BRANDSTÄTTER RECHTSANWÄLTE GMBH

EU Antitrust Law – Is Private Enforcement Effective or Effectively Dead?

Dr. Jürgen Brandstätter

European Corporate Counsel Summit 2011

Private enforcement – why?

The Commission of the European Union fined

- Producers of washing powder for € 315,2 mio (13.04.2011)
- 11 air cargo carriers for € 799 mio (09.11.2010)

Also NCAs may impose fines in national proceedings

continued:

When the Commission publishes its cartel rulings it regularly adds the following advice:

"*Any person or firm affected by anti-competitive behavior as described in this case may bring the matter before the courts of Member States and seek damages. The case law of the Court and Council regulation 1/2003 both confirm that in cases before national courts, a commission decision is binding proof that the behavior took place and is illegal. Even though the Commission has fined the companies concerned, damages may be awarded without being reduced on account of the Commission fine*"

(http://ec.europa.eu/competition/cartels/what_is_new/news.html)

continued:

The commission therefore makes it clear that

a) anyone may seek compensation,
b) the commissions decisions are binding and
c) even though a company has been fined competitors may still claim damages.

Legal basis for anti trust rules:

Article 101

(ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

— any agreement or category of agreements between undertakings,

— any decision or category of decisions by associations of undertakings, EN C 83/88 Official Journal of the European Union 30.3.2010

— any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

continued:

Article 102

(ex Article 82 TEC)

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

continued:

The gist of it is:

- if your competitor has engaged in price fixing,
- limiting production or carving up markets,
- charged you excessively high prices,
- charged everybody else predatory low prices aimed at driving you, a rival competitor, out of business
- or refused to supply you as an existing long standing customer without good reason,

you may sue him for damages.

European Court of Justice ruled:

- 2001 in *Courage – Crehan,* C-453/99:

(26) **The full effectiveness** of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) **would be put at risk** if it were not open **to any individual to claim damages** for loss caused to him by a contract or by conduct liable to restrict or distort competition.

(27) **Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices**, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.

(29) **However, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules** governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions **(principle of equivalence)** and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law **(principle of effectiveness)** (see Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 27).

[Emphasis added]

continued:

- 2006 in *Manfredi – Lloyd Adriatico,* C-295/04 – C-298/04:

(31) Moreover, it should be recalled that **Articles 81 EC and 82 EC are a matter of public policy** which must be automatically applied by national courts (see, to that effect, Case C-126/97 Eco Swiss [1999] ECR I-3055, paragraphs 39 and 40).

(81) The answer to the third question in Cases C-295/04 to C-297/04 and the fourth question in Case C-298/04 must therefore be that, in the **absence of Community rules** governing the matter, it is for the **domestic legal system** of each Member State to **prescribe the limitation period** for seeking compensation for harm caused by an agreement or practice prohibited under Article 81 EC, provided that the principles of equivalence and effectiveness are observed.

(96) **Total exclusion of loss of profit** as a head of damage for which compensation may be awarded **cannot be accepted** in the case of a breach of Community law since, especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible (see *Brasserie du pêcheur and Factortame*, cited above, paragraph 87, and Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 91).

[Emphasis added]

European Commission published:

2005 Green Paper Damages actions for breach of the EC antitrust rules:

Vigorous competition on an open internal market provides the best guarantee that European companies will increase their productivity and innovative potential. Competition law enforcement is therefore a key element of the “Lisbon strategy”, which aims at making the economy of the European Union grow and create employment for Europe’s citizens.

As part of an effort to improve the enforcement of competition law after the modernisation of the procedural law on the application of Articles 81 and 82 of the EC Treaty, this Green Paper and the Commission Staff Working Paper attached to it address the conditions for bringing damages claims for infringement of EC antitrust law. They identify obstacles to a more efficient system for bringing such claims and propose options for solving these problems. Facilitating damages claims for breach of antitrust law will not only make it easier for consumers and firms who have suffered damages arising from an infringement of antitrust rules to recover their losses from the infringer but also strengthen the enforcement of antitrust law.

continued:

2008 White Paper on damages actions for breach of the EC antitrust rules:

Any citizen or business who suffers harm as a result of a breach of EC antitrust rules (Articles 81 and 82 of the EC Treaty) must be able to claim reparation from the party who caused the damage. This **right of victims to compensation** is guaranteed by **Community law**, as the European Court of Justice recalled in 2001 and 2006.

