PAPER

CHECK AGAINST DELIVERY

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Remarks on: What are the problems with EC Antitrust Damage Actions in Europe? Does the private pillar require reinforcement?[1]

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IBA Conference

Day II – EC Antitrust Damage Actions

Panel 1: What are the problems with EC Antitrust Damages Actions in Europe? Does the private pillar require reinforcement?

A. Introduction

Over the last forty years there has been a culture in the EU of focusing on public enforcement to deal with breaches of antitrust law, whilst in other jurisdictions private enforcement is being increasingly used. The main reason for the low level of private enforcement appears to be that victims of competition law breaches find it too difficult to enforce their rights and bring their cases to court. Even though there has been small a number of successful claims in court, it is likely that the number and quality of settlements is lower then it should have been. Without the viable threat of being able to claim damages in court, private individuals have little negotiating power to be able to reach a settlement. Public enforcement is unquestionably indispensable for the effective enforcement of the obligations imposed by the Treaty. However, no public enforcer has the resources to investigate all cases of private harm caused by infringements of EC competition rules. Public enforcement focuses on the general interest and hence pursues the violations that are most harmful to community welfare and the economy. In the case of a violation, public enforcement only makes a general finding of infringement, but cannot possibly engage in the identification and pursuit of all cases that cause individual harm to victims which can be very numerous.

With the implementation of Regulation 1/2003 in 2004, European competition law was subject to considerable change, opening up the possibility for developing private enforcement alongside public enforcement. There is now huge potential for public enforcement to be complemented by the actions of individuals and business. If the European Commission can facilitate the process of allowing citizens and businesses to enforce their rights, then potential offenders will be more likely to think twice before breaking EC competition rules. However, steps towards promoting the private enforcement of European competition rules will require a solid and balanced legal framework. Today, significant obstacles, such as access to evidence and the cost and complexity of proceedings, block the effective operation of such damages actions.

B. Problems of Antitrust Damages Actions in Europe

1. Lack of Incentives

The main reason for the current lack of private enforcement is the lack of incentives for potential claimants. A study[2] launched by the European Commission shows that the general rule in Europe is that the loser pays the costs. The low level of damages awarded and uncertainty as to the result of court action, combined with the risk of having to bear all costs if the case is lost, is probably one of the main reasons why potential claimants decide against going to court, even when they have a meritorious case. The main problem for creating a solid pillar of private EC antitrust enforcement is related to the issue of creating enough incentives to get claimants to court. In Europe it is much easier to go to public authorities than to go to court, with all the hurdles, costs and risk that this involves. It is the cost of proceedings and the limited amount of damages likely to be awarded which prevent claimants from going to court. Hence, it has to be ensured that the potential benefits of bringing meritorious proceedings clearly outweigh the possible costs, and that victims are provided with the appropriate procedural tools..

2. Difficulties of Access to Evidence

Actions for damages in antitrust cases normally require the investigation of a much broader set of facts and issues than in ordinary civil litigation cases. The establishment of an infringement and proof of damage can involve issues like: what is the relevant market, what is the position of the defendant and competitors on that market, what is the likely or actual effect in the market, what is the damage caused, and where the passing-on defence is raised, what is the damage passed on to the next level of trade . The particular difficulty with this kind of litigation is that often the relevant evidence is not available to the claimant but is held by the party committing the anti-competitive behaviour or by third parties. Competition cases can require investigation into a whole range of facts and issues in a context where there is normally a high level of information asymmetry. Providing claimants with access to evidence is fundamental to facilitating damages claims. In order to do this, the rules concerning access

[2] Study on the conditions of claims for damages in case of infringement of EC competition rules, the Comparative Report, available at: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/comparative_report_clean_en.pdf, I. (ii), page 1-117.

to evidence which is in the defendant's possession need to be made stronger. In most Member States, the powers of national courts to order the production of documents are very limited. Very few Member States have mandatory pre-trial disclosure requirements. Parties are thus not obliged to produce the relevant documents unless the requesting party can expressly identify the individual document he seeks. This makes it very difficult to obtain the evidence necessary to support a claim. It is unacceptable that victims of an antitrust infringement cannot bring a damages claim or lose their case in court, simply because they do not have access to evidence. It must be possible to find reasonable ways of bringing that evidence to the attention of the court. This is fundamental to facilitating private enforcement.

