



BDI

Ongoing and upcoming developments in European competition law

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- Private Enforcement for Breach of Competition Rules
- New Guidelines for art. 82 EC ?
- Competition news in specific sectors

Cartel Settlement Procedure in the EU (1)

26.10.2007: Draft legislative package to introduce settlement procedure for cartels

- Proposal:

Defendants can enter into a settlement with the Commission

- if they acknowledge their involvement in the cartel and their liability
- if they agree to a faster and simplified procedure

In return: Defendants can expect a lower fine

Settlement negotiations: Purely at discretion of the Commission

Cartel Settlement Procedure in the EU (2)

Background:

Commission aims

- to simplify the administrative proceedings and
- to free resources to pursue more cases
- to reduce litigation in cartel cases and incentives to appeal

Successful strategy?

Welcomed initiative, but changes have to be made to attract a large number of settlements

Cartel Settlement Procedure in the EU (3)

Details of the Commission's proposal

- Settlement can take place prior to SO (Statement of Objections)
- Parties (cartel defendants) initiate settlement discussions by written settlement request
- Request entails scope of infringement and admission of liability, also anticipated level of fine
- Potential objections and supporting evidence to be disclosed to the parties
- Parties can state their views (no hearing after „settled“ SO is issued)
- COM enjoys broad discretion whether to enter into a settlement
- Settlement in parallel with leniency program
- No waiver of the right to appeal

Cartel Settlement Procedure in the EU (4)

Evaluation of the proposal by legal and industry groups:

- Uncertainty about settlement discount: biggest obstacle
 - Percentage of fine or fixed amount?
 - No transparency with regard to the fine level
 - No flexibility on the amount of fines (hard core cartels, repeat offenders)
- Written submission might be subject to „discovery“ proceedings in US civil litigation

Cartel Settlement Procedure in the EU (5)

US „plea agreements“ compared

- Starting point: US Sentencing Guidelines for Organisations
- Differences:
 - Prosecution of corporations and individuals
 - Criminal liability
- Practice:
 - „Race“ for settlement
 - Varying discounts for defendants
 - More generous approach

Cartel Settlement Procedure in the EU (6)

How to improve the proposal?

- Discount must be real incentive
- Detailed information about the fine must be provided
- Access to core evidence and information to be granted
- Oral submissions should be possible
- Settlement not at the sole discretion of the Commission
- Parties should gain from agreed settlement

Private Enforcement for Breach of Competition Rules (1)

- Green Paper on damages actions for breach of the EC antitrust rules (2005)
- White Paper (expected: April 2008)
- Definition: Private Enforcement
 - „Enforcement of the EC competition rules by private individuals“
- In contrast to: Public Enforcement
 - „Enforcement of the EC competition rules by the Commission and NCAs“

Private Enforcement for Breach of Competition Rules (2)

Starting Point:

- Firms and individuals can claim damages for loss suffered as a result of infringements of competition rules
- Companies must be held responsible to anyone damaged by their actions

Controversal debate:

- Do we really need „more“ private enforcement?
- Should „private enforcement“ serve public goals (eg. deterrence)?
- How could private damages actions be increased without leading to „US-style excess“?

Private Enforcement for Breach of Competition Rules (3)

Need for action?

- Commission: „total underdevelopment“ of damages claims for infringements of competition rules in the Member States (Ashurst report)
- Commission's assumption has been refused (eg. by France, United Kingdom and Germany)
- German FCO: „Private antitrust enforcement is a well-established practice in Germany“

Private Enforcement for Breach of Competition Rules (4)

- Enforcement of national and EC competition law takes place on national level
- Some reasons for the relative rarity of damage actions:
 - complex cases
 - lack of information and evidence
 - calculation of damages
 - most private actions are „follow-on“-actions
- Example of a pending major private cartel case:
German Cement Cartel (100 mill. Euro)

Private Enforcement for Breach of Competition Rules (5)

Main options of the Green Paper:

- Access to evidence
 - Disclosure by parties
 - Access to documents held by NCAs
 - Different standards in Member States
- Alleviation of the burden of proof
 - Binding effect of decisions of NCAs in other Member States‘ civil court proceedings
 - Lowering standard or reversal of the burden of proof

Private Enforcement for Breach of Competition Rules (6)

Main options of the Green Paper (continued):

- Fault requirement
 - Strict liability
 - Differentiation as to the seriousness of the infringement
 - Invocation of excusable error
- Damages
 - Legal definition
 - Quantum of damages (interest, punitive damages?)
 - Member States: generally limited to the loss suffered (compensatory damages)

