

CARTEL DAMAGE CLAIMS

- CDC -

ABA SECTION OF INTERNATIONAL LAW

- 2010 FALL MEETING -

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Funding of private antitrust actions

- Funding = one of the main obstacles for claimants:
 - High costs associated with preparation of case, e.g.
 - Lawyers
 - Economists
 - Court fees
 - In-house preparation and research (transaction data, supply agreements, evidence ...)
 - Complex, cost and work intensive
 - Risk assessment: Uncertain outcome for individual claimant
 - Lack of market-wide information
 - Loser pays rule
 - Access to evidence?
 - Duration of proceedings



Funding of private antitrust actions

- Solution = collective redress
 - Economies of scale, better information, easier access to funding
 - COM suggested two mechanisms in White Paper
 - Representative actions by qualified entities (e.g. consumer associations)
 - Opt-in collective actions by express decision of individual victims
 - But: Directive withdrawn, new consultation on collective actions announced until 4th quarter of 2011
 - On national level:
 - End-consumer schemes e.g. in Portugal, Sweden, Italy
 - UK:
 - Representative actions (but: *Emerald Supplies*)
 - Group Litigation Order
 - Conditional Fee Arrangements
 - After the Event Insurance

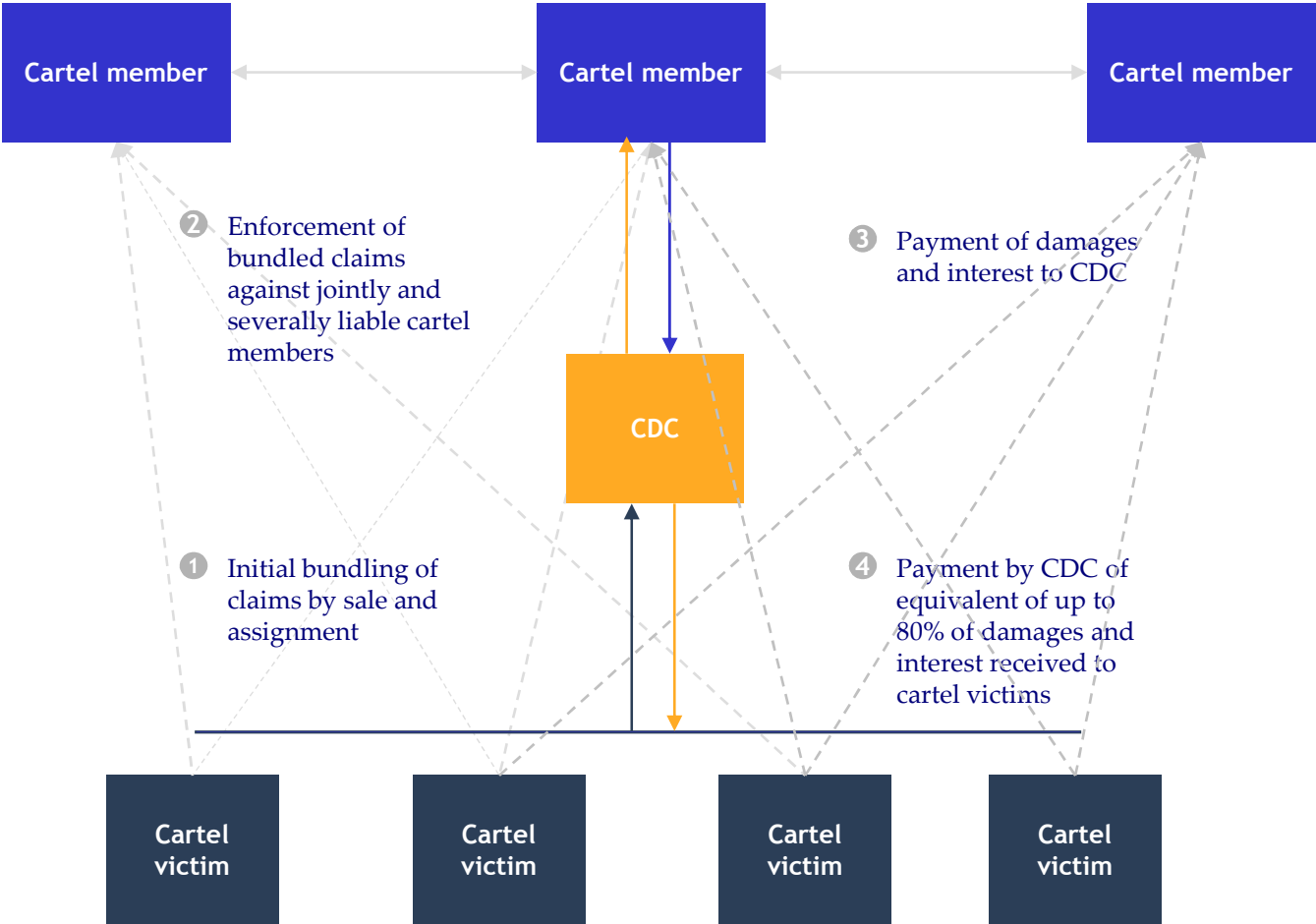


Funding of private antitrust actions

- “Market alternative” - CDC approach: Purchase and collective enforcement of claims
 - Purchase of damage claims from multitude of companies affected by same cartel
 - Grouping claims on a material law level by assignment
 - Possible in most EU countries (even in absence of collective redress mechanism)
 - Possibility to analyse industry-wide transaction data/market data – better conclusions as to market-wide and individual effects of cartel
 - Enforcement in and out-of court in own name and on own account
 - Admissibility of action brought by CDC based on assignment model confirmed by German Supreme Court in April 2009



The CDC model



CDC's approach maximizes the chance of successful enforcement of damage claims while simultaneously reducing associated risks and costs in comparison with individual enforcement

Assessment of damages in EU

- Legal basis rooted in EU law
 - Court of Justice in *Courage/Crehan* and *Manfredi*:
 - “Any individual can claim compensation for the harm suffered” if:
 - infringement of Art. 101 / 102 TFEU
