



THE ONLY GLOBAL ASSOCIATION OF YOUNG LAWYERS

## Seminar on Damages Actions for Breach of Antitrust Rules



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30 September - 2 October 2010 | COPENHAGEN  
30 septembre - 2 octobre 2010

DAMAGES ACTIONS  
FOR BREACH OF  
ANTITRUST RULES

ACTIONS EN DOMMAGE ET INTÉRÊTS  
POUR INFRACTION AUX RÈGLES  
DE CONCURRENCE

### SEMINAR REPORT

Reporters

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**FRIDAY MORNING 1 OCTOBER 2010**

**CHOICE OF COURT AND FORUM SHOPPING**

Moderator: **Tanja Jussila** / Waselius & Wist (Finland)

Speakers: **Christopher Vajda** / Monckton Chambers (England); **Pär Remnelid** / Vinge (Sweden); **Jacob Pinborg** / Kammeradvokaten (Denmark)

- International choice of jurisdiction:
  - o In international cases there is likely to be a choice of different jurisdictions
  - o Choice of court can have considerable impact on proceedings since they are subject to national procedural rules:
    - Limitation periods
    - Access to evidence
    - Type of damages awarded
    - Availability of passing-on defence
    - Joint and several liability
    - Speed of proceedings
    - Settlement
    - Costs
  - o Regulated by Regulation 44/2001 (Brussels I)
- National choice of procedure:
  - o Cases without an international dimension can still allow for the choice of different procedures:
    - Complaint to the European Commission
      - Likely to take several years, then even more for damage claim in civil courts
      - Likely to incur very high costs to support the case with arguments and evidence
    - Civil procedure in courts
      - Likely to take several years, even longer if declaratory awards are sought first to establish, e.g., the existence of a breach of competition rules
      - Likely to incur very high legal costs
    - Civil arbitration
      - Likely to be fairly quick due to lack of appeal
      - Can choose arbitrators with expertise in competition law
      - Fairly high costs but makes up for it by saving time, so costs can be seen as an investment
      - Will the defendants act in good faith?

**ACCESS TO EVIDENCE**

Moderator: **Tanja Jussila** / Waselius & Wist (Finland)

Speakers: **Søren Zinck** / Lind Cadovius (Denmark); **Arttu Mentula** / Merilampi (Finland); **Jonathan Tickner** / Peters & Peters (England)

- Access to evidence:
  - o Claimants are often in a difficult position because to prove their case they must access large amounts of complex evidence possessed by the defendant or a third party
    - E.g., administrative file of the competition authorities, court file of the public enforcement case
  - o Evidence is necessary concerning the finding of an infringement, the causal link and the amount of damage
  - o Due to business secrets, a claimant may not wish to present all available evidence
    - E.g., cost structure to prove the amount of damage
  - o If parties agree, they could use a neutral expert to assess the evidence and testify on it, thus avoiding full disclosure
  
- Finnish asphalt cartel case:
  - o Somewhat unusual case in regard to access to evidence because claimants are public entities
  - o All documents of public entities are by default public documents
    - Otherwise would need to request court to order disclosure of specified documents, which is quite cumbersome
  - o Defendants have requested documents to present economic counter-evidence
  - o Considerable time has elapsed from the time of the infringement, so some documents have already been destroyed - access to evidence?

Reporter: Tomasz Feliszewski

**FRIDAY AFTERNOON 1 OCTOBER 2010**

### **DAMAGES**

Speakers: **Dario Paschetta** / Studio Frignani, Turin, **Pär Remnelid**/ Vinge, Malmö ,  
**Auerelien Condomines** / Aramis, Paris

Calculation of the damages in antitrust cases- economic approach in action  
(based on Oxera Report)

Issues:

- What the plaintiff must prove and how
- Fault requirements in damage-related cases
- Casual relationship between the breach of the antitrust rules and the harm (case-study on Italy)
- Diverse methods for estimating damages ("cost based approach"; "before and after" method and "yardstick" method)

Whom should damages be allocated to??

Issues:

- Community right to damages (Courage/Manfredi)
- Damages claim- requirements
- Co-contractors and indirect purchasers in context of claiming damages
- Constraints subject to the principles of equivalence and effectiveness
- Rendering competition law rights effective accessible to citizens (role of representative and collective actions)

The Passing On Defence

Unclear applicability on the national level:

Germany (Transportbeton case, KG Berlin, 2009): passing on defence was rejected by the court with stating that indirect purchasers could claim their share from direct purchasers

Italy (VIH/Juventus case, 2009): the court concluded that the end-users, not the buyer of the overcharged products, suffered the damage

France (Lysine cartel, 2010): French supreme court annuls an appeals court decision because the passing on issue had not been sufficiently explored.

