

EUSA 2007

WE SAY COMPETITION, YOU SAY ANTITRUST: CAN DIVERGING POLICY OBJECTIVES BE MET BY UNIFORM ENFORCEMENT POLICIES?¹

Declan J. Walsh
Faculty of Law, University College Cork
declan.walsh@ucc.ie

INTRODUCTION

The intention of this short paper is to consider the current proposals of the European Commission to formalise and facilitate private party actions for damages in the field of EC competition law. This suggested *Americanisation* of competition law enforcement arguably goes against the aims and objectives of European Community Competition policy. In excess of 90% of all antitrust actions in the United States are now by way of private party enforcement but it is contended that the specific policy objectives of the European Union are better addressed through a strict model of effective public enforcement.

On the 19th of December 2005 the European Commission published a Green Paper on *Damages actions for breaches of the European Community Competition Rules*.² This follows the recent modernisation package that has been fully applicable since 1 May 2004. The Green Paper focuses on developing the opportunities for private party actions for damages in E.C. competition law. Historically the right of enforcement of E.C. competition law has been seen as the responsibility of the European Commission which was conferred with its enforcement powers in 1962.³ However it is suggested that the right of private party action probably derives from the judgment of the European Court of Justice in *Van Gend en Loos*⁴ in the following year. The first overt suggestion from the ECJ of such a right came in 1993 in an opinion of Advocate General Van Gerven in the *Banks* case.⁵ However, it is with its judgment in *Courage*⁶

¹ This is a working draft and should not be quoted or cited without the authors prior permission

² http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/gp_en.pdf

³ Council Regulation Number 17 of 1962

⁴ Case 26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos.v. Nederlandse Administratie der Belastingen* [1963] ECR 1

⁵ Opinion of Advocate General Van Gerven of 27 October 1993 in Case C-128/92 *H.J.Banks & Co Ltd v. British Coal Corporation* [1994] ECR I-1209

that the Court of Justice firmly put its views on private enforcement forward. Here the Court stated that

“...actions for damages before the national courts can make a significant contribution to the maintenance of effective competition within the Community.”⁷

The recent modernisation package which came into force in 2004 also exhibits a belief that private party actions are envisaged.⁸ However in the absence of any substantive Community rules in the area it was unlikely that effective actions could be maintained. While there has been a long history of private parties using EC Competition rules in defensive mode,⁹ it is unlikely that private party actions for damages would occur without some active prompting from the Commission. There have been suggestions that threats of private actions have been used to induce settlements between various private parties but there is no definitive research in the area to back up this suggestion. It is in this context that the Commission published its Green Paper. Following a consultation period that ended in April 2006,¹⁰ the Commission is awaiting an opinion from the European Parliament before an anticipated White Paper publication by the end of the year. While the Green Paper identifies various problems and provides various options it is contended that any proactive action on the part of the Commission will inevitably be less than satisfactory and will take the Commission on a road away from its stated policy aims and objectives.

It is my contention that the Commission by actively encouraging and facilitating private party actions is obviating its responsibilities as the primary enforcer of E.C. competition law and policy.¹¹ In recent years the Commission has been keen to point out that the defence of the consumer is its primary objective,¹² yet it is arguable that it is direct enforcement by the Commission that is most effective in securing consumer rights.

Many commentators have seen the Green Paper as a shift towards an American style approach to antitrust enforcement but it is contended that such a similarity in antitrust enforcement neglects the different policy objectives that were envisaged and intended on either side of the Atlantic. It has been argued that private enforcement of the antitrust laws of the United States vindicates the same substantive goals as public

⁶ Case C-453/99 *Courage v. Crehan* [2001] ECR I-6314. The Court has recently reemphasised the importance of effective judicial remedies in private party actions in Case C-295/04 *Manfredi .v Lloyd Adriatico Assicurazioni* [2006] ECR I-0000

⁷ Para 27

⁸ Council Regulation Number 1 of 2003. Recital 7 states “National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the substantive rights under Community law, for example by awarding damages to the victims of infringements.”

