Kluwer Competition Law Blog

Effective Enforcement of Cartel Damage Claims Through the Assignment Model: The Preliminary Ruling Procedure Before the CJEU in Case C-253/23 (ASG) – A Comment

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The Regional Court of Dortmund has asked the Court of Justice of the European Union (CJEU) for a preliminary ruling on the access of cartel victims to the so-called 'assignment model' (see here). Private enforcement of EU competition law is essentially driven by damage actions that bundle claims assigned by a multitude of victims to a commercial plaintiff. The Dortmund court doubts whether concerns against this approach under German law can survive an assessment under European Union law. This article analyses relevant EU rules (III.), describes beforehand the assignment model (I.) and the German statutory law at stake (II.), and puts the questions referred to the CJEU in a wider context (IV. to V.). The case should be practically important for private antitrust enforcement in Europe as a whole.

Assignment model

Description

Under the assignment model, a large number of injured parties, usually companies harmed by the same infringement of EU and/or national competition law, contractually assign their respective claims for damages to a specialised company or entity. The terms and conditions of the agreement are individually negotiated. The assignee becomes the new owner of the claims and enforces them bundled in its own name and at its own expense out-of-court or, represented by a lawyer, in court. This is also how the plaintiff in the Dortmund case, a company duly authorised to provide debt collection services under the German Legal Services Act (*Rechtsdienstleistungsgesetz*, RDG), is asserting claims for damages resulting from the (alleged) *Roundwood* cartel, which previously have been transferred to it by 32 sawmill companies. Typically, such a specialised company receives from the assignors a fee in the event of success.

Relevance

The assignment model has proven to be successful and effective in the field of competition law for almost 20 years now in various Member States. It has led to several landmark rulings by national

courts and the CJEU and to many out-of-court settlements, which resulted in substantial compensation payments.

- In big cartel cases, such as *Hydrogen Peroxide* (EEA), *Sodium Chlorate* (EEA), *Paraffin Wax* (EEA) and *Cement* (Germany), the respective infringers would not have paid any damages if the injured parties had not transferred their claims for damages to a professional legal services provider for their joint enforcement. Not a single (successful) action was filed by an individual victim, although in each case it was a 'follow-on' situation in which a competition authority had already found a serious infringement (e.g., price-fixing or market-sharing) with significant detrimental effects on competition.
- In other cases, actions for damages that enforce a multitude of assigned claims at least complement individual enforcement activities. Both *Air Cargo* and *Lifts and Escalators* are early examples. The *Trucks* cartel is still flooding national courts across Europe with individual actions and different outcomes, but it led also to several assignment actions concentrating the claims of numerous injured parties in the courts, such as in Amsterdam and Munich. Another recent case, the *Sugar* cartel, has led to more than 90 lawsuits by the food industry against the sugar producers before German courts – and to one legal action covering the harm suffered by food retailers at the next market level also affected by the cartel. The latter action is based on the assignment model.
- Last, but not least, the *Roundwood* case, which has led to the referral from Dortmund to the CJEU, is based on a 'stand-alone' situation, in which the plaintiff cannot rely on a binding decision of a competition authority. In such cases, there is regularly no private enforcement at all, even if there are strong indications of an infringement of competition law.

Overall, tens of thousands of companies across the EEA have opted for this model to date, transferring their claims to a specialised entity that enforces the bundled claims. This has evidently led to the enforcement of claims which otherwise would not have been enforced at all.

In fact, according to the preparatory works to Directive 2014/104/EU on antitrust damages (Damages Directive), the European Commission estimated the range of compensation that victims of infringements of EU competition law are not pursuing, and thus forgoing, each year between EUR 5.7 and 23.3 billion.

The reasons for this are well-known and result from the specific features of antitrust damages litigation. The enforcement of antitrust damage claims is risky and complex, and requires a combination of specific economic, legal and IT expertise as well as administrative and financial means to cover potentially lengthy litigation. The Damages Directive has led to improvements in the last few years (see Krüger/Weitbrecht, *Kollektiver Rechtsschutz im Kartellrecht*, § 19, paras. 9-17; see also, recently, the Court of Appeal (England & Wales) in *Evans v Barclays Bank PLC & Ors* [2023] EWCA Civ 876, paras. 118 et seqq). But consumers, SMEs and even large corporate victims still face many practical obstacles to the enforcement of their rights, such as:

