

CDC CARTEL DAMAGE CLAIMS™
THE EUROPEAN BRAND FOR PRIVATE ANTITRUST ENFORCEMENT

Private Antitrust Enforcement

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What is missing?

*Myths &
facts
regarding
private
enforcement
in the EU*

- **“The overall number of antitrust damage claims in the EU is raising significantly so that no action is required...”**
- **Facts:**
 - Follow-on actions only in 25% of all COM cases, significantly lower percentage for NCA cases
 - Overall damage amount claimed are nowhere close to damage foregone by victims of in EU of up to €23 billion in 2012 alone (COM estimate)
 - Focus on small number of jurisdictions (Austria, Finland, Germany, Netherlands and United Kingdom)
 - Individual claimants typically large companies or public entities
 - Bundling of claims by specialised entities
 - Large part of justified damage claims still foregone (in particular SMEs and consumers), resulting in perpetuation of illegal benefit for cartel members

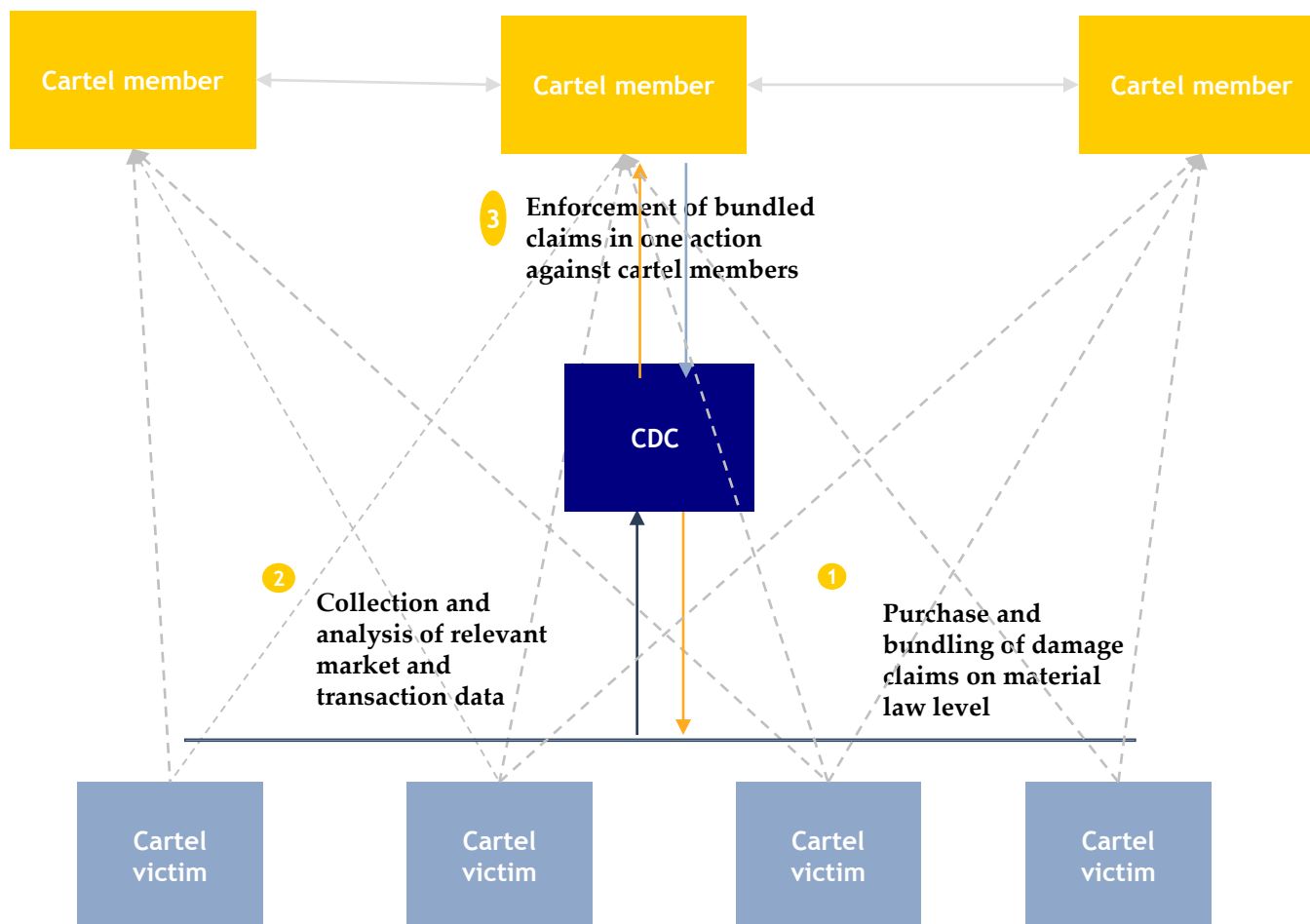
*Myths &
facts
regarding
private
enforcement
in the EU*

