



Managing litigation: impact of costs, funding, insurance, and manpower

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*Competition Law: Cartel Damage Claims – A Magic Bullet for Consumer Redress or
Just a New Business Opportunity for Lawyers?*

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- **Internal cost factors of claims enforcement for affected companies**
 - Human resources
 - Data collection
 - IT infrastructure
 - In-house availability of legal skills (*i.e.*, competition law and litigation)
- **External cost factors**
 - Lawyers' fees
 - Economists' fees
 - Data collection and market intelligence
 - Pre-trial access to evidence, incl. administrative proceedings
- **Procedure**
 - Court Fees, expert fees, own litigator's fees
 - Discovery
 - Availability of ADR
 - Security for adverse costs
 - Consideration of appeals and referral to ECJ
 - Plurality of defendants;
 - Role of third party intervenors
- **General: timing and duration of proceedings**

- **Assessment of the value of the case to be brought**

- Stand-alone vs follow-on
- Presumption of harm; probability and “how much”
- Availability and conservation of legal and economic evidence
- See also [Appendix 1](#) on preliminary assessment (check list)

- **Defendants to be addressed**

- Sufficiently strong to comply with potential judgment in favour of claimant, considering joint and several liability and potentially high number of similar claims by further damaged companies and duration of proceedings
- Parental liability
- Publicly listed defendants vs. businesses owned by individuals: avoiding the “Sausage Gap”
- *Leniency PLUS+* approach and consecutive partial settlements with co-cartelists as cost-mitigating factors and further support of evidence

- **Influence of available jurisdiction and applicable law**
 - See [Appendix 2](#) on jurisdiction and [Appendix 3](#) on applicable law
- **Cost considerations and choice of forum**
 - Principle of “loser pays” seems to homogenously apply throughout EU. However, actual amounts and procedural differences are paramount, as some examples following CDC’s experience show:
 - Finland: court fees for 1 day pre-trial and full 4 day hearing in case € 20MM+ claim: € 113 /one hundred and thirteen!); lawyers’ fees compensated according to reasonable hourly rates
 - The Netherlands: court fees app. € 7,500 per instance; adverse cost capped at app € 25,000 per counterpart/instance; separate contribution proceedings (*i.e.* no additional adv. cost risks implied)
 - Germany: up-front court fees, capped at € 30MM claims value: app. € 330K in first, plus € 440K in 2nd, plus € 550K in 3rd instance; and adverse cost risk per defendant of € 835K (three instances); in addition identical max cost risk for any third party intervener in main proceedings
- **Further decision/cost drivers in the course of the proceedings**
 - Are electronic data admissible; acceptance of foreign language documents?
 - Sufficiently staffed and skilled, experienced, specialized courts
 - Availability of class action mechanism

- **Funding by internal resources**
 - Decision governed by business plan and balance sheet: How long will it take; how high is the probability of a positive outcome; what benefits can be achieved compared to losing the case; where will the case be brought; what alternatives are available; recoverability of costs incurred?
- **Funding by external sources**
 - Reduced/split fee model for own lawyers' costs
 - Cap and success elements
- **Direct involvement of external litigation funder**
 - Minimum claims size; actual multiples expected
 - Costs and timing of due diligence
 - Order of participation in case of success
 - Percentage in proceeds of the case to be shared
- **Combined fee model, presented by law firm and funder**
- **Adverse costs issues**

- **Standard legal insurance regularly does not provide coverage for active pursuit of damage claims**
 - May change following implementation of Directive 2014/104/EU on antitrust damages (esp. presumption of harm)
- **After The Event Insurance (ATE) available only in few jurisdictions (e.g. UK, however costs are no longer reimbursable)**
- **Alternatively, in absence of insurance**
 - Direct standing leaves claimant in position as a potential addressee of adverse cost orders
 - Possible solution: back-up cost guarantee by solvent third party; where deemed appropriate limited to co-claimants share in group proceedings
 - Where applicable: combination of full claims assignment to sufficiently capitalized claims SPV/ Stichting
 - When claims are assigned to SPV: possible deposit of potential maximum amount of hypothetical adverse cost orders

