



# Competition Law Roundtable

ILFA E-IURE

Minneapolis Convention

May 27, 2011

BOSTON | DALLAS | MINNEAPOLIS | SAN FRANCISCO | WASHINGTON, DC | BEIJING\*

[zelle.com](http://zelle.com)

*\*In association with ZY & Partners*

# Introduction

- Overview of the importance of private antitrust enforcement for international corporations
- Scope of discussion: cartel and victim perspectives of competition regimes in the United States, Canada and European Union

# Introduction

- Private enforcement a very important component historically of decentralized antitrust enforcement in the U.S.
- Why private enforcement?
  - Detection/deterrence
  - Compensation
  - Remediation
- Increasingly important elsewhere
  - Canada, European Union

# U.S. Substantive Law

- Sherman Act Section 1
  - “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”
    - 15 U.S.C. § 1
  - Prohibits *unreasonable* restraints of trade involving two or more entities
  - *Per se* versus “rule of reason”

# U.S. Substantive Law

- Sherman Act Section 2
  - “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony [...]”
    - 15 U.S.C. § 2
  - Prohibits the willful acquisition or maintenance of monopoly power in a relevant market

# U.S. Substantive Law

- “Every” does not mean every
- Foreign Trade Antitrust Improvements Act (“FTAIA”)
  - Sherman Act does not apply to non-import foreign commerce unless (1) the conduct has a “direct, substantial, and reasonably foreseeable effect” on U.S. domestic commerce, and (2) “such effect gives rise to a claim” under the Sherman Act
  - *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004)

# Private Enforcement in the U.S.

- Clayton Act Section 4
  - “[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States [...], and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”
    - 15 U.S.C. § 15(a)

# Private Enforcement in the U.S.

- “[A]ny person” does not mean “any person”
  - *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) prohibits “pass on” defense
  - *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) precludes “indirect purchaser” lawsuits
- More than 35 states permit indirect purchaser lawsuits
  - “Repealer statutes”
  - State court decisions

# Private Enforcement in the U.S.

- Class actions provide an important tool for private enforcement of U.S. antitrust laws
  - Fed. R. Civ. P. 23 allows certification when certain prerequisites satisfied
    - Rule 23(a) requirements of numerosity, commonality, typicality and adequacy
    - Rule 23(b) requirements of predominance and superiority
  - “Opt-out” classes
- Class Action Fairness Act (“CAFA”)

# Private Enforcement in the U.S.

- Contingency fees permissible
- Private litigants may benefit from judgments obtained by the government
  - Clayton Act Section 5(a)
- Broad discovery available
  - Fed. R. Civ. P. 26(b) allows discovery of “any nonprivileged matter that is relevant to any party’s claims or defenses [... R]easonably calculated to lead to the discovery of admissible evidence”

# Canadian Substantive Law

- Competition Act
  - “The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, [...] and in order to provide consumers with competitive prices and product choices.”
  - Includes provisions prohibiting combinations, conspiracies or agreements that restrain or injure competition unduly. (See, e.g., §45(1))
  - Also includes provisions dealing with unilateral conduct. (See, e.g., §79(1))

# Private Enforcement in Canada

- Private actions permitted for:
  - Conduct contrary to Part VI of the Competition Act, which largely deals with price fixing and other coordinated (not unilateral) conduct
  - Failure of any person to comply with an order of the Competition Tribunal or another court under the Competition Act
- Damages
  - Actual losses suffered plus additional amount not to exceed costs of investigation and proceedings

# Private Enforcement in Canada

- **Class Proceedings**
  - Comprehensive class proceedings legislation in place in the Federal Court and most provinces
  - General criteria for certification:
    - Pleadings disclose cause of action
    - Identifiable class
    - Proposed representative appropriate
    - Common issues present
    - Class action the preferable procedure
  - Plaintiffs often coordinate lawsuits in British Columbia, Ontario and Québec to pursue “nationwide” class actions

# Private Enforcement in Canada

- Courts have noted general trend towards certification
  - *Pro-Sys Consultants Ltd. v. Infineon Tech. AG*, 2009 BCCA 503 (Nov. 12, 2009) (class of direct and indirect purchasers of DRAM memory certified)
- Two recent decisions in British Columbia limiting indirect purchaser recovery
  - *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2011 BCCA 187 (Apr. 15, 2011)
  - *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2011 BCCA 186 (Apr. 15, 2011)

## E.U. Substantive Law

- Article 101(1) of the TFEU prohibits agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction, or distortion of competition within the European Union.
- Article 102 of the TFEU prohibits the abuse by one or more undertakings of a dominant position within the common market.

# Private Enforcement in the E.U.

- *Manfredi* – European Court of Justice:
  - “any individual can claim compensation for the harm suffered where there is a causal relationship” between harm and unlawful practice
  - up to each member state to set own rules
- Courts Competent to Hear Competition Cases
  - Regulation 44/2001 – jurisdiction of courts of member states
  - *Provimi* – English High Court decision

# Private Enforcement in the E.U.

- Collective Actions
  - White Paper on Damages Actions
  - Draft directive on class actions withdrawn
  - Public consultation on collective redress
  - UK: opt-in collective actions allowed if brought by consumer organization after finding of infringement (*JJB Sports*); representative actions (*Emerald Supplies*)
  - Germany: assignment of aggregated claims to a third party

# Private Enforcement in the E.U.

- The Pass-On Defense and Indirect Purchaser Standing
  - Pass-on defense allowed in UK (*Devenish*), but not Germany
  - Indirect purchasers have standing: *Manfredi*
- Damages Available for Violations of the Competition Rules
  - UK (*Devenish*): must be based solely on losses to the claimant
  - Germany: may take into account gains by infringer

# Private Enforcement in the E.U.

- Very Limited Access to the Evidence Necessary to Prove an Antitrust Violation
  - Some discovery allowed in U.K. and Germany
- Follow-on actions
  - Can rely on Commission decisions
  - Stay of proceedings: *National Grid*
- Rules Concerning the Costs of Litigation
  - Availability of contingency fees
  - The “loser pays” principle

# Concluding Thoughts

- Counsel need to think globally with respect to competition matters
  - Government investigations
  - Civil lawsuits, either as a plaintiff or defendant
- Important to have counsel familiar with the various legal systems

# ¿Preguntas? Contáctenos

- **Michael E. Jacobs**  
Zelle Hofmann, Minneapolis  
mjacobs@zelle.com  
612.336.9171
  
- **José M. Umbert**  
Zelle Hofmann, San Francisco  
jumbert@zelle.com  
415.633.1914