⁹ See Case 127/73 *BRT v. SABAM* [1974] ECR 51

¹⁰ The Commission received approximately 150 comments, the majority of which are available at: [EU/Competition - Antitrust/Comments on the Green paper on Damages actions for breach of the EC antitrust rules](http://ec.europa.eu/competition/antitrust/comments_on_the_green_paper_on_damages_actions_for_breach_of_the_ec_antitrust_rules)

¹¹ For a detailed consideration of this point see: Dan Wilsher “The Public Aspects of Private Enforcement of E.C. Law: Some Constitutional and Administrative Challenges of a Damages Culture” 3 *CompLRev* 27 (2006)

¹² see for example any of the recent speeches by Commissioner Neelie Kroes at http://ec.europa.eu/comm/competition/speeches/index_speeches_by_the_commissioner.html

enforcement.¹³ However, it is my contention that the substantive goals of E.C. competition law vary significantly from those identified in the United States and the distinctive policy objectives inherent in E.C. competition policy require a distinctly European approach to enforcement. It is this divergence in policy objectives that gives rise to the question of whether differing policy objectives can be met with similar enforcement methods. Commissioner Kroes has stated that the current proposals at E.C. level are not a ‘cut and paste’ job viz US enforcement mechanisms yet one gets the impression that the lady doth protest too much.¹⁴

There is also a view expressed that academics and lawyers have spent much time considering substantive antitrust issues while ignoring issues relating to enforcement doctrine.¹⁵

A SHIFT IN POLICY?

At the outset it is important to consider the objectives and goals of competition law enforcement. Strong arguments have been made that private enforcement is complimentary to public enforcement but many believe that a move to private enforcement goes against the objectives of EC competition policy.¹⁶ It should obviously act as a deterrent to those who would engage in anti competitive behaviour and allow also for the compensation of those who have suffered loss as a consequence of such behaviour. Whether or not the current approach to enforcement is having an effective dissuasive impact is open to debate. It can be argued that the current high level of cartel decisions is evidence of an epidemic of price fixing amongst the oligopolies of Europe. However, I would suggest that the current spate of decisions against cartels is in fact evidence of the effectiveness of the Commissions Leniency Policy.¹⁷ It should be noted that cartel investigations take a number of years to run their course and it is only in the past year that we have begun to see the fruits of more vigorous public enforcement. If anything, the reporting of these recent decisions and the imposition of record levels of fines is arguably going to have a serious dissuasive effect on those undertakings that would consider engaging in anticompetitive practices. There is also considerable evidence that the mere threat of antitrust enforcement may deter anticompetitive action in markets beyond that which is being

¹³ Joseph F. Brodley, “Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals” 94 MICH. L. REV. 1 (1995)

¹⁴ See comments by Commissioner Kroes at “Competition Law and its surroundings – links and new trends” Competition Day, Vienna, 19 June 2006 at: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/382&format=HTML&aged=0&language=EN&guiLanguage=en> More recently in Brussels the Commissioner has spoken about the need for the private enforcement solutions ‘to be firmly bedded into European culture and tradition’ <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/128&format=HTML&aged=0&language=EN&guiLanguage=en>

¹⁵ See Richard M. Buxbaum, “Public Participation in the Enforcement of the Antitrust Laws”, 59 California Law Review 1113 (1971)

¹⁶ In support of the complimentary benefits of private enforcement, see Assimakis P. Komninos, “Public and Private Antitrust Enforcement in Europe: Complement? Overlap?” 3 ComplRev 5 (2006). For a strong defence of the superiority of public enforcement see Wouter PJ Wils “Should Private Antitrust Enforcement be encouraged in Europe” (2003) 26 *World Competition* 567

¹⁷ Commission Notice on Immunity from fines and reduction of fines in cartel cases, (2006/C 298/11) at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/c_298/c_29820061208en00170022.pdf

investigated.¹⁸ Critics of the current fines based approach¹⁹ argue that while such fines may act as a deterrent they do not assist in compensating the victims of anti competitive agreements. However it is likely that consumers, the real victims of such practices, will be unable to recover damages in any effective manner under the new proposals. The plight of indirect purchasers from a cartel will not improve under a private enforcement regime.