3. Threshold of Fault Requirement

In many Member States, damages claims require fault to be proven. In some legal systems there is a presumption of fault, either rebuttable or irrebuttable, once a violation of competition law has been found, or the violation is in itself considered to establish fault. In other legal systems, however, no such presumption exists. Consideration should therefore be given to the standard of fault required in damages claims. The fault requirement can be an additional obstacle for private claimants if the threshold is put too high.

4. Difficulty in Calculating Damages

Claimants in cases that follow public enforcement decisions should be able to rely on those decisions as proof or strong evidence of an infringement. However, this will not prove the quantum of damages, which is not the area of investigation of competition authorities. In an action for damages for breach of Community competition law, as in any damages action, the claimant will need to quantify the damage suffered. Several economic models have been developed for calculating damages for complex economic situations. The quantification of damages in competition litigation is very complex given the economic nature of the illegality and the difficulty of reconstructing what the claimant's situation would have been in the absence of the infringement (as is usually required under tort rules). This gives rise to significant obstacles in private actions for damages in the field of competition law. In particular, the issue of establishing the casual link between the infringement and the damage caused. The further down the chain, the more difficult it will be to argue that there is still a sufficient link between the damage and the infringement, taking into account the possibility of numerous external elements which could have influenced the market price and costs.

5. Uncertainty as regards Passing-On Defence and Indirect Purchaser Standing

The "passing-on defence" arises in a situation where an undertaking which purchases from a supplier that is overcharging for a good or a service, may be in a position to mitigate its economic loss by passing-on the overcharge to its own customers. This could lead to a situation where the damage could be passed down the supply chain or even passed on entirely to the ultimate purchaser, the final consumer. Hence, the exact distribution of damage along the supply chain is exceedingly difficult to prove. Indirect purchasers, in particular, may have great difficulties in proving the extent of the damage they have suffered and the causal link with the infringing behaviour. No consistent regulation of passing-on exists in the different Member States. This lack of clarity, combined with the difficulties in obtaining sufficient proof (in particular relating to the establishment of causation and damage), constitute serious obstacles to claims by indirect purchasers. The possibility for defendants to rely on the passing-on defence can also seriously restrict private actions by direct purchasers. This issue is again an especially difficult one, particularly in relation to damages claims in the field of competition.

6. No Official Collective and Representative Actions

It is doubtful that any system relying only on individual actions will be sufficient to compensate for the harm done to end consumers. Some form of collective action is probably required to ensure that this harm can be fully repaid to society. At the same time however, great care must be taken to avoid creating the conditions which might give rise to the alleged excesses of the US class action system. Since many direct purchasers pass-on some element of their damages to the level in the supply chain below them, consumers are almost always the ultimate victims of anti-competitive behaviour. However, they are also the least likely to bring damages claims, since their claims are too small to bring individual lawsuits to court.

Consideration should therefore be given to ways in which consumers' interests can be better protected by collective actions (by which is meant a single claim brought on behalf of a group of affected persons) and representative actions (actions brought by representative organisations, such as consumer organisations). Besides protecting consumer interests, collective actions can serve to consolidate a large number of small claims into one action, thereby saving time and money. It is very important that we get any instrument of collective / representative action right, so as to get an effective remedy for society whilst not producing the perceived US excesses linked to opt out class actions.

7. High Burden of Proof

The alleviation of the claimant's evidentiary burden was addressed by the ECJ in the Aalborg Portland judgment. After having paraphrased Article 2 of Regulation 1/2003, the Court continued that

"although according to those principles the legal burden of proof is borne either by the Commission or the undertaking or association concerned, the factual evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged".[3]

The high burden of proof of causation and damage in a claim, combined with the lack of disclosure and the asymmetry of information, exacerbates the obstacles for private enforcement in national courts.

8. Applicable Law

Apart from the establishment of an infringement of Article 81, 82 EC, everything else is presently regulated by 27 different national laws. The differences between these national rules, for example on passing-on or calculation of damages, can create inconsistencies and foster forum shopping. It is not acceptable that one national court might potentially have to apply 27 different national laws to a case having effects in the whole Community. Europe needs a more consistent body of rules and at the very least, a system that ensures the application of one substantive law in any given case.[4]

I have outlined here-above eight particularly important problem areas for private enforcement in Europe. This list is by no means exhaustive but the issues mentioned are of particular difficulty in the field of competition law claims.

