

# CARTEL DAMAGE CLAIMS

- CDC -

---

---

## **Towards an Effective Legal Framework for the Enforcement of Damage Claims**

– ALDE Seminar Collective Redress:  
Moving the Debate Forward –

---

---

Dr. Ulrich Classen  
Brussels, March 4 2009



## Legal and economic background

- ECJ in *Courage* (2001) and *Manfredi* (2006):
  - Any person damaged by violations of Art. 81 or 82 EC has a right to full compensation, directly conferred by EC law
  - Any person must have the possibility to effectively enforce its damage claims (principle of effectiveness)
- Economic analysis of competition law violations:
  - Hardcore cartels alone result in annual damages of between € 25 and € 69 billion in Europe (Commission, Impact Assessment Report, SEC(2008) 405, para. 43)
  - Particularly affected: SME's and end-consumers
- However: Today rare attempts to recover damages due to insufficient economic incentives



# Cost-risk analysis of claims enforcement

- Effective damage recovery depends on threefold cost-risk analysis:
  - Victims: decision to claim damages
  - Infringers: decision to compensate (e.g. settlements)
  - Third party funders: decision to invest
- Legal framework must ensure predictability and legal certainty of cost-risk analysis:
  - Harmonisation of limitation periods
  - Access to evidence (e.g. Commission's case file)
  - Guidelines on calculation of damages
- Necessity: Improving the cost-risk-ratio of victims by mechanisms of collective redress



# Mechanisms of collective redress proposed by the Commission in its White Paper

- Two complementing types of collective actions:
  - Representative actions: qualified entities (e.g. consumer associations, state bodies or trade associations) bring action on behalf of identified or identifiable victims
  - Opt-in collective actions: victims deliberately decide to enforce their claims in one single action
- Collective redress is necessary to ensure effectiveness of the right to full compensation:
  - Shared burden, costs and financial risk of victims enforcing their claims (cost-risk-ratio)
  - Balancing the structural disadvantage of single victims vis-à-vis infringers
  - Alternative multitude of single actions would be problematic for Member States' court system



# Collective redress in competition law cases

- Proof of individual damages resulting from violation of Art. 81 or 82 EC complex (hypothetical market price)
- Direct purchasers
  - Incentive to bring/join actions given large amount of claims
  - Availability of evidence (e.g. invoices for entire cartel period)
  - Claims can grouped without collective redress
- Indirect purchasers:
  - Low incentive to bring or join damage actions given small amount of claims
  - Difficulty of court-proof substantiation and evidence
- Consumer associations prepared for administrative burden and costs of mass claims antitrust litigation?
  - Negative experience in UK: *Which?*, *Dairy and Milk Cartel*



# No factual presumption of passing-on of cartel-related price overcharges to end-consumers

- Commission's proposal:
  - When end-consumers bring damage actions against cartel members the former should be able to rely on the rebuttable presumption that overcharges in its entirety are passed on to their market level
- Rebuttable presumption in favour of end-consumers:
  - Not justified from economical perspective: Overcharges can rarely be passed-on in its entirety to indirect purchasers
  - Discrimination of direct purchasers (e.g. SME's) who always directly sustain the cartel-related damages
  - De facto restriction of damage actions by direct purchasers
  - Who shall rebutt presumption in course of litigation of end-consumers against cartel members?
  - Contrary to principles of full compensation, effectivity and, thus, property rights of direct purchasers (Art. 17 EU Charter on fundamental rights)



# Funding of collective redress

- Funding presupposes predictability of damage recovery and, thus, legal certainty
- Conversion of antitrust damage claims into valuable assets is a key element to solve funding problems:
  - Effective legal framework for the enforcement of damage claims will convert claims into valuable assets
  - Given the amount of the damages, there will be sufficient incentives for the parties concerned and other market participants (e.g. third party funders) to enforce their claims or to fund economically viable collective actions



# CDC-approach to effective claims enforcement

- CDC is a company that bundles damage claims on a material/substantive law level:
  - Purchase of claims (from a multitude of companies) resulting from the violation of EC and national competition law
  - Assessment of amount of damages: collection and economic analysis of purchase/market data, conclusions as regards
    - Market-wide effects of the violation
    - Overcharges paid
    - Cartel-related damage of each company
  - Enforcement of aggregated claim in its own name and on its own account in and out-of Court
- CDC enhances cost-risk-ratio for parties concerned and other market participants (e.g. third party funders) to engage in private claims enforcement
- Leniency PLUS+: Bonus program for members of the cartel willing to facilitate enforcement



# CARTEL DAMAGE CLAIMS - CDC -

Avenue Louise 475

B-1050 Bruxelles

Tel.: +32 (0) 2 2134920

[classen@carteldamageclaims.com](mailto:classen@carteldamageclaims.com)

[www.carteldamageclaims.com](http://www.carteldamageclaims.com)