The rationale behind private party actions is that it is an obvious follow on from developed concepts such as direct effect and state liability. It is contended that full effect can only be given to E.C. competition law if private parties have direct rights of action against offending undertakings. Yet this argument can be undermined by recalling that although citizens of the European Union may bring Member States to court for failing to give effect to Community law, it is still the Commission that has the primary responsibility in this area.²⁰ Furthermore, it is increasingly obvious that the monetary penalties available to the Commission to ensure proper application of Community law are having the desired effect.²¹ When the Commission brings proceedings against an undertaking it does so from a neutral standpoint. One cannot underestimate the significance of the diverging motives behind private and public enforcement; private profit as opposed to public policy. The Commission can also apply competition law against undertakings engaged in anticompetitive behaviour where no particular damage has been caused or loss suffered.²² It has been argued that the Commission is limited in its action by the resources at its disposal, but equally, Member States have the ability to increase those resources if they see the benefits of effective competition law enforcement.

WHY PRIVATE ENFORCEMENT IS NOT A SOLUTION

Any rational undertaking that is contemplating anti competitive behaviour will weigh up the potential gains against the possible sanctions. If the sanctions fall short of the gains in economic terms then the attraction in engaging in such activity is obvious.²³ Such an undertaking would be well advised that for a variety of reasons it is unlikely that it will suffer loss in damages equivalent to the gains accrued through its anti competitive behaviour.

Inertia

¹⁸ See Jonathan B. Baker "The Case for Antitrust Enforcement" 17 *Journal of Economic Perspectives* 4,27 (2003)

¹⁹ The Commission may impose a fine of up to 10% of the undertakings previous years aggregate world wide turnover. The largest fine so far imposed was €97 million against Microsoft in 2004. The decision is currently the subject of an appeal at the Court of First Instance. In 2007 the Commission has already imposed fines totalling in excess of €2 billion on members of various cartels. See European Commission Cartel Statistics at <http://ec.europa.eu/comm/competition/cartels/statistics/statistics.pdf>

²⁰ Art 226 EC

²¹ Art 228 EC, see in particular Case C-304/02 *Commission .v France* [2005] ECR I-6263

²² It should be recalled that Article 81 EC refers to agreements, decisions and concerted practices that have as their *object* or effect, the distortion of competition in the Common Market.

²³ see Richard A. Posner, *Antitrust Law* (2nd ed. 2001)

There is a strong likelihood that an undertaking engaged in anti competitive action will only face action from a certain number of customers and therefore not face serious economic loss. Potential plaintiffs face barriers such as access to evidence, legal costs and a fear of taking action against a supplier with whom it is likely to be engaging in future dealings. In particular, rules on disclosure vary greatly between the twenty seven Member States and harmonisation of such rules may prove difficult at best. The investigative powers of the European Commission have recently been strengthened and it is the Commission with its neutral stand point and strengthened resources that is best placed to initiate proceedings.

Passing On Defence

It is likely that any private party action for damages will be met with a passing on defence. While such a defence has been roundly rejected in antitrust cases in the United States²⁴ it is likely that such a defence may find favour in some European courts. If a passing on defence were to succeed it may be difficult for an indirect purchaser to successfully claim damages as it has been suggested that a plaintiff in a private party action will have to meet the criteria of a direct causal link as established previously by the Court of Justice with regard to state liability.²⁵ The failure of indirect purchasers to succeed in an action against a cartel or monopolist obviates the suggestion that the motivation of the Commission in its proposals is consumer centred.

Leniency

Much of the success of public enforcement at EC level in recent years has been based on the successful operation of the Commission's Leniency Notice.²⁶ The operation of the leniency and immunity programme is the persuasive counterbalance to the dissuasive effect of fines. There is a very real fear that undertakings may be well advised to steer clear of the leniency programme if the benefit of gaining immunity from fines is offset by handing over evidence that may lead to future actions for damages. Undertakings may well take a strategic decision not to come forward with evidence regarding a cartel and some of the submissions received on foot of the Green Paper show marked differences in opinion as to the damages that a cartel member should be liable for following a grant of leniency.²⁷ The road taken by the European Commission in its forthcoming White Paper will have major consequences for firms in deciding whether or not to come forward under the current leniency programme. It is my contention that its proposal on private actions for damages may lead to the ruination of its own policy on cartels.

²⁴ *Hanover Shoe Inc. v. United Shoe Machinery Corp.* 392 U.S. 481 (1968) & *Illinois Brick Co. v. Illinois* 431 U.S. 720 (1970)

²⁵ Norbert Reich, "The 'Courage' Doctrine: Encouraging or Discouraging Compensation for Antitrust Injuries?" 42 CML Rev., 35 at 46.

