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Private Antitrust Enforcement

– Experience and Perspectives –

Vereniging voor Mededingingsrecht
(The Hague, 25th April 2007)

The Roots of CDC

‘The first advantage of private enforcement is direct justice, which allows the victims of illegal anticompetitive behaviour to be compensated for the loss they have suffered’

[Commissioner Kroes 2005]

- **Starting point ‘German Cement Cartel’**
 - Uncovering of the nation-wide hardcore cartel by Bundeskartellamt in spring 2002
 - Heavy cement price slump directly after break-up of the cartel
- **Parties injured by the Cement Cartel: ‘What can we do?’**
- **Legal framework to support damage claims appeared clear**
 - National law provides legal basis for claims for damages based on infringement of Art. 81 EC and the national cartel prohibition
 - Landmark decision ‘Courage/Crehan’ of the European Court of Justice in 2001
- **Consequence: Foundation of CDC Cartel Damage Claims SA, Brussels, in summer 2002**

The Reality of Private Enforcement

'The picture that emerges from the present study on damages actions for breach of competition law in the enlarged EU is one of astonishing diversity and total underdevelopment'

[Ashurst 2004 – Comparative Report]

- **Actual obstacles**

- Hardly evidence on existence, duration, functioning of the cartel (stand alone cases)
- Difficulties to prove its detrimental effects (only subjective perception of the market)

- **Legal obstacles**

- Chances of success highly uncertain for individual companies (prior administrative decisions insufficient)
- Proof of causal links (individual standing); access to evidence (no pre-trial discovery nor disclosure)

The Reality of Private Enforcement

- **Economic obstacles**

- Costs of claim and damage substantiation (creation of know-how; comprehensive data collection and evaluation; expenditure of money and time; high manpower requirements)
- Legal costs ('loser pays' rule, court fees and attorneys' fees)

- **Obstacles due to firm policy**

- Reprisals concerned in case of a 'coming out'
- Entrepreneurial and/or personnel links to cartel members

CDC's Approach

- **Providing a ‘working platform’ to stimulate and to pool all the interests involved**
 - *Analysis of the market players’ interests*
 - *Companies affected by the cartel (injured parties)*
 - Possessing claims for damages; mostly small or medium-sized enterprises
 - Asking for means to overcome the obstacles to private enforcement
 - *Law firms*
 - Offering specialisation, experience, commitment and clients
 - Looking for solutions on behalf of clients
 - Trying to avoid conflicts of interest (no US-style plaintiff bar)

CDC's Approach

- **Providing a ‘working platform’ to stimulate and to pool all the interests involved**
 - *Economists*
 - Offering sound economic insights into cartel structures and effects
 - Trying to utilise and provide their knowledge and skills
 - *Investors*
 - Looking for investments, marketable claims and a return on capital
 - Offering funding of legal proceedings
 - *Cartelists (leniency applicants)*
 - Offering insights into cartels and markets
 - Asking for economic/legal incentives (‘Leniency PLUS+’)

CDC's Approach

- **Developing tools and providing specialised services to overcome the obstacles**
 - *Know-how*
 - Specialised personnel; computer-based data collection and assessment
 - Thus, lawsuits offering no reasonable prospects are avoided
 - *Special Procedures*
 - Damage evaluation using ‘tradebaCCC’
 - Thus, sound analysis of the market affected
 - *Bundling of claims*
 - Assignment and purchase of damage claims, or ‘general plaintiff’ (initialising, organising or supporting class actions, group actions or representative actions)
 - Collective settlement bargaining
 - Thus, aggregation of knowledge on the market affected, reduction of costs and risks, reducing costs per unit, and protection of anonymity
 - *Providing, organising of, litigation funding*
 - Integration of third party litigation funds

Where we are Now

- **Cement Germany (under appeal)**
- **Cement UK**
- **Hydrogene Peroxide**
- **Lifts and Escalators**
- **Others**
- **Non-formal networking**

Conclusions

‘More private antitrust enforcement through better access to damages: an invitation for an open debate’

[Commissioner Kroes 2006]

Contact

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