- **“Private enforcement results in ‘ambulance chasing’ and unmeritorious claims...”**
- **Facts:**
 - In EU virtually always follow-on actions to cartel decision by competition authorities
 - Very careful *ex-ante* assessment of claimants due to legal and economic risks involved in potentially long-lasting litigation
 - Information asymmetry and lack of data/evidence
 - High upfront administrative and cost burden for claimants
 - Procedural tactics by defendants to delay proceedings
 - Some claimant/funding firms have already exited ‘the market’, others have only brought one single antitrust damage action
 - Current risks inherent in litigation preclude bringing of unmeritorious cases

*Myths &
facts
regarding
private
enforcement
in the EU*

- **“Private damage claims are targeted at leniency applicants and therefore have a negative effect on leniency programmes...”**
- **Facts:**
 - In practice: No chilling effect observed on leniency programmes
 - Immunity from fines remains a significant incentive to apply for immunity/leniency
 - Damage actions typically brought against several cartel members and not solely against leniency applicant, other cartel members often drawn into litigation by third party notifications etc.
 - Leniency applicants do submit artificial appeals against fining decision in order to avoid binding effect
 - Leniency applicants can claim for contribution against other cartelists
 - Decisive factors for claimants where and against whom to bring an action are:
 - Effectiveness and reliability of judicial system, incl. costs
 - Relevant case law and precedents

Bundling of claims at material level as effective way of enforcing antitrust damage claims across the EU



Advantages:

- Outsourcing of enforcement to specialised entity
- Ongoing business relationships not harmed
- Access to data of multitude of cartel victims helps to overcome information asymmetry
- Creation of synergies for victims, defendants and court systems of MS
- Increases chances to obtain fair compensation and enforce claims in and out-of court which otherwise would be foregone (e.g. SMEs)

Method practiced across the EU and specifically recognised for antitrust damage claims by courts in D, NL, A, FIN, F

Development of consistent case law across EU Member States

- **Development of common approach of national courts to key procedural and substantive issues in follow-on damage claims**
 - Jurisdiction: Confirmation of applicability of Art. 6(1) and Art. 5(3) Brussels I Regulation to follow-on damage actions
 - Nature of antitrust damage claims and basic principles of liability
 - Non-contractual / tortious nature of claims
 - Joint & several liability of cartel members
 - Parent/subsidiary liability (personal responsibility of 'economic unit')
 - Confirmation of standing of direct and indirect purchasers
 - Interpretation of limitation periods in light of effectiveness principle
 - Estimation of damages and passing-on defence
 - Wide range of quantification methods
 - Legal assumption that cartels result in damage
 - Narrow applicability of passing-on defence
- Many aspects incorporated in draft EU directive

Development of consistent case law across EU Member States

■ Key judgments in the EU

■ Austria

- Supreme Court, judgment of 14 February 2012 - 5 Ob 39/11 - *Lifts & Escalators*
- Supreme Court, judgment of 2 August 2012 - 4 Ob 46/12m – *Hobex*
- Supreme Court, judgment of 20 November 2012 – 5 Ob 123/12t – *Payment cards*

■ Finland

- Helsinki District Court, judgment of 4 July 2013 – 11/16750 – *CDC HP vs Kemira*

■ Germany

- Higher Regional Court Berlin, judgment of 1 October 2009 – 2 U 17/03 – *Readymix concrete*
- Higher Regional Court Karlsruhe, judgment of 11 June 2010 - 6 U 118/05 (Kart) – *ORWI*
- Federal Supreme Court, judgment of 28 June 2011- KZR 75/10 – *ORWI*

