

CARTEL DAMAGE CLAIMS

- CDC -

Case study

- State of play and future trends of private enforcement in Europe -

Antitrust Litigation Conference



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Overview

- Where is the damage?
- What are the obstacles for potential claimants?
- How to overcome the obstacles?
- Case study: the German cement cartel
- Key drivers for the future development of private enforcement in Europe
 - Joint and several liability
 - Reconciliation of leniency programs and private enforcement
 - Access to information



Where is the damage?

- Damages by competition law violations
 - Commission: Hardcore cartels alone result in annual damages of between € 25 and € 69 billion in Europe
 - AAI Working Paper by John M. Connor: Median overcharge between 17% and 21% of sales (based on 516 hardcore cartels 1990 – 2008)
- Effective damage recovery depends on a threefold cost-risk analysis
 - Victims: decision to claim damages
 - Infringers: decision to compensate (settlements)
 - Potential third party funders (e.g. CDC or institutional investors): decision to invest in a case
 - Damage claims as valuable assets



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
 - Still unclear legal situation across European jurisdictions
 - No effective collective redress mechanism



How to overcome the obstacles?

- CDC-model: Grouping of damage claims on a material law level by assignment
- Purchase 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
- All costs and financial risks with CDC: Enforcement in and out-of court in own name and on own account



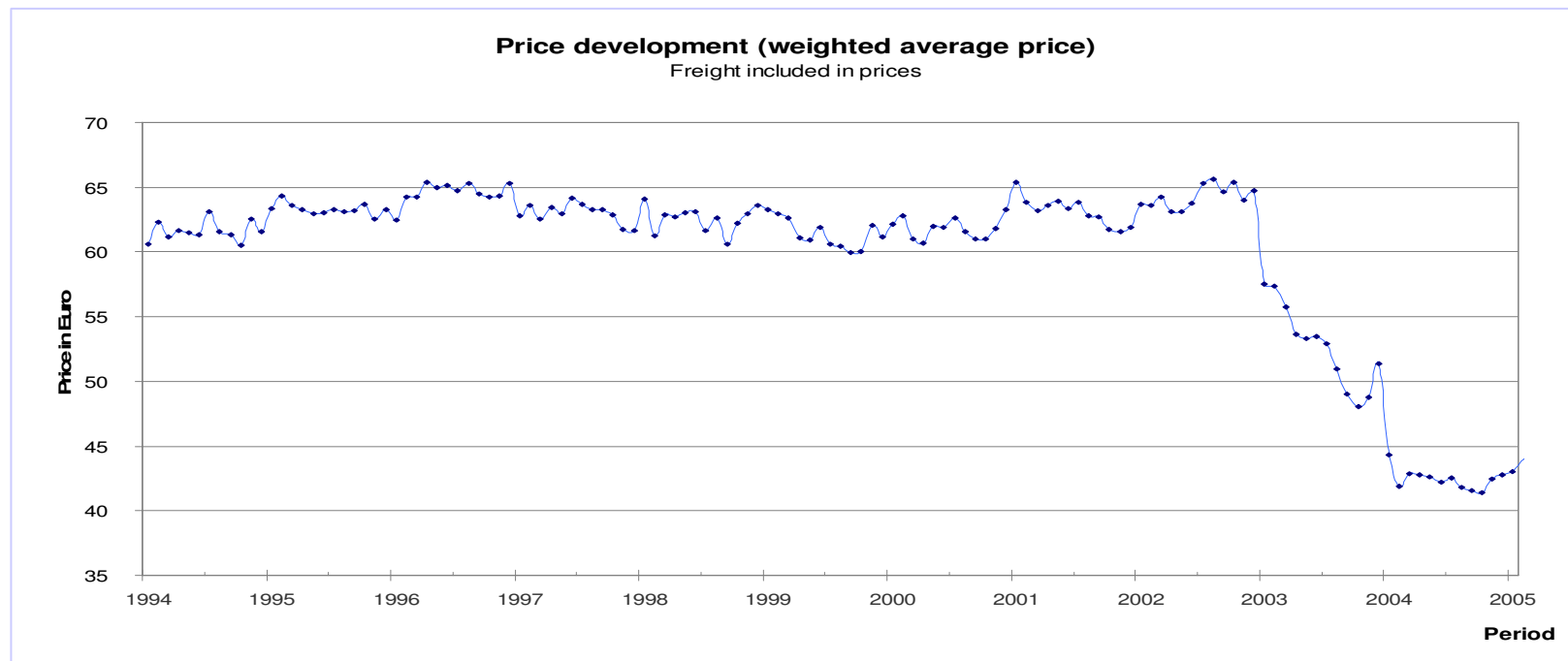
Case study: The German cement cartel

- In 2003 Federal Cartel Office found six cement companies (Cemex, Holcim, Heidelberg, Lafarge, Dyckerhoff and Schwenk) guilty of cartel agreements, partly since the 1970's until 2002
- CDC purchased damage claims of 36 cement customers
- In 2005 CDC started damage action as claimant before lower court in Düsseldorf against all six cartel members
- Total amount of damages: exceeding € 170 million plus interest (at least 5% above base rate)



Case study: The German cement cartel

- Detailed price analysis based on more than 200,000 purchase invoices to substantiate cartel-related damages (“before-and-after method”)
- Development of cement prices per ton 1993 to 2004 (significant price decrease after discovery of the cartel):



Case study: The German cement cartel

- Higher Regional Court Düsseldorf on 14 May 2008 confirmed the admissibility of CDC's damage action:
 - Competence of court: Cartel had effects throughout Germany, also Düsseldorf
 - 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
- German Supreme Court (BGH) confirmed on 7 April 2009 the judgment of Higher Regional Court
 - Legal Services Act: clearly no infringement

Case study: The German cement cartel

- Importance of court cases
 - Creation of legal certainty
 - Improvement of negotiation position
 - Suspension of limitation periods
- But: tailor-made solutions for each case
 - Out-of-court settlements
 - Development of Leniency PLUS⁺ concept: Practical limitation of liability of cartel member against provision of detailed evidence
 - Reduction of risk exposure under joint and several liability rules
 - Acceleration of proceedings
 - Improvement of evidence



Future trends

- Overall increased private enforcement activity in Europe
 - Developments in UK, Germany, Netherlands, Scandinavia, Italy, Portugal, Hungary – increasing choice of interesting *fori*
 - National provisions subject to Community law principles of effectiveness and equivalence
 - *Aquis communautaire* set out in COM Staff Working Paper already applicable today before national courts
 - In case of non-adoption, the White Paper may be model for national regulations
 - Art. 6 Reg. 864/2007 (Rome II) on applicable law



Future trends

- Development of effective settlement culture in Europe
 - Requirement of creative solutions for civil law implications of joint and several liability/contribution among infringers
 - Leniency PLUS⁺ concept: Opportunity for applicant to leave the front row of joint and several liability
- Rights of access to information
 - Sharpening the scope of discovery rights in European / national law
 - European Parliament: “Victims must be allowed access to Commission documents”



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