

CARTEL DAMAGE CLAIMS

- CDC -

Private Antitrust Enforcement

– Experience and Perspectives –

LSE The London School of Economics and
Political Science, Department of Law

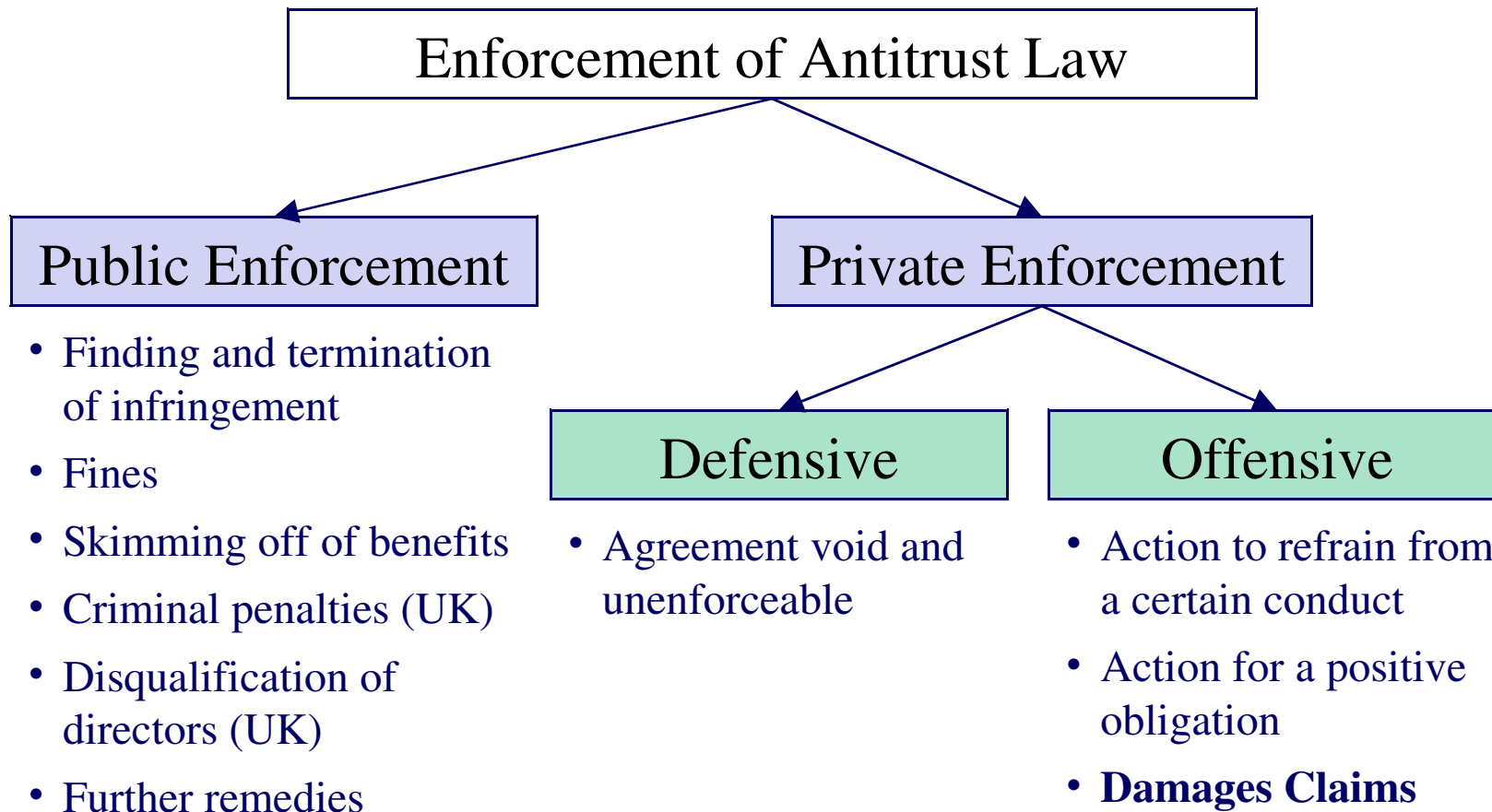
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Overview