Private Enforcement for Breach of Competition Rules (7)

Main options of the Green Paper (continued):

- Passing-on-Defence and standing of indirect purchasers
 - First purchaser might have passed on the overcharge to its customers, may a defendant rely on this fact?
 - Indirect purchaser: a buyer further down in a supply chain
 - ECJ (Courage and Crehan/Manfredi) confirms COM's reading
 - Standing of indirect purchaser is closely linked to collective redress mechanism

Private Enforcement for Breach of Competition Rules (8)

Main options of the Green Paper (continued):

- **Collective redress**
 - Introduction of collective actions: representative action by associations and opt-in class action
 - New trend in European legal policy (DG Comp/DG Sanco)
 - Consultation of the consumer collective redress benchmarks (open until 17.3.2008)

Private Enforcement for Breach of Competition Rules (9)

Main options of the Green Paper (continued):

- Costs of damages actions
 - „Loser pays“- principle: disincentive for bringing an action
 - Green Paper: suggests to limit/exclude cost orders for the claimant
- Effect on leniency programmes
 - Discovery of leniency applications could endanger leniency
 - Conditional rebate or reduction of civil liability for leniency applicants?
 - EU-Parliament: no joint and severe liability

Private Enforcement for Breach of Competition Rules (10)

Reactions to the Green Paper:

- 140 comments
- Majority takes a sceptical view
- Backing through European Parliament (April 2007)
- EU-Parliament: no double damages, pro passing-on defence

Private Enforcement for Breach of Competition Rules (11)

Comparison with US system

- US antitrust law must be seen in its overall context
- DOJ cannot impose fines in cartel cases
- Private enforcement is common feature
- No risk for plaintiff due to cost rules
- Pressure to agree to settlement by the defendant
- Only direct purchaser may sue and receive compensation (federal level)
- Exclusion of the passing-on defence
- Pre-trial discovery
- Treble damages
- Jury trial
- Opt-out class actions

Private Enforcement for Breach of Competition Rules (12)

Evaluation of the green paper (summary of some of the main criticism by legal and industry groups):

- US system should not be imposed
- Commission lacks competence for procedural changes
- Special tort law for competition infringements is not necessary and could change the nature of the legal systems in the Member States

Private Enforcement for Breach of Competition Rules (13)

Evaluation (continued):

- Access to evidence: increase in costs of discovery has become inflationary
- Alleviations of proof: binding effect of NCA decisions may not hamper rights to defence
- Punitive damages: contrary to the *ordre public* in some Member States

Private Enforcement for Breach of Competition Rules (14)

Evaluation (continued):

- Passing-on Defence: should not be excluded, exclusion could lead to unjust enrichment of the claimant
- Class actions: potential for excess in other jurisdictions, Member States more in favour of „representative action“
- Costs of actions: „loser-pays“ principle should be maintained

New Guidelines for Art. 82 EC ? (1)

- Commission: comprehensive review on the legal and economic framework of Art. 82 EC
- Art. 82 EC: prohibits exclusionary and exploitative abuse of a dominant position
- December 2005: „Staff discussion paper“ on the application of Art. 82 EC to exclusionary abuses
- Main contents:
 - assessment of dominance
 - framework and methodology for analysis of exclusionary abuses
 - individual approach to most common abusive practices (eg. tying, rebates and discounts)
 - introduces „more economic approach“

New Guidelines for art. 82 EC ? (2)

- What is meant by „more economic approach“?
 - „effects-based“ approach based on economics
 - effect on consumers more important than on competitors
 - Commission will take into account business reasons (efficiencies) justifying abusive behaviour
 - supported by business
- Guidelines could increase legal certainty
- Further paper on exploitative abuses: delayed, expected in 2008

Competition news in specific sectors (1)

Motor vehicles (cf. Block Exemption Regulation No 1400/2002)

- Covers distribution of motor vehicles and spare parts
- Similar concept as in vertical block exemption regulation
- Commission's effort to break down constraints on competition
- Contains long and detailed "black list"
- Market share threshold: 30 % (40 % for selective distribution systems)

Regulation (expires in March 2010) – to be renewed?

Competition news in specific sectors (2)

Energy markets (gas and electricity)

- Background: competition problems (eg. lack of real choice of supplier, market fragmentation along national borders, high degree of vertical integration and high market concentration)
- Commission's third legislative package (September 2007):
 - preferred option: „ownership unbundling“
 - alternative: "independent system operator"
 - installation of a European Regulatory Agency
- Opposition by some Member States and proposal of „third way“ :
 - unbundling without ownership transferral