- Need to demonstrate and prove the detrimental price effects of the competition law infringement causing harm to the cartel's business partners. The economic analysis and quantification of antitrust damage, including causality, usually requires market-wide data and information, ideally covering the affected market before, during, and after the infringement;
- Information asymmetries vis-à-vis the infringers, as well as a lack of evidence, due to the secret nature of cartels;
- Possible burden on ongoing business relationships due to lawsuits against business partners on

whom the plaintiff might be dependent (fear of retaliation, e.g. delivery stops);
- Risk of long-lasting litigation due to the legal and economic complexities involved;
- High costs risks (e.g., lawyers, economic experts, court fees, use of internal resources) which might even exceed the individual harm. This is even more relevant because cartels lead to a cost-risk asymmetry by their very nature, as the plaintiff may be confronted with all the several cartel members who thereby multiply the adverse cost risk of the plaintiff, while they can share their own costs – it is common practice in antitrust litigation that defendants set up 'joint defence committees' to bundle all their resources and know-how; and
- Difficulty in raising third-party funding for litigation, as the potential harm to an individual from the infringement may be too small to attract investors.

According to an empirical study recently published by the German Ministry of Justice on the reasons for the decreasing number of actions filed with the courts in Germany, companies, when deciding whether to take legal action, take into account that costs of litigation are charged to the balance sheet, but the litigation profit is booked only as 'other income'. Thus, an individual action for damages in cartel cases is often considered worthwhile only if the amount in dispute is at least EUR 10 million, given the risk of litigation costs (e.g., for lawyers, experts and economists). In the case of smaller damage amounts, "*an attempt must be made to bundle the claims of several companies*", which is why 'legally certain assignment models' are required (see final report on the research project *Erforschung der Ursachen des Rückgangs der Eingangszahlen bei den Zivilgerichten* of 21 April 2023, p. 177).

Thus, as Advocate General Jääskinen recognised in his Opinion on *CDC Hydrogen Peroxide*, the emergence on the legal scene of players whose aim is to combine 'assets based on claims for damages arising from infringements of EU competition' law demonstrates precisely that it is often "*not reasonable*" for injured parties to sue the infringers themselves individually (see AG Jääskinen, *CDC Hydrogen Peroxide*, para 29).

Advantages

The assignment model follows strong practical needs and offers significant advantages to the victims of competition violations, in particular:

- Synergies for the quantification of damages. The central collection and analysis of data from a multitude of injured parties (by the assignee as a specialised third party which itself has no competitive relationship with them) enhances the chances of proving the harm caused by the infringement. In turn, this also minimises the risk of unmeritorious claims;
- Decoupling ongoing business relationships from litigious law enforcement (e.g., a direct customer of the cartel does not have to take action itself against its ongoing suppliers);
- Synergies for the enforcement of claims in and out of court. The assignors benefit from a better cost-risk ratio through economies of scale and more bargaining power in settlement negotiations. Defendants deal with fewer plaintiffs compared to the (hypothetical) situation in which each assignor sues separately and may reach a 'once-and-for-all' judgment or settlement (see also Recital 48 Damages Directive). Courts need to take evidence only once with regard to a multitude of parties and avoid conflicting judgments (especially if the assigned claims involve different market levels and thus the issue of the passing on of damages);
- Outsourcing of the complex, time- and cost-intensive process of evidencing damages and

enforcing the claims; and
- Allowing de facto access to funding. The assignors benefit from the fact that the assignee who acquires the claims usually bears all the costs of their legal enforcement. The assignee has access to third-party litigation funding at attractive terms through the bundling and hence aggregation of assigned claims (see See Schreiber/Seegers, *Collective or Class Actions and Claims Aggregation in the EU: the Claimant's Perspective*, Heaton/Holt (eds.), GCR Private Litigation Guide, 3rd ed. (2021) p. 41).

Lack of alternatives

The contractual bundling of claims through assignments is intended to overcome the often-complained fact that provisions in the EU do not provide effective collective redress in competition law. The referring Regional Court of Dortmund confirms this for Germany in detail.

In fact, classical procedural means, such as the joinder of actions (in Germany: *Streitgenossenschaft*), have hardly gained practical relevance in antitrust litigation. Joined actions of different injured parties are still individual actions with all related disadvantages (see above). A joinder of actions is regularly unstable in the course of the proceedings (e.g., due to individual settlements) and difficult to manage, if they come at all before the same court. In addition, claimants involved must be careful not to commit a cartel offence themselves by jointly using their commercial data for a damage assessment. Similarly, genuine factoring is mostly only a theoretical option and not really attractive for competition law victims (for this, see Petrasincu/Unseld, *Zulässigkeit des Sammelklage-Inkassos nach den financialright-Entscheidungen des BGH – Zum Urteil des LG Mainz im Rundholzkartell*, Neue Zeitschrift für Kartellrecht 1 (2023) p. 9 (13).