²⁶ See note 16 above

²⁷ The various submissions received on foot of the Green Paper can be accessed at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/gp_contributions.html

Lack of Consumer Actions

Consumers who have suffered loss are highly unlikely to take individual actions against undertakings engaged in anti competitive behaviour. A brewing cartel that adds 5 cent to the price of a pint of beer in the E.U. may derive a monopoly profit of hundreds of millions of Euro in a year, but a consumer who drinks 10 pints a week is unlikely to commence proceedings for the recovery of €25! Furthermore, it is submitted that those potential consumers who were priced out of the market by the cartel and suffered loss by being unable to purchase the goods in question are an unidentifiable group. It is precisely this lack of consumer actions that highlights the paucity of benefits that will arise from a shift towards private party enforcement.

DEFENDING THE CONSUMER

It should be recalled that the aims and objectives of the European Union are many and that no one policy has pre-eminence over another. Thus while Article 3 of the EC Treaty refers to '*a system ensuring that competition in the internal market is not distorted*',²⁸ it also refers to '*a contribution to the strengthening of consumer protection*'.²⁹ The goal of consumer protection along with all other Treaty objectives must therefore be given consideration by the European Commission, the Court of Justice and national courts when enforcing and applying EC competition law. This is where we may observe a sharp delineation between the objectives of the antitrust laws of the United States and the competition policy of the European Union.

As stated earlier, it is unlikely that consumers will benefit in any way from a move towards private party actions. If the Commission really believes its own message that competition policy is about defending the interests of consumers then it is argued that it would do well to maintain its current system of enforcement. It is patently obvious that consumers are unlikely to have the motivation, and perhaps not the standing, to maintain a private party action. In the earlier example of a beer cartel the product remains the same throughout the various stages of distribution from brewery to distributor to bar to customer. Contrast this with a product such as citric acid. Are we to believe that a price cartel in citric acid would have consumers rushing to the courthouse steps? Whereas a direct purchaser of citric acid such as a soft drinks producer, a detergent manufacturer or a food producer might succeed in an action against the cartel, the indirect purchaser, or consumer, will have little chance of being able to quantify the loss suffered as they consumer their coca-cola and wash their glass with Persil automatic !

Proponents of private enforcement will argue that consumers will derive the benefits of direct purchasers succeeding in actions for damages as any award of damages will be passed on to consumers in the form of price reductions. This is perhaps somewhat

²⁸ Article 3(1)(g) EC

²⁹ Article 3(1)(t) EC

fanciful as such direct purchasers are more likely to show loyalty to a board of directors and shareholders than to a disparate group of consumers.

It is submitted that the current fines based system is as likely to bring trickle down benefits to consumers as private actions by direct purchasers.³⁰ The Commission regularly points out that fines are paid into the Community budget thereby reducing the contributions of Member States. This in turn reduces the tax burden on citizens.³¹ This may seem somewhat fanciful in a world ever more cynical of government and politics, but is it any more fanciful than suggesting that large supermarket chains or food producers will pass on the proceeds of damages actions to its customers?

It may be contended that the imposition of fines does not have a significant deterrent effect on would be cartelists and monopolists. While it must be acknowledged that the rational cartel or monopolist may weigh up the potential profits as against the probable fines for a breach of EC competition law, one must also note that the Commission is entitled to factor into the calculation of the fine, any additional amount that would make good the illegal gain made by the undertaking.³² If the Commission is of the view that the maximum fine is not sufficient to meet the loss suffered at the hands of the cartel or monopolist there is nothing to prevent it seeking an amendment to Regulation 1/2003 and getting the maximum level of sanction increase above the current 10% ceiling. Furthermore, an undertaking must consider the possibility that a successful investigation against it by the European Commission may lead to the same evidence being used against it in the United States given the high level of cooperation now found between the two jurisdictions.

