

German Antitrust Actions Against EU Cartels

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Introduction

In the United States, private enforcement of antitrust laws against cartels has always played an important role in establishing a fair and prosperous marketplace. Europe, on the other hand, has primarily relied on the power of antitrust authorities, mainly the EU Commission and national antitrust agencies, to do the same job. The hesitation to commence private lawsuits for damages against cartels in EU countries has largely derived from the plaintiff's obligation to prove all facts, in particular the cartel violations, beyond a reasonable doubt without obtaining the court's assistance. This contrasts with the situation in the United States.

Recent Changes

Current legal developments in the EU, particularly in Germany, have significantly changed this frustrating situation to the benefit of the infringed plaintiff:

- The plaintiff no longer needs to prove that a cartel violation actually was committed by the defendant if a final decision of the EU Commission or a German antitrust agency says so. Such a decision is strictly

binding on all follow-on damage proceedings before German antitrust courts. The only requirements left to prove are causation, intent or negligence on the side of the defendant and the amount of damages on the side of the plaintiff. The plaintiff may, of course, also use the findings of the EU Commission and the German antitrust agencies to help establish these remaining requirements in court.

- In 2005, the German Antitrust Code had also explicitly excluded the passing-on defense, which was often used in the past. This defense consisted of the defendant's argument that the plaintiff allegedly had suffered no damage because the plaintiff had passed on the price overcharge of the price-fixing cartel to the purchaser by raising his or her own price. Since the reform, German antitrust courts have considered the price overcharge to be equal to the amount of damages incurred by the plaintiff.

Unclaimed Money

The EU Commission currently estimates that cartels cause damages of between €25 billion and €69 billion in Europe



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every year. At the same time the EU Commission has estimated that the compensation that victims of antitrust infringements are forgoing by non-claiming in the EU annually amounts to between €5.7 billion and €3.3 billion.

Example: German Cement Cartel

Recently, the German Antitrust Agency uncovered a hardcore-cartel in the German cement sector. Numerous cement producers had divided the German cement market between themselves, fixed prices and made agreements with each other on sales quotas. The German Antitrust Agency had therefore imposed a fine totaling €702 million on twelve of such German cement companies. Because of the recent reforms in Germany concerning the antitrust damages proceedings a follow-on antitrust damages proceeding against the German cartel cement companies ensued before the antitrust court in Düsseldorf which is currently still unfolding. The infringed companies in this antitrust proceeding combine damages claims of €176 million.

German-Style Class Actions

Even though German civil proceedings do not allow for class actions as commonly practiced in the U.S., German law does allow damage claims to be bundled with one

company that leads the particular lawsuit. Next to the above mentioned cement case, several such German-style antitrust class actions have recently been started and successfully fought through in court, some financed by US law firms. The numbers of such antitrust lawsuits in Germany are currently increasing. They are also being encouraged by the EU Commission, which offers its assistance to plaintiffs in such cases. Considering also the high quality of the specialized and internationally recognized German antitrust courts, follow-on actions for damages in Germany against EU cartels will continue to constitute a powerful tool to both compensate cartel victims in the future and contribute to fair and prosperous competition in Europe.

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