Finally, the EU Directive 2020/1828 on representative actions also offers no real alternative. Firstly, it does not even list competition law as an area of law to which it applies. Secondly, it concerns only claims of consumers, who, however, hardly play any role in private antitrust enforcement due to their small, dispersed, damages (if any) and their typical lack of storing relevant evidence (e.g., invoices for the purchase of cartelised products years before). In contrast, companies and business customers having purchased the cartelised product commercially on a large scale and having therefore regularly suffered significant harm are *not* protected by the Directive. Thirdly, the opt-in representative actions can be filed by non-commercial bodies such as consumer associations. However, the latter typically do not have the personal, organisational and financial means to cope with the complexity of antitrust damages actions, in contrast to commercial plaintiffs specialized in actions under the assignment model. [1]

Although the German implementation act opens representative actions al to small businesses (with up to 10 employees) and covers competition law, this does not significantly change the situation in practice.

The issue at stake before the CJEU

German Legal Services Act

The assignment model may be subject to special rules under the applicable national law. In

Germany, it usually requires an authorization for the provision of debt collection services under the Legal Services Act (*Rechtsdienstleistungsgesetz*, RDG) (English translation available here).

The RDG regulates the authorization of natural and legal persons to provide certain out-of-court legal services in Germany, such as debt collection (*Inkassozession*), outside the legal profession. [2]

The statute places this activity under a separate authorisation requirement. If claims are assigned for the purpose of collection to a non-lawyer, who is not registered for debt collection services with the competent authority, such assignments are null and void.

This is precisely the danger the plaintiff faces in the *Roundwood* case pending before the CJEU. If the assignments of the sawmill companies were null and void due to a violation of the RDG, the plaintiff would have to expect a dismissal of its action for lack of standing.

There is no doubt this plaintiff (assignee) is duly registered for debt collection services under the RDG. But according to some German lower instance courts, debt collection services (specifically) in the field of competition law are impossible, because this area of law would be 'too complex' particularly in view of the requirements for a debt collection authorization.

The Regional Court of Dortmund follows this view at least for 'stand-alone' cases, such as in *Roundwood*. However, it doubts whether it would be compatible with EU law if private enforcement of competition law were, therefore, not possible at all under the assignment model and the RDG. The CJEU must now fundamentally deal with this question which also concerns similar restrictions on antitrust enforcement in other Member States.

No need to request the CJEU in the case at hand

As far as German law is concerned, the question referred by the Dortmund court is, in principle, moot. The view according to which an assignment model such as in *Roundwood* would categorically violate the RDG has already been rejected by both the German Federal Court of Justice and the legislator. [3]

German Federal Court of Justice

The Federal Court of Justice (*Bundesgerichtshof*) already rejected a narrow interpretation of the RDG in its landmark *LexFox* judgments of 2019 and 2020. Instead, it demands a 'liberal understanding of the notion of debt collection service', taking into account the fundamental rights of both the debt collection service providers and the assignors as well as changed realities of life. The Court also affirmed both the assumption of costs by the assignee and the agreement of a success fee (see Esp. Federal Court of Justice, *LexFox I*, e.g. paras 141 and 171; *LexFox IV*, paras 54-56).

In its *AirDeal* ruling in 2021, the Court fundamentally affirmed the admissibility of what it calls a 'class action debt collection' (*Sammelklage-Inkasso*). In particular, the Court considered the large scale bundling and joint judicial enforcement of claims for damages on an assignment basis by a

'class action business for complex claims' (in the words of the Court) which is registered for debt collection services as in line with the RDG. Although the *AirDeal* case does not concern competition law, the Court referred to the necessity of assignment actions specifically for the enforcement of cartel damage claims of injured companies. It considered in particular collective redress under the so-called 'model declaratory action' (*Musterfeststellungsklage*) in Germany, which is limited to consumer claims, as not being a suitable alternative. The Court in *AirDeal* again upheld the combination of contingency fee, assumption of costs and authorisation of the plaintiff to conclude irrevocable settlements, all agreed upon with the injured parties under the assignments (see Federal Court of Justice, *AirDeal*, esp. paras. 8, 44, 57 and 62 commented by Krüger/Weitbrecht, *Bundling Claims by way of Assignment in Germany*, Mass Claims 2 (2021) p. 107 and see also Higher Regional Court of Munich, para 54).