- Private Enforcement – Definition, Relevance and Development
- Obstacles to Private Enforcement
- 2008 White Paper of the EC Commission
- Further Issues in Practice
- Interim Results
- Different Points for Discussion

Private Enforcement – Definition, Relevance and Development



Private Enforcement – Definition, Relevance and Development

‘Hardcore cartels are the most egregious violations of competition law’

OECD (2003)

‘Any individual can claim compensation for the harm suffered where there is a causal relationship between the harm and an agreement or practice prohibited under Article 81 EC’

ECJ ‘Courage and Crehan’ (2001) and ‘Manfredi’ (2006)

‘The first advantage of private enforcement is direct justice, which allows the victim of illegal anti-competitive behaviour to be compensated for the loss they have suffered’

Commissioner Neelie Kroes (2005)

Private Enforcement – Definition, Relevance and Development

- Main objectives: compensation and deterrence
 - Damage claims are protected by the fundamental right of property
- Paramount role in US antitrust law
 - About 95 per cent of the antitrust cases are initiated by private parties
 - Idea of ‘private attorney generals’
 - Strong incentive mechanisms (e.g. class action, treble damages, pre-trial discovery, American rule on costs, contingency fees, no-contribution rule)
- Economic value of cartel-based damages in the EU
 - Case law assumes that any cartel generates benefits in favour of its members
 - Annual damages of 25 to 69 billion Euro caused by EU-wide and domestic hardcore cartels (EC Commission 2008)
- However, PE is still a new phenomenon in the EU

Private Enforcement – Definition, Relevance and Development

- Milestones in the development of PE in the EC
 - ECJ, Case C-453/99 *Courage and Crehan* [2001] ECR I-6297
 - System of self-assessment under Regulation 1/2003
 - Law reforms in some Member States (e.g. Germany's Competition Act 2005)
 - Ashurst Study (2004)
 - Green Paper of the EC Commission on damages actions (2005)
 - ECJ, Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619
 - Resolution of the European Parliament on the Green Paper (2007)
 - Impact Study on behalf of the EC Commission on damages actions (2008)
 - White Paper of the EC Commission on damages actions (2008)
 - Rise of legal actions all over Europe (e.g. UK, Austria, Germany)
 - What next?

Obstacles to Private Enforcement

‘The picture that emerges from the present study on damages actions for breach of competition law in the enlarged EU is one of astonishing diversity and total underdevelopment’

Ashurst Study (2004)

‘There has been a limited growth of private antitrust cases across Europe, compared to the findings of the Ashurst report’

Impact Study (2008)



Obstacles to Private Enforcement

Practical reasons for a party injured by a cartel to forbear from lodging a damage claim against the cartelists:

▪ Actual reasons

- Hardly evidence on existence, duration and/or functioning of the cartel (information asymmetry)
- Difficulties to prove the detrimental effects of the cartel on both the market and the injured company in question (subjective perception)

▪ Legal reasons

- Chances of success in court highly uncertain for individual companies
- High demands on demonstration and proof of damage and causality
- Access to evidence questionable
- No or no convincing collective redress mechanism in antitrust claims

Obstacles to Private Enforcement

- Economic reasons

- Legal costs ('loser pays' rule)
- Costs of claim and damage substantiation
- Adverse cost-benefit ratio, especially in case of scattered low-value damages ('rational disinterest')

- Reasons due to firm policy

- Concern of reprisals; possible strain on existing business connections
- Entrepreneurial and/or personnel links to cartel members

