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Private antitrust actions : An overview of national case laws - Foreword of the 2010 edition

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1. Introduction

As well known, after an antitrust infringement has taken place a victim can turn to the judge to obtain an injunctive relief, a declaration that a contractual clause is null and void ex antitrust laws, and damages. All these legal actions represent what we call private antitrust actions (hereinafter, PAAs).

Plausibly the last typology of private actions is the most important one, because through actions for damages the victim can get reparation (that is, monetary compensation) for the harm suffered. Some years ago the European Commission (EC) has made explicit its intention to boost actions for damages in the European Union (EU) not only to strengthen the enforcement of competition laws, but also to make it easier for consumers and firms to recover their losses.

Nonetheless, the number of private actions for damages in Europe still lags far behind expectations. Waelbroeck et al. (2004) clearly stated that the regime of actions for damages for infringements of antitrust laws in the EU-25 is totally underdeveloped [1]. According to Renda et al. (2007), no remarkable increase occurred between May 2004 and September 2007 and there was a very limited growth in the number of private antitrust cases across Europe : accordingly, only 96 PAAs would have taken place in the EU at 27 countries [2].

To date the EC acknowledges that in the EU victims of infringements of antitrust laws have only rarely obtained reparation for the harm suffered, in such a way foregoing a total amount of compensation in the range of several billion euros (DG Competition website, November 2010).

The present article is meant as a foreword by which to address the issue of the shortage of PAAs (including private actions for damages) in the EU and restate the importance attached to the e-Competitions research programme, which led to construct a database on national competition case laws with more than 3,000 summaries from several EU member states. This article is structured as follows. In section 2 we sum up the results of a survey on PAAs based on data collected from e-Competitions and published in 2009. In section 3 we sum up the obstacles which hinder PAAs in Europe : high process costs, low monetary incentives and, last but not least, high incompleteness of antitrust laws. In section 4 we provide an attempt to systematise the various case summaries collected in this Special Issue. Finally in section 5 we offer a review of the law and economics literature on PAAs at EU level.

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2. A survey on private antitrust actions in the EU at 2009

A survey of PAAs in the EU based on data collected from e-Competitions has been provided by Marra and Sarra in 2009. The authors gathered information about 146 proceedings (with around 80% of these occurring between 2004 and 2008), concerning 115 national judicial cases including : (i) 45 actions for damages ; (ii) 52 among injunctive reliefs and actions to obtain declarations that contractual clauses are null and void ex antitrust laws ; (iii) 18 counterclaims (that is, defensive actions in the merits of competition law in lawsuits in which the claimant is the defendant to whom it was contested non-compliance with contract schemes or clauses).

The authors emphasised how most actions were dismissed, often because of lack of evidence : complainants faced considerable obstacles in satisfying evidentiary requirements. Evidentiary requirements, as known, are less burdensome in cases concerning per se prohibitions and in follow-on actions. With regards to the former, for example, most cases in the sample concerned practices very close to per se illegal standards (price-fixing, boycotts, discrimination, etc.) and it is also indicative that 28 complaints of the 43 successful PAAs addressed per se prohibitions.

3. What obstacles to private antitrust actions ?

What are the obstacles faced by plaintiffs in initiating complaints and getting reparation for antitrust infringements ? We might identify several obstacles or deficient incentive schemes.

First and foremost we focus on monetary incentives : potential plaintiffs are encouraged to bring PAAs and, more specifically, actions for damages before the court only if the difference between expected compensation and legal expenses is sufficiently high. Also the White Paper on Damages Actions for Breach of the EC antitrust rules [3] seems to concentrate on the monetary dimension ; in this document full compensation is the guiding principle : "victims must, as a minimum, receive full compensation of the real value of the loss suffered" (EC, White Paper, 2008, 7). To boost actions for damages the EC suggests looking at some well defined options : taking out restrictions on potential compensation, making available multiple damages or limiting the passing-on defence. Alternatively, according to the EC, plaintiffs could be supported by measures to lower process costs, which are serious "disincentive to bringing an antitrust damages claim, given that these actions may be particularly costly and are generally more complex and time-consuming than other kinds of civil action" (EC, White Paper, 2008, 9). Accordingly, it could be desirable to reduce the proof of negligence/intent required or proof of damages or to shorten the proceedings.