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[3] Joined cases C-204/00, C-205/00, C-211/00, C-213/00, C-217/00 and C-219/00 Aalborg Portland and others v Commission [2004] ECR I-123, para 79.

[4] With regard to the issue of applicable law, reference should be made to the Commission's proposal for a Regulation on the law applicable to non-contractual obligations (the "Rome II Regulation") Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II"), COM(2003) 427 final as amended by the modified proposal.

C. Examples of Cases which Show Obstacles

1. UFC-Que Choisir

An ongoing case in France shows the difficulties that consumers may encounter when claiming damages in the absence of a true representative action. The French consumer association UFC-Que Choisir, along with more than 12,000 claimants each having suffered minor economic loss, recently launched a follow-on action for damages against the three mobile telephone operators which had been sanctioned by the French Competition Council in 2005 for a breach of competition law. In order to handle this action, the association engaged considerable human and financial resources. Due to the considerable administrative burden encountered and the costs involved, only a small percentage of the alleged victims were eventually able to submit a claim. Out of several million of the mobile telephony operators clients, 200,000 actively expressed their intention to launch an action by registering on the consumer association's website, however only approximately 12,000 claims could actually be brought. The fact that a large number of alleged victims will not receive compensation for their losses is far from satisfactory and illustrates the need to provide measures in order to facilitate consumers' claims for damages arising from anti-competitive conduct.

2. Arkopharma v. Roche / Hoffmann La Roche

The recent decision of the Tribunal de Commerce de Nanterre in Arkopharma v. Roche / Hoffmann La Roche shows the difficulties surrounding the passing-on defence.[5] The claimants claimed damages against Roche / Hoffmann La Roche which along with a number of other parties had already been fined by the European Commission for taking part in a vitamin cartel. The judge noted that in its vitamin cartel decision the Commission highlighted the fact that the infringement had harmed end consumers and so therefore that direct purchasers were able to pass on the overcharge down the supply chain. In the present case, the claimant alleged that it had suffered harm from the cartel by being overcharged without proving that it had resulted in a reduction of its margins. The judge concluded that if a causal link between the infringement and the overcharge was established, on the contrary, the causal link between the overcharge and the harm alleged by Arkopharma was not, given the fact that

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[5] Tribunal de Commerce de Nanterre, Arkopharma v. Roche / Hoffmann La Roche, May 11 2006, available at: http://ec.europa.eu/comm/competition/antitrust/actionsdamages/nanterre_2004f02643.pdf

Arkopharma had the possibility to pass on this overcharge to its clients. By not passing on where it had the possibility to do so, Arkopharma had freely set its pricing policy and the judge considered that the defendants could not be held liable. This may be too simplistic an approach given the fact that the possibility of passing-on may be limited by competition in the market.

3. Meridian Communications Limited and Cellular 3 Limited v Eircell Limited[6]

This was a stand-alone action between a recent entrant into the Irish mobile telecommunications market and an undertaking owned by the former mobile telephony monopoly supplier. The action was heard in the High Court for over 94 days between 18 January 2000 and 29 November 2000 before eventually being dismissed. By the time the Supreme Court appeal came to the hearing, the company's assets had been exhausted and the action proceeded no further. The litigation also brought an end to the attempt by Meridian Communications Limited and Cellular 3 Limited to enter the Irish mobile telephony market.

D. Reinforcement of the Private Pillar?

In the landmark case of Van Gend en Loos, the European Court of Justice emphasised that good enforcement is not just related to public enforcement. In order to ensure the effectiveness of the whole system, it is beneficial that other enforcers have a role to play by way of private actions.[7]

"(…) *the vigilance of individuals to protect their rights amounts to an effective supervision in addition to the supervision entrusted to the diligence of the Commission and of the Member States*."

This statement contains the clear message, firstly that the EC Treaty creates rights which protect every country, company and consumer, and secondly everyone that benefits from those rights can go to court to enforce them. The reasoning in this 1963 judgement - which was groundbreaking at the time but now commonplace in most fields of Community law - was further developed by the ECJ in two recent cases, specifically related to competition law.[8]

[6] OBSERVATIONS ON ASPECTS OF COMMISSION "GREEN PAPER ON DAMAGES ACTION FOR BREACH OF EC ANTI-TRUST RULES" AND THE ACCOMPANYING "COMMISSION STAFF WORKING PAPER", James O'Reilly, page 5, available at: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/143.pdf

[7] European Court of Justice, February 5, 1963, van Gend en Loos ./. Netherlands Inland Revenue Adninistratie.

