

CARTEL DAMAGE CLAIMS
- CDC -

Trends and developments in damages actions

- Cartel Risks 2010 -

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Private enforcement in Europe – a changing world at EU...

- Economic impact study by Commission confirmed magnitude of damages caused by competition law violations in Europe
 - Hardcore cartels alone result in annual damages of between € 25 and € 69 billion in Europe
- Proposal of directive on antitrust damages actions
 - Very disputed, in particular collective redress
 - Unclear whether new Commission will adopt the proposal
 - Guidelines on calculation of damages for national judges
- Commission Staff Working Paper sets out *aquis communautaire* already applicable before national courts
 - National provisions are subject to Community law principles of effectiveness and equivalence (*Manfredi*)
- Harmonization of substantive law applicable in cross-border damage claims under Art. 6 (3) Reg. 864/2007 (Rome II)

... and at Member States level

- Initiatives in various MS to facilitate damage actions (e.g. Germany, UK, Italy, Denmark, Portugal, Belgium)
- National courts across EU shape right of compensation
 - 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”
 - Spain: Judgment of Valladolid provincial court (9 October 2009 – *Sugar cartel*) – award of damages, rebutting economic argument that cartel did not cause damages
 - UK: Judgment of High Court in (27 October 2009 – *Cooper Tire*) – concentration of jurisdiction of claims against several members of a pan-European cartel based on joint and several liability

Practical implications for companies

- Overall increased private enforcement activity in Europe
 - Companies under statutory obligation to assess / pursue claims
 - Increased likelihood of follow-on actions have to be accounted for in overall strategy of infringers
- Access to evidence
 - Recognition of prima facie proof in *lex fori*
 - Access to Commission file under Regulation 1049/2001?
 - 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*)

Practical implications for companies

- Possibility of collective action?
 - Restrictive interpretation of representative action by UK Courts (*Emerald Supplies*)
 - Federal Court of Justice in Germany confirmed admissibility of CDC action based on bundling of damage claims by assignment (*Cement*)
- Requirement of creative solutions for private law implications of joint and several liability / contribution among infringers
 - e.g. 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

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