Private Antitrust Enforcement in Europe -
Private Enforcement from a claimant‘s perspective

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Strong political support for recovery of cartel damages

Compensation of cartel victims

- „We need to ensure that all European citizens and businesses have effective access to compensation.“ (Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy)

- „Meritorious claims for damages should be aimed at compensating, in a fair way, the victims of an infringement for the harm done.“ (EU Commission)

Enforcement of competition law

- „As a result of the self-assessment system, protecting competition increasingly becomes a task of private claimants and courts rather than competition authorities.“ (Monopoly Commission)

- „Private damages actions are taking up an important role in the enforcement of competition law.“ (German Federal Cartel Office (BKartA))

Deterrence and prevention

- „... to create an effective civil-law system of sanctions with an additional significant deterring effect.“ (German Federal Government)
DB is exposed to cartels with increasing frequency

- DB’s purchasing volume exceeds € 25 billion/year
- COM: average overcharge around 20%
- Due to effective leniency programs the number of detected cartels will increase
- General obligation on management to enforce claims for damages
  - Business decision (Business Judgement Rule)
  - Adequate evaluation of all economic, legal and strategic aspects
- Concrete obligations
  - Identify infringer and amount of damages
  - Evaluate chances and costs of enforcement
  - Further criteria: Negative impact on public image and/or on business relations
  - Sufficient documentation (meeting minutes, strategy proposals, etc.)
Private Enforcement at DB - Pioneer in Europe?

- **Existing measures at DB**
  - Established cross-departmental, group-wide Cartel Damages Committee
  - Central coordination and reporting point ("one face to the cartelist")
  - Projects for important cases (e.g. rail track cartel, air cargo cartel)
  - Focusing on prevention (procurement process)
  - Formation of a new "Private Enforcement" entity within DB’s legal department (CRK(4))

- **Status of the proceedings**
  - 6 out-of-court settlements
  - 10 court proceedings in 5 different jurisdictions
  - many more cases in pipeline
  - about 2-3 new cases per year

⇒ Claim value: more than € 1 billion plus interest
Private Enforcement entity within DB’s legal department

Because DB is exposed to cartels with increasing frequency and because of the general obligation on management to enforce claims for damages, a new entity within the legal department was established.

By establishing the new entity in 2013 with the only aim to handle and steer the private enforcement of cartel damages claims, DB is a forerunner amongst large companies in Europe.

- Systematic examination and enforcement of cartel damages claims
  - Establishing specific strategies to enforce claims efficiently
  - Legal and economic assessment of the claims
  - Planning, monitoring and controlling all activities in connection with the enforcement of the claims
  - Supporting the enforcement of claims by active and strategic communication work
  - Settlement negotiations

- Significant participation and contribution to relevant legislative procedures by means of statements and discussions with political decision-makers

- Business model already profitable
  - DB-Group management provides funds for litigation costs upfront. Costs are being deducted before litigation proceeds will be paid out to the DB companies actually affected by the cartel.
Three main challenges in practice

- Access to file
- Passing-on
- Limitation periods
Basics: Theory vs. practice

- Claims for damages under EU and national law
  - **ECJ**: every injured party is entitled to claim for compensation (*Courage, Manfredi*)
  - **Member states** determine legal proceedings
  - Protecting “*effet utile*”
  - **Germany**: The consolidated s. 33 GWB helps strengthening competition law by making enforcement of cartel claims easier

- Claims for damages in practice
  - Due to recent court decisions *follow-on* claims are **significantly more difficult**
  - Legislative action is needed to have an **effective private enforcement regime**
Burden of proof for the damage suffered lies on the claimant

- **Proof of damage**: Difference between the cartelized price actually paid and the hypothetical competitive price during the time of the cartel (s. 249 BGB)

- **Proof of causality**: Implementation of the cartel?

- Judge’s duty to estimate the damage under German law (s. 287 ZPO) does not balance the information asymmetry (duty to substantiate the claim)

- **Asymmetry of information at the expense of the injured party**
  - Claimant must have access to the files to be able to effectively enforce claims
**Access to file – No weighing up by German courts on case-by-case-basis**

### European Courts

- **Weighing up the interests involved**: Protection of the leniency program as well as protection of the injured party (*Pfleiderer*)
- **Donau Chemie**: Rules stating that antitrust victims can only get access to file with consent of cartel members violates the *effet utile* because there is no assessment on a case-by-case basis
- **EnBW**: ECJ overturned GC on application of Reg. 1049/2001 (Transparency Regulation)
  - As a rule the COM may refuse access to the entire content of the COM file as these documents fall within the exceptions of Art. 4(2)
  - It is up to the applicant to show that a certain document might justify an exception to the rule. → Possible without knowledge of this document?

