

# CARTEL DAMAGE CLAIMS

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## Civil Damage Claims: Direct Action?

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# Overview

- Civil Damage Claims: Scale and environment
- Damaged companies still face difficulties to pursue damage claims
- Commission proposals on collective redress
- The CDC model
- Leniency PLUS<sup>+</sup> concept: Transportation of leniency model into civil litigation
- Practical example:
  - The German cement cartel
  - The EU-wide Hydrogen Peroxide cartel



# Civil Damage Claims: Scale and environment

- Scale of cartel damages according to Commission study
  - Hardcore cartels in the EU result in annual damages of between €25 billion and €69 billion (= 0.23% to 0.62% of the EU's GDP in 2007)
  - Victims of antitrust infringements currently forego between €5.7 billion and €23.3 billion per year
  - Average duration of cartels 5-7 years
- What are cartel damages?
  - Actual loss (overcharge)
  - Loss of profit
  - Interest as of first day of infringement (*Manfredi, Marshall*)
- Companies under statutory obligation to assess/pursue claims
  - Damage claims increasingly perceived as valuable assets



# Civil Damage Claims: Scale and environment

- Important incentives at EU level
  - Publication of White Paper on damage actions by Commission
  - Harmonization of substantive law in antitrust damage claims under Art. 6 (3) Reg. 864/2007 (Rome II)
- Legislative changes aimed at facilitating private damage claims (e.g. Germany)
- Recent national judgments enabling damage claim enforcement
  - UK:
    - Court of Appeal in *Cooper Tire & Rubber Company v Shell Chemicals and Others* (23 July 2010) – concentration of jurisdiction of claims against several members of EU-wide cartel based on joint and several liability
  - Germany:
    - Higher Regional Court Berlin (1 October 2009) – award of damages and establishment of *prima facie* evidence in relation to (i) participation in cartel, (ii) implementation of cartel agreements, and (iii) price effects of cartel on the entire market
    - Higher Regional Court Karlsruhe (11 June 2010) – exclusion of passing-on defence
    - Lower Regional Court Bonn (19 July 2010) – access to file of national competition authority

# But: Damaged companies still face difficulties to pursue damage claims

- 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)
  - Upfront risk analysis: Uncertain outcome for individual company due to lack of experience and market knowledge; loser pays rule
  - Duration of legal proceedings
- Legal obstacles
  - Lack of collective claim mechanisms
  - Access to evidence (e.g. Commission file)



# Commission proposals on collective redress

- Commission proposals in White Paper
  - Representative actions by qualified entities (e.g. consumer associations)
  - Opt-in collective actions by express decision of individual victims
- Practical concerns in relation to end consumer claims
  - Insufficient economic incentive
  - Lack of evidence
  - Consumer associations not equipped to enforce complex multi-party damage claims
- Overall it seems unlikely that the Commission will adopt the proposals

