Is Private Enforcement of Competition Law Still an Option in Germany?

Some thoughts on the judgment of LG Düsseldorf from December 17th, 2013, 37 O 200/09 (Kart), by Polina Pavlova, Max Planck Institute Luxembourg.

On December 17th, 2013, the District Court Düsseldorf dismissed a claim for damages against the participants in the German cement cartel. The case at issue can be regarded as a pilot one in the area of private cartel law enforcement in Germany. The judgment, although a first instance one, is the result of a long lasting litigation. In April 2009, the Federal Court of Justice confirmed the admissibility of the claim. Particularly against this background, the dismissal on the merits by the Regional Court came as a surprise.

The case started originally in 2003, when the German Federal Cartel Office issued record fines against the participants in the German cement cartel which had been operating since 1988. In 2005, Cartel Damage Claims (CDC), a Belgian publicly held corporation, brought an action for damages against the former cartel members. The Belgian corporation had been established with the aim of bringing the present lawsuit as a plaintiff in German courts. The corporation acquired the claims of 36 companies who had purchased cement from producers participating in the anti-competitive agreement. CDC bought each claim at a modest price and additionally arranged for the cartel victims to receive a share of the damages obtained in case of success of the action. The claims were assigned to CDC; their total value amounted to 131 million Euro. In an interlocutory judgment from 2007, subsequently upheld by all instances, the District Court of Düsseldorf confirmed the

admissibility of the lawsuit.

On the merits, however, the District Court dismissed the claim because of invalidity of the assignments to CDC; as a result, CDC had no standing to sue. According to the District Court, the assignments initially performed before July 1st, 2008 were invalid due to the violation of the German Act on the Prohibition of Legal Advice. This Act, which dates back to 1935, has no equivalent in other European legislations. Its purpose was to guarantee the quality of legal advice, i.a. by preventing debt-collection agencies from taking advantage of consumers. The constitutionality of the Act has repeatedly been questioned on the grounds that it restricts severely the constitutional guarantee of professional freedom. However, the German Federal Constitutional Court has given its support to the Act in several decisions, arguing it protects the general public against unprofessional legal advice. Similar doubts regarding the fundamental freedom of services under Article 49 TFEU were dispelled by the ECJ in case C- 3/95, *Reisebüro Broede v. Sandker*.

Under Section 1 of the Act of 1935, professional collection of debts required special (and not easy to obtain) authorisation by the competent authority. Initially, CDC had not applied for such authorisation. Therefore, the Regional Court of Düsseldorf decided that there had been a breach of law which, under Section 134 of the German Civil Code, entailed the invalidity of the assignments. In July 2008, the Legal Advice Act was replaced by the Legal Services Act. The current Act essentially pursues the same purpose as its predecessor and sets similar requirements in order to ensure the sufficient qualification of providers of legal services; it nonetheless permits and facilitates the provision of legal services by registered entities. CDC registered under the new Act, and all claims for damages were assigned a second time to it. However, even though the Legal Services Act allows the assignment of claims to registered entities, the District Court denied once

more the validity of the operation, this time by asserting it was against public policy (Section 138 of the German Civil Code).

The District Court based its reasoning on the assumption that in the event of losing, the plaintiff would not have the funds required to reimburse the legal costs of the defendants. The argument must be read together with the German procedural "loser pays" rule (Section 91 of the Code of Civil Procedure), according to which the losing party is obliged to cover the full costs of the litigation, including the lawyer's statutory fees incurred by the winning party. Therefore filing a claim entails a financial risk, particularly high in cases like the one at issue (a claim for more than 130 million €). According to the District Court, pushing forward an undercapitalised legal entity as a plaintiff transfers the risk to the defendant; an outcome that was evident for both CDC and the assignors. As a result, the Court concluded that the assignments of the claims violated the good morals and were null and void.

This statement comes as a surprise. It is worth noting that, at the beginning of the proceedings, the plaintiff had formally applied for a reduction of the value of the dispute in order to cut down the costs of the litigation. As the litigation costs in Germany are calculated according to the value of the claim, the diminution of the value of the dispute narrows the litigation risks for both parties. Usually, German courts are not empowered to reduce the value of the litigation unless it is explicitly provided by law; however, this is the case in cartel matters where the court may – at its discretion – reduce the amount of the dispute in order to facilitate private enforcement of competition law.

In the cement cartel case CDC's application for a reduction of amount of the litigation had been surprisingly dismissed – it seems that the Court was uncomfortable with the business model of CDC, aiming at increasing the value of litigation by

bundling claims for damages from different victims of the cartel. When evaluating the litigation risks, the District Court relied on the information given by the plaintiff on its financial situation when it had sought the reduction of the amount of the litigation. Accordingly, the District Court held that CDC's own submissions regarding its inability to pay the costs of the litigation at the beginning of the proceedings indicated that the plaintiff would be unable to compensate the litigation costs of the other parties. As a consequence, the Court decided that the assignment of the claims deteriorated the procedural situation of the defendants with regard to the (future) compensation of their litigation costs, and, therefore, it was void. The final outcome of the reasoning of the Court is a shift of the legal framework for encouraging private enforcement to its contrary: first the plaintiff was denied a reduction of the cost risk; then, the claim was dismissed because of the plaintiff's inability to carry that risk. In this respect the line of argument of the District Court seems paradoxical.

Furthermore, it is worth stressing that considerations of EU competition law are completely absent from the Court's reasoning. Again, this line of argument must be criticized: the plaintiff had based its claim for compensation on a general tort provision of the German Civil Code (Section 823 para 2 BGB) in conjunction with Article 81 TEU (now: Article 101 TFEU). Yet the District Court only relied on the infringement of German cartel law by a domestic cartel, i.e., it did not address the right of cartel victims to compensation that derives directly from the TFEU. According to the case-law of the ECJ since *Courage v. Crehan*, victims of cartel infringements are entitled to a full and efficient compensation. However, the District Court did not consider these principles of Union law when it assessed the legality of the assignment to CDC under Section 138 of the German Civil Code.

All in all, the decision of the District Court shows a remarkable reluctance with regard to the private enforcement of cartel damages. It should be noted that the business model of the plaintiff (CDC) has been challenged in other civil courts in Europe (see recently the interlocutory judgment of the District Court of Helsinki from July 4th, 2013), but it has never been declared illegitimate. Decisions as the one by the Regional Court of Düsseldorf, even first instance ones, could make Germany less attractive as a forum for efficient cartel law enforcement. As a result, plaintiffs will shop to other jurisdictions like the Netherlands, Finland or the United Kingdom. However, it still remains to be seen whether the Court of Appeal and the Supreme Federal Civil Court will uphold the judgment of the first instance.