WHITE & CASE

Client Alert

German decision on collective redress

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Börries Ahrens
Partner, Hamburg
bahrens@whitecase.com

Charles Balmain
Partner, London
cbalmain@whitecase.com

Markus Burianski
Partner, Frankfurt
mburianski@whitecase.com

Markus Langen
Partner, Frankfurt/Munich
mlangen@whitecase.com

Axel Schulz
Partner, Brussels
aschulz@whitecase.com

Justus Herrlinger
Local Partner, Hamburg
jherrlinger@whitecase.com

Lars Teigelack
Associate, Düsseldorf
lteigelack@whitecase.com

Cartel Damage Claims, a Belgian SPV for the collection of follow-on damages in antitrust litigation, has lost an appeal against six members of the so-called German cement cartel. On 18 February 2015, the Higher Regional Court of Düsseldorf upheld a judgment of the Regional Court of Düsseldorf[1] dismissing CDC's multi-million euro claim against six companies involved in the German cement cartel as inadmissible due to lack of sufficient funding.

The case received widespread attention because CDC is an attempt by cartel victims to overcome the lack of "real" class actions in Germany and other Member States.

The CDC business model

CDC, a Belgian-registered company specialised in enforcing claims of cartel victims, was assigned the claims of 36 companies injured by the cartel. In exchange, CDC received a purchase price consisting of a fixed amount of EUR 100 plus 65%-85% of the amount obtained in court (if any). In addition, most of the injured entities made contributions towards costs depending on their financial capacity.

Litigation began in 2005 with the parties arguing over the procedural limitations of the CDC business model. The German Federal Supreme Court allowed the case to go forward after several years and disputes on the merits began in October 2013.

The Judgment

The Düsseldorf courts applied German law to the case because the defendants had not agreed to CDC's proposal that Belgian law should apply.

The courts did not generally oppose the idea of pooling claims in a plaintiff-SPV and recognised the rational apathy of potential cartel victims to claim small amounts with high litigation risks. The court dismissed the case, however, because CDC was insufficiently funded. CDC would not have been able to cover litigation costs even for the first instance in the event of a defeat and openly admitted to this. Therefore, the court held that the transfer of claims to CDC was immoral under the German Civil Code (*contra bonos mores*). It has long been prohibited under German law to avoid litigation costs through the assignment of claims to a party not capable of covering even these costs.

Unlike in other countries such as the US where each party bears its own costs, German civil litigation rests on the principle that the loser reimburses the winner for all costs and fees. Due to CDCs insufficient resources, the defendants would have had to bear all

[1] http://www.justiz.nrw.de/nrwe/lgs/duesseldorf/lg_duesseldorf/j2013/37_O_200_09_Kart_U_Urteil_20131217.html (available in German only).

costs in the event of a defeat but would not be (fully) reimbursed in the event of a win.

The court did not allow an appeal to the German Federal Supreme Court but CDC has one month after receipt of the full decision to challenge the non-allowance of the appeal.

Outlook

The message to follow-on plaintiffs is that the CDC model (assignment of claims) generally works but the SPV needs to be funded sufficiently. Several other questions for practitioners in follow-on litigation remain. Most importantly, the court did not provide guidance on potential funding models. It further remains unclear whether the plaintiff needs to fund litigation costs only for the first instance or all possible instances. Litigation costs in Germany can add up to approx. EUR 3.5 million in court fees and (non-hourly) attorney remuneration alone. Attorney fees in excess of the legal reimbursement limit or costs of assessing the actual damage would add further risk to the litigation. Creative funding structures will hence be the main challenge for supporters of the assignment of claims to an SPV.

The requirement that follow-on damages claims be properly funded was already emphasised in the European Commission's non-binding recommendation of June 2013 setting out common principles for compensatory collective redress mechanisms. The Commission recommended that courts be entitled to stay follow-on damages actions if "*the claimant party has insufficient resources to meet any adverse costs should the collective redress procedure fail*" (para. 15). However, the Düsseldorf judgment appears to have gone even further, as it did not merely stay the action but dismissed it as inadmissible. Whether the Düsseldorf judgment may potentially make Germany less attractive in the future for potential plaintiffs compared to other jurisdictions such as the UK remains to be seen. There are currently alternative collective litigation vehicles in place (*e.g.*, in claims against the so-called air cargo cartel) and claimants will try to adapt them to the Düsseldorf requirements and to avoid the insufficient funding obstacle.

Indeed, although the European Commission has long been pushing for a harmonised collective redress system to facilitate follow-on litigation in national courts, Europe is still far from having adopted any common approach to "class actions". After a Green Paper in 2005 and a White Paper in 2008, the provisions on collective redress had to be removed for Directive 2014/104 on follow-on damage actions to be finally adopted in October 2014 and the Commission had instead to issue a non-binding recommendation on the subject. (See our previous client alert on this topic here.)

The Directive intends to remove a number of practical difficulties for claimants seeking follow-on damages in national courts. Whereas German law already includes a number of these claimant-friendly rules, the Directive also includes additional legislation such as a presumption of damages following a competition authority decision, increased access to evidence for claimants, clearer rules on limitation periods and rules on the passing-on defence in certain circumstances. Member States have to transpose the directive into national law within two years, but they retain an appreciable margin of discretion in so doing. As a consequence, potential plaintiffs and defendants will have to continue monitoring closely the developments in the 28 Member States to assess the most favourable jurisdiction to their position.