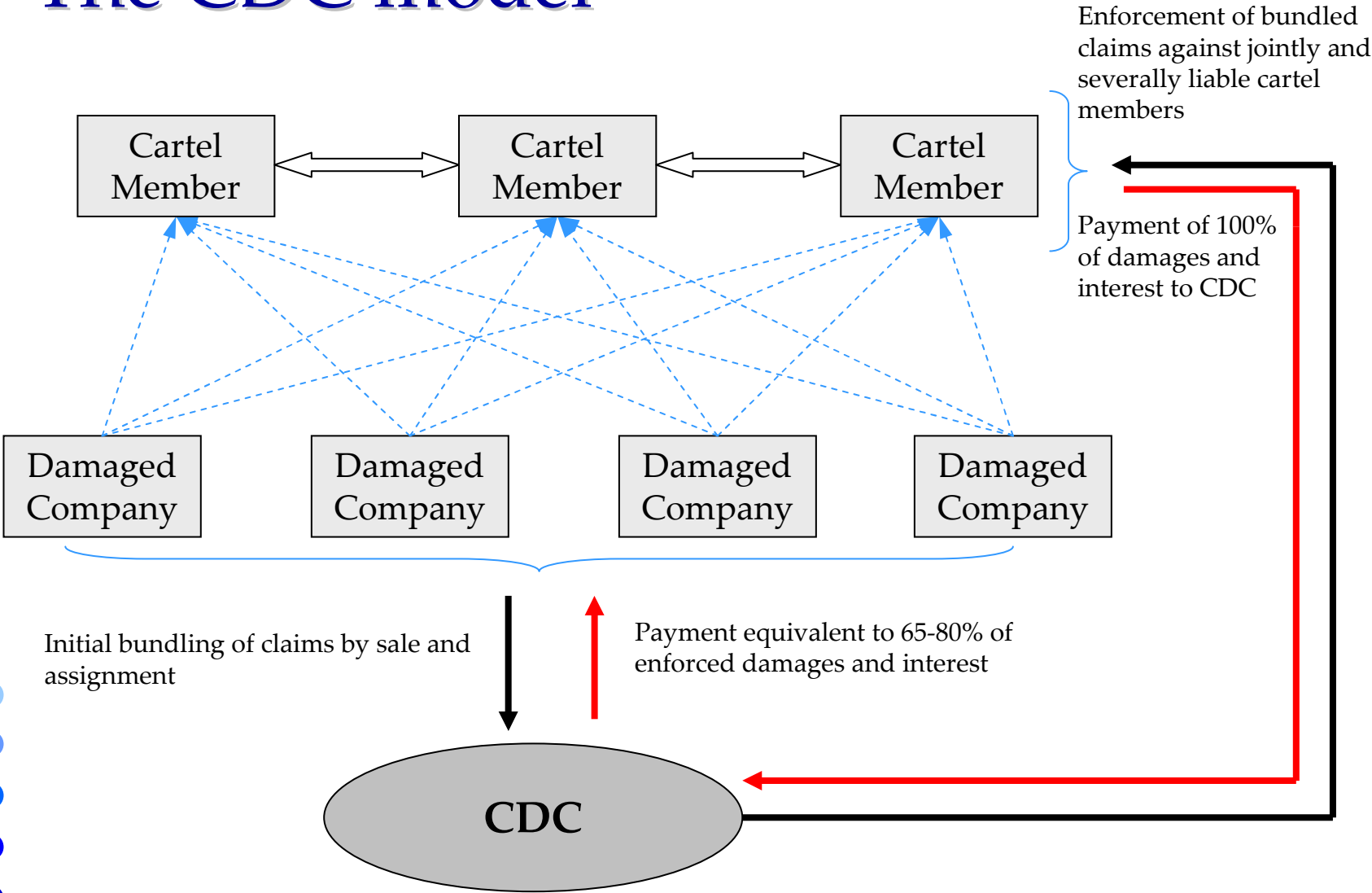


# The CDC model

- Grouping of damage claims on a material law level by assignment
- Purchase of damage claims from multitude of damaged companies in pre-selected cases
  - Synergies incentivise damage claims enforcement
  - Solution for private damage actions (even in the absence of collective mechanisms)
- Collection and economic analysis of industry-wide transaction/market data - conclusions as regards:
  - Market-wide effects of the cartel
  - Price overcharges
  - Damage of each company
- Enforcement in and out-of court in own name and on own account



# The CDC model



# Leniency PLUS<sup>+</sup> concept

- Transportation of leniency model into civil litigation
  - 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
- Successful application of Leniency PLUS<sup>+</sup> concept in practice



