

CARTEL DAMAGE CLAIMS

- CDC -

Private Litigation: The situation in the Member States – Class actions?

– GCLC 4th Annual Conference –

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Overview

- Obstacles for plaintiffs in (collective) private damage actions in Germany
- The CDC-approach to effective collective damage claims enforcement
- Recent judgment in the German cement cartel case
- Some comments on the EC White Paper



Obstacles for (collective) private damage actions

- Legal obstacles
 - Unclear legal situation prior to changes in German Competition Act in 2005
 - Restrictive interpretation by courts
 - No effective collective redress mechanism for direct purchasers
- Practical obstacles
 - Evidence
 - Damage calculation
- Economic obstacles (in particular for SMEs)
 - Continuous business relationships
 - Cost intensive preparation and litigation
 - Uncertain outcome and loser pays rule



CDC-approach to effective claims enforcement

- Legal approach
 - Bundling by assignment and collective enforcement of damage claims of a multitude of damaged companies / persons
 - CDC enforces claims in its own name and assumes entire financial risk
 - Purchase price: Fixed part and variable part (up to 80 % of the successfully enforced claims)
- Economic approach
 - Centralised collection and analysis of purchase and market data on industry-wide basis
 - Well-founded conclusions with regard to cartel-related price overcharge and individual damage sustained by each company



German cement cartel case

- CDC bundled claims of 36 cement purchasers against members of the German cement cartel
- Total amount of damages exceeding € 170 million + interest (8% above base rate)
- Higher Regional Court (2nd instance) has confirmed admissibility of damage action
 - Substantiation: Sufficient to demonstrate the basis for damage calculation and specify a minimum amount
 - Right to claim: CDC may claim in its own name based on formal assignment of damage claims
 - Higher Regional Court has not granted right to appeal to Federal Supreme Court as case lacked fundamental relevance



Some comments on EC White Paper

- Practical experience shows that some form of collective enforcement is required
 - Representative actions: experiences in Germany and the UK are not encouraging
 - Opt-in collective action: each claimant still has to individually substantiate claim and damage
- Decisive trigger for future development: If damage claims become effectively enforceable and thus more valuable, the market will find solutions



Some comments on EC White Paper

- Focus on indirect purchaser claims combined with presumption of passing-on to end-consumers may not result in full compensation of damages
 - Limited damage suffered by indirect purchasers results in lack of economic incentive to start enforcement of damage claims despite availability of collective redress (e.g. UK dairy cartel)
 - Lack of court-proof evidence at end-consumer level not remedied by *inter partes* disclosure
 - Presumption of passing-on discourages actions by direct purchasers, resulting in lack of recovery of damages and perpetuation of unjust enrichment by cartel members
 - Parallel actions by direct and indirect purchasers or multi-level indirect purchaser actions – possibly in various jurisdictions – may result in unwanted “race for damages”



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