



**BDI**

## Ongoing and upcoming developments in European competition law

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## Cartel Settlement Procedure in the EU (1)

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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)

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### **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)

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### 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)

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### **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)

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### **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)

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### 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)

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- 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)

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### 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

### Controversial 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)

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### 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)

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- 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)

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### **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)

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### **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)

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### **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)

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### **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)

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### **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)

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### **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)

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### 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)

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**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)

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### **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)

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### **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)

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- 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)

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- 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)

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### **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)

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### **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

