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# Private Antitrust Enforcement

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14th Summer School on European Business Law  
Düsseldorf, Germany

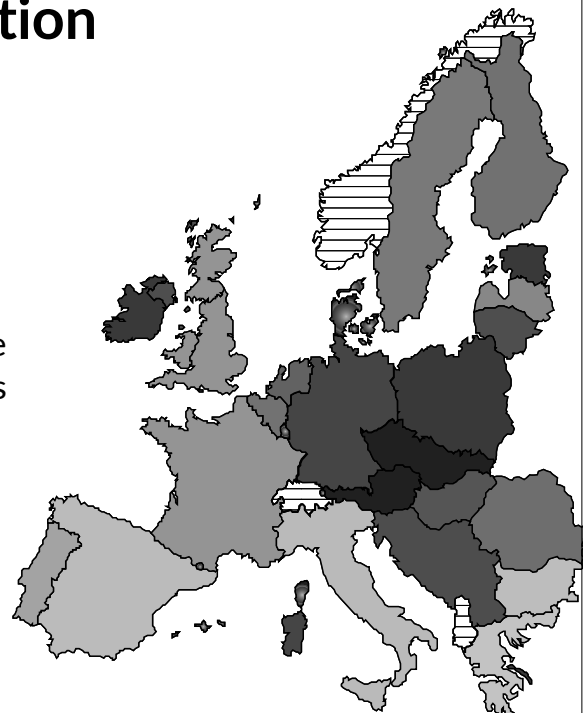
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# Introduction

- where an **undertaking**
  - breaches the prohibition on cartels
  - abuses a dominant market position
- infringement of Artt. 101, 102 TFEU (Treaty on the Functioning of the European Union)
- infringement of Member State's law on Restraints on Competition
- (traditionally) **public law sanctions**
  - most dominant in the media: fines
  - imposed by the European Commission or also by the National Competition Authorities (NCAs)

# Introduction

- two levels of administration:
- European Commission vs National Competition Authorities (NCAs)
- EU anti-trust law basically takes precedence (in application) over the anti-trust law of the Member States
- only covers offences that extend beyond the borders of any single Member State
- affects the European single market
- offences that do not affect intra-(Member) State trade: national legislator and the NCAs





## Typical Cases

- horizontal arrangements: cartels, collusion, conspiracy, predatory pricing, price discrimination, price fixing
- vertical arrangements: exclusive dealing, market restrictions, refusal to deal/sell, resale price maintenance, tied selling
- alternatively abuse of dominant market position
- result: obtain higher prices (than when competition undistorted)



## Typical Cases

- discovery by competition authority or whistle blowing
  - **fine** by the competition authority
  - majority of participants admitted this (to be eligible for leniency programs)



# Introduction

Fines in 2017

- on European level: substantive fines in 2017, approx € 2 billion
  - price fixing of air cargo carrier: € 780 million
  - trucks cartell: € 880 million
  - car batteries: € 68 million
  - thermal systems: € 155 million
  - light systems: € 27 million
  - Co-Driver protection systems: € 34 million
- National Competition Authorities (NCAs)
  - Germany: € 60 million
  - (small) Austria: € 10 million



# Introduction

Civil Law Consequences

- not **only** hefty fines and other public law sanctions
- also: **civil law consequences**
  - brought by enterprises and other non-state, i.e. private, persons who have sustained losses as a result of anti-competitive conduct
    - reparative or preventive **injunctions**
    - **compensation** for damage sustained
- **follow-on cases:** following an existing decision of the European Commission or an NCA
- **stand-alone cases:** no decision by the European Commission or an NCA



# Civil Law Remedies

Situation in the Member States

- anti-trust actions for damages by private claimants
  - significant and dominant in the anti-trust debate: Germany; The Netherlands; United Kingdom
- pursuit of private anti-trust actions in numerous other Member States: **difficult if not impossible**
  - European Commission: only 25% of all competition law infringements upheld in its decisions (2006–2012) resulted in follow on actions
  - stand alone actions (no prior finding of a breach by a competition authority): extremely rare
  - damage: **€ 5.6–23.3 billion p.a.**



# Activity of the European Legislator

Competition Law is a pivotal policy area of the European Union

2014: approval by EU Council of Ministers | approval by the European Parliament;

## 2005

**Green Paper**

Damages actions for breach of the EC antitrust rules

## 2008

**White Paper**

Damages actions for breach of the EC antitrust rules

## 2013

**Package of Measures**

**Centre Piece:** Proposal for a Directive ... on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Directive 2014/104/EU or **DADA** (Directive on Anti-Trust Damages Actions))