■ Netherlands

- District Court Arnhem, judgments of 26 October 2011 and 16 January 2013 - Ref. 208814 and 208812 - *Tennet vs. Alstom and Tennet vs. ABB*
- District Court The Hague, judgment of 1 May 2013 – Ref. 414499 – *CDC vs Shell et al*
- Court of Appeal Amsterdam, judgment of 24 September 2013 – Ref. 200.109.253/01 – *Equilib vs KLM et al*

Development of consistent case law across EU Member States

■ Key judgments in the EU

■ Spain

- Supreme Court, judgment of 24 June 2012- 344/2012 - *Acor*

■ United Kingdom (selection)

- *Provimi vs Aventis*, [2003] EWHC 961
- *Devenish Nutrition vs Sanofi Aventis*, [2007] EWHC 2394 and [2008] EWCA Civ 1086
- *Cooper Tire vs Shell Chemicals*, [2009] EWHC 2609 and [2010] EWCA Civ 864
- *Emerald Supplies vs British Airways* [2009] EWHC 741 and [2010] EWCA 1284
- *National Grid vs ABB*, [2009] EWHC 1326 and [2012] EWHC 869
- *Toshiba Carrier vs KME*, [2011] EWHC 2665 and [2012] EWCA Civ 1190
- *Bord Na Mona vs BPI*, [2012] EWHC 3346
- *2 Travel vs Cardiff Bus*, [2012] CAT 19
- *Deutsche Bahn vs Morgan Crucible*, [2013] CAT 18

- Austria currently the MS with the most advanced case-law

*Comments
on the EU
draft
directive*

- **COM proposal overall positive...**
 - Codification of *aquis communautaire*
 - Clarification of standing for direct and indirect purchasers
 - Importance of principles of effectiveness and equivalence
 - Binding nature of national and COM decisions
 - Clear rules on limitation
 - Confirmation of joint & several liability of cartel members
 - Limitation of liability of immunity applicant to own 'share of harm' as effective incentive for first fully cooperative cartel member
 - Rebuttable presumption of harm
 - Damage claim includes
 - Price overcharge
 - Interest as of date of damaging event
 - Loss of profit
 - Focus on out of court settlements, e.g. suspensive effect of consensual dispute resolution

Comments
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directive

- ... however, COM proposal could be improved:
 - Access to evidence
 - *Per se* prohibition of access to leniency statements and settlement submissions not in line with *Donau Chemie* judgment (C-536/11)
 - Better: General proportionality test subject to court control
 - Clarification of ‘confidential information’ and ‘business secrets’: facts relating to infringement and commercial interest not to be sued for damages do not deserve protection
 - Passing-on defence to be excluded if claims from further down the distribution chain are *de facto* impossible or unfeasible (e.g. low value & dispersed claims) in order to prevent unjust enrichment of cartel members
 - Effective settlement mechanism in Art. 101 infringements requires final legal certainty for settling parties across EU jurisdictions and thus objective definition of ‘share of the harm’ (volumes criteria)

*What is
missing?*

- **Full transparency regarding facts of the infringement by publication of meaningful prohibition decisions**
 - Potential victims could assess *ex-ante* whether they are harmed and whether they want to claim for damages
 - Avoidance of lengthy access to evidence litigation before MS courts
- **Protection of rights of victims in the context of public settlements**
 - Publication of little or significantly less information on the infringement as real incentive for entering into public settlements
 - Current situation = bargaining to the detriment of third parties' fundamental rights (Art. 17 and 47 EU Charta)
- **Critical assessment of the 'success' of leniency programmes**
 - Conflict between public and private enforcement not proven
 - Leniency programmes can be strategically used against competitors; they inherently favour larger, well advised undertakings
 - Focus of authorities taken away from investigation of infringements which are really harmful to EU economy (e.g. raw material cartels)?

*What is
missing?*

- **Guidance on interest calculation**
 - Interest is a key aspect of damage claims, in particular in long-lasting cartels/damage proceedings
 - Cross-border effects of EU-wide cartels might result in parallel application of national laws from various MS
 - Significant differences and changes over time in applicable laws
 - Guidance/standards required for national judges in Art. 101/102 infringements in order to provide legal certainty for all parties and avoid lengthy litigation
- **Central register/website of all cartel decisions published by EU competition authorities (COM and NCAs)**
 - Central website accessible for potential victims across the EU
 - Public version of original decision
 - English summary of key facts of infringement
 - Could be implemented in the context of the ECN



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