

CDC holds out for favourable admissibility ruling in cement damage claim

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IN BRIEF

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By Mario Hilgenfeld

Düsseldorf -- A German judge has indicated he could be minded to allow Belgian firm Cartel Damage Claims to bring a damage action worth over 100 million euros against a group of cement manufacturers accused of indulging in a cartel that spanned three decades.

At a hearing before the Higher Regional Court in Düsseldorf yesterday, the cartel senate's chief judge Juergen Kuehnen gave early signs he deemed the claim admissible.

Citing what he called the "decisive" ruling of the lower regional Düsseldorf court, appealed by the cement firms, Kuehnen dismissed arguments that delved into the specifics and nature of CDC's claim, saying that on admissibility it sufficed that CDC laid claim to the right to bring the damages action for it to go ahead.

Even lawyers for the cement companies conceded during the hearing that they had understood the case was going against them.

The proceedings before the Higher Court are on admissibility alone. The substance of CDC's 113 million euro damage claim on behalf of 29 of the cartel's biggest customers is still under examination by the lower regional court, in a case currently on ice while the parallel dispute over admissibility is played out.

If the Higher Regional Court follows Kuehnen's line, that substantive analysis of CDC's damages action can go ahead, potentially paving the way for more such claims following the same model.

Two major issues dominated the hearing yesterday, which took place before a three-judge panel, Judge Kuehnen presiding.

The first was whether CDC's application had been clear and defined enough.

Lawyers for the cement producers argued that as the claim was inspecific it should be declared inadmissible. They said CDC should have better detailed the single claims by factors such as product line or manufacturer. Otherwise, they argued, CDC would not be precluded from bringing new actions based on the same grounds, thus harming the cement firms' ability to defend themselves effectively.

Representatives of the cartelists also drew attention to the incompleteness of CDC's own database managing the claims, and various recent changes that had been made. This, they said, also made it impossible for them to determine the respective claims CDC was trying to assert before the court.

Kathrin Westermann, acting for CEMEX Deutschland, said the changes to the database and that the CDC application refers to the database "is not easy to understand. Single positions are taken out of the database. This is not comprehensible."

Chief judge Kuehnen however replied that it was not decisive that CDC submit a completely substantiated and detailed claim, simply that the plaintiff "shows the will to enforce" the claim through the courts, and identifies "facts which make the dispute discernable" from any future claim that might be brought.

He told the hearing that his understanding of CDC's claim was that it indeed satisfied those conditions, particularly in encompassing 'all' possible claims that any of the 29 cement customers might bring against the cartel members.

The cement producers then went on to argue that CDC lacked standing as the firm was bringing claims on behalf of 29 cartel victims and not on the basis of its own rights assigned to it. The companies claimed CDC could not say it had bought the claim outright and was bringing it in its own right. They pointed to the cost of the proceedings which exceed some million euros, while CDC has only 10,000 euros capital. Furthermore, CDC should have sought permission to collect and defend the claims, lawyers for the cement firms argued.

Westermann, again for CEMEX, went further to argue that "an economic approach is decisive for the assessment of the asserted claim." By this she sought to claim that CDC was clearly not asserting its own rights, as the main beneficiaries of the proceeding were to be the 29 cartel victims.

Again, however, Judge Kuehnen declined to delve too far into the substance, saying that in order to determine admissibility "it is sufficient that the plaintiff claims that he has the rights" to the claim.

"Whether the assignment [of rights] itself is valid is not to be clarified at this stage."

It would be enough, he signalled, to consider the wording of the purchase contracts CDC secured with the cement buyers in order for CDC to show it had bought the claims and could assert its own rights before the courts.

The parties also discussed a recent procedural move by CDC to extend the numbers of 'represented' cartel victims by another six new companies, increasing the overall claim to 131 million euros. The cement companies asked the court to dismiss the extension, but CDC lawyers said there was no need for the court to rule on it. The extension was therefore taken as having been withdrawn, potentially leaving the way open for CDC to bring a separate claim on behalf of the six further companies.

The court will deliver its judgment on 14 May 2008.

The damages action itself stems from a Bundeskartellamt decision in 2003 to fine cement companies around 660 million euros for taking part in a cartel that dated back as far as the 1970s.

Cartel Damage Claims was established in order to buy and represent claims from the companies affected by the cartel, and brought the case before the regional court of Düsseldorf. That court chose to split the case in two, dealing with the fundamental admissibility of the claim in an interim judgment in February 2007.

That ruling said the claim should be admissible, and was appealed by the cement firms to the higher court.

CDC's model's model of assigning and bundling claims could be a way to navigate the German legal system and bring actions following an antitrust infringement. The company is already planning to represent clients in other antitrust actions in the future. Yesterday's hearing will be of particular interest to the paper and chemicals industry, since CDC is in the preliminary stages of preparing a claim against hydrogen peroxide producers. Others in Germany, notably Talionis and a law firm in Hamburg Fritze Paul Seelig, are also known to have considered or to be considering similar 'bundling' options.

If the model as a whole is successful it may, however, not signal the start of a wave of private enforcement. Currently the model is best suited to large scale industrial purchasing, where companies have access to invoices for products with a clear unit-price.

Other industries, particularly in the area of services or in more consumer-oriented fields, can prove more difficult to assess in terms of damage and therefore construct a claim.

But the fate of the CDC model will nevertheless provide food for thought at a time when the European Commission is seeking clarity on how to promote a European approach to damage actions.

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