## 2016

**Transposition into Member States' Law**

Minimum Standard Directive massive changes in Member States' Civil Law



# Introduction

European Directive (art 288 TFEU)

- Methodology: What is a **European Directive**?
- directive is a legal act of the European Union
  - which requires Member States to achieve a particular result
  - **without** dictating the means by which to achieve that result
- c.f. Art. 288(3) TFEU (Treaty on the Functioning of the European Union)
  - *“A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”*



# Overview of the Directive

- **idea**
  - creating a uniform European approach
  - avoidance of any exaggerated interference with the national procedural and liability laws
- primary aim of the DADA
  - give victims effective means of action to obtain full compensation (viz. actual loss & loss of profits)
- cf. CJEU Manfredi (ECLI:EU:C:2006:461)

## Typical Cases

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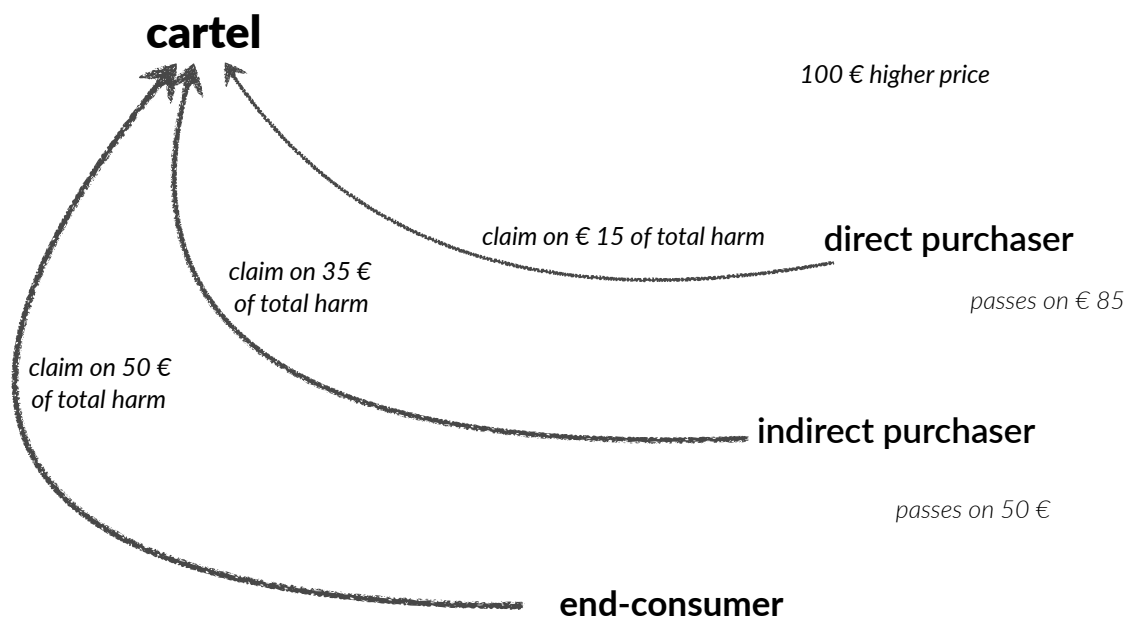
## Who Can be Sued?

- all (associations of) **“undertakings”**
- established European technical term; introduction into liability, competition & procedural law of the Member States
- discussion: application CJEU decision in **Akzo** (ECLI:EU:C:2009:536)?
- liability of a parent company for cartel practices by subsidiary; undisputed: liability must be assumed when the parent company has a controlling influence on the subsidiary
- CJEU in Akzo: rebuttable presumption of controlling influence when **parent owns 100%** of the capital of the subsidiary/largely **follows instructions** of parent company
- future parent companies cannot avoid civil liability by allowing their subsidiaries to become insolvent

# Standing

- “any individual” formula, c.f. CJEU in *Courage* (ECLI:EU:C:2001:465)
  - all natural and legal persons that suffered harm due to infringement of European or national competition law
- including “indirect” victims
  - cartel overcharges for goods
  - goods are sold on down a chain
  - direct purchaser (interim trader) passes on the anti-competitive price
  - indirect purchaser suffers pecuniary damage
  - standing of indirect purchaser, c.f. BGH in *ORWI* (BGHZ 190, 145)

# Standing





## Passing On-Attack

- indirect purchasers only have a claim where the (interim) purchaser **further up the chain passes** on the anti-competitive price
- however: selling a good could be a very **iterative process**
  - for instance, sugar is contained in 90% of all consumer products
  - result: a lot of purchasers have a claim, which could be very (very) low, e.g. € 0,01

