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NEWS

A new model for private damages

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The European Commission says that private litigation in Europe is underdeveloped. Yet in Germany, more than 100 private competition lawsuits are filed each year. Peter Scott investigates.

A significant day for competition law in Germany was 17 April 2009. The country's Supreme Court refused cement company Dyckerhoff permission to challenge a lower court decision which declared proceedings launched by Cartel Damage Claims (CDC) admissible.

In 2003, six cement producers were fined e660 million by the Federal Cartel Office for price fixing between 1993 and 2001, and CDC's case is based on the FCO's decision. Some lawyers say the Supreme Court's ruling signals the beginning of a fully fledged private cartel enforcement regime in Germany, and could even provide a model for the rest of Europe.

Since Germany amended its Act Against Restraints of Competition (ARC) in 2005, it has been easier to bring actions for damages. "Whoever violates a provision of this Act, Articles 81 or 82 of the EC Treaty or a decision taken by the cartel authority shall be obliged to the person affected to remediate and, in case of danger of recurrence, to refrain from his conduct," the amended act reads. "The claims [...] may also be asserted by associations with legal capacity for the promotion of commercial or independent professional interests."

It seems clear enough, and indeed there was never any real doubt that an aggrieved company could bring a private suit against an aggressor, either following on from a European competition authority decision or as a standalone action. But no one was sure what could constitute "associations with legal capacity for the promotion" of claims. How, if at all, could collective actions be brought? Who could bring them? And given that no professional association or trade body has brought a claim in the four years since the law hit the statute books, what are the alternatives?

Cartel Damage Claims

When CDC was set up in 2003, its business model was untested, but its logic seemed sound. It aimed to navigate some of the problems that have since been articulated by the European Commission in its 2008 white paper on damages actions. "Individual consumers, but also small businesses, especially those who have suffered scattered and relatively low-value damage, are often deterred from bringing an individual action for damages by the costs, delays, uncertainties, risks and burdens involved. As a result, many of these victims currently remain uncompensated," the paper says. "At the rare occasions where a multitude of individual actions are brought in relation to the same infringement, procedural inefficiencies arise, for claimants, defendants and the judicial system alike."

Lawyers suggest a further important consideration: many small and medium-sized companies, and even confident multinationals, might be deterred from bringing claims that could jeopardise relationships with suppliers or customers.

CDC tried to get around these problems by purchasing claims from 36 aggrieved parties – small and medium-sized businesses which say they suffered damage from the cement cartel – for nominal fees. It would then bear the costs (and therefore the risks) of the action in return for a share of the damages if it ended in success. Though not a collective action in the strict sense, the similarities are clear. However, costs are sufficiently high to make this sort of action a gamble, at least initially. In an April 2008 comment submitted to the commission on its white paper, CDC said that it had already spent e2.5 million on the cement cartel claim, before the substance of the action has even been heard.

The approach has clear advantages for cartel victims: claimants with tight budgets have no exposure to extensive legal costs; multiple claims can be pursued in a single case, reducing procedural inefficiencies; and, perhaps most significantly, if there are enough claimants, it removes some of the stigma associated with suing business partners.

It's potentially lucrative for CDC too. The company says that claimants will receive between 75 and 80 per cent of realised damages. In its cement cartel litigation, it is seeking total damages of e114 million, while in another action against a hydrogen peroxide cartel, it has identified damages of e430 million. The 20 to 25 per cent of damages that CDC could receive will do much more than cover its costs.

The April decision was significant because it means the model is valid in principle, even though some legal issues remain that are yet to be heard in court, such as how damages are assigned between the parties.

There are other reasons why Germany is an attractive forum for these sorts of cases. Albrecht Bach, partner at Oppenländer in Stuttgart, who represents CDC in its case against the cement cartel, explains: "The German legal system is relatively efficient in terms of timing and arriving at decisions, and it's fairly predictable," he says. "The question of whether there was an infringement is not an issue for the German courts either," because any decision from a national European competition authority or the European Commission is binding on the court. Finally, section 287 of the German civil code of procedure allows judges a wide discretion in assessing fines. "The judge can estimate the amount of damage, which limits considerably the burden of proof," says Bach. "The Supreme Court has said that the judge has to make an award if there is any harm at all."

Till Schreiber, legal counsel for CDC, says that: "A lot of issues the commission highlighted as problematic [in the white paper] can be dealt with without having to change procedural law on the basis of the CDC model."

Numbers game

Lawyers say the validity of CDC's model, and the degree of legal certainty that the Supreme Court's decision seems to provide, has encouraged similar organisations to set up in Germany, while some law firms are thought to be looking closely at developing their own rival models.

Germany also has a relatively well-established history of private enforcement by individual companies pursuing claims against suppliers or competitors. Almost every law firm in Germany has represented a defendant in a private case, and many have worked for individual corporate claimants, especially on damages actions against dominant companies.