- **In-house**

- Up-front procurement and IT division
- Data collection
- Briefing of/by external counsel/economists team
- Decision finding
- Case specific: assumed average min. 250+ hrs

- **External**

- Competition/trial lawyers: 300+ hrs per instance of court proceedings, incl. written submissions and attendance in hearings and pleading
- Economist (incl. econometrics): 200+ hrs for establishing theory of harm, calculation of damages and interest, and rejecting adverse arguments; providing expert witness/deposition

- **Consideration about minimum claims size**

- Assuming and let alone internal costs of € 75/ hr and external average costs of € 250/ hr, in total € 143.750, in combination with adverse cost risks and court fees, individual claims of less than € 1 MM in potential value will only scarcely be pursued nor externally fundable.

- **The implementation of the Directive 2014/104/EU will only to a very limited extent enhance the possibilities of victims of hard-core cartels, even in clear-cut follow-on cases, to effectively realize their right to full compensation of any damages caused by the cartel**
- **Deterrence of potential claimants by inappropriate and even disproportional cost risks and procedural obstacles should be reduced by creating a level playing field across all jurisdictions across the EEA**
- **Deterrence of continuous cartel activities will only be achieved by consequent improvement of the legal framework for private damages actions**

APPENDIX

Annex 1

Preliminary assessment (check list)

- **Legal**
 - Decision and/or press release of Commission/NCA
 - Jurisdiction(s)
 - Applicable law(s)
 - Statutes of imitation
 - Access to information

 - **Economic**
 - Theory of harm
 - Market reports
 - Public statistics
 - Estimate of damage

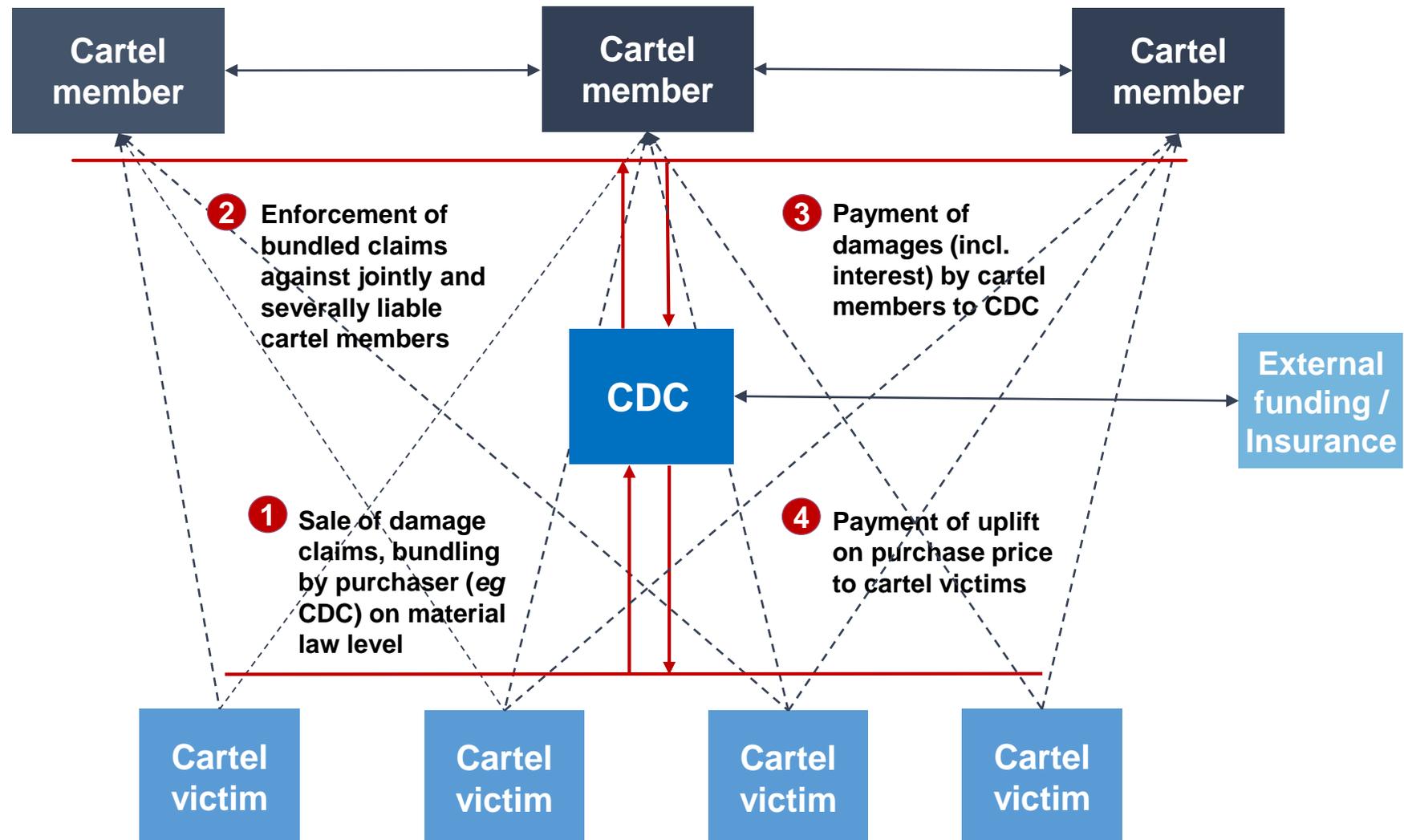
 - **Data collection**
 - Electronic data (different formats and programmes over time)
 - Hardcopy paper invoices, and microfiches
 - Other documentation (e.g., contracts, order forms)
 - Interviews with industry experts and personnel from purchasing department
 - Data cleaning and error detection
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- **International competence of national courts under Regulation (EU) No 1215/2012 (Brussels I bis)**
 - Cartel damages cases: judgment of the ECJ of 21/05/2015 in Case C-352/13 *CDC Hydrogen Peroxide*
- **Art. 4(1): each cartel member can be sued at domicile**
- **Art. 8(1): co-cartelists can be sued together before one court**
 - In the event of a single and continuous infringement, “claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings”
 - Each addressee of the infringement decision as a potential “anchor” defendant
 - Confirmed by numerous national court decisions in the UK, Netherlands, Germany and Austria
- **Art. 7(2): *forum delicti***
 - Courts of the place in which the cartel was definitively concluded or the place in which one agreement in particular was concluded which is identifiable as the sole causal event giving rise to the loss allegedly suffered, or courts of the place where the victim’s own registered office is located
- **Jurisdiction clauses in supply contracts**
 - Only applicable if specifically worded to include antitrust damage claims
 - Not applicable *vis-à-vis* jointly and severally liable co-cartelists
 - Applies *mutatis mutandis* to arbitration clauses (Appeal Court of Amsterdam *Sodium Chlorate* [2015])