## Class Actions

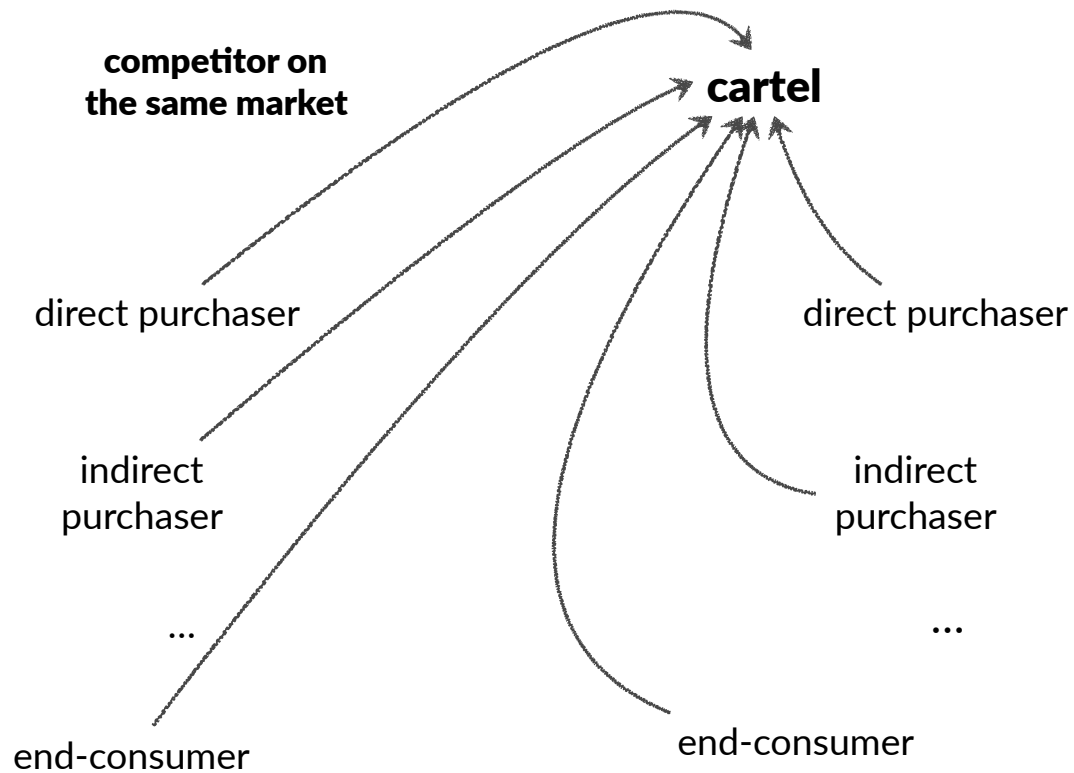
- bundling of claims?
  - e.g. CDC
  - bought the claims of all purchasers in the cement cartel
  - problem: OLG Düsseldorf – CDC had not sufficient resources in case of a lost action
- class actions?
  - European legislator: transformation into Member States' law voluntary
  - Germany (amongst others) no such action available

## Passing On-Defence

- indirect purchaser only suffers loss where the (interim) purchaser further up the chain passes on the anti-competitive price
  - where (interim) purchaser can pass his “loss” on – no actual loss
  - passing on defence
- burden of proof on the defendant
- note: defendant may require disclosure by the claimant/third parties
  - danger for claimants
  - defendant could delay the proceedings & obtain internal data from the claimant
  - thus, force a settlement

## Umbrella Claims

- purchaser is neither direct or indirect purchaser
- contract with a competitor of the cartel
- c.f. CJEU in KONE (ECLI:EU:C:2014:1317)
- market price generally rises
- result: even the **non-contracting party** has a claim against the cartel



## Harm

- claimants may seek full compensation
  - full compensation also includes
    - compensation of lost profit (*lucrum cessans*)
    - plus interest from when the harm was sustained
    - significant sums in long-running cartels

## Quantifying the Damage

- highly complicated: quantification of anti-trust damage
- complex economic models; specialists are essential; may take years; costs: 6-digit-number
  - European legislator provides help
  - “Practical Guide”: how to quantify harm caused by cartels
  - uniform procedure by Member States

