to the assignors, and was thus subject to the German Legal Consultation Act.

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

Recognizing potential issues under the German Legal Consultation Act, CDC had solicited new assignments of the same claims in 2008 and 2009.

The District Court had held these new assignments also to be invalid. While they did not violate the Legal Services Act (*Rechtsdienstleistungsgesetz*) which replaced the Legal Consultation Act in July 2008 because CDC had in the meantime obtained the required license, the District Court found these assignments to be in violation of public policy. Under the German "loser pays" provisions of the Civil Procedure Code (*Zivilprozessordnung*), 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, had not, in the event of a loss, allowed for such costs to be covered since the vehicle had been only minimally funded. CDC itself had acknowledged early in the litigation that the vehicle – in case of defeat – would not be in a position to pay court and defense fees should the value of the litigation be set at an amount exceeding EUR 5 million.

Given that the value of litigation was ultimately set at EUR 30 million, which is the maximum amount under German procedural law even if the claim is higher, and given that CDC had already admitted that it would not be able to pay court and defense fees that would be incurred at this case value, the District Court concluded that CDC had impermissibly sought to shift the financial risk of litigation from the plaintiff to the defendants and, hereby, to undermine the German "loser pays" principle. This, the District Court found, amounted to a violation of public policy.

The Court again upheld the District Court's findings. It also ruled that CDC's later efforts to remedy its underfunding could not alter the basic fact that the assignments, at the time they were performed, violated public policy and were therefore null and void. Again, the Court dismissed CDC's arguments in their entirety. In particular, CDC had argued that its intermediary function was justified by the EU legal principle of

effectiveness, which must be considered when enforcing cartel-related damage claims. The Court rejected this point, emphasizing that this principle's purpose was not to deprive defendants of their right to claim reimbursement of their legal costs.

3. Assignments in 2014 Amounted to an Impermissible Amendment of the Action

In reaction to the District Court's decision and as a matter of precaution, CDC again solicited new, "precautionary" assignments of most of the original claims in 2014.

However, the Court refused to examine the validity of these renewed assignments, ruling that the submission of new assignments as a basis for the claimed damages amounted to an amendment of the action. German law permits such amendment only if (i) the defendants give their consent, or (ii) the court holds the amendment to be appropriate under the circumstances of the case. In the Court's view, both requirements were not met in the case at hand. Thus, the Court concluded that it could not take the renewed "precautionary" assignments into consideration at all when deciding the case.

4. Statute of Limitations and Suspension

Interestingly, the Düsseldorf Court of Appeals also held that, in any case, all damage claims brought by CDC were time-barred. The Court's findings with respect to the limitation of the claims and the suspension of the limitation period are remarkable in at least two respects:

a. Significance of Press Coverage for the Commencement of a Limitation Period

Under German civil law, the limitation period for a tort claim is three years. It does not commence before the end of the year in which the claim arose and the aggrieved party obtained knowledge of the circumstances giving rise to the claim and of the identity of the tortfeasor, or could have obtained such knowledge absent its own gross negligence.

In the case at hand, the question was thus when the assignors of the claims obtained, or should have obtained, knowledge of the cartel and the identity of the cartel members.

German courts have so far been rather reluctant to consider the significance of press coverage in cartel-related cases. The Düsseldorf Court of Appeals, however, followed the approach of the first-instance judgment in finding that extensive, detailed and unequivocal press coverage can indeed trigger the commencement of the limitation period. According to the Court, when damage amounts in the range of hundreds of millions of Euros are at stake, it may be assumed that the allegedly harmed cement purchasers will be monitoring their market carefully, in particular with regard to the defendants as "eminently important" suppliers.

Therefore, the assignors should have had knowledge of the circumstances giving rise to the damage claim as early as 2003, when the FCO rendered its decision and published a press release. In the Court's view, failure to be aware of the extensive press coverage of the concluded cartel proceedings in the given circumstances would amount to gross negligence.

b. Expansion of the Scope of the Rules Suspending the Statute of Limitations

The German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) provides that the statute of limitations for damage claims is suspended if and when the European Commission or the competition authority of an EU Member State initiates proceedings based on the alleged competition law violations in question. In such a case, the statute of limitations generally ceases to be suspended six months after a final and binding decision is made in the cartel proceedings.

In the first instance, the District Court had not applied the said provision, since it had only been introduced as of July 1, 2005. The Düsseldorf Court of Appeals, in contrast, opted for a broader understanding and also applied the suspension rules to damage claims that arose prior to July 1, 2005, holding that those are applicable if:

- (i) the damage claims in question were not time-barred at that time, and
- (ii) the decision of the European Commission or the competition authority of an EU Member State was not final and legally binding at that time.

c. Claims were Time-barred in the Case at Hand

Irrespective of its broad interpretation of the suspension rules, the Court held that all of CDC's damage claims were time-barred. Given that the assignments, both prior to and after June 2008, were invalid (see 1. and 2. above) and CDC therefore lacked standing throughout the entire first-instance proceedings, the limitation period was consequently not suspended by the lawful bringing of an action. The assignments in 2014 were not only to be ignored (see 3. above), but would in any case have come too late. Even though the Court took the suspension of the statute of limitation by the cartel proceedings into account, the limitation period which commenced at the end of 2003 had elapsed by the time of the renewed assignments in 2014.

III. Implications

The Düsseldorf Court of Appeals' judgment evidently dealt CDC's business model a massive blow. This is illustrated by CDC's press release: "*CDC SA has invested more than six million euro in the case. [...] In view of the unpredictable danger of additional third-party interventions, and the economic risks resulting therefrom, CDC SA has abandoned a complaint to the Federal Court of Justice against the [Court's] denial of leave to appeal. The judgment of the [Court] has thus become final.*"

However, it should be noted that, in spite of the Court's decision, CDC and other special purpose vehicles like it may continue to operate – they will only need to ensure that they are sufficiently funded to cover court and defense costs in litigation that they initiate.

While these requirements certainly raise the bar for vehicles like CDC which consider bringing “collective” follow-on actions, it remains to be seen whether that alone will ultimately prove to be a real hindrance to the enforcement of cartel-related damage claims in Germany. Recent developments like DB Barnsdale AG's initiation of an action against airfreight carriers before the Cologne District Court – in terms of the amount claimed, the largest cartel follow-on action ever brought before a European court –, would seem to point in a different direction.

For additional information, please do not hesitate to contact Dirk Schroeder (dschroeder@cgsh.com), Rüdiger Harms (rharms@cgsh.com), Elisabeth Macher (emacher@cgsh.com), or Julian Alexander Sanner (jsanner@cgsh.com) in the Firm's Cologne Office (+49 221 80040 0).

CLEARY GOTTLIEB STEEN & HAMILTON LLP

Office Locations

NEW YORK

One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS

12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS

Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON

City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW

Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE

Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME

Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN

Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG

Cleary Gottlieb Steen & Hamilton (Hong Kong)
Hysan Place, 37th Floor
500 Hennessy Road
Causeway Bay
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING

Cleary Gottlieb Steen & Hamilton LLP
45th Floor, Fortune Financial Center
5 Dong San Huan Zhong Lu
Chaoyang District
Beijing 100020, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES

CGSH International Legal Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO

Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299

ABU DHABI

Al Sila Tower, 27th Floor
Sowwah Square, PO Box 29920
Abu Dhabi, United Arab Emirates
T: +971 2 412 1700
F: +971 2 412 1899

SEOUL

Cleary Gottlieb Steen & Hamilton LLP
Foreign Legal Consultant Office
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210, Korea
T: +82 2 6353 8000
F: +82 2 6353 8099