INTERNATIONAL COMPETITION LAW SERIES

Private Enforcement of EC Competition Law

Edited by
Jürgen Basedow

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Published by:
Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands
E-mail: sales@kluwerlaw.com
Website: http://www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.,
7201 McKinney Circle
Frederick, MD 21704
USA

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive
Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

ISBN 978-90-411-2613-9

Private Enforcement of EC Competition Law

International Competition Law Series

Volume 25.

The titles published in this series are listed at the end of this volume

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INTRODUCTION

Jürgen Basedow

Anti-competitive conduct is detrimental to the economy as a whole. It may cause losses to competitors whose business opportunities are curtailed or who are even driven out of the market, to suppliers who receive too little and to customers who pay too much. The redress of such losses falls into the domain of the law of torts. However, successful claims for compensation are rare in this field. Outside the United States of America, litigation has hardly ever reached the final stage of a damage award. The reasons are manifold: the victims may prefer to cooperate with the cartel members; others may be afraid of the cartel's retaliation, and again others may abstain from litigation because they feel that the burden of proof or the financial risk of a defeat is too heavy for them. Whatever the reasons may be, the victims' rational abstention leads to a deficit of implementation in the field of competition law.

This is the reason for the public enforcement of competition law. While this area of the law deals with commercial relations pertaining to private law, the remedies provided by private law have turned out to be insufficient or even totally inadequate for the protection of competition. They depend upon the procedural initiative of private parties which will often be lacking. Public bodies have to fill this gap. There is virtually no antitrust statute in the world which does not provide for an administrative authority entitled to intervene in private contracting and private business practices when in the public interest. Some statutes, like those of the United States[1] and of Germany,[2] additionally provide for damages as a remedy granted to cartel victims; but in these countries too, the

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1 See sec. 4 of the Clayton Act of 1914, 15 U.S.C., para. 15 (2004).

2 § 33 of the Law against Restraints on Competition as amended by the 7th amendment of 12 July 2005, BGBl. 2005 I 1954.

protection of competition depends primarily on the prosecution of anti-competitive behaviour by the public authority. In most other jurisdictions, competition law has always been regarded as an off-spring of administrative law, in particular of the price regulations which were very common in earlier years. Here, the implementation of competition law is an exclusive matter for the public authorities.

The public enforcement of competition law may be appropriate for bringing anti-competitive behaviour to an end. However, it does not help the victims. Fines may reach high amounts of money, but they do not compensate the losses caused. And if they do not match the prospective profit to be earned by the cartel members, they cannot provide for an effective deterrence against cartelization. This consideration points to two basically different and sometimes contradictory objectives of the present debate on damages claims for anti-competitive behaviour: the full compensation of losses sustained by cartel victims and the deterrence of market actors from engaging in such conduct. We should refrain from looking at damages claims for anti-competitive behaviour only from the viewpoint of the private enforcement of competition law. While such private enforcement may be significant as a supplement to the public enforcement, it is not the only and not even the predominant target of compensation claims. It is of equal significance that cartel victims are fully compensated for the losses they have sustained as a consequence of the illegal behaviour of other market participants. The European Commission therefore has to be commended for the title of the Green Paper published before Christmas 2005; unlike this book, it does not refer to the popular term of private enforcement of competition law but to damages claims for violation of the antitrust laws.[3]

Following the 7th amendment to the German Law against Restraints on Competition,[4] the Commission's initiative was meant to stir a debate across Europe on the need for legal reform that encourages private plaintiffs to claim compensation of losses they have suffered from anticompetitive conduct. The Max Planck Institute for Comparative and International Private Law therefore convened an international conference on the matter which took place in Hamburg on 6 and 7 April 2006. The papers and proceedings of the conference are hereby presented to the public.

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[3] Green Paper on damages actions for breach of the EC antitrust rules, COM(2005) 672 final of 19 December 2005, with, as an annex, Commission Staff Working Paper, Annex to the Green Paper on damages actions for breach of the EC antitrust rules, SEC(2005) 1732 of the same day.

[4] See supra at n. 2.

The policy considerations involved in the Commission initiative are presented by Mr. Emil Paulis, the Head of the Policy Section of the Directorate General on Competition of the European Commission. To a certain extent, the Green Paper reacts to the *Courage* judgment of the European Court of Justice of September 2001.[5] In that case, the court decided that everyone who has suffered losses from a violation of art. 81 or 82 EC is entitled to compensation. While the court left the details to national law, it pointed to the existence of a possible cause of action for compensation flowing from the EC Treaty. This reminds one of, and suggests a comparison with, other causes of action such as art. 288 para. 2 or the liability of Member States for the violation of Community law. For several years, academics have tried to filter out general principles of European tort law from the case law relating to these other causes of action. Professor Walter van Gerven who is one of the most prominent writers in this field and who has contributed to the present discussion in his former capacity as Advocate General of the Court of Justice[6] explains the relevance of this case law to our subject.