Bernhard Heitzer, president of the Federal Cartel Office, says the number of private damages actions is increasing rapidly: "In 2005, we had 34 cases of action for damages in competition matters," he says. "In 2006, there were 106 cases, 123 in 2007, and in 2008 there were 100 cases."

The numbers may not seem that large, but for Europe, they are significant. Indeed, a comparison with the US, often cited as an example of a jurisdiction that has failed to rein in the excesses of private litigation, is instructive. In 2007, the US saw about 1,100 private antitrust cases filed. That's about one for every 276,000 Americans. In the same year, Germany had 123 cases filed: about one for every 666,000 people.

Heitzer adds: "Against the background of these figures you can understand that we were surprised to see the commission's statement in its white paper on private enforcement that private enforcement litigation was totally underdeveloped."

While the "underdeveloped" remark can be dated to a paper produced by the law firm Ashurst LLP for the commission as far back as 2004, many German lawyers see it as representing a view that persists to this day.

So what kinds of cases are being brought in Germany? The courts regularly receive lawsuits filed by companies against suppliers for refusal to deal and other abusive conduct. Books, cosmetics and fashion markets have all seen private cases in recent years; small telecoms companies also bring regular cases against larger operators.

The trend has the full support of the FCO: "We believe in Germany that private litigation can play an important complementary role in enforcing competition legislation," Heitzer says. "Since the last amendment to the competition legislation we have effectively designed the means for competition litigation and there is no point in hiding our position here."

And the Federal Cartel Office is an efficient and productive agency, which issues lots of decisions in cartel and abuse cases.

For example, its recent focus on the energy sector – including an inquiry last year – means that energy is becoming one particularly fertile area for private enforcement. And a change to the statute in 2008 introduced a new provision (section 29) to the ARC, meaning that abuse of dominance in the energy sector is seemingly easier to show than in the past.

A dominant public utility company in the sector is abusing its position if it demands "fees or other business terms which are less favourable than those of other public utility companies or undertakings in comparable markets, unless the public utility company provides evidence that such deviation is objectively justified," or if its fees "unreasonably exceed its costs".

Sources say this is likely to boost private cases in the sector, either in the form of follow-on actions from FCO decisions, or as standalone cases brought by customers of large energy companies.

In the US, most law firms either represent defendants in antitrust litigation or they represent plaintiffs. Though there are exceptions, many firms that rely on large corporate clients for income are reluctant to be seen suing large corporations, not to mention the conflicts that often arise when firms find themselves on both sides of the fence. So is a similar split likely to occur in Germany?

Kathrin Westermann, partner at Nörr Steifenhofer Lutz in Berlin, says separate complainant and defendant bars are unlikely to develop. "Certainly where good clients are concerned, most firms will be happy to bring complaints for them," she says.

This seems to be a consensus view. But most lawyers are careful to distinguish between CDC-type actions and individual companies enforcing antitrust claims against others. Only Freshfields Bruckhaus Deringer categorically rules out representing claimants, and that's a firm-wide policy. Others agree that as the stigma associated with businesses pursuing claims against colleagues or clients continues to diminish, so will the difficulties for law firms representing claimant companies.

The elephant in the room

Among all the discussion of private enforcement in Germany, it is remarkable how rarely anyone mentions everyday consumers – those individual purchasers of products and services who, according to the European competition commissioner Neelie Kroes, forgo "billions in compensation" because of a lack of ability to claim.

At present, though the CDC model would in theory work for consumers, it would face practical problems. Consumer associations have yet to bring private cases against cartels. What's more, in German law there is no legal provision for class action suits. Schreiber explains that though the CDC has looked at consumer actions, it would ideally work alongside consumer organisations to enable them. And individual consumers would ideally need to be able to submit claims electronically. Currently under German law, courts require physical, paper claims from each claimant – impractical and hugely resource-intensive in a large collective consumer action. Additionally, there are difficulties with demonstrating damage to consumers who may be some way down the supply chain from where the cartel occurred.

But though there is undoubtedly a long way to go before there is a clear and efficient way for consumers to bring cases, the FCO and European Commission are both working hard to tackle industries where consumer harm is most pronounced. Heitzer says the office has taken a "fundamental decision" to address more consumer-driven topics, and to "use, quite intensively, the new tool of sector inquiries" in consumer industries. So it looks like there will be no shortage of decisions for plaintiff lawyers looking for suitable consumer test cases to get their teeth into.

Will private antitrust enforcement become a significant second string to the legal system's bow in Germany? Many lawyers say that it's no longer a question of if, but of when. And if the speed of progress since the 2005 amendment to the ARC is anything to go by, it may be sooner than some, including the European Commission, had ever imagined.