

## The future of class actions in Europe from a claims aggregator's perspective

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**CDC Cartel Damage Claims is the European frontrunner in recovering antitrust damages by bundling claims on the basis of assignment. CDC brings them to court in one legal action, in its own name and at its own cost and risk. CDC also provides solutions for cartel members on how to reduce their risk exposure associated with antitrust claims. As managing director, Till is responsible for managing, funding and settling some of the largest private antitrust damages cases in Europe. We were invited to CDC's office in Brussels, where we were warmly welcomed by Till and Martin Seegers. Martin has been legal counsel at CDC for 12 years and is involved in all of CDC's cases across Europe. Till and Martin took the time to answer our questions after we made our introductions over coffee. This interview was conducted in English.**

### *Increasing number of collective actions*

From Till's introduction, it becomes clear that CDC's business is focused on dealing with cartel damages claims of companies. Those companies are generally not the end consumers of the products. This is a deliberate choice by CDC since "it is much more difficult to substantiate the dispersed and small damages suffered by end consumers than by a direct purchaser, because typically, end consumers are only indirectly linked to the companies involved in the cartel."



Till also notes that the companies that suffered damage as a result of the cartel are increasingly aware of their right to claim compensation. He expects that this will lead to a growing number of individual as well as collective actions. He points out several reasons for this awareness. “Companies see that others were successful in bringing damages claims, so they do not want to stay behind. As a result, we are not only looking for cases ourselves, but we see more and more companies that contact us.” Furthermore, Till has noticed that the Antitrust Damages Directive<sup>1</sup> has created the sense of awareness that cartel damages can be claimed throughout the EU, although the Netherlands is and will continue to be an important jurisdiction for bringing mass claims. “However, we do not necessarily have a choice of jurisdiction, in particular when national infringements are concerned, which can typically only be brought before national courts.”

Besides a growing awareness, developments in legal IT will also lead to an increase in antitrust damages claims, Till says. “Typically, large companies are in a position to handle antitrust claims and litigation themselves. But mass litigation is regularly a solution for small or medium sized companies, which I think have difficulties claiming damages on their own. IT systems make it easier to bring such claims.”

### *Opting-in by assignment is an effective solution*

As Till mentioned that the claims aggregation model is increasingly known by companies, we wonder if this is the only model CDC uses for bundling claims. Till confirms that while CDC is looking at alternatives, this remains the preferred option for the moment. “We always take the full assignment, which is the best way to create synergies via outsourcing the overall process of quantifying damages and enforcing claims. I think it works very well in practice. Typically, we deal with a higher number of companies in a range from 10 to 50, but in recent cases the number has grown to several hundred. Moreover, the assignment model is accepted by the courts as well as the companies. They see it as a fair way of getting compensation.” Till is convinced that

<sup>1</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

the assignment model will be valuable in the future. “The assignment model is not only used in antitrust cases, but also, at least partially, in other cases, like shareholder actions and the ‘Dieselgate’ cases in Germany.”

By assigning their claims, the claimants make it clear that they want to join the action. Till prefers this to opt-out proceedings. “You must always have some sort of individual substantiation. Moreover, we understand that at least currently, we need to individualise the damage. To quantify the individual damage, you need a lot of data which you only get when bundling claims. Therefore, we prefer opting in to opting out. I also think that opting in is more in line with what the companies want. They can decide not to bring a claim against their supplier, but instead try to resolve the conflict in a different way for strategic reasons.”

Although Till prefers an opt-in model, he imagines that in certain cases class actions on an opt-out basis might be more efficient: “End consumers might be more dependent on this kind of collective redress, because litigating against large companies is risky. There are also synergies for the defendants and the courts, as you don’t want to have twenty million end consumers with small claims across Europe.”

### *EU jurisdictions have a different approach to cross-border issues*

Till’s last remark brings us to the question of what he thinks of the different approaches to cross-border claims in EU jurisdictions. “There are still significant differences indeed,” he says. “The Netherlands has always been rather open to foreign claims. That is different from, for example, Germany, where it is a challenge to bring a foreign claim to court. In the Netherlands, the judges are not afraid to – if necessary – apply foreign law. Dutch courts also seem to be much more pragmatic. I think that has very much to do with legal culture.”

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According to Martin, the different approach might also cause problems when recognising opt-out class action judgments or opt-out class settlements from another EU jurisdiction, although this has not yet been tested. In Germany, for example, it is

considered a basic principle that a claim cannot be adjudicated without the claimant's knowledge and consent. However, the Dutch court has no problem with declaring cross-border settlements binding on all the class members that do not opt out ('WCAM settlements'). Till and Martin share their view on what is necessary to facilitate cross-border settlements: "What could be interesting is to have an overall European collective settlement. If you want to bring claims in 12 or 15 jurisdictions, you would like to be certain that you can end the proceedings by a court-approved settlement that is recognised throughout the EU. It would be best if you have the possibility to opt in."