 - existence of damage
 - Causal link between damage suffered and infringement



Assessment of damages in EU

- Scope of compensation
 - Principle of full compensation (*Manfredi*):
 - Actual loss → “the overcharge”
 - Loss of profit → consequential losses, e.g. foregone profits
 - Right to interest → from moment when damage occurred
 - Difference to US
 - No treble damages (However: EU law does not preclude national provision of exemplary damages, e.g. Ireland)
 - Due to long average duration of cartels, the availability of pre-judgment-interest can easily double the actual damage



Assessment of damages in EU

- Quantification
 - Different methods from relatively simple comparator based methods to complex econometric models
 - Courts seem to prefer simple approaches (e.g. *Vitamins* – before/after price comparison of average market price)
 - No *one-size fits-all* solution
 - But: Effective right to compensation may not be obstructed by excessively difficult damage calculation
- Oxera report commissioned by DG COMP published in January 2010
- Non-binding guidance for national courts in 2011?

Assessment of damages in EU

- Issues raised by passing-on defense
 - Argument: all or part of damage was passed on to next level of supply chain so that direct purchaser suffered no / limited harm
 - Problem with indirect purchasers:
 - often no incentive to sue due to widely dispersed low value claim
 - lack of information
 - Result: illegal profits remain with cartel members
 - Key question: how to ensure full compensation without hampering private enforcement as such
- Different approaches in different jurisdictions ...



Assessment of damages in EU

- US: *Illinois Brick*
 - no standing for indirect purchasers, no passing on defense
- EU: unclear
 - *Courage/Crehan*: “any individual” has standing, implying recognition of passing-on defense
- UK: *Devenish Nutrition*
 - Standing for direct and indirect purchasers, damages only for losses actually suffered at each level of the supply chain
- Germany:
 - Section 33 (3) German ACR: direct purchaser has suffered damage irrespective of subsequent sale to indirect purchasers; courts have excluded passing-on defense in order to strengthen effectiveness of private damage actions
 - OLG Karlsruhe (*Carbonless paper*)
 - KG Berlin (*Berlin ready-mix concrete*)

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