## Cost/Risk Analysis

- litigation risk rests very decisively on the available evidence
- remember: risk of litigation must be pondered carefully
  - a double-digit number of joint defendants
  - hourly rates of specialised law firms: € 380-700
- plus:
  - internal costs,
  - expert opinions,
  - documents to be submitted (CDC: 1.6 tons of paper in 6-fold copy)
- cost risk from € 2.5 million for one instance to € 9.5 million for three instances

## Cost/Risk Analysis

- Claimant has to provide evidence for
  - Defendant's participation in a cartel
  - Cartel impact of the individual business
  - Occurrence of damage
  - Amount of damage
- assumption for occurrence of damage occurrence
- already according to the old legal situation with the binding effect of authority/legal decisions

## Binding Effect

- **follow-on claims**
  - litigation risk for the claimant?
  - (joint) defendant(s) are **bound** regarding all evidence from the authorities proceedings
  - no dragging out in follow-on action for damages (with evidence applications)
- objection: defendant's right to be heard?
  - no! defendant has had opportunity to contest the authority's decision at all instances
  - claimant's main advantage: the binding nature of the decision triggers presumption of damage



## Stand Alone Claims – Disclosure of Evidence

- evidence is out there!
- European legislator:
  - forces access to (relevant categories of) evidence in the hands of
    - the defendants
    - third parties
    - competition authorities
    - by court order
- penalise failure to provide existing evidence



## Problem: Leniency Programs

- example: Austrian NCA refused to make evidence accessible
- old § 39 (2) of the Austrian Cartel Act (Kartellgesetz): access to the court files contingent upon the “consent of the competition law infringer”
- CJEU in Pfeiderer (ECLI:EU:C:2011:389):
  - “absence of binding regulation under European Union law”
  - domestic courts, “on the basis of their national law, to determine the conditions under which access must be permitted by weighing the interests protected by European Union law”
  - **“that does not necessarily mean that access may be systematically refused”**



## Problem: Leniency Programs

- public prosecution of anti-competitive conduct depends on voluntary cooperation; less likely for fear of later disclosure; vital: **documents must be protected**
- (*unreserved*) protection of “leniency statements” and “settlement submissions”
  - national court (actually) must ensure that only “leniency statements” and “settlement submissions” are banned
- note: disclosure of (most) information **after finalisation** of competition authority’s proceeding
  - all information collected for the proceeding by the competition authority; all communication to the parties; withdrawn settlement submissions



## Not a One Way Road

- note: defendant undertakings may require the disclosure of evidence held by the claimant
- numerous joint defendants – flood of applications
- careful preparation proceeding of plaintiff (possible passing on defence)



## Joint and Several Liability

- per definition: collusive conduct of multiple undertakings
- **joint and several liability**
- externally: each undertaking obliged to compensate the entire damage
- internally: recourse against the other infringers
  - in proportion to relative responsibility
  - turnover
  - market share
  - role within the cartel



## Joint and Several Liability

Again: Leniency Programs

- time-factor between whistleblowers & non-whistleblowers
- non-whistleblowers will drag out public prosecution as far as possible
- whistleblowers: **will not contest** the authority's decision
  - whistleblower's (authority's) decision
    - first to become final
    - first to become binding
    - first follow-on actions





# Joint and Several Liability

Again: Leniency Programs

- limitation of whistleblower's joint & several liability
  - where immunity was granted under a leniency program
- undertakings are only liable to
  - (direct and indirect) purchasers and suppliers
  - unless: impossible to obtain full compensation from other cartel participants
- such privilege would seem absent in all European Member States' laws
  - absent in academic research (see Artt VI-4:102, VI-6:105 DCFR; Art 9:101 (1) (a) PETL)
  - why not? victim' risk and burden of assessment of financial capacities of the individual injuring parties



# Joint and Several Liability

Medium & Small Enterprises

- exception for a second group of tortfeasors:
- small and medium-sized enterprises (SMEs)
  - 99% of European undertakings
- liable only
  - to their own purchasers
  - if at the time of the infringement they had less than 5% market share
  - full liability would endanger their economic viability and their assets would lose all of their value



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# International Dimensions

- International Dimension: Cartel throughout Europe
- Directive: different Implementation in the Member States

## Competent Court

Art. 4 Brussels Ia Reg.

Art. 7(1) Brussels Ia Reg.

Art. 7(2) Brussels Ia Reg.

**Art. 8 Brussels Ia Reg.**

## Choice of Law Rules

Art. 6(1)(b) Rome II Reg.

## Substantive Law

specific Member State's  
Implementation of  
DADA

*Problem: how to get there?*



# International Dimensions

Competent Court | Adjudicatory Jurisdiction | Brussels Ia Regulation

## SECTION 1

### *General provisions*

#### *Article 4*

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.