2008 White Paper of the EC Commission

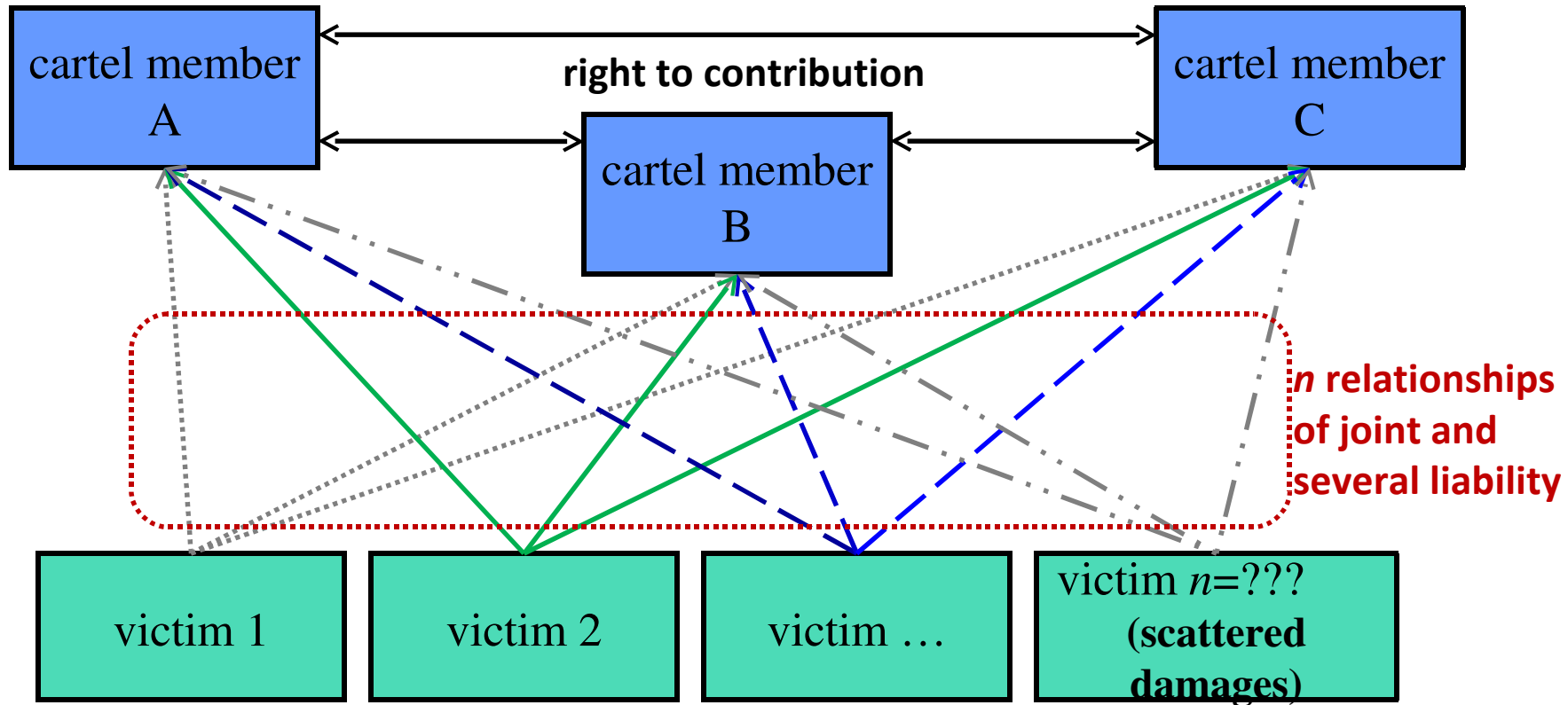
- Objective: to enhance PE by overcoming the obstacles mentioned to achieve ‘full compensation’ and deterrence in line with ‘European legal culture and traditions’
- Suggestions for different measures and policy choices
 - Standing: indirect purchasers and collective redress
 - Access to evidence: disclosure inter parties
 - Binding effect of NCA decisions
 - Fault requirement
 - Definition and calculation of damages
 - Passing-on overcharges
 - Limitation periods
 - Costs of damages actions
 - Interactions between leniency programmes and actions for damages
- What will be the next step(s)?