## **COORDINATION ISSUES WITHIN THE ECN AND THE EXTENSION OF THE LEGAL FRAMEWORK**

Speakers: **Christian Volltrath** / European Commission- DG Competition, Brussels, **Christian Bergqvist** / University of Copenhagen

### Antitrust Damages Actions- Where do we stand and where may we go??

Issues:

- Collective redress as the way of ensuring realistic chance of compensation for all categories of victims ( Representative action/ Collective (group) action)
- European Commission is going to publish non-binding guidelines on quantification of damages (focus on economic insights into the qualification of antitrust harm)
- Compensation as primary objective of public enforcement
- EU legislative initiative still vague

### Is Harmonization of European Procedural Framework Possible and Desirable?

Issues:

- Public enforcement vs. private enforcement
- Follow on litigation as an argument for not disclosing information
- Follow on litigation as an argument for not seeking leniency
- Binding effect of the NCA's decision makes it highly attractive to build your case upon a NCA's decision and it turns NCA into a kind of gatekeeper in context of taking private enforcement actions
- Shortfalls of Regulation 1/2003
- Underestimated role of Article 15 Regulation 1/2003

Reporter: **Michael Klöcker** / Gorrissen Federspiel (Denmark)

## **SATURDAY MORNING 2 OCTOBER 2010**

### **A DANISH PERSPECTIVE**

Moderator: **Erik Bertelsen** / Kromann Reumert (Denmark)

Speakers: **Christian Alsoe**/ Gorrissen Federspiel (Denmark), **Christopher Kjoelbye Jensen**/ Plesner (Denmark), **Henrik Holtse**/ Bech Bruun (Denmark)

The purpose of this session was to provide a general overview of damages cases in Denmark and to outline the possibility and relevance to damages cases related to infringements of the Danish Competition Act.

In general the discussions showed that damages cases and private enforcement still are under development in Denmark although private enforcement has increased in the recent years and is expected to increase significantly in the years to come. Major obstacles will be the burden of proof and the legal costs.

Subjects discussed included:

- The regulation and nature of claiming damages
  - o Jurisdiction
  - o Choice of law
  - o Pan-European cartels / infringements
  - o Possibility of class actions
- Basis for claiming damages in Denmark
  - o Decision from the National Competition Authority (NCA) or the arrangement between the parties in the damages case?
  - o To what extent can the court question decisions from the NCA? In Denmark the decision is final if it is not appealed
  - o To what extent will the court look into economic evidence and to what extent will causality and likelihood play a role?
  - o How can the losses be calculated?
  - o In general, there are too few Danish cases yet to answer these questions. However the questions illustrate the obstacles of private enforcement in Denmark
  - o Infringements of the Competition Act are also a criminal offence. This can have an impact on damages cases and private enforcement in general
- Cases and practice in Denmark

- Very few cases end up in court, but one case has granted the plaintiff damages
- A few cases has been settled
- Fact is though that not many cartels has been revealed in Denmark
- Recent changes to the Competition Act makes class actions possible in Denmark
- Based on the recent changes of the Competition Act and the resent court cases damages cases are expected to increase

### **A BROADER PERSPECTIVE**

Moderator: **Martin André Dittmer** / Gorrissen Federspiel (Denmark)

Speakers: **Leopoldo Pagotto** / Xavier, Bernardes, Braganca Sociedade de Advogados (Brazil), **Maria Ostashenco**/ Alrud Law Firm (Russia), **Nico Just**/ Osbourne Clarke (Germany)

The purpose of this session was to expand the discussion to a broader perspective by introducing damages cases and experience from other parts of the world.

In general private enforcement is still underdeveloped although attention is drawn to the concept and the benefits of private enforcement. Major obstacles are the burden of proof, the access to file and to relevant evidence, the calculation of the loss and the legal costs which can be substantial.

In Germany though the Cartel Damages Claim institution has been a success so far and is expected to develop further in the years to come.

- Damages linked to competition law infringements in Brazil
  - Few cartel cases (in the past)
  - Private enforcement is not common and has not been encouraged in the past
  - Based on reason development in USA private enforcement has been growing and it has been acknowledged that private enforcement can have an effect on cartels and anticompetitive behaviour
- Damages linked to competition law infringement in Russia
  - Private enforcement is still underdeveloped
  - Still, any person violated can claim damages for the court
  - Standard regulation related to damages applies. There are no specific regulation regarding competition law and private enforcement
  - Legal costs, burden of proof, access to file and evidence are some of the vital barriers in order to have effective private enforcement
- Damages linked to competition law infringement in Germany

- Cartel Damages Claim (CDC), a private organized group of lawyers who specialize in private enforcement
- Do to specializing CDC have developed practical solutions to handle damages cases including getting access to file and evidence.
- CDC basically takes over the damages case from the victims and bears the cost and risks. It is not considered as a class action institution. However CDC bundles stakeholders claims into one case
- CDC has handled a case regarding damages in Germany related to the cement cartel where the antitrust claim amount to approximately € 176 million. CDC has taken over claims on behalf of 28 stakeholders (medium sized companies in the concrete sector)
- CDC has also introduced a leniency PLUS programme concept related to private enforcement. The programme extends public leniency programmes to private enforcement