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Private Actions for Infringement of Competition Laws in the EU: An Ongoing Project

Dr Stanley Wong, StanleyWongGlobal
(of the Bars of British Columbia and Ontario)

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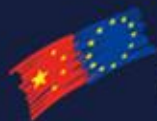
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EU Competition Laws

- EU competition laws consist principally of
 - Article 101, Treaty on the Functioning of the European Union (TFEU) against anti-competitive agreements and concerted practices
 - Article 101 TFEU against abuse of a dominant position (anti-competitive unilateral conduct)
- The 27 (soon 28) Member States of the EU have national competition laws similar to those in the Treaty
- Commission and Member States have parallel competences for enforcement of Articles 101 and 102 TFEU: Council Regulation (EC) No 1/2003

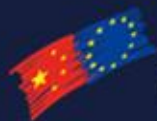


Private Action for breach of EU competition Laws

- The EU Court of Justice has determined that a private right of action for infringements of EU competition laws, namely Articles 101 and 102, TFEU, exists in the European Union:
 - Case C-453/99 *Courage and Crehan* [2001] ECR I-6297
 - Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619

Right of Private Action: EU Jurisprudence

- Principles
 - Basic right: Articles 85(1) and 86, EC Treaty [now Articles 101(1) and 102, TFEU] produce “direct effects in relations between individuals and create rights for the individuals concerned which the national courts must safeguard” (*Courage and Crehan*, paragraph 23)
 - Standing: “any individual can rely on a breach of Article 85(1) of the Treaty [Article 101(1) TFEU] before a national court even where he is a party to a contract that is liable to restrict or distort competition” (*Courage and Crehan*, paragraph 24)
 - Causality: “any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC” (*Manfredi*, paragraph 61; see also paragraph 63)



EU Jurisprudence cont'd

- The existence of a private right of action strengthens the effectiveness of EU competition rules:
 - “The full effectiveness of Article 85 [Article 101 TFEU] ... and, in particular, the practical effect of the prohibition laid down in Article 85(1) [Article 101(1) TFEU] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition” (*Courage and Crehan*, paragraph 26)
 - “Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.” (*Courage and Crehan*, paragraph 27)

EU Jurisprudence cont'd

- The important role of national domestic legal system, national courts and national court procedural rules:
 - national courts “must ensure that those rules [Community competition rules] take full effect and must protect the rights which they confer on individuals” (*Courage and Crehan*, paragraph 25)
 - In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State, subject to the principle of equivalence and principle of effectiveness, to ensure the following:
 - Procedural Rules: “to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law,” (*Manfredi*, paragraph 62);
 - Extent of Harm: “it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages for harm caused by an agreement or practice prohibited under Article 81 EC,;
 - Causality: “to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of ‘causal relationship’,” (*Manfredi*, paragraph 64);
 - Limitation Period: “to prescribe the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 81 EC,” (*Manfredi*, paragraph 81)

EU Jurisprudence cont'd

- Types of damages available include:
 - Actual loss and loss of profit: “it follows from the principle of effectiveness and the right of individuals to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest” (*Manfredi*, paragraph 100)
 - Exemplary or punitive damages: “in accordance with the principle of equivalence, if it is possible to award specific damages, such as exemplary or punitive damages, in domestic actions similar to actions founded on the Community competition rules, it must also be possible to award such damages in actions founded on Community rules”. (*Manfredi*, paragraph 99)
 - Unjust enrichment: “However, Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them”. (*Manfredi*, paragraph 99)

EU Member States

- In many EU Member States, there also exists a private right of action for infringements of national competition laws.
- As a result, the domestic courts of the Member States hear private actions for infringements of EU competition laws, national competition laws or both.

European Commission

- For almost a decade the Commission has been engaged in a project to improve the effectiveness of private action for breach of EU (and national) competition laws.
- The Commission is of the view that there are significant legal and procedural obstacles in EU Member States which undermine the right of private action.
- Private actions must however be brought before the national courts of Member States. This is an important consideration in the efforts of the Commission in promoting private actions.



