RESPONSE TO THE WHITE PAPER ON DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES

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Introduction

This note focuses on **Chapter 4** of the White Paper on damages actions for breach of the EC antitrust rules[1] and its accompanying Staff Working Paper[2] (SWP) and Impact Assessment Report[3] (IAR) - the **proposal to introduce the binding effect of Member State competition authority decisions on national courts throughout the Community**.

The proposed rule and policy options

The Commission proposes that "When national courts in actions for damages rule on agreements, decisions or practices under Article 81 or Article 82 EC which are already the subject of a final decision by an NCA within the European Competition Network (ECN) finding an infringement of Article 81 or Article 82 EC, or are the subject of a final ruling by a review court upholding the NCA decision or itself finding an infringement, they cannot take decisions running counter to such a decision or ruling. This obligation is without prejudice to the right, and possibly obligation, of national courts to seek clarification on the interpretation of Article 81 or 82 EC under Article 234 EC." (SWP, p. 45)

In the preferred option in the Impact Assessment Report, "national courts dealing with antitrust damages claims cannot go against any finding by a Member State's competition authority confirming an infringement of the competition rules" (IAR Executive Summary, p.3). The policy options pertaining to this proposal in the impact assessment are:

[1] COM(2008) 165, 2.4.2008
[2] SEC(2008) 404, 2.4.2008
[3] SEC(2008) 405, 2.4.2008

Options 1&2: findings of NCA binding if not appealed or if confirmed on appeal

Option 3: binding only on courts of the Member State whose competition authority issued the decision

Option 4: non-regulatory approach – best practice, recommendations only

Option 5: no action – status quo

Fault and proof

Given that one aim of the proposal is to alleviate the complainant's burden by allowing him to rely on an NCA's finding of infringement without producing further proof, there is a close relationship with the White Paper's proposals on fault. Under the Commission's preferred policy option in the IAR, in Member States where there is no strict liability, fault is presumed as soon as the infringement has been established. In this context, fault would therefore be attributed by the NCA's decision. In the event of excusable error, the defendant can be exonerated. The policy options are:

Option 1: strict liability

Option 2: rebuttable presumption of fault, with exoneration for excusable error

Option 3: strong probative value of finding of infringement

If options 2 or 3 were selected, courts would have more scope for making a determination depending on national causation rules. The binding effect of the NCA infringement would not necessarily lead to a penalty or damages.

Necessity of binding effect?

The 2004 Ashurst comparative report identifying and analysing the obstacles to successful damages actions in the Member States[4] found that "All Member States at least recognise that statements/decisions by a national competition authority, a national court or an authority from another EU Member State can be submitted as evidence in damages proceedings although most do not consider them as binding." (p.69). As stated in the White Paper, the only Member State currently to allow the binding effect of foreign NCA decisions is Germany under section 33(4) GWB. The Ashurst study's subsequent investigation of the persuasive effect and evidential value of such decisions in each Member State (p. 69-70) in the status quo suggests that decisions are usually followed even if they are not binding, which may raise the

[4] Available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf

question whether this proposal is necessary. On the other hand, it suggests that in practical terms it would not take a great leap for national courts to implement the proposal. The purported benefits of the proposal are that it would promote consistent application of the EC antitrust rules, increase legal certainty, contribute to judicial economy by avoiding relitigation of issues, and encourage damages actions by alleviating the burden of proof on the complainant.

Relationship between decisions of administrative bodies and the judiciary

The proposed rule would place NCA decisions on a par with those of the Commission pursuant to Article 16(1) of Regulation 1/2003, with the limitations that: it would apply to the same undertakings and same practices; only final decisions would be binding (all appeals exhausted and time limits expired); and it would apply without prejudice to the preliminary reference procedure under Article 234EC.

The obligation not to take a decision running counter to one by the Commission applies by virtue of supremacy of Community law, with the decision under the ultimate control of the European Court of Justice – the relationship is not one of deference of the national court to the Commission. However, there is a weaker basis for the binding effect of a foreign NCA decision in the national courts of the other Member States. An analogy can be drawn with the recognition of civil and commercial judgments under Regulation 44/2001[5]. It should therefore follow that the **conditions for binding effect of the decision of an administrative body should not be less strict than recognition of another court's judgment.** There should be at least the same safeguards for rights of defence, particularly as a review or appeal court may not have positively confirmed the NCA's decision if it has not been appealed.

If this binding effect proposal is adopted, a provision analogous to Article 34(1) of Regulation 44/2001 allowing a court to exceptionally refuse recognition of a judgment of another Member State on ground of public policy should be included as a safety net and to mirror the recognition of national court judgments. In particular this would allow scope for judicial control where fair legal process may have been

[5] Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001, L 12/1

impeded, in line with the European Convention on Human Rights and EU Charter on Fundamental Rights and as foreseen in the case law of the Community courts[6]. The Commission has already stated that it would not object to that public policy exception being written into law (SWP, para 162).

In practice if the NCA's decision *is* upheld by a review or appeal court it would be simply a matter of recognising another Member State court's judgment. As the Commission points out (SWP, para 149), it would often [although not always] be a judgment confirming the NCA decision that binds the judge hearing the civil case on damages claims. This 'court to court' dialogue may be more palatable and familiar to some judges. Concerns raised about this particular proposal undermining the independence of the judiciary would therefore be most pertinent if the decision had not been appealed, and rights of defence not guaranteed during the administrative proceedings.

S.33(4) GWB does not limit binding effect of administrative decisions to claims against parties addressed by the decision. Before implementing the binding effect proposal at Community level it would be advisable to study how the German domestic provision has operated in practice through its interpretation by the courts.

Actual or perceived general hierarchy of decisions of administrative bodies over civil court judgments, or public over private enforcement, should be avoided.