Advancing this case law, the Federal Court of Justice in its *Financialright* judgment of 2022, concerning another class action debt collection in the *Diesel* case, even recognized 'foreign law' as a capable subject of debt collection. It rejected a restriction of permissible debt collection activities to any sub-areas of the law. Further, it does not exceed the collection authorisation under the RDG if the service provider's expertise, proven to obtain this authorisation, is not sufficient to enforce the claims in question, because they require a complex legal assessment. If necessary, the service provider must acquire the necessary know-how. Equally, the Court saw no problem in the commercial nature of the debt collection service and affirmed the financing by a third-party litigation funder (see Federal Court of Justice, *Financialright*, paras. 18, 27 and 54).

Thus, the criticism of the assignment model in competition cases, which underlies the Dortmund referral to the CJEU, is already misguided under German law.

German legislator

This has also been confirmed by the German legislator. In the reform of the RDG by the so-called Legal Tech Act in 2021, it expressly rejected the exclusion of competition law and certain other legal areas from debt collection. Instead, with explicit reference to competition law, the Government emphasised that debt collection service providers are able to familiarise themselves with complex areas of law. The opposing view of the Federal Council (*Bundesrat*), supported by some *Länder* not least to defend themselves against the assignment actions in *Roundwood* (where they are defendants!), has been rejected by the legislator (see Printed Matter of the Bundestag no. 19/27673 (2021) pp. 61-62).

To ensure sufficient expertise, only a description of the intended activity (e.g., bundling of claims) and the relevant field of law (e.g., competition law) is required to obtain a licence for debt collection services under the RDG 2021, though the competent registration authority may require extended proof of expertise (Section 2(1)(4) of the 2021 Legal Services Regulation (*Rechtsdienstleistungsverordnung*)

Debt collection service providers already registered and engaged in such activities before the amendment of the law were allowed to submit a corresponding certificate of expertise during a transitional period, in order to continue their activities (see Federal Court of Justice, *Financialright*, para 30). The plaintiff in *Roundwood* did this as well. Again, there should be no doubt about the current validity of the assignments under German law.

No difference in stand-alone actions

Accordingly, there is also no room for considering a violation of the RDG, as the Dortmund Regional Court does, given at least in the case of stand-alone actions, as they would be particularly complex. Any complexity does not in itself exclude an authorization under the RDG.

In addition, the Court's distinction as to whether an action is based on an administrative finding of the antitrust infringement, which is binding for the court (follow-on), or not (stand-alone), appears neither convincing nor practicable (see Section 33b of the German Competition Act (in EN here) and Article 9 Damages Directive). Rather, it would raise difficult questions: How could a rule of evidence for judicial proceedings affect a material assignment agreement which (also) covers extrajudicial legal services? What about 'hybrid' litigation involving both follow-on and stand-alone elements (e.g., alleging a cartel period going beyond the administrative finding which is limited to a certain 'minimum' period)? And do we want legal uncertainty with regard to standing in court, if this were to depend on the outcome of a dispute over the right interpretation of a fining decision (e.g., due to its ambiguous wording)?

Contradiction of the Dortmund opinion with further national case law

In *Sugar*, the Higher Regional Court of Karlsruhe unreservedly confirmed the admissibility of the assignment model in cartel cases, provided only the assignee is registered for debt collection services under the general rules. Accordingly, the Karlsruhe Court did not see a conflict with the EU principle of effectiveness and the necessity of a referral to the CJEU under Article 267(2) TFEU:

"*Bundling of claims for effective enforcement (…) would also be possible within the framework of the RDG (see on "class action debt collection": Federal Court of Justice, judgment of 13 July 2021, II ZR 84/20, AirDeal). If Plaintiff were itself a registered person pursuant to Section 10(1)(1) no. 1 RDG, a corresponding legal service by Plaintiff with regard to the bundled claims would also seem possible. However, the principle of effectiveness under EU law does not require that such requirements for the quality of legal service providers be waived in the case of an assertion of antitrust damages claims. In particular, it does not constitute an excessive impediment to the enforcement of the cartel prohibition if a national registration procedure is provided for in order to ensure a minimum quality for the legal service provider who is to act in this context. (…) The requirements for a referral decision to the CJEU pursuant to Article 267(2) TFEU are not met. (…) The interpretation of the principle of effectiveness standardised in Article 4 [Damages Directive] can be based on the established case law of the CJEU on the "effet utile" principle. The question raised by Plaintiff overlooks the fact that under German law it is perfectly possible to bundle cartel-related damages actions by way of assignments"* (Higher Regional Court of Karlsruhe, judgment of 17 Nov 2021, 6 U 56/20 Kart, *Sugar Cartel*, paras. 212, 241 (translation and omissions by us).

