

2009 – A Watershed Year for European Civil Antitrust Litigation

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What was predicted, is now reality..



- It was predicted, and it was slow to develop
- But it is gaining momentum
- The main barriers are eroding:
 - procedural difficulties,
 - cultural barriers inhibiting actions against suppliers,
 - costs for claimants, and
 - lack of specialist plaintiff's lawyers

The EC Commission objective: Getting the courts more involved

- Getting the European courts involved in competition law enforcement has been a top priority for the EU Commission for the past 20 years
 - *Automec II* [1992]: Commission must prioritize its case load
 - Commission Notice on co-operation with the National Courts, 1993
 - *Crehan* [2001] and *Manfredi* [2006]: nature of damages available to claimants in private damages actions
 - Regulation 1/2003: The modernisation regime
 - Ashurst Report (2004)
 - Green Paper (2005) and White Paper (2008) on damages actions for breach of the EC antitrust rules:
- Commission is trying to make it easier for “victims” of cartels to seek reparation for damages suffered

The tool: A directive facilitating damages claims

- Commission draft directive to facilitate damages claims:
 - The passing-on defence
 - Standing: 'qualified entities' to bring claims / indirect purchaser standing
 - Access to information (disclosure and discovery)
 - NCA decisions binding in all member state courts
 - No fault requirement
 - Limitation periods
- Attempted to have legislation adopted so MEPs would only be consulted and would not have the formal ability to amend the text

Antitrust damages are politically charged..

EuropeanVoice

BUSINESS Competition

Kroes fails in bid for compensation claims

Commission will lack authority for proposals

Legislation would allow group legal action

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Neelie Kroes, the European commissioner for competition, has failed in her efforts to bring forward legislation to encourage compensation claims against businesses guilty of antitrust violations. She was forced to retreat because after 1 November the Commission lacks the authority for such controversial proposals.

A spokesman for the Commission said it was still committed to making the proposal, but was unable to say when this would take place, both because it was unclear when the next Commission would be formally appointed, and because of reservations over Kroes' text.

The legislation would allow groups of plaintiffs across Europe to band together to launch compensation claims against companies suspected of antitrust infringements.

It would also set out rules on disclosure of evidence in such cases, and on how long victims would have to bring a complaint.

The legislation is strongly supported by consumer groups but is fiercely opposed by businesses, which



ANTITRUST PROPOSAL
Neelie Kroes, EC

argue that it would lead to US-style class actions, in which law firms launch cases on behalf of large numbers of plaintiffs. This is strongly denied by the Commission.

Blocked attempt

José Manuel Barroso, the president of the European Commission, earlier this month blocked an attempt by Kroes to put the draft legislation on the Commission agenda, because he felt that it required more work.

It is understood that he was concerned that Kroes planned to present the measure as an initiative linked both to the promotion of competition and to

the development of the single market. This dual legal justification would have granted the European Parliament an equal role with member states in deciding the legislation, something that Barroso felt required more reflection lest it set a precedent.

Kroes, who will not be a member of the next Commission, originally wanted the draft legislation adopted before the summer, but withdrew it for redrafting after an outcry from business lobbies. The German government also expressed concerns.

Kroes said earlier this month, however, that she still hoped to bring the proposal forward before the end

of her mandate, something that is now impossible.

Johannes Laitenberger, spokesman for Barroso, said that it would "fall to the next college to take this matter forward and to lead the debate on the substance [of the proposal]". He said that there was "consensus" that the proposal will be presented.

He said that the Commission was still reflecting on what kind of legal justification it should use.

"This is an institutional matter that has to be taken very seriously," he said. "Different legal bases have different systematic implications which require the Commission to assess their possible impact."

- Commission President José Manuel Barroso intervened to postpone adoption of the new directive.
- *"The private actions proposal is ready...As we are caretakers now I will hand it over to my successor to the next commission."*
- Neelie Kroes, 11 November 2009