The reference to general principles also points to the need for comparative analysis. In fact, the development of Community law has always drawn from the more comprehensive experience of national laws of the Member States and of third countries. This has also been the case during the preparation of the Commission's Green Paper.[7] Our own debate is enriched by national experience from the United States, presented by Professor Hannah Buxbaum; from Germany, presented by Professor Wulf-Henning Roth; from France, presented by Professor Laurence Idot; and from Italy, presented by Professor Carlo Castronovo. We may see that the views on the Commission's Green Paper differ depending on the respective national experience.

Following the Community perspective and the comparative approach, the third part of our symposium is dedicated to some key issues of the present debate. Employing an economic perspective, Professor Martin Hellwig presents

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5 ECJ 20 September 2001, case C-453/99 *(Courage Ltd v. Bernard Crehan)*, [2001] E.C.R. I-6297; the Court has elaborated on its findings in *Courage* after the Hamburg Conference im ECJ 13 July 2006, joined cases C-295/04 to C-298/04 (*Manfredi v. Lloyd Adriatico*).

6 See the opinion of AG *van Gerven* of 27 October 1993 in the case C-128/92 *(Banks v. British Coal Corp.)*, [1994] E.C.R. I-1209 paras. 36-45.

7 Ashurst Study on the Conditions of Claims for Damages in case of Infringement of EC Competition Rules, prepared by *Waelbroeck/Slater/Even-Shoshan* (25 August 2004) available at <http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/comparative_report_clean_en.pdf>.

a paper on the calculation of damages and in particular on the relevance of the passing-on of losses sustained in an upstream market to customers in a downstream market. Of particular significance is procedural devices which may help to overcome the lack of implementation established above. Professor Rolf Stürner deals with the duties of disclosure and the burden of proof in private anti-trust litigation while Professor Astrid Stadler tackles the issue of collective actions that may help to overcome the rational abstention of individuals. Given the supplementary character of private litigation in comparison to public enforcement, it is important that the former does not curtail the effectiveness of the latter. This may become a particularly serious problem in relation to the leniency programmes implemented by competition authorities. Would a cartel member that has decided to notify the national or European cartel office of its own cooperation in the cartel not run the risk of being sued for damages in a private court? Would it therefore perhaps abstain from notification? The complex issues arising in this context and the possible policy options are outlined by Dr. Ulf Böge, President of the German Cartel Office. Finally, any European instrument on damages actions for violation of artt. 81 and 82 will be embedded into the national legal systems and will be applied by national courts. Therefore, issues of jurisdiction and choice of law will almost inevitably become relevant in any such litigation. They are treated by this writer in the final paper of this volume.

The Hamburg Conference conveyed the impression that outside the field of hardcore cartels effective private enforcement is not very likely. But private enforcement in this limited area would mean progress as compared with the present situation. At present, victims of these particularly serious violations hardly ever receive any compensation. Improving their situation would not only promote justice but would also have a deterring effect for the whole of competition law. In a discussion, someone hinted at the possibility of over-deterrence. While the present situation is rather characterized by under-deterrence, such risk cannot be ignored altogether. In particular, it should be taken into account that the usual corollary of liability, i.e., insurance, will rarely alleviate the civil consequences of antitrust violations. In fact, enterprise liability, which has rapidly developed throughout the last decades in fields like environmental pollution or capital market frauds, has brought about new types of insurance which provide comprehensive cover for the leading personnel of undertakings. However, this coverage will be of limited significance for antitrust liability since agreement on hard core cartels is usually an intentional wrong. The insurance of liability resulting from intentional acts is excluded by law in many countries, and, even where it is permitted, insurers will hardly ever accept this type of risk.

Consequently, the civil liability for antitrust violations will have to be borne by the single companies and the single persons involved.

Another aspect which would merit closer analysis in the future concerns the relation between liability for the violation of competition laws and general tort law. For several years, efforts have been made in European scholarship to draft general principles of European tort law derived from the comparison of delictual liability under the national laws of the Member States.[8] Apparently, the general discussion on these issues has thus far not taken account of specific issues relating to antitrust liability whereas the specific discussion on these matters has thus far essentially ignored the general debates.

Europe is still far away from the system of private antitrust litigation known in the United States of America. It is by no means clear that European legislation is heading towards the American model. Much discussion will be needed before we know what we are heading for. This discussion involves economists and lawyers of various disciplines as reflected by the background of the speakers. The lively debates of the Hamburg symposium, reported by Christian Heinze in this volume, are also meant to contribute to this discussion – leading perhaps to a better understanding of the economic need and legal particularities which could generate a specific European discipline in this area.

The editor of this book has been supported by advice and help from several persons. In particular, I am indebted to Dr. Anatol Dutta for his editorial assistance, to Michael Friedman who, as a native speaker, carried out the linguistic revision of several papers, and to Ingeborg Stahl for the preparation of the manuscript.

