

CARTEL DAMAGE CLAIMS
- CDC -

Cartel Enforcement, Leniency and Settlement
- Competition Summit 2009 -

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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
- Harmonization of substantive law in antitrust damage claims under Art. 6 (3) Reg. 864/2007 (Rome II)
- Access to evidence under Regulation 1049/2001 and follow-up legislation?
 - EP: Victims must generally be allowed access to Commission documents, subject to protection of confidentiality

... 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
 - UK: Judgment of High Court in *Cooper Tire & Rubber Company v Shell Chemicals and Others* (27 October 2009) – concentration of jurisdiction of claims against several members of a pan-European cartel based on joint and several liability
 - Germany: Judgment of Higher Regional Court Berlin (1 October 2009) – awarding damages and establishing *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
 - Spain: Judgment of Valladolid provincial court (9 October 2009) awarding damages for first time in Spain, rebutting economic argument that cartel did not cause damages
- National provisions are subject to Community law principles of effectiveness and equivalence (*Manfredi*)

Future developments

- Overall increased private enforcement activity in Europe
 - Companies under statutory obligation to claim?
 - Increased likelihood of follow-on actions have to be accounted for in overall strategy of infringers
- Requirement of creative solutions for private law implications of joint and several liability / contribution among infringers
- 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

Future developments

- Settlements with Commission should not undermine fundamental right of victims to effective compensation
- Perceived conflicts between public leniency programmes and follow-on damage actions should be dealt with in the context of the leniency programmes / general fining policy
 - Effective compensation of victims or the commitment thereto as precondition for immunity or reduction of fines
 - COM Green Paper, Option 29: Successful leniency applicants benefit from a limitation of the damage claims against them, if they enable victims to pursue claims against the other infringers (e.g. by providing evidence)
 - Efforts of effective compensation to be accounted for in the context of the fine calculation

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