**Lessons learned**: Cartel victims face enormous difficulties to get access to COM files

### German Courts

- There is no weighing up between two equal interests, leniency generally prevails
- **County Court of Bonn (Pfleiderer)**: No access to the documents to protect leniency program and future antitrust investigations
- **District Court of Düsseldorf (Coffee roaster)**: No access to the files to protect the participant’s interest in privacy and the leniency program itself
- Mere access to anonymized decision and list of secured evidence
- **Higher Regional Court of Hamm**: Access to files which are part of a criminal file of the public prosecution authorities for a civil court in civil procedure in principle possible

**High Court, UK (National Grid)**: Judge ruled the disclosure of leniency documents by applying the principles of "*Pfleiderer*" on a case-by-case basis
Access to file – Limiting the right of access to the files in practice

Scope of access in practice

Decision
- BKartA grants access to non-confidential versions of the decision
- COM publishes non-confidential versions of decision (partly delays of several years)
- Problem: Settlements and lengthy proceedings

Leniency
- COM and BKartA deny access to leniency corporate statements and settlement submissions

Procedural documents
- COM denies complete disclosure of documents
- BKartA grants access to lists of secured evidence

Cartel authorities admit high protection of cartelists
**Passing-on defense hinders effective private enforcement**

- **ORWI**: Federal Court of Justice (BGH) permits generally passing-on defense in favor of a cartel member
- Increasing complexity and higher trial risk for the cartel victims
- Burden of proof falls on indirect purchaser, and distant sales levels will have little incentive to claim passed-on damages (to the benefit of cartelists)
- **Exclusion of passing-on defense** (similar to federal US-law) and a claim settlement within the contractual relationships to be preferred:
  - Asserting damages by direct purchaser and
  - If necessary: indirect purchaser’s claim against direct purchaser
- To **avoid an atomization** of damages, the objection of passing-on should be limited to cases in which the cartelized product was passed on (BGH-ORWI, District Court of Arnheim - Tennet ././ ABB, 12/3/13)
- Risk of double-claims is a purely theoretical problem
Limitation periods - Additional risks due to unclear and short limitation periods

Limitation periods:
- 3 years (dependent on knowledge), S. 195, 199 BGB
- 10 years (independent of knowledge), S. 199 (3) No. 1 BGB (since 1/1/02)

Beginning of limitation periods?
Knowledge or grossly negligent lack of knowledge of all circumstances substantiating the claim (S. 199 (1) No. 2 BGB): In principle limitation period begins at the earliest with the publication of the final decision (Austrian Supreme Court, 16/12/13) / insight into the decision

BUT: Recent case law (District Court of Düsseldorf, 17/12/13) suggests that limitation already starts with publication of press release in some cases (risks of high litigation costs, access to information is delayed)

Is a 10 years limitation period which is independent of knowledge too short?
Long-lasting cartels and proceedings, long duration to get access to the penalty notice

Applicability of S. 33 (5) GWB to “old cases”?
Inter-temporal law of limitation, recent decision argues against applicability (District Court of Düsseldorf, 17/12/13)
EU-package of measures is a first step in right direction

- EU has recognized shortcomings of private enforcement in Europe. EU-Proposal contains important impulses and clarifications in order to **strengthen the private enforcement of competition law**
- DB welcomes the proposal to **harmonize the rules on limitation periods**:
  - Exclusion of limitation periods before knowledge
  - Minimum limitation period of 5 years from the time knowledge is obtained
  - Limitation periods shall not begin to run before the infringement has ceased
- Admissibility of the passing-on defense bears the risk, that also directly affected purchasers refrain increasingly from enforcing their claims
- DB welcomes the proposed provisions on the **disclosure of documents**, however:
  - General exemption from disclosure obligation with regard to leniency corporate statements and settlement submissions is to be rejected (*Pfleiderer, Donau Chemie*: assessment on a case-by-case basis required, Art. 101 TFEU = primary law)
  - Leniency programs will remain attractive without further privileges (immunity, reduction of fines)
- Directive has passed European Parliament April 2014
  - Next step is for the Council to formally adopt the Directive which is expected in May 2014
  - It will become law when it is published in the Official Journal (not expected before September 2014)
  - Thereafter, Member States will have two years to implement the Directive
Thank you for your attention.