

Press Release

Higher Regional Court dismisses appeal in German cement cartel case

Brussels, 25 February 2015 – On 18 February 2015, the Higher Regional Court ('Oberlandesgericht') of Düsseldorf dismissed the appeal brought by CDC Cartel Damage Claims SA (CDC SA) in the context of the damage action launched in August 2005 against Cemex, Dyckerhoff, Lafarge, Schwenk Zement, HeidelbergCement and Holcim for damages resulting from their participation in the German cement cartel (see [here](#)). The Higher Regional Court widely confirmed the judgment of the Regional Court ('Landgericht') Düsseldorf of 17 December 2013.

The action concerns damage claims against members of the German cement cartel. In 2003, the Federal Cartel Office imposed fines on the defendants for participating in market-sharing agreements and other cartel practices which together covered the entire territory of Germany from the early 1990s until 2002. The Higher Regional Court of Düsseldorf upheld these findings in June 2009 (see the court's [press release of 29 June 2009](#)). That judgment was ultimately upheld by the Federal Court of Justice ('Bundesgerichtshof') in February 2013 (see [here](#)). In these administrative proceedings it had in particular been established that the cartel members generated substantial profits by their illegal practices.

In the civil proceedings, neither the Regional Court nor the Higher Regional Court of Düsseldorf did rule on the merits of the damage claims or the quantum, but dismissed the action due to assumed invalidity of the transfer of claims by 36 purchasers of cement to CDC SA as well as procedural considerations.

According to the Higher Regional Court, the transfer of claims which took place prior to the formal registration of CDC SA as a provider of legal services infringed the German Act on the Provision of Legal Advice ('Rechtsberatungsgesetz'). The transfer of claims which took place subsequent to the registration of CDC SA as a legal service provider did, according to the Higher Regional Court, violate the public morals as they amounted to an uneven distribution of cost risks to the detriment of the defendants. As a result these transfers were also declared void. Pursuant to the Higher Regional Court the main aim of the claims transfer from the damaged cement purchasers to CDC SA was to shift the cost risk to an entity which in the opinion of the court did not show the required standard that at the time of entering into the contracts in 2008/2009 it had the financial capacity to cover the potential statutory adverse costs which could be awarded to the defendants. In this respect, both the Regional Court and the Higher Regional Court relied on a statement by the director of CDC SA from 2005 which concerned the request of the claimant to reduce the value of the claim which in turn is relevant for determining the statutory reimbursable costs. Despite the negative decision in the case at hand the Higher Regional Court nevertheless specifically confirmed that as a matter of principle damage claims resulting from competition law infringements can be transferred to a 'claims vehicle', subject to the conditions laid down in the judgment, i.e. a registration under the German Legal Services Act and sufficient provisions which avoid the risk that the defendants will not be able to recover their statutory reimbursable costs in case the damage action is lost.

The Higher Regional Court did not adjudicate on the validity of additional assignments which were conducted in 2014 after (i) a capital increase of CDC SA of € 2 million, (ii) the payment of an amount covering the potential adverse costs into a trustee account, and (iii) additional financial commitments. In addition, CDC SA had fulfilled all cost reimbursement orders in relation to the first instance. However, the Higher Regional Court did not decide on the validity of these new assignments as in the opinion of the court these assignments resulted in an amendment of the original claim which it deemed not to be pertinent and therefore dismissed them on procedural grounds.

CDC SA and its lawyers from law firm Oppenländer Rechtsanwälte are in the process of analysing the judgment in order to determine whether an appeal will be lodged against the decision of the Higher Regional Court not to grant a right to further appeal.

