
German Supreme Court Facilitates Private Damage Actions for Competition Law Violations—Confirms Permissibility of "Bundled" Antitrust Damages Actions

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In the midst of growing concerns in the European business community about an internal proposal by the European Commission to facilitate private enforcement of antitrust law in EC Member States through group or representative actions, the German Supreme Court (Bundesgerichtshof, "BGH") has paved the way for similar actions before German courts in its ruling of April 7, 2009, in *Cartel Damage Claims ("CDC") vs. Dyckerhoff AG*. There, CDC, a Belgian company, collected damages claims from victims of a market sharing and price fixing cartel in the German cement industry and sued six German cement producers based on these claims. Rejecting a motion to dismiss the claims, the BGH confirmed that actions based on "bundled" damages claims assigned to a single plaintiff are permissible under German law—thus allowing actions similar to opt-in class actions (i.e., class actions that plaintiffs join by affirmative consent). The decision—which has just been published—is likely to give a boost to private antitrust damages actions in Germany although many critical issues concerning such actions remain to be resolved. Notably, only a few days after the BGH released a press statement concerning its ruling, CDC brought a second lawsuit, claiming approximately EUR 600 million from six producers of hydrogen peroxide on behalf of 32 customers.

The CDC case arose out of an investigation by the German Federal Cartel Office (Bundeskartellamt), which ended in 2003 with the Bundeskartellamt imposing a fine of a total of over EUR 700 million on 12 German cement producers for market sharing and price fixing. Subsequently, 36 cement purchasers assigned to CDC their damages claims against members of the cement cartel. Based on the assigned claims, CDC sued the six largest participants in the cartel before the Düsseldorf District Court (Landgericht ["LG"] Düsseldorf), seeking to hold defendants jointly and severally liable for damages of about EUR 150 million (without interest), but leaving to the court determination of the exact amount. CDC agreed with the members of its "class" of cement purchasers to acquire their damage claims in return for a payment of EUR 100 each and between 15% and 25% of any damages ultimately obtained.

Defendants' Argument: "Bundled" Damages Action is Impermissible as De Facto Class Action

The defendants contested the permissibility of the "bundled" damages action brought by CDC on

essentially two grounds: First, they argued that CDC's claim was insufficiently precise because CDC had neither specified each individual claim of the members of its "class," nor indicated the exact amount of the total damages claimed. Second, they argued that CDC lacked standing to sue because the assignment of the claims was void. According to the defendants, CDC misused the defendants' customers' right to assign claims to bring what amounts to a class action, when that instrument is not recognized under German civil procedure. In view of the defendants, CDC's business model violates the German rules concerning the provision of legal services. From an economic perspective, the defendants argued, CDC did not truly acquire the damages claims from cement purchasers. Rather, defendants claimed, CDC effectively agreed to provide legal services in connection with the enforcement of these claims, although it does not have the necessary permit (e.g., an admission to the German bar). Those legal services included: assessing and valuing claims; negotiating a settlement with the producers; and, ultimately, enforcing the claims in court. In addition, the defendants argued that CDC's misuse of the assignment resulted in an unfair distribution of litigation risks between the alleged victims (as the original claim holders and the main beneficiaries of a litigation success) and the defendants: It was unclear whether CDC would be able to pay the defendants' litigation costs if the courts reject CDC's action, but the original claim holders would not be liable for these costs because they are not parties to the proceedings. In addition, the defendants claimed that CDC could not pursue a de facto representative action for the victims absent valid assignment. For these reasons, the defendants asked the court to dismiss the action.

Düsseldorf Court of Appeal: "Bundled" Damages Action is Permissible in Principle

In a judgment of February 21, 2007, the LG Düsseldorf denied defendants' motion to dismiss. Defendants appealed, and the Düsseldorf Court of Appeals (Oberlandesgericht ["OLG"] Düsseldorf) upheld the lower court's judgment on May 14, 2008.

The OLG Düsseldorf held that CDC's claims were sufficiently precise. CDC had made clear that the action concerned all possible damages claims resulting from all cement supplies that the 36 purchasers received between 1993 and 2002. Moreover, CDC had both provided a precise minimum amount of total damages and presented the court with the basis for its estimation of that sum. The OLG Düsseldorf noted, however, that, when addressing the substance of the matter, the lower court will have to address the defendants' many concerns about determining the amount of damages.

As to CDC's standing to sue, the OLG Düsseldorf referred to a general principle of German civil procedure that, for an action to be permissible, it is sufficient for a claimant to assert his or her own right in his or her own name. And, when such a right has been acquired through assignment, it is sufficient to assert that an assignment of the right has in fact occurred. Whether the assignment is legally valid is a question of substantive law and only affects the merits of the action.

German Supreme Court Confirms Düsseldorf Court of Appeal's Judgment

One defendant appealed the OLG Düsseldorf's judgment to the Bundesgerichtshof. The BGH dismissed the appeal with a very brief decision and a press release further explaining its reasoning. The BGH held that bundling of damages claims for breaches of antitrust law is in

principle permissible under German civil procedure. It observed that, as a general matter, the fact that a lawsuit based on bundled individual claims may be complex is irrelevant to the determination whether the lawsuit is permissible. In addition, the BGH confirms the OLG Düsseldorf's view that it is sufficient for CDC to assert that there has in fact been an assignment of the claims to it. The BGH apparently shares the OLG Düsseldorf's view that the lower court should defer reviewing the legal validity of the assignment until it reviews the merits of the action. Finally, the BGH held that CDC's claim was sufficiently precise, even though CDC did not specify the exact amount of the claim. CDC may be required, however, to provide more details concerning the basis and calculation of its claim as the proceedings unfold.

Discussion

The cement cartel damages has received significant attention in Germany and elsewhere as an attempt to provide an alternative to class actions—which are generally not available in Germany - by means of "claims bundling" (i.e., the assignment of individual claims to a single firm that then sues for competition claims).

The BGH's decision suggests that it is possible to bring actions similar to "opt in" class actions by using traditional instruments of German civil law and procedure. It also demonstrates that the German courts are willing to facilitate private damages actions for breaches of antitrust claims. The decision is therefore certainly welcomed by those who are anxious that Germany not lose ground in what some have viewed as a competition among European jurisdictions to become the most attractive forum for such actions.

Nonetheless, many fundamental questions remain to be resolved. Most of the issues that defendants argued in their appeal were procedural questions going to the permissibility of such actions must now be addressed as questions of substance in the proceedings that are still pending before the LG Düsseldorf. These include in particular: (i) the legal test for determining whether assignments of antitrust claims to companies like CDC are valid and (ii) the methodology for determining the amount of damages and the degree of substantiation, individualization, and certainty required.

The BGH decision may not have come as a great surprise to observers of the case, but it is an important development as Germany and other European jurisdictions—as well as the European Commission—continue to explore ways to provide for competition actions based on aggregated claims and for private damages actions more generally. Companies and their counsel would do well closely to follow developments in this case—and in similar cases in other Member States as well as discussions about the European Commission's internal proposal for harmonized rules for private damages actions and aggregated claims throughout the EU.

Authors



Dr. Stefan Ohlhoff
LLM

PARTNER

✉ stefan.ohlhoff@wilmerhale.com

☎ +49 30 20 22 63 55