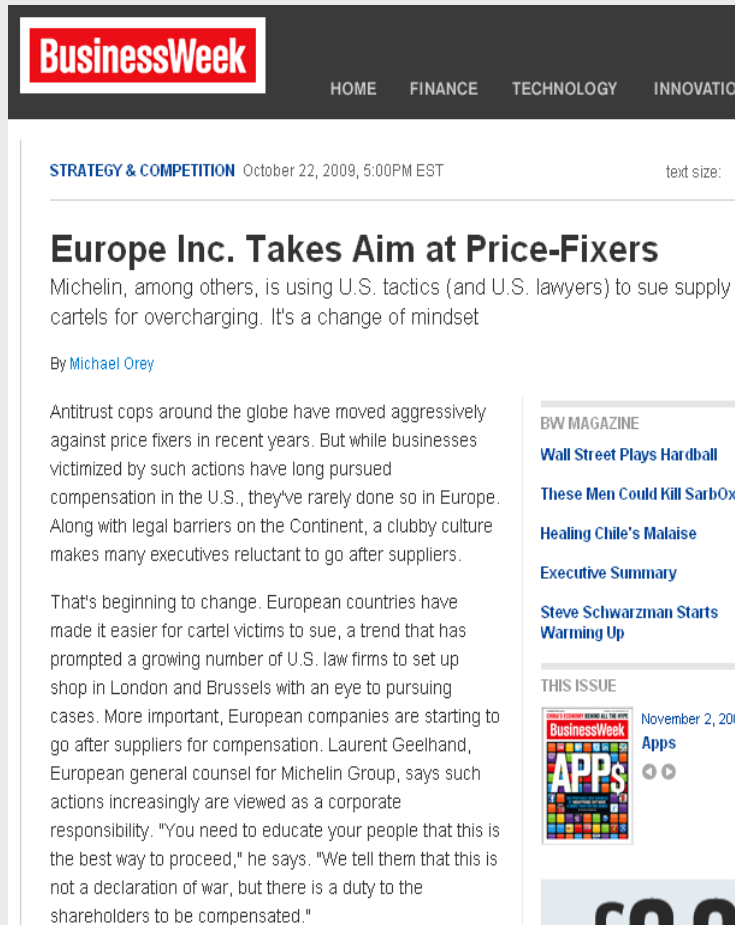
Focus is now on EU Member States and courts

- Member States are proposing and adopting legislation to facilitate or control legal actions arising out of competition law infringements
- But above all 2009, was the year for plaintiffs to take their cases to national courts around Europe

National legislatures have been active

- The UK introduced its specialised court – the CAT
- Collective actions have been introduced in Sweden, Finland, Norway and Denmark
 - They will be introduced in Italy and are likely to be introduced in France
- In Spain, legislation has been enacted to allow civil courts to directly apply national competition rules, which will also facilitate damages actions
- Germany has removed several perceived obstacles to damage claims through its 2005 competition law
- Hungary has introduced a rebuttable presumption that a cartel had an effect of 10 per cent on the price and therefore claimants will only have to prove damage exceeding this lump sum amount

But the courts are where the action is..



BusinessWeek HOME FINANCE TECHNOLOGY INNOVATION

STRATEGY & COMPETITION October 22, 2009, 5:00PM EST text size:

Europe Inc. Takes Aim at Price-Fixers

Michelin, among others, is using U.S. tactics (and U.S. lawyers) to sue supply cartels for overcharging. It's a change of mindset

By [Michael Orey](#)

Antitrust cops around the globe have moved aggressively against price fixers in recent years. But while businesses victimized by such actions have long pursued compensation in the U.S., they've rarely done so in Europe. Along with legal barriers on the Continent, a clubby culture makes many executives reluctant to go after suppliers.

That's beginning to change. European countries have made it easier for cartel victims to sue, a trend that has prompted a growing number of U.S. law firms to set up shop in London and Brussels with an eye to pursuing cases. More important, European companies are starting to go after suppliers for compensation. Laurent Geelhand, European general counsel for Michelin Group, says such actions increasingly are viewed as a corporate responsibility. "You need to educate your people that this is the best way to proceed," he says. "We tell them that this is not a declaration of war, but there is a duty to the shareholders to be compensated."

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THIS ISSUE
November 2, 2009
[Apps](#)

- Why?

- More US firms using US tactics
- Less cultural barriers inhibiting litigation against suppliers
- More pressure from shareholders to seek compensation
- Less financial risks for plaintiffs
- Less opportunities in US courts
- Forum shopping has become more sophisticated
- Defensive actions on the rise
- More certainty as to how European cases will be conducted

The plaintiff's bar is now a reality

HAUSFELD^{LLP}

- Establishment of US class action firms in Europe, e.g. Hausfeld LLP:
 - *Paraffin wax, Marine Hose, Air Cargo*

DICKSTEINSHAPIRO^{LLP}
| Experience Innovation

- Use of US class-action firms in Europe:
 - Michelin hired Dickstein Shapiro, a Washington (D.C.) law firm, to help it recover excess payments in the synthetic rubber cartel



- 'Magic Circle' firms acting for Claimants as well as Defendants

„The European Brand for Private Antitrust Enforcement“
CARTEL DAMAGE CLAIMS
- CDC -

- Claims aggregators, e.g. Talionis International and Cartel Damages Claims (CDC):
 - *German cement, Hydrogen Peroxide, Elevators (pending), Paper cartel*

Third party funding is reducing the risk of litigation for claimants

- ‘Loser pays’ across Member States creates high risk for claimants considering an action
- Third-party funding is an effective tool to reduce the cost risk:
 - FirstAssist Legal Protection:
 - Signed deal with Hausfeld in 2008 to launch ‘CartelKey’ to reduce the risk of Claimants paying high costs
 - Funding Marine Hose claim against Dunlop
 - Claims Funding International Plc:
 - Will conduct litigation in the Netherlands for the EVO (Dutch shippers council) on behalf of those damaged by the Air Freight Cartel (Commission decision pending)
 - CFI will fund the case and assume all the risk in return for a commission, only if successful
 - Others: insurance firms such as Allianz, accountants such as Smith & Williamson and funds like Harbour Litigation Funding