Another argument often put forward by proponents of private enforcement is that public authorities do not have sufficient resources to effectively pursue all infringers of competition law. This argument ignores the fact that studies continually show that the proceeds of effective antitrust enforcement far outweigh the costs of such enforcement.³³ The greater the resources invested in enforcement by the Commission, the greater the proceeds in terms of fines will be. We must also acknowledge that the policy of fair and effective competition between undertakings in the European Union is as important to the public interest as to require public enforcement rather than private litigation.³⁴

³⁰ For an overview of the rules on the imposition of fines in EC competition law see: Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (2006/C 210/02) at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/c_210/c_21020060901en00020005.pdf See also Joined Cases C-100 to 103/80 *SA Musique Diffusion française and others .v Commission of the European Communities* [1983] ECR 1825

³¹ See Competition: Commission Action against Cartels – Questions and Answers, at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/454&format=HTML&aged=0&language=en&guiLanguage=en>

³² Provided that the maximum limit of 10% of the undertakings previous year's aggregate turnover is not breached.

³³ See Jonathan B. Baker "The Case for Antitrust Enforcement" 17 *Journal of Economic Perspectives* 4,27 (2003)

³⁴ Indeed, such an argument has been made in the past in relation to effective enforcement in the United States. See Wendell Berge, "Some Problems in the Enforcement of the Antitrust laws" 38 *MICH. L. REV.* 462 (1940)

Furthermore, it is regularly suggested that by allowing a scheme for private enforcement, the Commission is ensuring that it can target its resources at the most heinous of cartelists. It is suggested by analogy with United States antitrust enforcement that this leads to greater efficiency in the field of enforcement. This argument fails however on the ground that in the United States the sanctions arising from public enforcement are criminal in nature and as such are only pursued in the most extreme of cases. The use of the de minimis rule at EC level allied to the use of national competition authorities through the modernisation process that came into force in 2004 should allow the Commission to target its resources most effectively at serious infringers.

CONCLUSION

Despite the protestations of DG Competition it is clear from the discourse surrounding the Green Paper that the direction of the proposals is towards *Americanisation* of the antitrust process. This, despite many criticisms within the United States of its current enforcement regime.³⁵ Indeed, it has been pointed out that although the U.S. authorities have proposed a concurrence of procedures in antitrust enforcement, they have not proposed uniform rules on private enforcement.³⁶

Speaking in Brussels in March 2007, Commissioner Kroes indicated that the proposals on private enforcement were about protecting ‘customers and consumers, the small businesses and individual citizens who foot the bill of illegal behaviour’.³⁷ Yet, it is precisely these groups who are least likely to benefit in the rush to private enforcement. A rush to see private enforcement of competition law as a panacea for all anticompetitive ills is unlikely to benefit European consumers. Rather, vigorous enforcement of the existing rules by DG Competition is far more likely to yield results through use of the leniency procedure and heavy fines. Further reforms of DG Competition’s own procedures may also assist in ensuring effective public enforcement. The OECD has recently suggested an explicit separation between the investigative and decision making functions of the Commission.³⁸ This suggestion is to be welcomed but has obvious resource and structural implications for the Commission. Any proposals to change the rules governing the enforcement of the Community competition rules requires the agreement of the Council of Ministers, something which has not always been forthcoming in the past.³⁹ With a White Paper due at the end of 2007 it is obvious that the debate on the issue is far from concluded.

³⁵ See in particular Richard A. Posner, *Antitrust Law* (2nd ed. 2001) Chapter 10

³⁶ Joel Davidow, ‘International Implications of US antitrust in the George W Bush era’ (2002) 25 *World Competition* 493, 496.

³⁷ Speech by Commissioner Kroes “Reinforcing the fight against cartels and developing private antitrust damages actions: two tools for a more competitive Europe” Commission/IBA Joint Conference on EC Competition Policy, Brussels, 8th March 2007, at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/128&format=HTML&aged=0&language=EN&guiLanguage=en>

³⁸ ‘Competition Law and Policy in the European Union’ OECD (2005) at <http://www.oecd.org/dataoecd/7/41/35908641.pdf>

³⁹ It took fifteen years for the Council of Ministers to adopt the Merger regulation from the time it was first proposed in 1974.

A battle to persuade the Member States to adopt the Commission proposals and adapt their own national procedural rules will not be easily won. Rather, the Commission might be better advised to invest its time and resources into giving full effect to the existing policies and rules. The persuasive effect of leniency, the dissuasive effect of fines and more efficient public enforcement can all lead to an effective policy that supports competition and protects consumers.