



Competition litigation – recent legal and policy issues

Deutsche Bahn AG

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Berlin, 14 March 2014

Increasing press coverage of private enforcement

Bloomberg

Mersen, SGL and others will disclose material to Deutsche Bahn in UK damage claim
20 Jan 14 | 19:15 GMT

Deutsche Bahn, Other Railroads Sue Carbon Makers Including Germany's SGL

ThyssenKrupp pays Deutsche Bahn damages over cartel: paper

FRANKFURT Tue Nov 19, 2013 2:05pm EST

March 18, 2013 12:54 pm

Michelin and Deutsche Bahn spearhead private antitrust enforcement in Europe claiming millions

By Evelina Kurgonaite and Nicholas Hirst in Brussels

27.01.2014 14:42
PaRR Breaking News -- Criminal cartel charges for UK water tank supplier boss

UK dispute over Deutsche Bahn lawsuit draws input from EU Commission

27 Jan 14 | 16:30 GMT

Deutsche Bahn seeks damages from escalator cartel

11 Feb 11 | 15:29 GMT Author: Lewis Crofts

Strong political support for recovery of cartel damages

Compensation of cartel victims

- *„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.“ (Monopolkommission)*
- *„Private damages actions are taking up an important role in the enforcement of competition law.“ (Bundeskartellamt)*

Deterrence and prevention

- *„... to create an effective civil-law system of sanctions with an additional significant deterring effect.“ (German Federal Government)*

Main challenges in connection with recent court decisions

Access to file

Passing-on

Limitation periods

Assignments of claims

Non-liability of parent companies

Access to file

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 are unlikely to get access to the COM decision

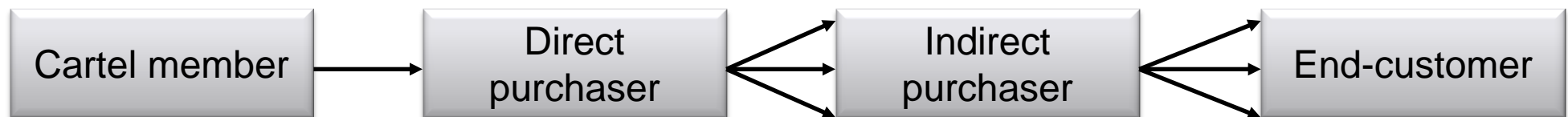
German Courts

- 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

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, LG 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 (LG 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 (LG Düsseldorf, 17/12/13)

Non-liability of parent companies in civil procedures

Liability of parent companies in Commission proceedings

- According to EU-law (**Akzo Nobel / Allianz**) parent companies can be fined for competition infringements / antitrust misbehavior committed by its subsidiaries. Where a parent company owns (almost) the entire share capital of another company, there is a rebuttable presumption that the parent exercises decisive influence over the behaviour and actions of that subsidiary, and therefore, should be jointly and severally liable for its actions

Non-liability of parent companies in Civil procedures

- District Court of Berlin on 06/08/13: This principle in Commission proceedings does not apply in civil procedures. It is for the member states (**Courage**) to determine the procedural modalities for actions for compensation as long as they do not make it impossible or excessively difficult to exercise the right of compensation. However, direct liability of parent companies is contrary to German law (separation principle)

Bundling of claims: assignment model immoral?

- In Germany, collective claims enforcement is possible by assigning claims to a litigation vehicle
- Unexpected judgment of Regional Court Düsseldorf on 17/12/13
 - Assignment of claims is immoral (and thus unlawful and void), if litigation vehicle lacks sufficient capital to cover adverse litigation costs
 - If litigation vehicle is not sufficiently funded the cost risks inherent to the litigation are unduly shifted to the defendants
 - It remains to be seen if the judgment will be upheld on appeal
- Unclear situation with regard to the required funding for a litigation vehicle:
 - Are sufficient funds only needed at the point in time when assignments are executed?
 - Are funds required to cover cost risk for several instances?
 - Are only adverse costs of defendants relevant or also costs of (potential) interveners?

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 will not start to run before the day on which infringement ceases
- 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 likely to be adopted until mid-2014

Thank you for your attention.