

**PRIVATE ANTITRUST LITIGATION AS
PART OF THE ANTI-CARTEL PACKAGE
IN THE U.K. AND GERMANY**

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FOLLOW-ON ACTIONS AS A SUPPLEMENT TO PUBLIC ENFORCEMENT

1. Private damage remedies for cartel victims recently upgraded in UK (1998 and 2002) and Germany (2005)
2. The availability of public agency infringement findings as evidence in private cases. (a) In Germany any Member State's findings can be used. (b) In UK only EC and OFT findings useable
3. UK Competition Appeals Tribunal ("CAT") as a potentially advantageous forum for follow-on cases only
4. Potential impact of follow-on cases on amnesty-seekers
5. Deterrent effect of private activities may be overrated
 - They increase corporate incentives for more stringent auditing and compliance programs
 - They do not seem to significantly chill individual incentives vis-à-vis cartel opportunities

THE RISK-REWARD BALANCES FOR PRIVATE PLAINTIFFS

1. **Cartel cases hard to prove without benefit of a prior government order.**
2. **Discovery is limited in Germany (as in most civil law countries)**
3. **“Loser pays” cost rules as a key deterrent in absence of prior government action (*Crehan v. Inntrepreneur* (2004) as an aberration)**
4. **Psychological barriers to corporate victims engaging in this type of litigation**
5. **Uncertainty generated by arbitration clauses (as in the *Parcel Tankers* cases).**

REAL INCENTIVES FOR FORUM SHOPPING

1. Europe has way more diversity than anything within US
2. UK courts (and CAT) may be advantageous forums in many cases
 - Better discovery.
 - More opportunity for oral testimony.
3. *Provimi v. Adventis* (Court of Appeals 2003)—successful effort by German vitamin cartel victims to proceed in the UK courts
4. German courts as potentially advantageous forums for suits based on infringements found by other Member States' competition authorities.