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Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Next Battleground In EU Antitrust Litigation

Law360, New York (April 07, 2009) -- Private antitrust actions for damages have traditionally played a very limited role in the enforcement of the European Union's competition rules.

However, in recent years developments at the community level have facilitated the bringing of damages claims and, moreover, certain reforms of the member states' legal systems have made private antitrust suits more attractive.

This article discusses some key features of the system for private enforcement of Articles 81 and 82 of the EC Treaty in the courts of four of the largest European jurisdictions — the United Kingdom, Germany, France and Spain.

Background

Articles 81 and 82 EC contain the basic competition rules applicable in the European Union.

Article 81(1) prohibits agreements between undertakings which have as their object or effect the prevention, restriction, or distortion of competition within the European Union, and Article 82 prohibits the abuse by one or more undertakings of a dominant position within the common market.

Where the agreements or abusive practices at issue are capable of affecting trade between the member states, Articles 81 and 82 are enforceable by the national courts of the member states.

In Europe, the antitrust laws have traditionally been primarily enforced by the community bodies. In this regard, in recent years the European Commission has stepped up its fight against price-fixing cartels, and has imposed very substantial fines for cartel violations.

On the other hand, in the member states private actions for damages for the infringement of Articles 81 and 82 EC have been extremely limited.

Nevertheless, over the last several years there have been a number of significant developments in the European Union aiming at facilitating the bringing of private damages actions for violations of community competition law.

Most recently, in March 2009, the European Parliament adopted a resolution in support of the white paper on damages actions published by the commission in 2008, which set out concrete recommendations aimed at creating an effective private enforcement system in Europe.

In addition to these developments at the community level, the national courts and legal systems of the member states also have an essential role in the development of private antitrust actions.

This article will focus on certain features of those legal systems that are likely to have a significant impact on European private antitrust enforcement.

Courts Competent to Hear Competition Cases

Pursuant to Council Regulation 44/2001, the courts of a member state have jurisdiction over antitrust cases when (i) the defendant is domiciled in that country, (ii) the harmful event occurred there, or (iii) any one of a number of defendants is domiciled in the member state and the claims at issue are so closely connected that it is expedient to hear and determine them together.

Significantly, member states have assigned responsibility over private antitrust cases to a limited number of specialized courts.

Thus, in England, competition law cases must be transferred to the Chancery Division of the High Court or to the Commercial Court and, where an infringement decision has been adopted by the Office of Fair Trading or the European Commission, claims for damages can also be brought before the Competition Appeal Tribunal.

In Germany, panels for commercial matters within the district courts are competent to hear civil antitrust actions, and most federal states have concentrated the jurisdiction for this type of litigation within a small number of courts covering several judicial districts.

Similarly, the French Commercial Code vests certain civil and commercial courts with exclusive jurisdiction over antitrust cases, and in Spain the Mercantile Courts, a recently created category of civil courts, have exclusive jurisdiction over competition proceedings.

Access to the Evidence Necessary to Prove an Antitrust Violation

In most European countries, the absence of discovery procedures constitutes one of the major obstacles to antitrust damages actions.

An exception is England, where the Civil Procedure Rules provide for the standard disclosure of all documents supporting or adversely affecting the parties' positions, and for the possibility of additional specific disclosure.

In contrast, the procedural laws of Germany, France and Spain do not provide for any pretrial discovery in the common law sense, and the courts of those member states may only order the production of documents that a party has specifically identified.

The difficulty for a plaintiff to obtain evidence of an alleged antitrust violation is less pronounced in follow-on actions, where there is a prior decision from the European Commission or a national competition authority finding an infringement.

In a subsequent civil proceeding for damages before a national court, a claimant can rely on an infringement decision by the Commission as binding proof of the violation.

However, the court may have to stay its proceedings until any appeals from the commission's ruling are resolved by the Community courts.

Additionally, in England the courts are also bound by final decisions by the Office of Fair Trading, and in Germany courts are bound by final decisions by the Federal Cartel Office or the competition authorities of other member states.

Damages Available for Violations of the Competition Rules

In its 2006 Manfredi decision, the European Court of Justice ruled that it is for the domestic legal system of each member state to set the criteria for determining the extent of the damages for harm caused by a violation of the community competition rules.

In this regard, the courts of the United Kingdom and Germany have considered the issue of calculation of compensatory damages in antitrust cases. Significantly, punitive or multiple damages are not available in these matters in Europe.

An important issue relating to damages is the availability of the passing-on defense, that is, whether the court should take into account that the direct purchaser of a product sold at a supra-competitive price may have been able to pass on all or some of its loss to the next purchaser in the chain of distribution for the product.

There is no detailed analysis of this issue in the case law of the community courts.

As for the Member States' laws, the English Court of Appeal recently indicated, in *Devenish Nutrition Ltd v. Sanofi-Aventis SA*, that the passing-on defense should be available to antitrust defendants where the plaintiff has reduced its loss by passing the overcharge to its own downstream customers.

In Germany, the recently amended Act against Restraints of Competition expressly provides that, if a good or service is purchased at an excessive price, damages shall not be excluded on account of the resale of the good or service. There are no reported cases in France or Spain addressing this issue.

Another related question is the standing of indirect purchasers, that is, purchasers who did not deal directly with a cartelist but to whom the illegal overcharge was passed on along the distribution chain. Under European Union law, indirect purchasers are entitled to bring antitrust damages claims.

In *Manfredi*, the European Court of Justice held that “any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC.”

Moreover, the European Commission explained in its white paper that this principle also applies to indirect purchasers. At the national level, this question has not yet been explicitly considered by the courts of the member states discussed here.

Rules Concerning the Costs of Litigation

In competition cases, the availability of contingency fees facilitates the prosecution of actions for damages.

In the United Kingdom, contingency fees are not permitted; however, English law allows conditional fee arrangements, pursuant to which the fee payable if the claim is successful is a basic fee plus an agreed-upon “success fee” uplift of up to 100 per cent of the basic fee.

In both Germany and Spain, contingency fees have traditionally not been permissible for litigation, but this situation has recently changed.

A bill revising the prohibition on contingent fee agreements has been introduced in the German Parliament as a result of a decision by the country's Constitutional Court, and the Spanish Supreme Court held last December that the ban on contingency fees was anticompetitive.

Finally, in France contingency fees which represent a supplement to an attorney's general fee are permitted.

In contrast to contingency fees, the application of the “loser pays” principle, requiring the losing party to pay the successful party’s costs and attorneys’ fees, acts as a disincentive to bringing antitrust damages claims.

The “loser pays” principle is currently applied, with a varying degree of flexibility, by the courts of many member states, including the United Kingdom, Germany, France and Spain.

Conclusion

As the commission’s recent decisions show, anti-competitive practices affect many industries within the European Union.

The legal developments described in this article have facilitated the bringing of private antitrust actions in Europe, and it can reasonably be expected that, in the next few years, private enforcement of the community competition rules will grow substantially in the national courts of the member states.

--By Daniel S. Mason and José M. Umbert, Zelle Hofmann Voelbel & Mason LLP

Daniel Mason is a partner with Zelle Hofmann in the firm's San Francisco office. José Umbert is an associate with the firm in the San Francisco office.

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