### *Competition between jurisdictions*

Given the fact that jurisdictions differ that much, we ask what Till believes to be the most relevant jurisdiction for class actions in about ten years' time. "This depends on how the competition between jurisdictions turns out," he answers. "For example, it remains to be seen how the New Deal proposal will be implemented. Also, everybody is curious to know how the new Dutch WAMCA legislation will be applied in practice. Furthermore, investing in an effective judicial system is key. Think of having interested judges who have the resources to deal with complex mass claims and court administrations investing in IT systems. For example, in the Netherlands and in Finland it is possible to submit data electronically, whereas in many parts of Germany you still have to provide paper. Another important factor is the court's approach to submitting documents in foreign languages. The Netherlands accepts not only documents in Dutch, but also in English, German and French. This is different in other countries. Lastly, the existence of specialised courts, such as the CAT in London and the Netherlands Commercial Court, makes a jurisdiction attractive as well."

### *Third party funders and abuse*

Since CDC is partially funding cases with third party funders, we are curious to know what Till thinks about third party funders coming to continental Europe. "I doubt if their business plans are realistic," Till says. "I think there is a lot of money but a rather limited number of cases. This might lead to the situation where a lawyer who would normally advise against litigating brings a case in which a professional funder bears the risks of losing. That means an increase of litigation and potentially of bad cases."

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These funders and CDC have different business models. Till explains: "Our idea is very much: we're doing one case, but it has to be done well legally. Because if we lose, a big investment is gone. The claims aggregation ensures that meritorious cases are pursued. Other funders have a different approach. They get a multiple of three to four times their investment so that even if they lose about half of their cases, they would still make profit because of the money they invest in all the other ones. So they have an incentive to have more cases in a broader portfolio. Take the class action *Mastercard* case in the UK for example. See the Mark interview (UK) for a description of this case. From what I read in the papers, that case seems mainly be driven by lawyers and their funders. I believe that the funding agreement holds that the funder either gets GBP 125 million or more than 20% of the unclaimed amount. The unclaimed amount could be very significant because even if there is a judgment, most of the funds will probably not be claimed by the affected class, as the individual amounts to which each of the 47 million end consumers are entitled to will be very low. I think judges should have a careful look at that."

Till and Martin have not come across abuse of the class action system in the jurisdictions that CDC has been active in (the Netherlands, Germany and Finland). "We negotiate a contract with companies that are also represented by lawyers and trade associations, so we think that for corporate claims the risk of abuse is not so big. Furthermore, in order to bring an action you really have to make a careful assessment of the risks and the budget. So bringing claims that have no substance is pretty much excluded in the claims assignment model, other opt-in models or individual claims. In opt-out situations, it may be different but we have no experience with that."

As an aside, Till shares his view on the funding of consumer organisations that in some class action systems must bring class actions as the qualified entity to do so: "They have

to handle class actions in a kind of pro bono way. I don't think that's realistic. At least in complex cases, you need access to money in order to pay for good lawyers and good economists. Otherwise, you will not be on the same level as the defendants.”

### Landmark case

When we ask Till and Martin what they consider to be a landmark case, they pick a case that CDC handled: the German *Cement Cartel* case<sup>2</sup>. Till and Martin explain that it paved the way for proceedings based on assignment and had a huge impact on other competition litigation cases.

A number of German cement manufacturers agreed on market allocation and quotas from the beginning of the 1990s until 2002, when the cartel was detected. The German competition authority imposed a fine of EUR 702 million, which was reduced to EUR 330 million on appeal. CDC acquired damages claims from several corporate customers of the cement manufacturers and brought them in its own name to the German court in 2005. After the Federal Court of Justice confirmed that CDC's action was admissible in 2009,<sup>3</sup> the Higher Regional Court of Düsseldorf dismissed the claim in 2015. It found the assignment of claims invalid in light of the cost risk shifted to CDC without documented financial means when concluding the claims purchase agreements. CDC therefore lodged a second action for damages in 2015. More than 20 corporate customers of cement producers assigned their claims amounting to more than EUR 138 million in damages. The Regional Court of Mannheim rejected the claim as time barred. In 2018, the Federal Court of Justice issued a judgment that clarified the legislation on limitation periods, thus overruling the interpretation of the Mannheim Court.<sup>4</sup> Following an appeal against the Mannheim Court's decision to the Higher Regional Court of Karlsruhe the case has been settled out-of-court in the meantime.

<sup>2</sup> See <https://www.carteldamageclaims.com/competition-law-damage-claims/cement-cartels>.

<sup>3</sup> BGH 7 April 2009, KZR 42/08.

<sup>4</sup> BGH 12 June 2018, KZR 56/16.

### Predictions for the future

We ask what Till and Martin believe will be the most important development in class actions. Many developments seem important, but they decide on this one. “Companies and natural persons will be more aware of their rights and more willing to pursue them. Access to information and information technology are the key elements to enable corporate victims and individuals to enforce their rights.” ➤