Commission cont'd

- In its 2008 White Paper, following on its 2005 Green Paper, the Commission identifies several areas for action, including
 - Collective redress through representative actions by qualified entities and opt-in collective actions
 - Access to evidence through strengthening disclosure between the parties (inter partes)
 - Binding effect of NCA decision (extending binding effect of Commission decision under Article 16(1) of Reg 1/2003)



Commission cont'd

- Develop framework for quantification of damages
- Presumption of pass-on of overcharges to facilitate action by indirect purchasers
- Protect effectiveness and integrity of leniency programmes of public enforcement to prevent disclosure of 'corporate statements' of leniency applicants
- In 2011 the Commission conducted two further consultations relating to private actions: collective redress and quantification of harm in damages actions.

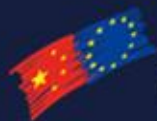
Key Commission Documents on Private Actions

- 2005: Green Paper – Damages actions for breach of the EC antitrust rules COM(2005) 672, 19.12.2005
- 2008: White Paper on Damages Actions for Breach of the EC antitrust rules COM(2008) 165, 2.4.2008
- 2011: Towards a coherent European approach to collective redress SEC(2011) 173, 4.2.201, Public Consultation (4 February to 30 April 2011)
- 2011: Draft Guidance Paper on quantifying harm in actions for damages based on breaches of the EU antitrust rules, Public Consultation (17 June to 30 September 2011)



Challenges

- Among the key challenges for the EU project are:
 - evidence: parties and third parties,
 - quantification of damages;
 - passing-on defence
 - evidence from competition enforcement agencies
 - collective redress



1. Evidence

- A major obstacle to success in a private action is the availability of evidence
 - to establish liability (infringement) and
 - to prove damages
- In jurisdictions with a history of private actions, most private actions are based on findings of an infringement of competition laws by a court, tribunal or administrative body such as a competition authority. These actions are called ‘follow-on actions’. “Standalone actions” are actions not based on public enforcement decisions.



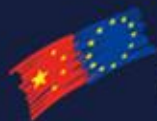
Evidence cont'd

- It is not surprising that plaintiffs rely on infringement findings of public enforcement.
 - Cartels are usually secret. Victims rarely are aware of their existence.
 - Much of the evidence about an illegal cartel are in the possession of the members of the cartel.
 - The uncovering of evidence through public enforcement facilitates follow-on actions.



Evidence cont'd

- Evidence in private actions, whether standalone or follow-on, comes from three main sources:
 - members of the cartel who are named as defendants in a private action;
 - third parties;
 - competition enforcement agencies.



Evidence cont'd

- Access to evidence in the possession of defendants depends on the availability of court procedural rules to compel disclosure between the parties:
 - to provide document disclosure;
 - to respond in writing to request for information other than documents; or
 - to provide a witness to be examined orally under oath as part of pre-trial procedures



Evidence cont'd

- Most jurisdictions provide some form of evidence disclosure between the parties.
- What are the conditions that must be satisfied to get disclosure?
 - Is disclosure automatically part of the litigation process?
 - Is the plaintiff obligated to seek a court order for disclosure?
 - How specific must the request be?

Evidence cont'd

- Issues with compelling evidence disclosure from defendants:
 - degree of specificity required of the plaintiff
 - degree of relevance of evidence requested
 - obligation of defendants to preserve evidence
 - sanctions for failure to disclose pursuant to a court order
- Some jurisdiction provide for procedures to obtain evidence from third parties including competition enforcement agencies
 - What are the conditions that must be satisfied to obtain evidence from third parties?