[8] See *European Group on Tort Law*, Principles of European Tort Law (2005).

POLICY ISSUES IN THE PRIVATE ENFORCEMENT OF EC COMPETITION LAW*

Emil Paulis

Good morning, ladies and gentlemen,

I am probably the only participant speaker here, who is not a professor. So that means that I don't feel very comfortable on the one hand and on the other hand I feel comfortable because it means that your expectations should not be too high.

But let me thank the Max-Planck-Institute, let me thank Professor Basedow for the invitation to this conference and seminar or workshop, which I think, is a real contribution to the debate which we want and wanted to launch and which has now started on the Green Paper on damage claims by victims of competition law violations. I am not here and I would not dare – I am not a professor – I am not here to teach. I am not here to sell anything. I am here to listen and to learn myself. So all I will be saying should only be perceived as something strictly provisional. Even if some-

* Transcript of a speech delivered and recorded at the Max Planck Institute for Comparative and Private International Law on 7 April 2006.

times my views come across as very strong. So, with those warnings, I would then want to start.

Professor Basedow said already that it is a long tradition that in many countries around the world there is public enforcement. Competition law enforcement has been very much – in Europe in particular, unlike in the US – a matter of public enforcement for forty or fifty years. We have had basically no private enforcement. We have not really done very much – I would say almost nothing – for the victims of violations of competition law. We have enforced as public enforcers, we have imposed fines, but we have not cared about what is the situation of the victims of these violations. Have we ever in our work really taken seriously the sufferings, the harms to victims? We look at these cases from a very high level, in a very abstract sense, with a very broad brush and impose fines in a very approximate way. We do not have the resources, we do not have the time, we do not at all investigate the harm, which goes with violations of competition laws. We make a very rough estimation and then we impose a fine which is very, very general in approach. So the victims, they have not got any medicine.

Now, luckily, the European Court of Justice in a very early judgement has reminded us all that good enforcement, i.e. effective enforcement – depends not only – or should not depend only – on public enforcers. It would be wrong to leave the effective enforcement of the treaty provisions in the hands only of the public enforcers. Because you do not know how strong that enforcement will be, you do not know what the resources will be, you do not know what will be the priorities which this public enforcer will fix. Therefore it is good for the effectiveness and for the health of the whole system that other enforcers can come in by way of private claims, by way of private actions. That was in the early sixties – in a very general sense, not specifically addressed to competition law – but it was a very cornerstone of what we should do if we want to have a more effective enforcement of the rules. That was *van Gend en Loos* at a very early stage.[1]

Now I think time is over. I think we have to do something. We are simply lagging behind. It cannot be that the US, which may exaggerate with treble damages; and some other jurisdictions around the world, walk decisively and aggressively into adding private enforcement – and we in Europe, we would stay behind creating a huge gap to the rights which exist for victims in other jurisdictions which may even attract claims to these foreign jurisdictions

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[1] ECJ 5 February 1963, case 26/62 *(van Gend en Loos ./. Netherlands Inland Revenue Administratie)*, [1963] E.C.R. 1 (English special edition)

because in Europe we have a real gap. We have not done our job. So that is my point of departure and therefore I think, we need to add to the public pillar, we need to add a private pillar. The private pillar is not there to substitute the public pillar. It is to be added. It is a complement to the public enforcement and it takes two forms either as a follow-on action or a stand-alone action which we all know.

If we now come to the most recent case law of the court in *Courage v. Crehan*, the next point to be developed here before we start our discussion is that it is an established right.[2] The court has said that there is a right to damages in case of violations. So it is not as if the European Commission again had invented something with its Green Paper, it is an established right which is fully in line with a string of case law of the Court of Justice and fits perfectly within these private rights which result from certain provisions in the Treaty. So that means that the competition rules, which are in the Treaty are actually protecting two objectives. It is of course the objective of the public institution of competition, but going with that also certain individual rights, which result from these provisions, which have a direct effect in the Treaty. And the court has underlined – again for the same reason as in *van Gend en Loos*[3] – that in order to have an effective enforcement you need to have the arm of private enforcement. That is the only way to really guarantee that you have an effective enforcement of these rules. I think that is an important basis which we must remember.

I. A special regime for antitrust liability?

Now – as Professor Basedow has already said – when we now look at what is ahead of us, it is not an easy task. It is a pretty difficult and complex one. Why? Because it has to do with Community law – the rule of substance, the rule, which tells us, whether or not there is an infringement that is a common rule to all the Member States. But everything else is in the domain of national law. That means potentially 25 different national laws. And that of course makes it pretty difficult. That is the first difficulty. The second difficulty, which goes with that, is that not only are there large differences and divergences between Member States, – but also we have to ask ourselves the question whether it is justified to create specific rules – here or there – at

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2 ECJ 20 September 2001, case C-453/99 *(Courage Ltd v. Bernard Crehan)*, [2001] E.C.R. I-6297.

3 See supra n. 1.