Confirmation of the assignment model under EU law to be welcomed

However, if one were to consider correct that national law does not allow for the assignment model ('class action debt collection') in competition law cases at all, contrary to the Karlsruhe court, then the Dortmund Regional Court's request for a preliminary ruling is indeed making a point. The Court doubts that excluding access to the assignment model in competition cases would be in line with EU law.

Principle of effectiveness

The Regional Court rightly points to the need for an effective enforcement of the prohibition of cartels in Article 101 TFEU. As the CJEU regularly emphasizes, the EU competition rules rely widely on an effective regime of private enforcement, namely actions for damages, which serve not only private interests (compensation) but also the public interest in the maintenance of effective competition (by deterrence). Thus, the full effectiveness of Article 101 TFEU and, in particular, the practical effect of the prohibition laid down its paragraph 1 would be put at risk if it were not open to any individual to claim damages (see CJEU rulings in *Sumal*, paras 33 and following and *Skanska*, paras 25 and 45). The right to full compensation (see Article 3 Damages Directive) is directly rooted in EU law, and it is up to the national courts to apply the provisions of EU law in areas within their jurisdiction and to ensure that those rules take full effect and protect the rights which they confer on individuals (see CJEU rulings in *Donau Chemie*, para 22; *Courage*, para 25; and *Manfredi*, para 89).

Certainly, it follows from the procedural autonomy of the EU Member States that, in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right to claim compensation. However, according to the CJEU, the rules applicable to actions for safeguarding rights which individuals derive from the direct effect of EU law must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) (see CJEU rulings in *Volvo and DAF Trucks*, para 50; and *Cogeco*, paras 42 and 43).

As Article 4 of the Damages Directive stipulates:

"*In accordance with the principle of effectiveness, Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law*".

If national rules and procedures are not designed or cannot be applied in a way which does not render the exercise of the right to compensation practically impossible or excessively difficult, the national court must set aside the provision of national law which conflicts with EU law. Following settled case law of the CJEU, the possibility for an effective exercise of the right to full compensation must not be weakened, diminished or even jeopardized (see *Simmenthal*, para 21; *Factortame*, para 21; and Donau Chemie, para 20).

This, however, would exactly be the case if 'class action debt collection' (within the meaning of the RDG) were not available for victims of competition law infringements.

Even if there has been an increase in legal actions in recent years, this should not obscure the fact that cartel damages are still essentially uncompensated (see above). All parties injured by an

antitrust infringement make their own cost-benefit calculation as to whether and how to enforce their claims. Each of them assesses the above-mentioned obstacles to private antitrust enforcement (e.g., difficulties in proving damage, burden on ongoing business relations, significant management and time effort, enforcement costs above claim value, difficulties in reaching fair settlements) depending on the individual circumstances and the case at hand. Companies damaged by cartels make a weighted, informed decision in each individual case as to whether and how to enforce their rights; this is already part of the management's duties towards the shareholders. If they choose not to assert their claims for damages resulting from a competition law infringement, this is not a voluntary waiver, but because they find the enforcement unreasonably difficult or risky.[4]

However, the following cannot be ignored: (i) there exist significant obstacles for individual antitrust damage actions; (ii) tens of thousands of cartel victims throughout the EEA have opted for the assignment model; and (iii) the assignment model allows for the enforcement of claims which otherwise would not be enforced at all (on the importance of the specific features of damage actions in the field of competition law, see also, *Cogeco*, paras 42 and 46 – competition cases require a complex analysis of facts and economic circumstances, to be taken into account in the interpretation of limitation periods-). Cartel victims have obviously concluded that individual actions or recourse to statutory means of collective redress, if open at all, are not feasible for them.

