

Private Enforcement in Global Antitrust Cases – the European Perspective

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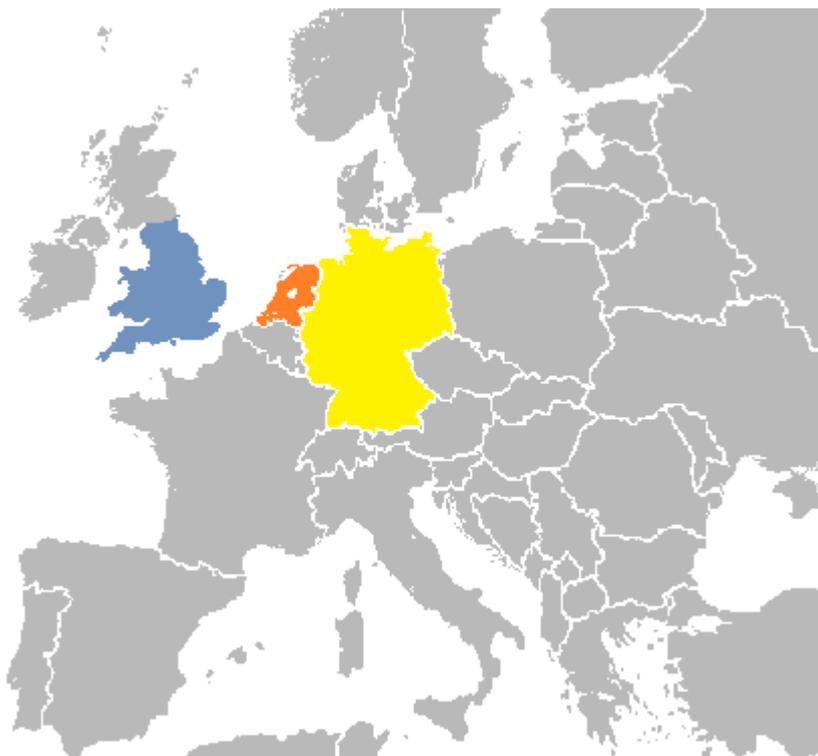
Overview

1. Private Enforcement in Europe on the rise
2. Case study: Air Cargo Cartel
3. Selected topics
4. Comparison with the US

1. Private Enforcement in Europe on the rise

- > Follow-on settlement/litigation now standard practice
- > Unprecedented level of claims (e.g. € 5 bn in air cargo) and number of court actions (e.g. more than 30 damage actions against the sugar cartel)
- > More legislation and court rulings favouring Claimants, e.g. in Germany and the Netherlands
- > EU Damages Directive (2014), e.g. presumption of damages, some (limited) disclosure, generous limitation period (5 years)
- > Introduction of class action regimes, e.g. in UK, France, Italy and Belgium
- > Development of plaintiff bars and vehicles

Popular jurisdictions for cartel damages claims



Germany

- Air cargo
- Car glass
- Sugar
- Cement
- Paper
- Hydrogen peroxide
- Elevators
- Vitamins
- Sales packaging
- Coffee
- Consumer goods
- Chocolate
- Cosmetics
- Fire trucks
- Flour
- Cathode ray tubes
- Rail compressors

UK

- Air cargo
- Car glass
- Carbon graphite
- Copper fittings
- Copper tubes
- CRT
- Gas Insulated Switchgear
- Industrial bags
- Interchange fees
- LCD
- Marine hose
- Methionine
- Paraffin wax
- Perindopril
- Synthetic rubber
- Vitamins

Netherlands

- | | |
|-------------|----------------------------|
| • Air cargo | • Vitamins |
| • Beer | • Gas Insulated Switchgear |
| • Bitumen | • Paraffin wax |
| • Fentanyl | • Sodium chlorate |
| • Elevators | |

2. Case Study: Air Cargo Cartel

- > February 2006: Dawn raids e.g. in US, EU, Korea and Brazil
- > From May 2006: Class actions e.g. in US, Canada and Australia
- > From 2008: Class action against BA in UK; BA with contribution proceedings against other airlines
- > November 2010: European Commission imposes fine of € 800 mn on 11 carriers from Europe, Canada, South America, Asia and Australia

2. Case Study: Air Cargo Cartel

- > April 2011: Dutch “torpedo” court action by Air France/KLM against direct customer Deutsche Bahn (“no liability for potential alleged damage”)
- > December 2013: Deutsche Bahn sues Lufthansa and Quantas (€ 3bn including third party claims) in Germany, LH with contribution claims against other airlines
- > May 2015: Publication of non-confidential version of Commission Decision
- > December 2015: General Court annuls Commission Decision

3. Selected issues: Disclosure

- > In the UK, wide disclosure obligations; frequent source of disputes: scope and extent, leniency material and rights of defence
- > In rest of Europe only very limited disclosure
- > Damages Directive sets minimum standards
 - > Establishes rights in principle to disclose relevant evidence
 - > but strict proportionality test: justification and merits of claim; scope and cost; protection of confidentiality and legal privilege



Causation and quantification of overcharge

- > Presumption of damages can be rebutted, e.g. Belgian elevator case
- > Only full compensation, e.g. no treble damages
- > Typically battle of economic experts
- > Preferred methodologies: Comparison of prices
 - > pre, during and after the cartel
 - > in cartelised region with prices in similar non-cartelised regions
- > Umbrella damages
- > Run-off damages

Pass-on Defense

- > Pass-on defense generally available in the EU, but burden of proof is unclear (e.g. in France presumption of pass-on, in Germany presumption of no pass-on)
- > Damages Directive stacking the odds in favour of Claimants:
 - > Burden of proof on Defendant
 - > Indirect purchasers can rely on a rebuttable presumption that any overcharge was passed on to them
 - > National courts must guard against multiple liability

4. Comparison EU – US

	EU	US (Fed)
Stand-alone actions	No practical relevance	Yes
Discovery	Typically only very limited discovery (and not immunity applications)	Yes (except immunity applications)
Punitive damages	No	Yes (exception: immunity recipient)
Umbrella damages	Yes	No
Joint and several liability	Yes (exceptions: small firms; immunity recipient unless no compensation from others)	Yes (exception: immunity recipient)
Contribution	Yes	No
Pass-on	Yes	No

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