

CARTEL DAMAGE CLAIMS

- CDC -

Trends and developments in cartel damages actions

- The Law Society Competition Section-

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Dr. Till Schreiber



What are the obstacles for potential claimants?

- Practical obstacles
 - Knowledge of infringement and of right to claim damages
 - Substantiation of damage
 - Court-proof evidence on damage and causality of cartel
- Economic obstacles
 - Ongoing business relationships with suppliers
 - Cost and work intensive claims preparation and enforcement (management time, lawyer and court fees)
 - Financial risk: Uncertain outcome and loser pays rule
 - Long duration of legal proceedings
- Legal obstacles
 - Complexity and (still) long duration of litigation
 - No implementation of procedural collective redress mechanisms at national level



How to overcome the obstacles?

- Grouping of damage claims on a material law level by assignment
- Bundling of damage claims from a multitude of victims
 - Synergies result in meaningful incentive to start enforcement
 - Trigger for private damage actions in Europe (even in the absence of collective mechanisms)
- Collection and economic analysis of industry-wide purchase / market data; conclusions as regards:
 - Market-wide effects of the violation
 - Price overcharges
 - Damage of each company
- Enforcement in and out-of court in own name and on own account by CDC
 - Shifting of risks
 - Outsourcing of claims enforcement and clearing of balance sheets



The German cement cartel case

- 5 August 2005: Damage action by CDC against six members of the German cement cartel following the purchase of damage claims of 36 cement customers
- 14 May 2008: Higher Regional Court Düsseldorf confirmed the admissibility of CDC's damage action
 - Substantiation: Sufficient to demonstrate the basis for a damage calculation and specify a minimum amount
 - Right to claim: CDC may claim in its own name based on the formal assignment of damage claims
 - No suspension of civil damage proceedings until end of appeal against administrative decision
- 7 April 2009: Federal Court of Justice (BGH) confirmed the judgment of Higher Regional Court



Trends and developments

- Overall increased private enforcement activity in Europe
 - Companies under statutory obligation to assess/pursue claims
 - Damage claims increasingly perceived as valuable assets
- Importance of *lex fori*
 - Germany: Judgment of Higher Regional Court Berlin (1 October 2009 – *Transportbeton*) - award of substantial damages in follow-on action
 - Establishment of *prima facie* proof in relation to:
 - participation in cartel
 - implementation of cartel agreements
 - price effects of cartel on the entire market
 - Defendants can generally not rely on “passing-on defence”



Trends and developments

- Access to evidence
 - Provisions of *lex fori* (e.g. discovery)
 - Access to Commission file under Regulation 1049/2001?
 - COM: Restrictive practice, reviewed by General Court
 - EP: Victims must generally be allowed access to Commission documents, subject to protection of confidentiality
 - Access to evidence under national provisions
 - Netherlands: NCA granted access to report on findings (*sodium hypochlorite*)
 - Germany: Court granted access to file of the Federal Cartel Office including leniency documents (*Pfleiderer ./.* Bundeskartellamt)
 - Court of Justice: Access to COM documents (*Zwartveld*) and documents in possession of defendants or third parties (*Laboratoires Boiron*)



Trends and developments

- Requirement of creative solutions for private law implications of joint and several liability / contribution among infringers
 - Increased likelihood of follow-on actions have to be accounted for in overall risk mitigation strategy of infringers
 - Leniency PLUS⁺ concept by CDC
 - Practical limitation of liability of cartel member against provision of detailed evidence on infringement and damage
 - Opportunity to leave the front row of joint and several liability and limit risk exposure
 - Reconciliation of public leniency programmes and private enforcement