Relationship with the European Competition Network

Some, perhaps unintended, consequences of the proposal would mean an asymmetry between the effects of decisions of administrative bodies and those of civil court judgments. The Modernisation Regulation on implementation of the antitrust rules[7] and the Network Notice[8] were drafted so that positive decisions at national level cannot have a binding effect on other NCAs. The current proposal for binding effect was not foreseen at the time of the Modernisation Regulation. In the Commission's

[6] C-7/98 *Krombach* [2000] ECR I-1935 para 21
[7] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1-25
[8] Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.04.2004, p. 43-53

explanatory memorandum for the proposal which became Regulation 1/2003, with regard to types of decisions under Article 5 of the Regulation it stated that "Decisions adopted by national competition authorities do not have legal effects outside the territory of their Member State, nor do they bind the Commission".[9]

The European Competition Network is based on a system of parallel competences, where each network member retains full discretion in deciding whether or not to investigate (Network Notice, para 5). Under Article 13 of the Modernisation Regulation, the fact that another NCA is investigating is sufficient grounds to suspend proceedings or to reject a complaint. However, it has "no obligation to do so" (Network Notice, para 22). Given the case allocation rules within the ECN, ideally a single NCA or a lead authority should adopt a decision, but there is no guarantee that the ECN will continue to work in this way. It is conceivable that several NCAs within the ECN could be investigating the same conduct, and may adopt different infringement decisions. If strongly divergent decisions were envisaged, i.e. one finding and infringement and one finding no infringement affecting trade between Member States (as opposed to only in the national market), the Commission would need to intervene and possibly take over the case under Article 11(6) of the Modernisation Regulation. It could be expected that a defendant would raise any finding of no infringement as evidence, and divergent decisions would require the court itself to investigate the facts of the alleged infringement.

Member State NCA decisions should be notified first through the ECN, so all NCAs would have had the opportunity to raise objections or risks of divergence after an NCA had notified its envisaged decision to the other members of the ECN under Article 11(4) of the Modernisation Regulation. However, there would have been no court input except where a Member State designated a court as an NCA in a public enforcement role. If other NCAs are not formally bound by each other's decisions, there seems to be an asymmetry if national judges are to be bound by the decisions of foreign NCAs (albeit those confirmed by appeal or review court).

[9] COM (2000) 582 final, p. 17

Nevertheless, in terms of consistent application, the current proposal could contribute to aligning the decisional practice of courts and NCAs, minimising divergence between public and private competition enforcers. It could function in tandem with the tools in Article 15 of the Modernisation Regulation, where courts may request the Commission opinion or the Commission may submit observations at its own initiative as amicus curiae. The Commission and NCAs are to inform each other through the ECN if they intervene with an amicus brief in any case, perhaps indirectly linking national courts with the ECN.

Principle of equivalence

The binding effect proposal goes further than the principle of equivalence.

Several Member States do not foresee their national courts being bound by decisions of their domestic NCAs. It would be strange if national courts were bound by decisions of the Commission and foreign NCAs but not their domestic authority. However, this should be a matter for national law. The Commission should not impose the option of binding effect of an NCA decision in the domestic context only in the courts of that Member State. In any event, from a more practical perspective, this would have limited useful effect in terms of consistent application of the rules, as it would undermine concentration of damages claims in multi-state cases in one court (SWP, para 161).

As an example, the Office of Fair Trading proposed that courts should merely "have regard" to UK NCAs' decisions and guidance, not proposing that courts be bound, but only that they "give serious consideration" to the decision, with the proviso that in the interests of legal certainty judges departing from NCA decisions should explain why they are doing so, particularly reconciling different precedents[10]. However, in a separate part of the same report it does support binding effect of other Member State NCAs' decisions.

Conclusion

The current proposal raises some concerns about a possible perceived hierarchy of the decisions of administrative bodies over civil court judgments, or public over private

[10] 'Private actions in competition law: effective redress for consumers and business: recommendations from the Office of Fair Trading', OFT916resp, November 2007, p. 41

enforcement; possible asymmetry of NCAs' obligations towards each other and courts' obligations; and (lack of) equivalence of binding effect of domestic NCA decisions with those of other Member State NCAs. However, from a pragmatic standpoint, the benefits to consistent application, legal certainty and alleviation of the burden of proof on the complainant appear to outweigh these, subject to limitations.

Recommendations

- NCA decisions finding *no* infringement should not be binding on courts (as proposed).
- Binding effect should exclude decisions based on national antitrust rules (as proposed).
- The operation and interpretation of the German domestic provision (s.33(4) GWB) should be studied for possible lessons.
- Binding effect should be employed only where the defendants in the follow-on action were heard in proceedings leading to the foreign NCA decision – if not addressees of the decision at least as participants. This should include parties as part of the same undertaking (e.g. subsidiaries) as defined under Community law.
- The public policy exception contained in Article 34(1) of Regulation 44/2001 applying to recognition of foreign judgments should also apply to recognition of NCA decisions; if this were not the case, decisions of administrative bodies would be afforded a privileged position relative to judgments of civil courts.
- Only the finding of infringement should be binding, not findings on the effects of the infringement. The burden of proving causal link, effects of infringement and quantum should remain with the complainant for determination by the court.
- The Commission should go ahead with a study on the possibility of NCAs acting as amicus curiae on quantum (its stated intention at 4.1.4 of the Impact Assessment). However, the NCA should not be automatically obliged, for resource reasons, to give evidence to assist in quantifying damages in all follow-on cases. This would be better dealt with through the NCA's discretion to submit observations (for example on whether exemplary damages should be awarded) based on existing provisions. The NCA should assist the court rather than the parties.

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