[8] Courage Judgement and Manfredi.

In the Courage v Crehan judgment of 2001, the ECJ confirmed that the basic principles from Van Gend en Loos apply as much to competition law as to other areas; when damage is caused as a result of an EC antitrust infringement, that damage should be repaired. In its Manfredi judgement, the Court of Justice underlined yet again the need for an effective redress for victims of competition law infringements.

These judgements show that the private enforcement of competition law has an important role to play in building the competition culture that we need to develop in order to fulfil our ambitions for economic growth in Europe. The Commission did not invent anything new with its Green Paper. The right to receive damages for violation of rights is an established principle which is fully in line with the case law of the ECJ. However despite this, the Ashurst study indicates that there have been relatively few cases in which damages have been awarded by national courts for breaches of Community competition law. The picture that emerged from this study was one of astonishing diversity and total underdevelopment.[9] The figures in the Ashurst Report may not reflect the actual level of private enforcement in Europe as they do not include those cases which have been settled out of court. Due to the typically confidential nature of settlements, reliable information is hard to come by. However, studies launched independently of the European Commission confirm the low number of successful judgements found by the Ashurst Study and underline the low level of private antitrust enforcement in Europe.[10] As a reaction to Regulation 1/2003 and the 7th amendment to the German act against restrictions of competition, academic literature very clearly underlines the underdevelopment of private claims for damages in cases of antitrust enforcement in Germany.[11]

In December 2006, a model case came to court in Düsseldorf that could determine whether many of the victims of cartels can receive damages in Germany. This case is significant because it was brought by a Belgian firm that had purchased the claims from third parties that had suffered damage. This is the first tort procedure in Germany using the new legislation at

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[9] Comparative and Economics Reports by Ashurst for the European Commission, Executive summary, Introduction.
[10] *Hempel*, Privater Rechtsschutz im Kartellrecht, 2002 (144 – 153).
[11] *Bulst*, Schadenersatzansprüche der Marktgegenseite im Kartellrecht, 2006 (27); *Hempel*, Privater Rechtsschutz im Kartellrecht, 2002 (146); *Mäsch*, EuR 2005, 825 (828); *Schütt*, WuW 2004, 1124; *Bechtold*/*Bosch*/*Brinkner*/*Hirsbrunner*, EG-Kartellrecht, VO 1/2003 Art. 6, Rdn. 2; *Bulst*, EBOR 2003, 623 (625); *Monti*, IBA 8th Annual Competition Conference 2004, 2; *Möschel*, WuW 2006, 115; *Nowak*, EuZW 2001, 717; *Bechtold*, ZHR 160 (1996), 660; *Bornkamm/Becker*, ZWeR 2005, 213 (215); *Hartog/Noack*, WRP 2005, 1397 (Onlineausgabe S. 8); *Hempel*, WuW 2005, 137 (141), *Hirsch*/*Burkert*, in Gleiss/Hirsch/Burkert (Hrsg.) EG-

national and European level. However, this ongoing case and some recent successes in other Member States cannot disguise the continuing low level of private antitrust enforcement. This shows the need for action at European level to push private actions forward. The rights of private parties to bring actions for damages must be seen as being in the public interest. Whilst cartels harm society[12], private antitrust enforcement brings clear benefits to society in terms of direct savings for customers and end consumers, deterrence against infringements, the promotion of economic efficiency and pro-competitive conduct and a greater intensity of compensation. Therefore, the benefits of antitrust enforcement dwarf any plausible estimates of costs of antitrust enforcement.[13] In order to encourage claimants to enforce their rights and bring claims, the private pillar needs to be reinforced.

Kartellrecht, Art. 85 (2), Rdn. 1725; *Schmidt*, in: Immenga/Mestmäcker (Hrsg.), EG-Wettbewerbsrecht, Art. 85 II, Rdn. 71; *Wils*, World Competition 26 (3) (2003), 473 (476).

[12] The "Frozen Fish"-Cartel raised prices by 20% for four years. The "Sewer Construction"-Cartel raised prices by 17%. (The overcharge to costumers exceeded $ 75 million in the US and $ 200 million worldwide.) The "Vitamins"-Cartel raised prices by 25-28%. (The overcharge to costumers exceeded $ 1,2 billion in the US).

[13] Baker, Journal of Economic Perspectives 2003, 27 (45).