This was also highlighted in the expert hearings on the Legal Tech Act before the German Parliament, in the context of which the legislator finally rejected a categorical prohibition of the assignment model under the RDG (see above). Representative is the following statement:

"*There is a great deal of uncertainty as to whether there is a justified need for non-lawyer service providers in addition to the legal profession, because there is no reliable empirical basis in Germany. However, there are such studies in other countries of the Western world, which show that there are a variety of reasons for people seeking justice to refrain from pursuing their claims. This may be because people do not have the financial means to pursue their claims (assuming they know about them), or because they do not want to because the risk of pursuing a claim is too high. (…) The doubts of consumers and businesses in pursuing legal claims play a role for small as well as for large amounts in dispute: (…) Before asserting a claim for damages, the haulier must weigh up whether it wants to go it alone against an overpowering phalanx of truck manufacturers and cartelists, if the preparation of an economic expert opinion alone requires at least a six-figure sum for the presentation of its damages, and if it also jeopardises its relationship with these manufacturers, which can prove detrimental to his company. The driver of a diesel vehicle has to consider whether she wants to fight alone against a car manufacturer that is surrounded by thousands of claims and spends billions on his defence – for the individual plaintiff her case may have a value in dispute of e.g. EUR 10,000, but for the company each case has a value in the billions, because any precedent to the detriment of the company must be prevented by all means (in these cases, service providers such as Financialright/myRight, CDC et al. play a role, bundling claims, providing financing and then hiring highly specialised lawyers to take concerted action against cartelists et al.). It does not matter whether clients have legal expenses insurance or not, because among the clients of the debt collection service providers are numerous assignors with legal expenses insurance. All of these service providers have tens of thousands of clients who have decided to assert their claims in a different way than in the traditional system*" [5].

In short, for the injured parties opting for the assignment model, the realistic alternative was not to sue individually nor to use other collective remedies, but to do nothing. Doing nothing means no compensation for those victims and certainly not full compensation for the harm caused by the

infringement. It means cartels can keep the illegal profits – which could be skimmed off by assignment actions – and will remain profitable. It means, finally, the prohibition of cartels is not effective.

It follows that national laws categorically excluding the effective bundling and enforcement of antitrust damages claims, as the Dortmund Regional Court assumes for the German RDG, would make the exercise of the EU right to full compensation excessively difficult, if not practically impossible, for many of the parties concerned, and hence jeopardise the full effectiveness of Article 101 TFEU, namely the practical effect of the prohibition of cartels.

Damages Directive

The role of the assignment model and its contribution to the private enforcement of competition law has been recognized by the Damages Directive. It expressly points to the transfer of claims in Articles 2(4) and 7(3). Article 2(4), third alternative, and in particular confirms the standing of parties acquiring and enforcing claims for antitrust damages, i.e., assignees:

"*Action for damages" means an action under national law by which a claim for damages is brought before a national court (…) by a natural or legal person that succeeded in the right of the alleged injured party, including the person that acquired the claim*".

To comply with this provision, national law may still regulate the acquisition of an antitrust damage claim as such but may hardly lead to categorically excluding this acquisition for the purpose of enforcing the damage claim. The latter is exactly what the RDG in Germany (supposedly) does.

It is irrelevant that the Directive does not require Member States to introduce 'collective redress mechanisms' for the enforcement of Articles 101 and 102 TFEU (see Directive's Recital 13). The assignment model opens a way for injured parties to *de facto* bundle their claims for damages on a material law level and within the system of individual legal actions. This has nothing to do with "*collective redress*" and its procedural mechanisms (e.g., representative action) (this has also been pointed out by Germany to the European Commission ahead of the Damages Directive, see e.g. Printed Matter of the Federal Council no. 248/08(B) (2008) p. 5). Article 2(4) makes this clear by distinguishing the right of action under assigned law in its *third* alternative (see above) from means of collective redress in its *second* alternative ('[an action] by someone acting on behalf of one or more alleged injured parties where Union or national law provides for that possibility').

Rather, Articles 2(4) and 7(3) of the Damages Directive are specifically aimed at cases which would be classified as class action debt collection under the RDG, such as in *Roundwood*. Considering assignment actions of this kind, the preparatory works to the Directive pointed out that enforcing aggregated or bundled antitrust damage claims is already known to most Member States. An "*express rule of law indicating that an assignment of a right of action in a civil competition case is lawful*" was explicitly recommended, however, because "*such a provision would provide the essential legal certainty for third party funders to provide funding to litigants across the Union. Without such a provision it is likely to be very difficult for funders to enter a number of national legal markets to provide necessary funding* (CEPS/EUR/LUISS, *Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios*, Final Report for the European Commission (2007) pp. 285 and 627). Furthermore, it was emphasised that "*claims transfer to a*

third party may help to overcome the problem of lack of participation by injured parties" (DG Internal Policies, *Collective Redress in Antitrust*, study for the European Parliament (2012) p. 37). Consequently, according to the European Commission, the Damages Directive "*refers to the possibility that a person may acquire the claim of another person. The goal of such acquisition may be to bring a joint action which may contribute to ensuring consistency between damages actions that are related to the same competition law infringement*" (para 27).