Despite the requirement to establish an effective legal framework turning exercising the right to damages into a realistic possibility, and although there have recently been some signs of improvement in certain Member States, **to date in practice victims of EC antitrust infringements only rarely obtain reparation** of the harm suffered. The amount of compensation that these victims are forgoing is in the range of several billion euros a year.

continued:

2008 White Paper …. :

In its 2005 Green Paper, the Commission concluded that this failure is largely due to **various legal and procedural hurdles** in the Member States' rules governing actions for antitrust damages before national courts. Indeed, such antitrust damages cases display a number of particular characteristics that are often insufficiently addressed by traditional rules on civil liability and procedure. This gives rise to a great deal of **legal uncertainty**. These particularities include the very complex factual and economic analysis required, the frequent inaccessibility and concealment of crucial evidence in the hands of defendants and the often unfavourable risk/reward balance for claimants.

The **current ineffectiveness of antitrust damages actions** is best addressed by a combination of measures at both Community and national levels, in order to achieve effective minimum protection of the victims' right to damages under Articles 81 and 82 in every Member State and a more level playing field and greater legal certainty across the EU.

White Paper recommendations:

- Standing
- Access to evidence: disclosure inter partes
- Binding effect of national antitrust decisions
- Fault requirement
- Damages
- Passing-on overcharges (defence)
- Limitation periods
- Costs of damages actions
- Interaction between leniency programmes and actions for damages

continued:

Standing

- **"any individual"** must be allowed to claim damages
- also applies to **indirect purchasers**
- **Collective redress** shall be possible by a combination of two complementary mechanisms,
  - **representative actions**, which are brought **by qualified entities**, such as consumer associations, state bodies or trade associations
  - **opt-in collective actions**, in which victims **expressly decide** to combine their individual claims for harm they suffered into one single action

continued:

Access to evidence: disclosure inter partes

- National courts should, under **specific conditions**, have the power to order parties to proceedings or third parties to **disclose precise categories of relevant evidence**.
- To prevent **destruction of relevant evidence** or **refusal** to comply with a disclosure order, courts should have the power to impose sufficiently **deterrent sanctions**, including the option to draw adverse inferences in the civil proceedings for damages.

continued:

Binding effect of NCA decisions

- National courts that have to rule in actions for damages on practices under Article 81 or 82 on which **an NCA** in the ECN has already given a **final decision** finding an infringement of those articles, or on which **a review court** has given a **final judgment** upholding the NCA decision or itself finding an infringement, **cannot take decisions running counter** to any such decision or ruling.

continued:

Fault requirement

- Once the victim has **shown a breach of Article 81 or 82**, the **infringer should be liable for damages caused unless he demonstrates** that the infringement was the result of a genuinely **excusable error**.
- An error would be **excusable** if a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition.

continued:

Damages

- **full compensation** of the **real value of the loss suffered,** loss of profit, right to interest
- To **facilitate** the **calculation of damages**, the Commission therefore intends to draw up a framework with pragmatic, non-binding guidance for **quantification** of damages in antitrust cases, e.g. by means of **approximate methods of calculation** or **simplified rules on estimating** the loss.

continued:

Passing-on overcharges (defence)

- **Defendants** should be **entitled to invoke the passing-on defence** against a claim for compensation of the overcharge. The standard of proof for this defence should be not lower than the standard imposed on the claimant to prove the damage.
- Indirect purchasers should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety.

continued:

Limitation periods

should not start to run

- in the case of a **continuous or repeated infringement**, before the day on which the **infringement ceases**
- before the victim of the infringement can reasonably be expected to have knowledge of the infringement and of the harm it caused him
- Commission suggests a **new limitation period** of at least **two years** should start once the infringement decision on which a follow-on claimant relies has become **final**.

continued:

Costs of damages actions

- early resolution of cases
- limits on the level of **court fees** applicable to antitrust damages actions
- procedural rules fostering **settlements**
- set **court fees** in an appropriate manner so that they do not become a disproportionate disincentive to antitrust damages claims
- give national courts the possibility of issuing **cost orders** derogating, in certain justified cases, from the normal cost rules, preferably upfront in the proceedings

continued:

Interaction between leniency programmes and actions for damages

- Adequate **protection against disclosure in private actions for damages** must be ensured for **corporate statements** submitted by a leniency applicant in order to avoid placing the applicant in a less favourable situation than the co-infringers. Otherwise, the threat of disclosure of the confession submitted by a leniency applicant could have a negative influence on the quality of his submissions, or even dissuade an infringer from applying for leniency altogether.
- The Commission therefore suggests that such protection should apply to all **corporate statements** submitted **by all applicants for leniency** in relation to a breach of Article 81 of the EC Treaty (also where national antitrust law is applied in parallel); regardless of whether the application for leniency is accepted, is rejected or leads to no decision by the competition authority

Thank you for your attention !

For further information please access our website:

www.bma-law.com