2. Quantification of Damages

- If damages are compensatory, how are they to be quantified?
 - in cartel case, typically, the plaintiff seeks compensation for the overcharge that they paid, that is, the difference between the amount paid and the amount that would have been paid if the cartel did not exist (subject to any deduction for pass-on)
 - in an exclusionary abuse case, the plaintiff may claim the loss profit resulting from the abusive conduct



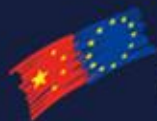
Quantification cont'd

- Where a court is asked to consider the price that would have existed but for the infringing conduct, parties would inevitably lead expert economic evidence.
- See,
 - Draft Guidance Paper on quantifying harm in actions for damages based on breaches of the EU antitrust rules, DG Competition, Public Consultation (17 June to 30 September 2011)



3. Passing-on Defence

- For a breach of EU competition laws, it is clear that any person who has been injured by the offending conduct may claim damages: *Manfredi*, paragraph 61
- In private actions, a distinction is made between direct purchasers and indirect purchasers:
 - direct purchasers are those persons who bought directly from the defendants
 - indirect purchasers are those persons who did not buy directly from the defendants but from a direct purchaser or another indirect purchaser



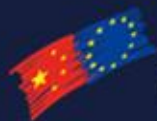
Passing-on cont'd

- If a direct purchaser incorporated the 'higher price' it paid in the price charged to its customers, should the direct purchaser be entitled to claim the full amount of the overcharge as compensation?
- In these circumstances, awarding the full amount of the overcharge to the direct purchaser would overcompensate it, resulting in an unjust enrichment.
- Should a defendant be allowed to plea the "passing-on" defence?



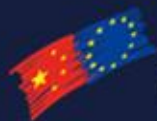
Pass-on cont'd

- If some of the overcharge paid by the direct purchaser (1st purchaser) is passed-on through the distribution chain, it may be very difficult for an indirect purchaser (2nd or subsequent purchaser) further down the chain to prove the harm it suffered.
- An indirect purchaser would have to lead expert economic evidence about what it would have paid if the offending conduct did not occur as between the defendant and 1st purchaser (direct purchaser).



Passing-on cont'd

- In principle,
 - all persons, including direct and indirect purchasers, who suffered injury as a result of a breach of competition law should be entitled to claim damages
 - the passing-on defence should be allowed since a plaintiff should not be overcompensated if the loss it suffered is less than the 'overcharge' it paid to the defendant



4. Evidence: Competition Enforcement Agencies

- A plaintiff in a private action would like to get access to the information gathered by the competition enforcement agency in any investigation into the conduct which is the subject-matter of the private action.
- The information provided in any enforcement decision is helpful. It may make potential plaintiffs aware of the unlawful conduct.
- Potential plaintiffs would like other information in the possession of the enforcement agency.



Evidence from Enforcement Agency cont'd

- Many enforcement agencies operate a leniency programme to offer incentives for participants in anti-competitive conduct, especially, cartels, to disclose information in exchange for leniency including a reduction of fines.
- A leniency programme is regarded as one of the most important tools for detecting cartels.
- Generally, the disclosure of information including documents is required in an application for leniency
- Under the leniency programme of the Commission and those of many Member States, a leniency applicant is expected:
 - to provide written statements that details the role of the applicant in the cartel ('corporate statements') and
 - to provide any relevant documents in its possession



Evidence from Enforcement Agency cont'd

- In private actions, a plaintiff may look to an enforcement agency for assistance in obtain evidence, especially in a follow-on action pursuant
 - court rules for disclosure
 - freedom of information laws
- The position of the Commission which is shared by the competition authorities of the Member States is that corporate statements and any documents created for the purpose of the leniency application should be protected from disclosure.

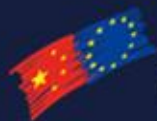
Evidence from Enforcement Agency cont'd

- In the view of the Commission, disclosure of corporate statements would
 - jeopardize the effectiveness of its leniency programme to combat cartels, and
 - also, would be unfair to the leniency applicant vis-à-vis other members of a cartel in a private action.
- No fundamental objection is taken to disclosure of information including documents that came into existence before the leniency application.
- Thus, the key issue is the disclosure of corporate statements and other documents that are created for the purpose of leniency applications.