According to Recital 12 Damages Directive, the rules on standing in Article 2(4) "*reaffirm*" the *acquis communautaire* on private antitrust enforcement. Indeed, Articles 2(4) and 7(3) are to be read together with Article 3(1), pursuant to which the Member States shall ensure that each victim of competition law infringements is 'able to claim and to obtain' full compensation for the harm, and Article 4, which recites the effectiveness principle. This confirms once again that compensation under the assignment model must be made practically possible in accordance with EU primary law and independent of the Directive's temporal scope.

Fundamental rights

In Germany, both the Federal Constitutional Court and the Federal Court of Justice consider the availability of debt collection services and access to justice through them as matters of fundamental rights. They point to the guarantee of property of those seeking justice (the injured parties) under Article 14 of the constitution (Basic law – *Grundgesetz*) and to the right of the debt collection service providers to exercise their profession under Article 12(1) Basic law. In particular on class action debt collection, the Federal Court of Justice held:

"*If business models such as the one of the Plaintiff lead to an overall increase in the number of proceedings at the civil courts, this will generally reflect an overcoming the rational disinterest of those seeking justice. The facilitated "*access to justice*" that comes to light here does not justify restricting Article 12(1) of the Basic Law*" (see Federal Court of Justice, *AirDeal*, para 33; and *LexFox I*, para 110).

The assignment model has actually led to an increase in antitrust damages actions. It is therefore hardly surprising when the Dortmund Regional Court's request to the CJEU also points to the right of the injured parties to effective legal protection. It is a right which specifically guarantees access to justice and is closely linked to the effectiveness of the right to full compensation rooted in EU competition law (see above). Both the victims' right to an effective remedy under Article 47 of the EU Charter of Fundamental Rights (Charter) and their right to property under Article 17 Charter, which also covers its "*assets based on claims for damages arising from infringements of EU competition*" (AG Jääskinen), are part of the *acquis communautaire* in private antitrust enforcement (see OJ EU 2013 C 167/19 para 4; see also Krüger/Weitbrecht, *Kollektiver Rechtsschutz im Kartellrecht*, Fuchs/Weitbrecht (eds.), Handbuch Private Kartellrechtsdurchsetzung (2019) § 19, paras 20 and following).

The assignment model in the private antitrust enforcement of other Member States

While (only) the lower courts in Germany are still reluctant to accept the assignment model, it plays an important role in the private antitrust enforcement in other Member States, such as the

Netherlands, Finland and Austria.

For example, the District Court of Helsinki, by judgment of 4 July 2013 no. 36492 in *CDC Hydrogen Peroxide Cartel Damage Claims v Kemira*, recognised the assignments of several companies to a CDC entity collecting damage claims in the follow-on *Hydrogen Peroxide* litigation. The Court referred in particular to 'CDC's better resources for gathering the information necessary for the matters under consideration' and the fact that the assignors did not succeed in settling their claims out-of-court, to explain why they decided to transfer their claims to CDC.

In the Netherlands, it is settled case law that cartel victims can assign their claims to a specialised plaintiff. In 2014, the Court of Appeal of Amsterdam, with regard to the follow-on action brought by vehicle EWD against members of the *Air Cargo* cartel, rejected the allegation according to which the bundling would constitute an abuse of procedure. In another *Air Cargo* action, the District Court of Amsterdam held that the assignments between the shippers and the claims vehicle Equilib were not contrary to public policy in its judgment of 13 September 2017. It held:

"*Combining such claims by means of assignment to a litigation vehicle is thus a legitimate means by which to achieve efficient settlement of cartel damage, as now also follows from Directive 2014/104/EU*" (para 4.27).

This was confirmed by the Amsterdam Court of Appeal in two judgments of 10 March 2020 (see here and here). Similarly, the same appeal court held in its judgment of 4 February 2020 that the claims for cartel damages in *Sodium Chlorate* were effectively assigned to the plaintiff there (para 3.14.3).

In its more recent judgment of 27 July 2022 in *Trucks*, the District Court of Amsterdam recognized the assignment model used by five plaintiffs again. It explicitly dealt with potential limitations from the German RDG and the English champerty and maintenance doctrine. The Court considered neither applicable to the case at hand. In addition, however, the judges emphasised that a nullity of the assignments would only benefit the cartel members and not the victims of the infringement. These consequences would not be justifiable and not be in line with Articles 2(4) and 7(3) Damages Directive, which speak in favour of assignments (paras 2.37).