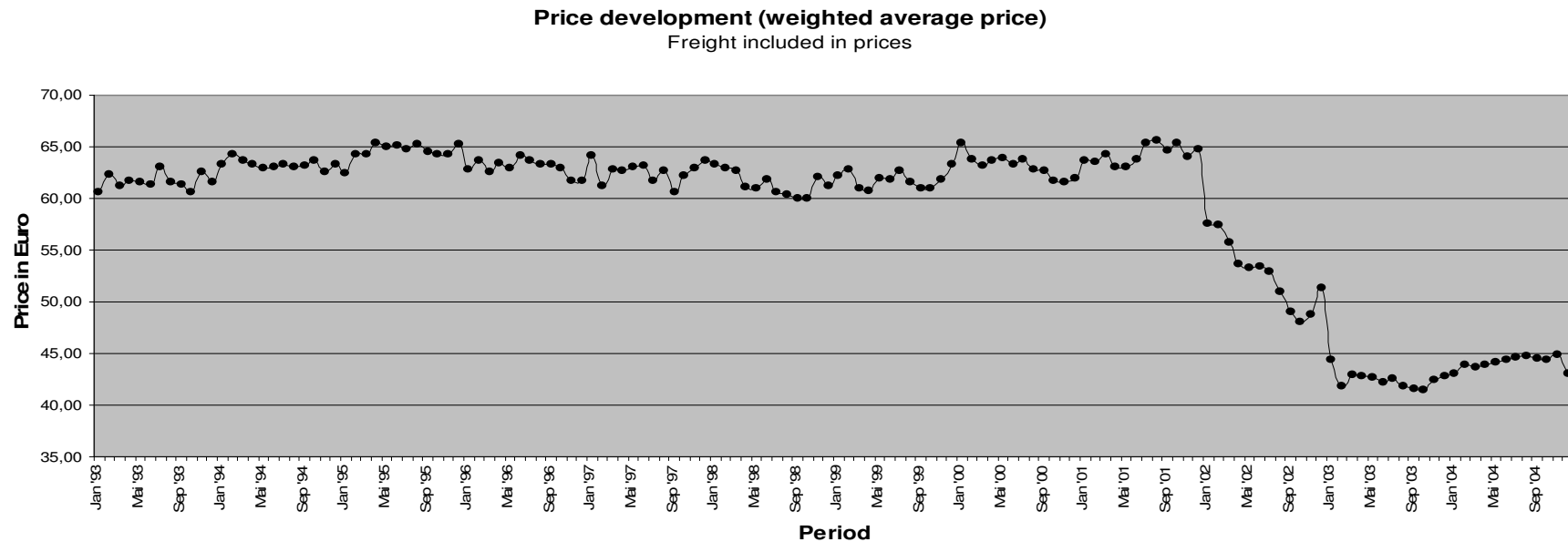
# Example: The German cement cartel

- In 2003 Federal Cartel Office found six cement companies guilty of cartel agreements; Higher Regional Court Düsseldorf upheld the decision in substance in June 2009, extending the infringement period from 1991 to 2001
- CDC purchased damage claims of 36 cement customers
- In 2005 CDC started damage action before lower court in Düsseldorf (Germany) against all six cartel members
  - Identification of minimum damage exceeding € 170 million and provision of facts that allow court to make a final damage estimate
  - Interest of at least 5 percentage points above base rate as of start of the infringement
- In May 2008 the Higher Regional Court of Düsseldorf confirmed the admissibility of the damage action by CDC. This judgment was confirmed by the Federal Court of Justice in April 2009, providing legal certainty. The hearing on substance is scheduled for May 2011.



# Example: 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 (end of 2001: leniency applications by cartel members)



# Example: The European HP cartel

- In 2006 the Commission found nine producers of Hydrogen Peroxide (“HP”) guilty of cartel arrangements in the EEA at least between 1994 and 2001
- CDC purchased damage claims from 32 pulp and paper producers with 94 production sites in 13 European countries
- In March 2009 CDC filed an action against six members of the cartel in Dortmund (Germany)
  - Action in stages (access to information and damages)
  - First analysis implies damages exceeding € 400 million
  - Hearing date scheduled for December 2010



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