

TOPIC:
THE JUDICIAL APPLICATION OF EUROPEAN COMPETITION LAW¹

General Rapporteurs:
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For several decades, application of competition rules in most, if not all, Member States remained essentially administrative: enforcement was undertaken by the European Commission and by specially entrusted authorities of the Member States. These public authorities had the power to impose administrative fines, cease and desist orders and, where available, structural remedies. The role of private parties having suffered the alleged infringement usually remained limited to act as complainant in the administrative proceedings. Even follow-on actions seeking damages once the public authority had already declared a particular anti-competitive conduct remained rare. Competition rules were seldom the main issue in civil disputes, although they were applied in courts "*à titre d'incident*".

Judicial application of EC –and national– competition rules has probably been one of the key issues in the "modernization" of competition law in Europe initiated by Commissioner Monti and enthusiastically continued by Commissioner Kroes. When the Commission decided to initiate the modernization process, private enforcement, of competition law in Europe was in a state of "total underdevelopment". In 2004 the European Commission carried out a Study on the conditions of claims for damages in case of infringement of EC competition rules, trying to identify the obstacles to successful action for damages existing in the Member States. In 2005 it published a Green Paper trying "to identify the main obstacles to a more efficient system of damages claims and to set out different options for further reflection and possible action to improve damages actions both for follow-on actions and for stand-alone actions." In 2008 the Commission issued its White Paper on Damages Actions for Breach of the EC antitrust rules that proposed several policy choices and specific measures to ensure effective redress mechanisms. Very recently, the European Parliament adopted a resolution supporting the proposals contained in the Commission's White Paper, but also stressing the need to avoid abuses of the system, "such as occurred in other legal systems, in particular in the United States".

Notwithstanding the unanimous desire to reinforce judicial application of competition rules in Europe and the proposals that have been made to achieve this goal, there seems to be a general consensus that relatively few private enforcement actions are brought before national courts.

This is why FIDE decided to address, once more², this topic. This time we have opted for pointing to the procedural obstacles that, in each Member State, make this private

¹ EC competition law includes the application of Articles 81 and 82, merger control and state aid control. However, we will focus only on the judicial application of Articles 81 and 82.

enforcement so difficult. By comparing different experiences, FIDE may hopefully be able to propose several measures that could facilitate the viability of private actions aiming at obtaining full redress for breaches of competition law.

Finally, for the sake of clarity we will define some of the terms used in our questionnaire:

- The expressions “judicial application” and “private enforcement” of competition Law are used as synonyms to refer to litigation in which private parties advance civil claims or counterclaims based on the competition provisions.
- Litigation “*à titre principal*” are cases where competition law is invoked, usually by the claimant, as a basis for his claim. Litigation “*à titre d’incident*” occurs when the defendant invokes the competition rules as a defense in a civil dispute.
- In “stand-alone” actions, the judicial application of the competition rules takes place without there being a previous decision of the administrative competition authority. “Follow-on” or “follow-up” actions take place once a public authority has adopted a decision condemning a particular anti-competitive action.

² Private enforcement of EU competition law has been touched upon in at least the following congresses: *National application of competition law* (Stockholm, 1998); *Competition Law and Policy of the European Union: The reform of Competition Law Enforcement – Will it work?* (Dublin, 2004); *The modernization of European competition law – initial experiences with Regulation 1/2003* – (Wien, 2008).

QUESTIONNAIRE TO NATIONAL RAPPORTEURS

1. Was competition law privately enforced in your country before Regulation 1/2003 entered into force?
2. If yes, was competition law applied as the main or principal issue of the dispute (*à titre principal*) or only as a subsidiary issue (*à titre d'incident*)?
3. Were stand-alone actions possible/frequent? Were follow-on actions possible/frequent?
4. Has the entry into force of Regulation 1/2003 substantially increased the possibility to bring actions in practice or the number of actions brought?
5. Was there a need to modify the national competition law and/or the procedural legislation to facilitate the application of Regulation 1/2003?
6. Has your national legislation been modified to take into account the recommendations included in the Commission's White Paper and Commission Staff Working Paper on Damages Actions for Breach of the EC antitrust rules? Are any of these recommendations already part of your national law? Are there concrete legislative proposals to implement any of these recommendations?
7. Is private litigation in competition cases dealt with by ordinary civil/commercial courts or by a specialized court? Is there a difference depending on whether competition law is applied *à titre principal* or *à titre d'incident*?
8. Is private litigation in practice essentially circumscribed to specific practices or industries (e.g. supply exclusivity of petrol stations; motor vehicles distribution, etc.)?
9. Has the national court to stay its proceedings once the National Competition Authority ("NCA") has initiated proceedings on the same matter, until a decision has been reached?
10. Has the NCA to stay its proceedings once a national court has initiated proceedings on the same matter, until a decision has been reached?
11. Are national courts bound by the final decisions adopted by a NCA declaring that a certain practice amounts to an infringement? Is the response the same where the NCA rules that the practice does not infringe competition law?
12. Is the NCA bound by the final decisions adopted by a national court declaring that a certain practice amounts to an infringement? Is the response the same where the national court rules that the practice does not infringe competition law?
13. If not, what is the value for a national court of a final decision adopted by a NCA and vice versa?
14. Is the final review of all the disputes (civil and administrative) related to competition law under the jurisdiction of a single court of last instance? Are there mechanisms to avoid inconsistencies in the case law?
15. Does your legal/constitutional system allow courts to be bound by administrative decisions – as provided for in Article 16 of Regulation 1/2003 in respect to the Commission's decisions –? In the absence of a specific legal provision such as Article 16 of Regulation 1/2003, what is or could be the