Conclusions

Claiming antitrust damages poses many significant difficulties in practice. For many affected companies it would be unreasonable from either a practical or business policy perspective to take action against the infringers individually. The statutory instruments of collective redress do not offer a viable alternative.

In continental Europe, the assignment model has therefore become an established, private solution for the bundling of damage claims against cartel members. This involves companies specialised in the analysis and enforcement of antitrust claims. Their activities are specifically requested by harmed companies after weighing all alternatives and often on advice of their lawyers. Many companies would otherwise not pursue their claims for damages at all.

EU law expressly recognises this form of effective enforcement. Restrictions on the assignment model (specifically) in competition law would conflict with this. The principle of effectiveness, Articles 2(4), 3(1), 4 and 7(3) Damages Directive, as well as Articles 17 and 47 Charter, each suggest that assignment actions for damages must be possible in all Member States.

In principle, national law might impose certain requirements on assignees to ensure proper operation. But national laws which categorically exclude the effective bundling and enforcement of damages claims in competition law cases (as the Dortmund Regional Court assumes under the RDG, although contrary to the German legislator) would make the exercise of the EU right to full compensation excessively difficult, if not practically impossible, for many of the parties concerned and hence jeopardise the full effectiveness of Article 101 TFEU.

Many cartel cases are cross-border and thus require a choice of forum. The CJEU confirmed that competition law victims can chose the forum to enforce claims, including plaintiffs operating on the basis of the assignment model. But the assignment model should be accessible for cartel victims in all Member States from the very outset.

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* This piece was originally published in CDC, see here.

[1] See the German Federal Cartel Office, *Annual Report 2020/2021*, p. 23; Stadler, *Musterfeststellungsklagen im deutschen Verbraucherrecht?*, Verbraucher und Recht 3 (2018) pp. 83, 86; Marktworth, *Coding a Collective Consumer Redress Vehicle in Germany*, Journal of European Consumer and Market Law 2 (2023) pp. 89, 94 et seq.; on 'legal tech debt collection' vs. representative action, see also Scherer, *Abhilfeanspruch gem. Art. 9 Abs. 1 VerbandsklagenRL /§ 1 Abs. 1 Nr. 1 VDuG-E und Verbraucherschadensersatzanspruch gem. § 9 Abs. 2 UWG – Kollektivrechtsschutz contra Individualrechtsschutz?*, Verbraucher und Recht 12 (2022) p. 443.

[2] A registered debt collection service provider may also assert the acquired claims as a party in court proceedings, but the provider must then be represented by a lawyer: see, e.g., Federal Court of Justice, *AirDeal*, paras 12-19.

[3] See Petrasincu/Unseld, *Zulässigkeit des Sammelklage-Inkassos nach den financialright-Entscheidungen des BGH – Zum Urteil des LG Mainz im Rundholzkartell*, Neue Zeitschrift für Kartellrecht 1 (2023) p. 9; Heinze, *Kartellrechtliches Sammelklagen-Inkasso nach Airdeal und RDG-Reformgesetz – zugleich Anmerkung zum Urteil des LG Stuttgart in Sachen Rundholzvermarktung*, Neue Zeitschrift für Kartellrecht 4 (2022) p. 193; Wagner/Weskamm, *Anspruchsbündelung durch Legal Tech: Im Dschungel des RDG*, Festschrift für Martin Henssler zum 70. Geburtstag (2023), p. 1605.

[4] Krüger/Seegers, *Kartellrechtliche Abtretungsmodelle, Legal-Tech und die Reform des Rechtsdienstleistungsgesetzes: Wer wird geschützt und wovor?*, Betriebs-Berater 18 (2021), p. 1031 (1033); See on a similar reasoning under the UK Competition Act the Court of Appeal (England & Wales) in *Evans v Barclays Bank PLC & Ors* [2023] EWCA Civ 876, paras. 117 et seqq.

[5] Hartung, *Written expert opinion by to the Committee on Legal Affairs and Consumer Protection of the German Bundestag* (2021) paras 23 and 25 (translation and omissions by us); see also the parallel expert opinion of the German Legal Tech Association, pp. 3.; Minutes of the 151st Session of the 19th German Bundestag of 5.5.2021, pp. 22, 29 and 30.

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