Contingency Fees and consolidation of claims are other means of reducing the cost risks

- Liberalisation related to contingency fees in:
 - Sweden
 - Germany
 - Spain
 - Italy
 - UK?
- Some form of success fees possible in most jurisdictions
- Aggregated claims are increasingly the norm
 - CDC, Talionis in Germany, Netherlands, Switzerland
 - Possible in most jurisdictions except England and Wales and Belgium

US courts provide less opportunities

- Treble damages, no passing on defence, and discovery traditionally favoured US litigation
- *Empagran* and *Emerson*
 - No US treble damages claims for European purchasers
 - Litigation is moving to Europe when there is no global settlement
- *Air Cargo*
 - US courts rejected hearing EU related damages claims
- *Twombly*
 - Weak cases are being dismissed, restricting the ability to plead a case in the US

The UK and Germany are the plaintiff's forum of choice at the moment

- Most European cases are still launched in England:
 - Extensive disclosure, including possible pre-action discovery, dedicated specialist tribunal, effective case management
- Germany is another favoured forum:
 - recognises NCA decisions, comparatively inexpensive and quick
 - a big market so generally affected by case, easy jurisdiction
- But cases have been launched across Europe, e.g.:
 - *Vitamins, Lysine* litigation in Norway, German, France
 - *Elevators* litigation in Belgium
 - *Synthetic Rubber* litigation in Italy (defendants case)

Proactive defence? No more torpedoes ?

- July 2007: ENI brought an action in the Italian courts for a negative declaration in relation to the synthetic rubber cartel
- April 2009: Italian court dismissed the case:

“...granting such requests would entail ignoring the mandatory character of the Decision and consequently denying its binding application which would be in clear contrast with Article 16 of Regulation 1/2003. Therefore those requests shall be deemed inapplicable before a national court.”

-Judgment of the Milan Court in *ENI* (53825/07)
- ENI has appealed against the decision.
 - If the appeal succeeds, the Italian Court of Appeal will decide on the merits of the case
 - A decision on the merits unlikely until 2013-2014

...or just better torpedoes?

- December 2007, 26 of the defendants in the Italian case, commenced claims in England against 23 parties who were alleged to have been part of the cartel
- October 2009: English Court ruled that the two cases can proceed independently:
 - The action against ENI would be stayed as Italy was the court first seized
 - The action against the other defendants will proceed in the UK
 - As a result, the English defendants may not be able to seek contribution against ENI as a joint tortfeasor?
- Not all member states require claimants to give warning of their intention to sue:
 - E.g. in England and Wales the claimant will be penalised on costs for not following proper pre-action protocol, but otherwise is not sanctioned.
- Should defendants bring declaratory actions before they have a clear view of whether they will be sued and by whom?

What will hit you?

- **Actions based on Commission / NCA decisions or “stand alone” claims?**
 - Commission decisions:
 - E.g. *Vitamins, Bitumin, Synthetic Rubber (ER and ESBR), GIS, Elevators, Carbon Graphite*
 - NCA decisions:
 - E.g. *Beer, Construction, Asphalt, Bitumen, Paper, Private Schools, Replica football shirts, Railway (including Enron)*
 - Stand alone action in one member state but NCA decision in another:
 - E.g. *Feed phosphates*
 - Stand alone when Commission decision is pending:
 - E.g. *Air Freight*

Who gets sued?

- The trend at the moment is that defendants tend to be “local companies” in the EU
- This seems to be based on:
 - EU defendants are easier and quicker ‘wins’
 - There are greater difficulties in establishing jurisdiction over non-EU defendants
 - EU claimants may have more difficulties in proving they suffered damage from non-EU defendants
 - Enforcement of judgments may be difficult
- But will the defendants found to be liable for the total sum of damages then seek compensation from joint tortfeasors?
 - Big difference to US system where contribution claims are not allowed
 - It changes the settlement dynamics
 - Should joint tortfeasors intervene before they are sued?

Settlements trends

- Settlements with some defendants are being used to fund further actions against other defendants involved in the same cartel:
 - E.g., CDC strategy
- Settlement negotiated in one jurisdiction may apply to victims in another:
 - E.g. *Fuel surcharges*
- Automatic settlements are emerging and potential defendants are setting up settlement funds:
 - E.g. Parker ITR in *Marine Hoses*

So where is this going?

- Expect more private damages actions throughout the EU
- Although damage awards will not replicate the treble damages in the US, plaintiff law firms and tactics from the US will continue to influence the direction
- England and Wales is likely to remain the jurisdiction of choice of plaintiffs, at least until the Commission passes its directive
- Potential defendants should consider limiting exposure, by taking proactive steps

Want to know more?

- This presentation and earlier presentations and articles on related topics available at: <http://www.lw.com/Attorneys.aspx?page=AttorneyBio&attno=01263>

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