Secondly we concentrate on the incompleteness of antitrust laws. As well known, antitrust laws might be considered incomplete because they fail to include conducts that culminate in harmful outcomes and use open-ended and/or vague wording [4]. Antitrust laws are rarely so rigorous and complete as to prohibit, a priori and unequivocally, socially pernicious entrepreneurial conduct. Because of incomplete laws, the issues involved in antitrust litigation are usually complex (see Marra and Sarra 2009). It is not evident where the legal standard has been set and the production of facts is never simple since it implies several challenging operations. Moreover, the determination of damages is not easy. We should not forget that the incompleteness of antitrust laws gives rise to uncertainty, which affects negatively the claimant's willingness to start a lawsuit. The plaintiff can control uncertainty only partially, at the cost of additional expenses [5], by gathering more facts and undertaking further legal and economic analyses.

If we share this last perspective we understand the essential role played in the everyday application of competition laws by a wide access to national courts decisions [6]. In the next section we provide an attempt by which to systematise the various cases selected to be part of this Special Issue.

4. A systematisation of selected case summaries

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Here we briefly present in an organised manner just some of the case summaries collected in this Special Issue : such a partial view has been imposed by the high number of case summaries (39). We give more details for a few cases in which the competent judges decided to award damages to victims. As a consequence we will deal with several interesting issues, including the passing-on, compensatory and punitive damages, moral damages, follow-on actions.

In the Carbonless-paper cartel case [7], the Higher Regional Court of Karlsruhe has recently awarded € 100,000 to a printing firm which purchased paper at a cartel price from a wholesaler who, in turn, purchased paper from members of a cartel of manufacturers. The Court acknowledged that : - indirect purchasers do not have the right to ask for damages ; - an exception might take place if the intermediary is a subsidiary of a cartel member ; - in this case the defendant is not entitled to plea the passing-on defence. To notice how in a previous case, the Vitaminpreise case [8], the same Court accepted the passing-on defence in favour of the defendants who argued that their higher prices charged to the direct customers were passed by these on to the operators active at next market level [9].

On the Carbonless-paper cartel case it is enlightening the summary presented by Thomas who alerts potential claimants on the fact that even if follow-on claims might look at first glance like a "simple and logical continuation" of the proceedings before a competition authority, these might give rise to several, crucial and new complicated questions : in the instance at stake, for example, the German Mannheim Regional Court pointed out that price rises could also be explained by referring to normal market conditions and not necessarily to the existence of a cartel [10].

On the passing-on defence it is to mention also the case Doux Aliments/Ajinomoto Eurolyne [11] : in this case summary Parmentier and Descôte illustrate the decisions taken respectively by the Commercial Court of Paris (which rejected the damages claim), the Paris Court of Appeal (which awarded Doux Aliments damages amounting to € 380,000) and, finally, the French Commercial Supreme Court. The Supreme Court overturned the judgment of the Court of Appeal because this failed to assess whether Doux Aliments had fully or partly passed on to its clients the illegal overcharge.

In a couple of case summaries [12], the attention has been placed on the international auction website eBay. eBay was found by the Tribunal de Commerce de Paris as liable for an infringement of the intellectual property rights of six manufacturers of luxury products belonging to the LVMH group. By means of three decisions, the Tribunal awarded damages for a total amount of € 38,800,000 to the companies of the LVMH group (including moral damages). For a similar infringement eBay was condemned to pay € 20,000 to Hermès, while in may 2009 the Paris Court ruled that eBay was not liable for counterfeit L'Oreal perfumes for sale on its website.

On the Vitamins Cartel case there are four summaries on the appropriateness of compensatory damages in private follow-on actions (actions brought on the back of previous decisions or judgments) [13]. According to the judge a victim in a claim following a decision by the EC would be only entitled to damages which compensate for loss and not to damages intended to punish and deter (that is an award of money assessed by reference to the wrongdoer's gain or an account of profits, with no regard to the victim's loss).

