

Damages claimants hampered by bitumen cartel decision

IN BRIEF

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By Lewis Crofts

Companies preparing private enforcement claims over a bitumen cartel are struggling to mount a case on the basis of the non-confidential decision published last week by the European Commission, arguing a lack of details, facts and figures is ham-stringing claimants and undermining the commission's own pleas for private enforcement.

Cartel Damage Claims (CDC), the Belgian firm leading the way in private enforcement actions in Europe, has bewailed the deletion of reams of figures in the non-confidential version of the decision which fined 14 companies 267 million euros for a Dutch bitumen cartel from 1994 to 2002.

The timing of the decision's publication last week - ten months after the September 2006 decision - is also not helping the cause, CDC maintained.

While the commission has to protect business secrets by suppressing swathes of specific information on the cartel meetings, crucial data such as sales values, purchase values and market shares are all missing, making life very difficult for claimants. The commission was unable to respond to questions regarding why certain information, including six-year-old market data, was considered secret.

The commission's own press release at the time of the fine stated that 'any person or firm affected by anti-competitive behaviour as described in this case may bring the matter before the courts of the Member States and seek damages, submitting elements of the published decision as evidence that the behaviour took place and was illegal.'

It now appears that the 'elements of the published decision' are far from sufficient to mount a credible claim.

Comparison has been drawn with the commission's 2001 decision on the vitamins cartel. In this case, the published decision contained information on pricing

developments which a German court judged sufficient to bring damages claims. Such information is, however, lacking from the bitumen decision, according to CDC.

Furthermore, although the commission has strict confidentiality guidelines to uphold, suppressing names and functions from the decision eliminates any possibility for claimants to call witnesses.

CDC is emerging as a front-runner in private enforcement cases in Europe, operating a model whereby it purchases and assigns the claims of individual companies and brings the claim on its own with the use of external counsel. It then returns a share of the damages - around 80 percent - to the claimants.

Despite the difficulties, the company is nonetheless considering bringing a collective action against the bitumen cartel, hoping that if enough claimants come forward they can gather the market data absent from the decision.

Although the commission doubtless did its utmost to work through the necessary legal and bureaucratic procedures to publish the decision, the lack of substance seems to run counter to the commission's own desire to see more private enforcement.

Early next year the commission will publish a White Paper on collective actions in the search for a model which could work for Europe without lapsing into the US class-action culture.

The cartel

The commission's fine hit eight suppliers and six purchasers. The biggest penalty of 108 million euros went to Shell as a repeat offender following involvement in the earlier PVC cartel.

The participants fixed the gross price of road bitumen invoiced to asphalt production plants, and they also fixed rebates for the construction companies which own these plants.

The decision was signed by Internal Market Commissioner Charlie McCreevy since Commissioner Neelie Kroes recused herself from the case having been director of one of the parties to the decision, Ballast Nedam, during the time of the infringement.

The companies fined include suppliers BP, Esha, Klöckner Bitumen, Kuwait Petroleum, Nynäs, Shell, Total and Wintershall, and construction companies Ballast Nedam, Dura Vermeer, Heijmans, Hollandsche Beton Groep (now part of Koninklijke BAM Groep), Koninklijke BAM Groep and Koninklijke Volker Wessels Stevin.

Bitumen is a product used in road surfacing and constituted an estimated market worth 62 million euros in the Netherlands in 2002.

The non-confidential version of the decision can be found [here](#).