



European Competition Law Update 2008

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Swiss and EU Trends in Private Antitrust Litigation

Nina Niejahr (Brussels)
Serge Pannatier (Geneva)

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EU Trends in Private Antitrust Litigation

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Private enforcement in the EU: Where are we now?

- Emerging trends in private damages actions
 - Forum shopping
 - Passing-on defence
 - Three examples
- Commission White Paper on private damages actions

Private Enforcement in the EU: Emerging Trends (1)

- Increase in private damages actions in Member States
- Between May 2004 – 3Q 2007
 - 96 antitrust damages actions in EU27 reported
 - Actions found in only 10 of 27 MS

Private Enforcement in the EU: Emerging Trends (2)

- ... not enough in Commission's view
- Despite "*an evolution in several Member States, the Commission can't sit back*"
- Further encouragement a top Commission priority

Private Enforcement in the EU: Emerging Trends (3)

- Forum shopping
- Passing-on defence
- Different types of private enforcement
 - Companies purchasing and pursuing damages claims
 - Consumer group representation

Private Enforcement in the EU: Forum Shopping

- Preliminary question: where to bring claim?
- Inevitable due to absence of EU-wide procedures
- Emerging *fora* of choice: UK and Germany
- Resurgence of the “Italian torpedo”

Private Enforcement in the EU: Forum Shopping – UK

- Specialist Competition Appeal Tribunal
- Favourable discovery rules
- Body of case-law
(*Courage v Crehan*, vitamins cartel cases)
- Expeditious treatment of cases

Private Enforcement in the EU: Forum Shopping – Germany

- 2005 legislative amendments facilitate private actions
- Right to inspect documents held at FCO (*Bundeskartellamt*)
- Cost-effective and expeditious

Private Enforcement in the EU: Forum Shopping – Consequences?

- **Claimants**
 - Choose jurisdiction carefully
 - Consider procedure sought/outcomes desired
- **Defendants**
 - may be pursued in any EU jurisdiction
(EC rubber cartel damages action in the High Court in London – Czech/Polish defendants)
 - Face potentially enormous defence costs

Private Enforcement in the EU: Passing-on Defence (1)

- Customer “passing on” illegal overcharge to own customers (indirect customers)
- Defence of infringer
 - Claimant suffered no loss as passed on price increase to customers
 - CFI emphasis on compensatory principle

Private Enforcement in the EU: Passing-on Defence (2)

- Defence of indirect customer
 - Invokes passing-on of overcharges to show harm suffered
 - Difficulty in proving existence/extent of passing-on due to distance from infringement

Private Enforcement in the EU: Three Examples

1. Germany: organisation “buying” cartel damages claims
2. UK: consumer group representation
3. Belgium:
the Commission “leading by example”

Private Enforcement in the EU: Enforcing Bought Claims (1)

1. *Cartel Damage Claims (CDC)*

- 2002: German cement cartel decision
- CDC set up to represent 29 injured parties against 6 cartel members
- Claim of > EUR 100 m
- March 2006: admissibility confirmed
- May 2008: admissibility confirmed on appeal

Private Enforcement in the EU: Enforcing Bought Claims (2)

- Admissibility
 - Jurisdiction: evidence of unlawful act within the jurisdiction
 - Specificity of claim: demonstrate parameters for calculation and the minimum damage
 - Standing: claims made based on assigned claims NOT class actions

Private Enforcement in the EU: Enforcing Consumer Claims (1)

2. *Which?/JJB*

- 2003: JJB fined for participation in UK football shirt price-fixing
- Media adverts; proof of purchase between 2000-2001 required
- March 2007: damages action by Which? on behalf of 130 consumers before CAT

Private Enforcement in the EU: Enforcing Consumer Claims (2)

- January 2008: settled
 - £20 per shirt bought during infringement period paid back to customers
- Unlikely to be repeated – future “opt-out” regime

Private Enforcement in the EU: The Commission “leading by example”

- February 2007: lifts & escalators decision
Commission fined Otis, KONE, Schindler and ThyssenKrupp a total of €992 million
- June 2008: damages case filed in Brussels
Commission requests provisional payment of €5 million from the four companies; then takes them to court over an unspecified amount for overpayments relating to 64 installations

Commission White Paper on Damages (1)

- *“concerning all categories of victim, all types of breach of Articles 81 and 82 EC and all sectors of the economy”*
- *“Any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an infringement of Article 81 or 82 EC. This principle applies to indirect purchasers”.*

(April 2008)

Commission White Paper on Damages (2)

- No need for a prior finding of an infringement by a competition authority
- NCA infringement decision = proof of infringement
- Collective redress: representative actions and opt-in collective actions
- Single damages (not multiple): actual loss, profit loss & interest (framework on damage quantification due)
- Corporate leniency statements non-disclosable

Commission White Paper on Damages (3)

- No opt-out class actions, no double/treble damages, no ‘US-style’ discovery
- Over 160 comments by 15 July 2008
- “*a legislative proposal is one of the options we have in mind*” – European Commission

Looking Forward ...

- Possible conclusion on private damages enforcement at EU-level in 2009
- MS courts will be acquiring expertise and more openly embracing private litigation
- Implication in cartel behaviour at EU-level = anticipate national litigation to follow suit
- Potentially: more damages actions filed → more damages recovered

Questions and a lively discussion ...



Swiss Trends in Private Antitrust Litigation

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Switzerland – The General Picture

- Swiss Competition Commission (ComCo) is the main enforcement authority
- Limited Role for Private Enforcement

Reasons for Lack of Private Litigation

- Primary role of ComCo
- Evidence problems
- Short limitation period
- No collective actions

è High costs, limited benefits

ComCo

- Public interest
- Ex officio/upon complaint
- Ex officio fact-finding
- No cost risk

Courts

- Individual interest
- Upon filing of claim
- Burden of proof
- Full cost risk

Available Remedies

- Unlawfulness of anti-competitive conduct
 - ex ante: (preliminary) injunctions
 - Ex post: damages, disgorgement of profit
- Nullity of agreements

Legal standing

- No “unclean hand” defence
- Indirect purchasers
- Consumers / consumers organisations:
no standing
- Trade associations
- Assignability of individual claims

Prevailing Role of ComCo

- Only authority allowed to rule on the lawfulness of a restraint of competition
 - > Civil court must refer questions re. lawfulness of a restraint of competition to ComCo
- Investigation

Injunctions

Can be ordered both by civil courts and the
ComCo

- removal or cessation of the restraint

Damages Claims

- Actual Damages
- Moral Damages
- Amount of the damages is determined by the judge

Disgorgement of Profits

- Remittance of profits earned as a result of an unlawful behavior
 - Profit earned in bad faith
- Can be cumulated with other available civil remedies

Nullity of Agreements

- Only upon request
- Contract entered with third parties by a party to an unlawful contract
- Whole or part of the contract may be declared null and void
- Nullity *ex nunc* or *ex tunc*?

Competition Law before Swiss Arbitral Tribunals

- Arbitrability
- Application of foreign competition law
- Limited review on appeal