With regards to follow-on actions it is useful to refer to the Healthcare at Home/Genzymecase [14] : this was the first time a damages claim was brought before the UK Competition Appeal Tribunal under section 47A in relation to a decision of the Office of Fair Trading of infringement of the Competition Act 1998. As reported by Brown the only previous damages actions brought before the Tribunal (stemming from the EC's Vitamins Cartel decision) were ended by consent order before any rulings were made by the Tribunal.

In the ACIP/Alloun case [15], the Paris Court of Appeal compensated a victim of a boycott. The damages were limited to € 20,000 as the applicant was not able to clearly determine its financial loss. According to Luciani this case is remarkable since the Court would have taken into account the fault committed in the assessment of damages and thus granted, without admitting it, punitive damages (not recognized in the French law system).

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On the calculation of damages, it is relevant the Danish Postal Service case [16], in which the Danish Eastern High Court awarded € 10,000,000 damages for a harm suffered in consequence of an abuse of dominance. Another instance concerning an abusive conduct of a firm in dominant position is one of the very few PAAs in Sweden, the Europe Investor Direct a.o./VPC case [17], in which the Court condemned the VPC to award damages of approximately € 384,000. On the calculation of damages it is remarkable the Stumbras case [18], in which the Court found necessary to balance the claimant's request for damages against some aspects : i) the fine already imposed on the défendant by the national competition authority, ii) the risky nature of the business and iii) the inherent unreliability of estimations of future profits. As a consequence, the Court awarded a substantially smaller amount of damages (approximately equal to € 144,000).

Sometimes the courts decided not to award damages. Rejections of damages claims occurred in the Vitória Sport Club/Radiotelevisão Portuguesa [19] and in the Aloyas/Repsol [20] cases. In this last one a Spanish Court, after finding a distribution agreement to be null and void pursuant to EC antitrust law, decided that the claimant was not entitled to recover the sums paid by contract. In the Chanelle Veterinary/Pfizer case [21], the Irish Supreme Court considered a pharmaceuticals distribution agreement to be lawful and rejected a claim in civil proceedings. In the Gifam/Google case [22] a French Court dismissed most of the plaintiff's claims for an alleged patent infringement by the Google's adwords system. In the Emerald Supplies&ANR/British Airways case [23] the English High Court made more difficult the bringing of representative actions by striking out a representative claim brought on behalf of all other direct or indirect purchasers of air freight services [24]. In Canal Satélite Digital-DTS/SGAE [25], a Spanish Court dismisses an application brought by a pay-TV against the Spanish copyright collecting society for infringement of article 82 EC. In the BAT/Chipnik case [26], a Dutch Court dismissed a plea on excessive tariff rates under both Dutch and EC competition laws.

A potential room for awarding damages was recognised in the Entega case [27], in which the German Federal Court of Justice held that offering divergent prices in the gas retail market by different subsidiaries of the same mother company might represent an anticompetitive price discrimination. About the real prospects of succeeding at trial, it is to mention the Safeway Stores & Ors/Twigger & Ors case [28], in which the English High Court opened the way for companies to pursue private actions for damages against employees and directors who are involved in competition law infringements : according to Barnes, this decision has the potential to bring important changes to the attribution of ultimate financial responsibility for competition law sanctions.

5. A review of the literature on private antitrust actions

In this section we provide a review of the literature on PAAs. We limit our review to scientific texts and articles published between 2005 and 2010 on law and economic journals. Given the wide range of specific issues we circumscribed the search to more general contributions.

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[23] Anthony Dawes, The English High Court strikes out a representative claim brought on behalf of "all other direct or indirect purchasers of air freight services", refusing to stretch the scope of the English civil procedure rules in order to encourage the bringing of private damages actions (Emerald Supplies & ANR/British Airways), 8 April 2009, e-Competitions, n° 26352.

[24] As noted by Dawes, this decision is likely to act as a deterrent for claimants for a couple of issues : first, it closes the door on representative claims brought by indirect purchasers ; secondly, it impedes actions for damages brought on behalf of a broader class of individuals which may only be identifiable following further discovery and proof.

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