- **Relevance of national law**
 - Statutes of limitation, causality, fault requirement, disclosure, remedies, etc.: partly harmonization by Directive 2014/EU/104
 - Still high differences in national interest regimes in particular (for this, see G Monti [ed.], *EU law and interest on damages for infringements of competition law: a comparative report* [2016])
- **General relevance of private international law of the forum state**
- **Possibly multitude of applicable laws**
- **Importance of place of domicile/production site of damaged entity**
- **For infringements after 11 January 2009: Regulation (EC) No 864/2007 (Rome II)**
 - Art. 6(3)(b) contains special conflict of laws rule for EU-wide infringements of competition law, uniform application of *lex fori*:
“[W]here the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court”

Annex 4

Bundling of claims and information



Annex 5

Securing evidence

- **Burden of proof and availability of evidence**
 - Burden of proof for damages and causal link with infringement typically lies with the claimant (regardless of the presumption of harm under Directive 2014/104/EU)
 - Often long-lasting infringements
 - Deterioration of evidence over time
 - Limited availability of electronic data (typically beginning as from the 2000s)
 - Changes in electronic data, accounting, and purchase systems over time
 - Legal obligation for document retention typically not longer than 10 years
 - **Legal and procedural requirements**
 - Acceptance of documents in electronic format in court proceedings?
 - If available, formal requirements for electronic submissions may differ from Member State to Member State
 - **Importance of securing evidence**
 - Identification of available data sources and documents (“data digging”)
 - Support by accounting, IT, purchase departments
 - No (further) destruction of possibly relevant documents and data
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Thank you for your kind attention!

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