Further Issues in Practice

- Interaction of international and national law in case of multi-state hardcore cartels in the EU
 - Competent court: Articles 5(3) and 6(1) of 'Brussels I' Regulation 44/2001
 - Relevant substantial law: Article 6(3)(a) of 'Rom II' Regulation 864/2007
 - Forum shopping?!

- Contribution among cartel members due to their joint and several liability → *next slide*
 - Within the EC, the right to contribution is the rule (differing with regard to the choice between a settlement or a claim reduction rule)
 - Expectation of contribution as an obstacle to settlement negotiations between a party injured and a cartel member
 - But, de facto no-contribution system like in the US (contribution too complex)?!

Further Issues in Practice



n relationships of joint and several liability

number of victims = number of relationships of joint and several liability = number of contribution relationships

Interim Results

- PE is essential to protect the rights of the victims and to deter unlawful behaviour
- PE in practice is insufficient yet due to a lack of incentives for the parties concerned
- Effective PE needs specific rules which differ from general principles of civil law
- PE should enhance the European enforcement culture rather than an US-like litigation culture
- PE and public enforcement supplement each other basically, but there may be conflicts

Different Points for Discussion

Preface

'More private antitrust enforcement through better access to damages: an invitation for an open debate'

Commissioner Neelie Kroes (2006)

Suggested topics:

- Need for new collective redress mechanisms?
- The issue of 'passing-on': focus on indirect purchasers?
- Interaction of private and public enforcement: leniency programmes v liability for damages?

Different Points for Discussion

Need for new collective redress mechanisms?

- The White Paper suggestions

- Representative action for damages brought by qualified entities.

But:

- Does it overcome the practical obstacles to PE?
 - Who bears the costs (money, time, manpower), and why?
 - Can the entity create or afford necessary know-how?
 - How can the objective of ‘full compensation’ be achieved?
 - See also problems according to slide *focus on indirect purchasers?* below
 - Example: UK ‘football replica shirts cartel’

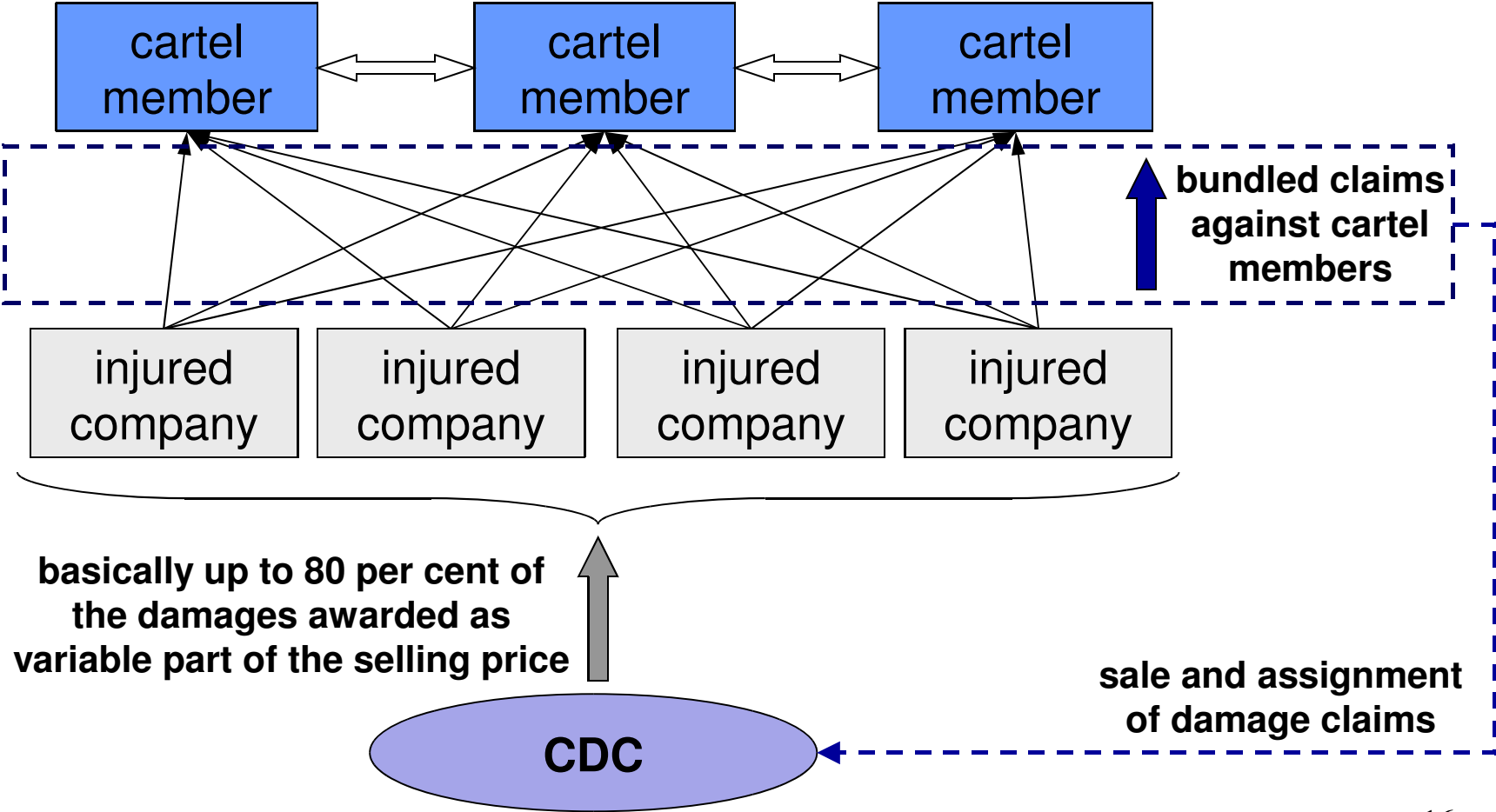
- Opt-in collective action. But:

