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# COLLECTIVE ARBITRATION – ANOTHER (BETTER) WAY TO ENFORCE FOLLOW-ON ACTIONS


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AIJA Annual Congress, Prague, 28 August 2014

WORKS

# ENFORCING/DEFENSE OF + DECIDING FOLLOW-ON ACTIONS IS NO WALK IN THE PARK

WHY?

- (a) Practical obstacles
  - (b) Process obstacles
  - (c) Substantive challenges
- 

**DEFERRING FACTORS DAMPERING PRIVATE ENFORCEMENT**

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## **FOLLOW-ON ACTIONS – SOME BASICS**

### **DEFINITION:**

Civil law claims (follow-on damages) subsequent to a finding of an antitrust violation by:

- (a) Competition authority (European Commission / national)
- (b) Court

### **OCCURENCE:**

- (a) Infringement proceedings
- (b) Private enforcement proceedings (Euro Defense / offense)

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## PRACTICE OBSTACLES:

- Lack of awareness (of existence, of specific violations, process)
- Lack of competence & skill (in-house, external counsel, courts)
- Lack of (specialised) process
- Remote (difficult to get your hands on) players
- \$\$\$ (experts, lawyers, internal resources)
- Lack of expertise / tools to manage the process
- Legal / market culture
- Lack of co-ordinated efforts ( EU / member states / business community / legal community)

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## PROCESS OBSTACLES:

- Lack of adequate procedural framework
  - Lack of collective proceedings in many EU member states
  - Lack of special (taylor-made) rules
  - Lack of resources (human / financial / systems)
- Lack of (international) co-ordination (one-stop-shop venue)
- Lack of (international) co-operation (authorities – courts / courts – courts)
- Time

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## **SUBSTANTIVE CHALLENGES:**

- Complexity (factual / legal / procedural)
- Procedural challenges (burden of proof – antitrust violation / damage suffered / qualification of damage; where / who / how?)

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## **WHY IMPLEMENTATION OF THE EU-DIRECTIVE ON DAMAGE ACTIONS FOR COMPETITION LAW INFRINGEMENT MAY NOT CHANGE A LOT IN THE FORESEEABLE FUTURE**

- Purely technical measures
- No focus on practical challenges of real life implementation
- Lack of necessary incentives to stakeholders(i.e. “no nudge”)

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## COLLECTIVE ARBITRATION CAN CHANGE THE GAME

- Yes, **collective** arbitration is possible
- Yes, requires consent (agreement) of (potential) parties
- But, provides obvious advantages so that consent is likely
- Once recongnized, system provides framework incintivising stakeholder to overcome existing and remaining/foreseable obastacles

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## SOME OF THE OBVIOUS ADVANTAGES

- International one-stop-shop possible (one venue/globally enforceable)
- Procedural flexibility (possibility to tailor-make proceedings)
- Availability of special procedural tools (e.g. document production)
- Flexible cost allocation (relevant e.g. for pooling of expert costs)
- Specialized fact finder and decision maker (specialized tribunals)
- Case management capability and flexibility
- Timing
- Confidentiality
- **AVAILABLE NOW!**

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## OUTLOOK

- Initiative of the ICC
- Upcoming ICC Seminar in Vienna early 2015

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Johannes P. Willheim heads the international arbitration practice at Vienna based law firm Willheim Müller (WMLaw, [www.wmlaw.at](http://www.wmlaw.at)) and has a strong focus on EU and US antitrust law and commercial law.

He has been acting as party representative as well as arbitrator in numerous international arbitration proceedings concerning, in particular, commercial matters (involving JVs, licensing and distribution issues), energy cases (mostly price revisions, contract and antitrust matters), corporate cases (such as shareholder of post-transaction disputes), infrastructure projects and investment-related disputes involving insurance issues.

He is a frequent speaker at conferences and regularly holds lectures on international dispute resolution. Prior to founding WMLaw Johannes worked in the Brussels office of a magic circle law firm and for a prominent Austrian practice. He holds degrees from the University of Chicago Law School (LL.M.), King's College London (PG Diploma in EC Competition Law), University of St.Gallen, and Vienna University.



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