Case C-360/09 *Pfleiderer*

- The issue of disclosure of corporate statements arose in Case C-360/09 *Pfleiderer* (Judgment of the Court of Justice of 14 June 2011) before the Court of Justice in a reference for a preliminary ruling by the Amtsgericht Bonn (local district court of Bonn).
- The facts are straightforward:
 - The Bundeskartellamt (German Competition Authority) imposed fines totalling EUR 62 million under Article 81 EC (now Article 101 TFEU) against members of a cartel of manufacturers of decor paper
 - For the purpose of preparing a civil action, Pfleiderer, a major purchaser of decor paper, requested from the Bundeskartellamt access to its investigative file including materials relating to any leniency application



Pfleiderer cont'd

- The Bundeskartellamt, *inter alia*, refused access to documents relating to leniency applications.
- Pfleiderer brought an action before the Amstgericht Bonn challenging the rejection decision under the applicable court rules which provided for disclosure.
- The Amstgericht sided with Pfleiderer and ordered disclosure, *inter alia*, of the documents relating to the leniency application.
- The Amstgericht stayed its decision and made a reference to the Court of Justice.



Pfleiderer cont'd

- The preliminary reference question asks whether under EU competition laws, a claimant for damages caused by a cartel may be denied
“access to leniency applications or to information and documents voluntarily submitted in that connection by the applicants for leniency which the national competition authority of a Member State has received, pursuant to a national leniency programme, within the framework of proceedings for the imposition of fines which are (also) intended to enforce Article 81 EC [Article 101 TFEU].”: paragraph 18

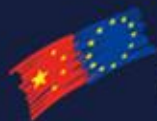


Pfleiderer cont'd

- The Court of Justice recognised the importance of leniency programmes to enforcing competition laws but, it also expressed the concern that it should not be “practically impossible or excessively difficult” to obtain compensation for harm caused by a breach of competition rules: paragraphs 25-30
- Accordingly, the Court refused to rule that EU competition laws must be interpreted to prohibit disclosure of ‘corporate statements’ and other documents relating to a leniency application.

Pfleiderer cont'd

- The Court ruled that whether such disclosure should be made involves the balancing of the legitimate interests of public enforcement and private action for damages and this should be done on a case by case basis.
- The Court noted that absent EU laws, it is for each Member State to “establish and apply national rules on the right of access, by persons adversely affected by a cartel, to documents relating to leniency procedures.” (paragraph 23)



Applying *Pfleiderer*

- The Court of Justice ruling calling for a balancing of interests has been applied in, at least, two cases.
- In the *Pfleiderer* case, the Amstgericht Bonn applied the ruling to deny access to leniency documents (30 January 2012).
- *National Grid v ABB* [2012] EWHC 869 (Ch.) Mr Justice Peter Roth ordered disclosure of redacted portions of the European Commission infringement decision quoting from corporate statements made by leniency applicants
- The Commission announced it will introduce legislation later in 2012 to protect corporate statements made in leniency applications.



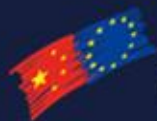
4. Collective Redress

- The Commission is of the view that collective redress should be available in order to achieve the objective of promoting private actions since many claims involving small amounts are unlikely to be filed unless they are consolidated in some manner.
- The challenge for the Commission is to bring in legislation (by regulation or by directive) to provide for collective redress in EU Member States which overcomes the objections of Member States which desire to preserve the high degree of autonomy they enjoy in establishing its domestic legal system including court procedural rules.



Collective Redress cont'd

- At the centre of the debate on collective redress, is the form of collective redress:
 - Should there be representative actions by qualified entities such as consumer associations?
 - Should there be opt-in collective actions in which each member of the plaintiff group must positively assent to join in the action?
 - Should there be opt-out collective actions in which each member of the plaintiff group may opt-out of the action, failing which it is included in the action?



Collective Redress cont'd

- Disagreement about the form of collective redress is founded on a concern that class actions American-style should not be introduced in Europe.
- This explains in large part the hostility towards opt-out collective actions, which are the norm in the United States.
- Vice-President Almunia, who is also the Competition Commissioner, has announced an intention to introduce by the end of 2012 legislation on collective redress on competition private damages action.



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THE END

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