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UNIVERSITÄT LÜNEBURG

2<sup>nd</sup> E.CA Competition Law &  
Economics Expert Forum  
Berlin, March 14, 2014

EU Competition Law & Private Litigation -  
An Overview

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# Private Litigation – Development

- EU Competition Law Reforms (~ 2004): debate about private enforcement as important complement in a consumer welfare-oriented competition regime
- Two parallel developments
  - 10 years legislative efforts to create a “European” (perfect) private litigation environment – proposed Directive in 2013, adopted in 2014(?)
  - Increased awareness results in actions for damages in national courts (in particular UK, NL, Germany)
  - Two largely disconnected developments; only cases concerning leniency materials (*Pfleiderer et al.*) sometimes bridge the gap



# Proposed Legislation – Reasons

## Do we need legislation to encourage more private litigation?

- Comm'n: harmonization among jurisdictions (effective v. ineffective jurisdictions)
  - Necessary in UK, NL, G / effective elsewhere?
- Comm'n: more effective compensation for victims
  - Explains Directive's "plaintiffs should win" approach
  - Comm'n empirical assumptions not universally shared
- But also (and perhaps more important)
  - Increased incentives to comply with competition law norms (a/k/a deterrence) – focus on hardcore cartels
  - Private litigation as a "laboratory" for competition law facts assessment and analysis



# Proposed Legislation – Content

## Main Provisions (largely unchanged topics since 2004)

- Facilitating access to evidence
  - With limitations to (over?)protect leniency programs
- Statute of Limitation
- Binding Comm'n & NCA decisions (?)
- Indirect purchaser & passing-on rules, but
- Nothing on claim aggregation
  - Parallel Recommendation for consumers & SMEs: toothless, non-effective
- Presumption of harm resulting from hardcore cartel
- Joint and several liability with compensation rules
- Settlements



# Proposed Legislation – Some Qs

- Will Directive be meaningful in practice?
  - A little bit ivory tower approach, little connection with actual problems in case law
  - Unlikely to change much in “non-effective” jurisdictions
- The indirect purchaser/passing-on obsession in Europe
  - Detailed (and problematic) regulation of indirect purchaser actions useless in the absence of effective claim aggregation
  - If indirect purchaser actions do occur, robust jurisdictional consolidation rules would be essential
- Why regulating compensation among defendants?
  - Increases complexity of trials
  - Excluding compensation could be more effective deterrent and more effective encouragement to settle
- Deterrence of settlements?