- value for a national court of a final decision adopted by a NCA of other Member State? And of a judgment of the court of another Member State?
16. Is there any form of discovery, either pre-trial or court-ordered based on fact-pleading? If not, what mechanisms are available under your national law to obtain evidence from the opposing party? Are they sufficient?
 17. In case of follow-on litigation, can private parties claim access to the administrative file to prepare their action before the national court? If so, will they also have access to documents that have been declared confidential by the NCA and to internal documents of the NCA?
 18. Who bears the burden of proof of the existence of an infringement in private litigation cases? What does the plaintiff have to prove to claim damages? Does the burden of proof shift during the proceedings? Are there legal presumptions affecting the burden of proof?
 19. What form of orders or remedies are available (i) in private actions before the courts; and (ii) in administrative proceedings by the NCA (e.g. declaration of infringement; declarations as to compliance with Article 81(3); annulment of agreements or of particular clauses; injunctions to restrain repetition of infringements; positive injunctions; interim measures in advance of final judgment; damages, etc.)?
 20. Are the administrative limitation periods for the imposition of penalties different from the term within which it is possible to bring an action for breach of competition law before the national court? What is the time limit to bring an action for damages?
 21. Are there special rules for competition law issues in relation to standing? Can indirect purchasers claim redress?
 22. Are there collective redress mechanisms allowing for the aggregation of individual claims for competition law infringements? Do your national procedural rules allow for (i) representative actions being brought by a specified body?; (ii) class actions generally; (iii) the consolidations of claims?
 23. If such possibilities do exist, can claimants having suffered damages in another Member State bring an action in your country? Would they have to prove that they had a direct relation with the defendant or would it be sufficient if they had this direct relation with the defendant's mother/sister company?
 24. Can a party claim full damages from one of the members of a cartel based on joint and several liability?
 25. What is the level of the costs and/or fees of legal procedures as compared with the cost of filing a complaint before the NCA?
 26. Do the legal costs and/or fees deter claimants from bringing stand-alone actions? Idem from follow-on actions. Are there procedural mechanisms to avoid this?
 27. Are there any specific substantive or procedural rules applicable to undertakings that have filed a leniency application? If so, are they only applicable to undertakings qualifying for full immunity?
 28. What is the average length of judicial proceedings before a final and binding judicial decision has been adopted and enforced? Compare with the proceedings followed before a NCA.
 29. Is there any judicial settlement procedure? Can administrative proceedings conclude with a settlement? What would be, if any, the differences in the settlement procedure?

30. Some of the obstacles to effective redress for victims of breaches of competition law are common to non-contractual claims in other areas (product or environmental liability; etc.). Are such claims easier/more frequent in your country? If so, why?
31. Do national courts have to inform the NCA and/or the European Commission of any claims where competition law would have to be applied? Is the obligation established in Article 15.2 of Regulation 1/2003 to transmit judgments regularly complied with?
32. Have your national courts asked for Preliminary Rulings *ex* Article 234 EC in cases concerning Articles 81 or 82 EC? If not, why?
33. Have your national courts requested your NCA or the European Commission intervention in judicial proceedings between private parties involving the application of competition law? How? Was their intervention required by one of the parties or decided *ex officio*? Are there any national procedural rules providing for the intervention of NCAs or the Commission in judicial proceedings?
34. Can any other bodies representing public interest (e.g. public prosecutor) and/or consumer associations bring judicial actions for breach of competition law? Can they intervene in judicial proceedings between private parties involving the application of competition law? How?
35. Can competition law issues be solved by private arbitration or other forms of alternative dispute resolution mechanisms?
36. What are the kinds of damages that can be awarded following a successful claim for breach of competition law (i.e. compensatory, punitive, disgorgement, etc.)?
37. What is the discretion of the courts on the calculation of damages? Is the existence of an administrative penalty, imposed either by the European Commission or by a NCA, taken into account when awarding damages?
38. Does the NCA take into account the compensation paid or to be paid by the company when determining the fine?
39. Is the passing on defense admissible as a defense before national courts in a competition law dispute?
40. Identify three main elements which, in your view, hinder the development of private enforcement of competition law in your country.
41. Indicate at least three measures which, in your view, would facilitate the development of private enforcement of competition law in your country.
42. The Commission and the European Parliament have been pushing for a "European" model of judicial application of competition law that would avoid the "potential excesses of the US system". Given the present underdevelopment of private enforcement in Europe, do you think it is possible to find right away a correct equilibrium or would it be necessary, to reverse the present atrophy of private enforcement in Europe, to introduce some positive incentives that could be eventually removed if excesses also appear?