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GERMANY

A Private Affair

Four years after being hit by a €660 million fine for price-fixing from Germany's cartel enforcement office, six cement companies are again on the defensive for their alleged misconduct. This time, however, they have a new opponent: Cartel Damage Claims SA (CDC), a Belgian company specifically created to pursue private antitrust cases in Europe.

CDC is not a law firm, though its board chairman and majority shareholder, Ulrich Classen, is an attorney who has practiced in both Germany and Belgium. And CDC itself did not suffer any losses due to inflated cement prices. But in February the German regional court in Düsseldorf said that CDC can seek damages from the six firms—a group that includes HeidelbergCement AG and Dyckerhoff AG—because it has purchased those claims from 29 smaller cement buyers that maintain they were harmed by the price-fixing.

All but one of the cement companies have appealed the fines imposed by the German government, contesting the validity of the price-fixing charges. (One company, Cemex SA, has already paid the fine and thus cannot appeal.) They have also appealed the Düsseldorf court's February decision on CDC's right to proceed with its suit.

"[The CDC suit] is a very interesting way to get around the limitations of the German litigation rules that do not allow for class action claims," says Stefan Ohlhoff, a competition law partner in the Berlin office of Wilmer Cutler Pickering Hale and Dorr.

In Germany, as in most of continental Europe, both plaintiffs firms and private antitrust class actions have essentially been nonexistent. Would-be plaintiffs and their lawyers face significant obstacles, starting with a rule that requires losers to pay the winning side's legal fees. In addition, there is no discovery process, plaintiffs must pay court and legal fees up front, contingency fees are essentially banned, and damages are limited strictly to monetary losses.

But Classen, who once worked for

the German cartel office, the Bundeskartellamt, says he has created an "economic result very similar to contingency fees" by purchasing each claim individually for €1,000 plus a promise of a share of 75–85 percent of the potential revenues

compensation for illegally inflated prices, says Carsten Gromotke, a partner with Jones Day's Frankfurt office and head of the firm's German antitrust practice. "This [case] is different because it is the first time whereby a company was set



A new company has devised a German version of an antitrust class action by buying up the claims of 29 cement purchasers who say that they were hurt by a cartel.

if he receives a positive judgment. CDC is claiming damages of €151 million, plus interest. It has already spent €2.2 million on the litigation, Classen says, including €274,000 just to file the cases. The cement buyers from which CDC purchased the claims have helped with the initial legal costs, since CDC has hired an outside firm, Stuttgart-based Oppenländer Rechtsanwälte, to handle the case. (Classen himself focuses on business operations, including transforming CDC into a holding company whose various divisions will each pursue a different cartel.) In January the company also received a cash infusion from Juragent AG, a German litigation financing firm, Classen says.

Prior private antitrust cases in Germany have involved single plaintiffs seeking

up for the express purpose of combining multiple customers' claims so as to be in a more powerful position to assert pressure on members of the cartel," he adds. Gromotke notes that such leverage could lead to a settlement.

At a hearing in February, the defendants asked the Düsseldorf court to invalidate CDC's case, arguing that the company does not legally own the claims against the six defendants. The court sided with CDC in its interim judgment, finding that CDC does own the claims and is entitled to bring the case. However, it has not yet ruled on the merits of CDC's claims. Experts say CDC faces hurdles going forward—specifically, proving its calculation of damages. CDC calculated its €151 million figure based on 300,000 invoices

from the defendants for cement supplies.

The CDC case comes at a time when both Germany and Europe are navigating changes to their antitrust litigation codes. In 2005 the German legislature amended the country's Act Against Restraints of Competition to facilitate more private antitrust cases. Previously, plaintiffs could not seek damages from cartels, unless they could claim that they were specifically targeted by cartel members. The new code also prevents the so-called passing-on defense, which once allowed defendants to claim that plaintiffs had simply passed inflated prices on to customers.

The European commission is also evaluating potential changes to the European Union's competition codes to make Europe a more friendly jurisdiction for private cartel claims. "Ninety-five percent of the antitrust enforcement in Europe is done by public authorities, and only 5 percent by private litigation," says Georg Weidenbach, an associate in the antitrust division of Baker & McKenzie's Frankfurt office. As a part of its push, the commission published a green paper in December 2005 that identified barriers to private cartel enforcement and presented a number of proposed changes. The European Parliament plans to issue its opinion of the green paper in April, and the commission will publish a follow-up white paper at the end of the year.

Antitrust attorneys here agree that while change has been slow to occur, it is certainly coming both in Germany and the E.U. The February ruling in the CDC case, says Weidenbach, "is another indication that we will face more antitrust litigation in Germany and probably other jurisdictions as well."

But few seem to want to copy the U.S. model of private antitrust litigation exactly. Neelie Kroes, the European commissioner for competition policy, clearly said in a March speech that she wants to create "European solutions"—not American ones. She added that some aspects of private enforcement in the United States would not work on the other side of the Atlantic: specifically, treble damages for all infringements and opt-out class actions, in which unnamed, qualifying plaintiffs are automatically included in a class unless they opt out. Says Wilmer's Ohlhoff: "I think what we will most likely see—and what is clearly the intention of German lawmakers and the European Commission . . . is a civil action in cartel cases that will look different than what is in the U.S. but will be much more popular here than it was in the past."

—Anne Marie Borrego

FOCUS EUROPE

ARBITRATION SCORECARD

HOUSTON'S GUSHER

A surge in energy disputes around the world has these Texas arbitration lawyers working full-throttle.

By Michael D. Goldhaber



PLUS:

Biggest Global Arbitrations
Law Firm League Table
The Busiest Arbitrators

From left: Baker Botts's Michael Goldberg, King & Spalding's Doug Bishop, and Fulbright & Jaworski's Mark Baker