# International Dimensions

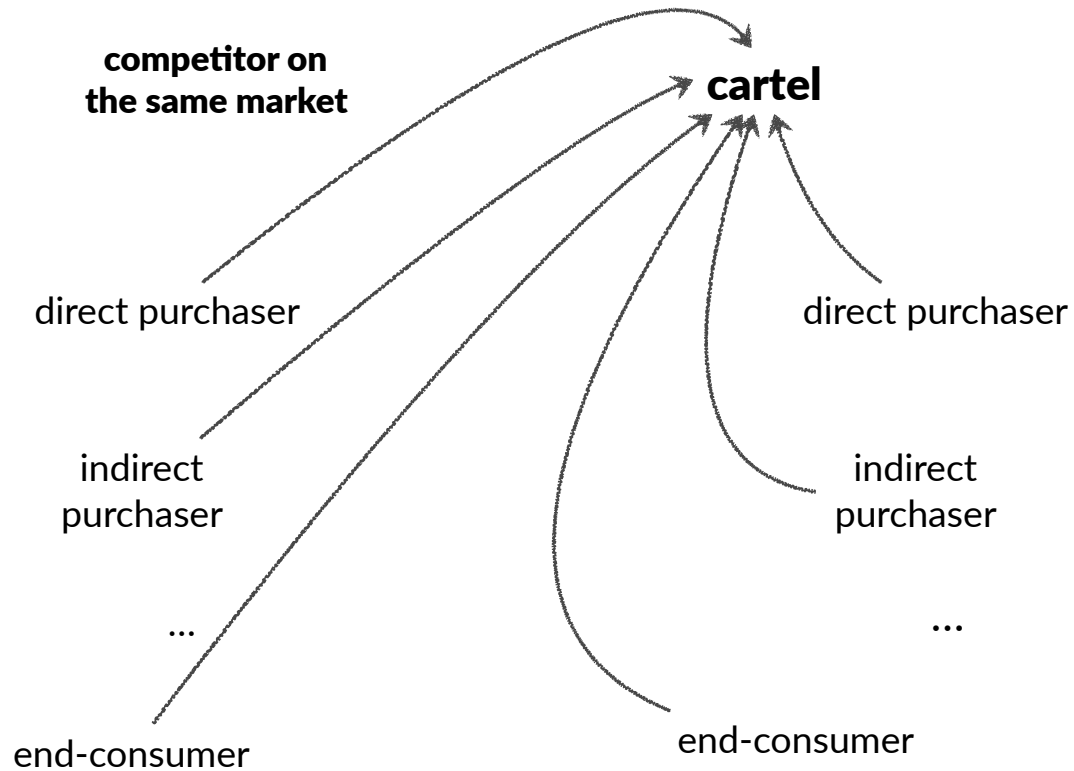
Competent Court | Adjudicatory Jurisdiction

## *Special jurisdiction*

### *Article 7*

A person domiciled in a Member State may be sued in another Member State:

- (1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
- (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
  - in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,



## International Dimensions

Competent Court | Adjudicatory Jurisdiction

### *Special jurisdiction*

#### *Article 7*

A person domiciled in a Member State may be sued in another Member State:

(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

- two competent courts: place of action (infringement of anti-trust law & place of effect (market))
- Court at the place of effect has limited recognition



# International Dimensions

Competent Court | Adjudicatory Jurisdiction | CDC

- cartel throughout Europe by several members
- in different Member States: Action at every Seat? Or at every place effected by the cartel?

## Article 8

A person domiciled in a Member State may also be sued:

- (1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the 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;

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# International Dimensions

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## Article 6

### Unfair competition and acts restricting free competition

- (b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where 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.

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## International Dimensions

Forum Shopping

- Art. 6(2)(b) Rome II Regulation
  - Market affected in more than one state
  - action at one the defendant's domicile (seat)
- application of the law at the defendant's domicile
- how to apply a specific implementation of the DADA?
- check the substantive laws at seats
- bring an action at the "best" seat under Art. 8 Brussels Ia Regulation
- due to Art. 6(2)(b) Rome II Regulation that specific law applies

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# Forum Shopping

Member States Implementation

- Methodology: Which Member State's implementation of DADA is best?
- viz. which version applies?
- DADA addresses tort law action
  - Brussels I<sup>a</sup> Regulation
  - Rome II Regulation
- (simplified) law (viz. version) at seat of one tortfeasor is applicable
  - provided: market at seat of one tortfeasor is affected by the restriction of competition
  - for all of Europe