- Does it overcome the actual obstacles to PE and the obstacles due to firm policy?
 - Example: UK ‘dairy cartel’

- CDC’s model as a ‘market-borne’ alternative → *next*
slide

Different Points for Discussion

Need for new collective redress mechanisms?



Different Points for Discussion

Focus on indirect purchasers?

- Does the Commission's focus on the enforcement of claims of/by indirect purchasers and the (rebuttable) pre-sumption of passing-on of overcharges promote PE?
- Some issues to be challenged:
 - Economic justification of the passing-on presumption
 - Incentives of end-consumer to bring damages actions
 - Conservation of court-proof evidence by end-consumers
 - Discouraging direct purchasers; handling of parallel proceedings
 - Possibility that cartel members can rebut the presumption at all due to the various market levels between them and the indirect purchasers
- Thus, effective compensation and/or deterrence

Different Points for Discussion

Leniency programmes v liability for damages?

- Protection of corporate statements of leniency applicants against disclosure in private actions for damages (White Paper, 2.9.)?
 - Fundamental right to compensation, principle of proportionality
 - Duty of the Commission of ‘sincere cooperation’ with the courts of the Member States (cf ECJ, Case 2/88 Imm. *Zwartveld* [1990] ECR I-3365)

- Limitation of civil liability of the immunity recipient to claims by his direct and indirect contractual partners (White Paper, 2.9.)?
 - Joint responsibility of all cartel members for the harm caused by the cartel
 - Incentives for out-of-court settlements
 - CDC’s *LeniencyPLUS+* programme as an alternative approach
 - Cf Impact Study (2008:505): asymmetric joint and several liability with settlement reduction rule

And so ...

'I was quickly confronted with the sceptics. With people who thought I was naïve about just how sensitive the issues in this area can be. With accusations that I was set on imposing ideas imported from the other side of the Atlantic, at the expense of longstanding European legal traditions and values. With pessimists who said it would be impossible even to have a rational debate on these issues. ... I can only say that I'm glad I stuck to my guns.'

Commissioner Neelie Kroes (2006)

'The guiding principle is not to let the perfect become the enemy of the good.'

ABA American Bar Association, Division of Antitrust (2005)

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Thank you for your attention !

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