Kluwer Competition Law Blog

Competition Conference Report: Disclosure of Evidence in Antitrust Damages Actions in Europe

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On November 3rd 2023, the University of Vienna, Department of European, International and Comparative Law, together with the European Circle for Competition Damages and the Austrian Society for European Law (ÖGER) hosted a conference on the relevant issue of disclosing evidence in antitrust damages proceedings.

Roughly ten years after the European Damages Directive had been enacted, the symposium presented a welcome opportunity to discuss whether the Directive's promises to facilitate damages claims for antitrust violations have been reflected in practice. The discussion revealed that the Directive's dual goals of 'removing obstacles for full compensation of all victims' and harmonizing 'the interplay between public and private enforcement' may be questioned, to say the least. The practical experience of the participants from various Member States echoed a highly divergent status for plaintiffs and defendants. Their respective positions still depend, to a high degree, on the circumstances of national procedural law, legal tradition, economic expert opinions, and even the benevolence of competent courts and individual judges. However, let's proceed step by step.

Following introductory remarks by the hosts, Lena Hornkohl and Martin Seegers of The Circle, the floor was open to the first panel on the role of evidence admission. Hanno Wollmann presented valuable insights into an antitrust lawyer's work in damages proceedings. After pointing out that over 90% of damages claims follow decisions by competition authorities, he emphasized that most abuse cases are initiated by private parties. While access to evidence in collusion cases is required to quantify the specific harm stemming from this conduct, disclosure is relevant in Article 102 TFEU cases to actually determine the modalities of the conduct in question (e.g. how are the dominant market player's algorithms primed). In most civil procedures, the determination of the appropriate scope of disclosure revolves around the question of proportionality. Clearly, the judges are required to balance the risk of exposing trade secrets with guaranteeing sufficient incentives for harmed parties to come forward in the first place.

Vivien Terrien of the European Court of Justice then went on to illustrate the Court's role in giving effect to its prominent ruling in *Courage vs. Crehan*, stipulating the right of parties affected by antitrust violations to receive full compensation. The introductory remark '*for effectiveness, we need full information*' exemplified the Court's noteworthy position on the necessity of disclosing relevant evidence. This is not only reflected in the judiciary's substantiation of the right to compensation in *Pfleiderer* and *Donau Chemie* but also targeted by requiring access to evidence in

interim proceedings (Mr. Terrien cited the *Akzo Nobel* and *Evonik Degussa* cases). The Court's general approach is guided by the notion that effective private enforcement supports the deterrence of violations. Nevertheless, Vivien Terrien acknowledged the difficult balancing tests for national courts regarding the proportionality of access. In this regard, a certain level of effort by plaintiffs to accurately describe the incurred harm and the anticompetitive conduct's cause may be required.

A response to these doctrinal prerequisites from a Member State perspective came promptly by Georg Kodek, Judge of the Austrian Supreme Court and head of the Federal Competition Appeal Court as well as Professor at the WU Vienna. Georg Kodek pointed to the high relevance of (national) procedural law due to four special characteristics of antitrust damages claims, namely (i) a certain tension between public and private enforcement, (ii) the given asymmetry of information, (iii) the multitude of victims due to the passing-on defence, and (iv) the very distinct set of facts in most abuse cases. He went on to describe the historical situation in Austria, where courts are under a certain duty to support disclosure of pertinent evidence. The Austrian civil procedure's drafter, Franz Klein, had hereby introduced notions of Anglo-Saxon discovery to emphasize the public purpose of the civil procedure while maintaining the civil law tradition by requiring parties to substantiate their legal interest for filing the initial claim. Disclosure hence shifts to the court's determination *after* a complaint has been filed. This again provided for an argument to entrust specialized courts, regularly dealing with antitrust cases to determine disclosing evidence, as is partially the case in the Austrian antitrust system (insofar as, in Austria, the Federal Competition Authority, the BWB, is required to file a claim to the Federal Cartel Court where it intends to levy fines or block mergers).

After an amicable lunch break, the conference shifted to the topic of cooperation with competition authorities in antitrust civil proceedings. Regarding the right of access to public files for substantiating claims, Verena Strasser, Austria's Federal Cartel Prosecutor Deputy, cited recent OECD statistics contradicting the recently voiced concern of reduced leniency applications due to civil proceedings' access obligations. In this regard, the Austrian Competition Act even requires an authority's assistance to the competent civil court in determining the appropriate amount of compensation (§ 37L Austrian Competition Act (KartG). However, for the difficult challenge of quantifying damages, Verena Strasser basically referred to the EC's general guidance of 2013 on quantifying antitrust damages.

Following this rather tentative guidance for parties in practice, Lena Hornkohl presented the possibility of confidentiality arrangements between parties of a procedure (summarising her previous work, see here). Such prearrangements between the parties present a comprehensive disclosure mechanism by allowing a review of relevant evidence by specially ascribed, neutral third parties. Mostly, this will be done in the form of a so-called '*confidentiality ring*' between neutral lawyers or otherwise appointed experts. The obligation of neutrality and the expert's proficiency in antitrust matters safeguards trade secrets while simultaneously guaranteeing a timely and efficient continuation of proceedings. The conference participants then discussed the future development of evidence intermediaries regarding the potential benefits of artificial intelligence. Florian Neumayer rounded up the afternoon presentations by acknowledging that even determining which evidence to disclose to experts amounts to a 'hot topic' in practice. In his opinion, though there may be broad consensus on the high relevance of disclosing evidence, the parties that actually file for it, seem to (have so little substance to rely on) regularly lose the case. Due to some opposition in the audience, the argumentation then revolved around the necessary conclusiveness of antitrust damages claims in practice.

In this regard, Peter Gussone voiced the interesting conception that for Article 101 TFEU cases, regularly filed as *follow-on* claims, mere recourse to economic expert opinions was sufficient in determining causality and the scope of harm incurred on the relevant market. The real requirement of attaining access to evidence was rather deemed compelling for Article 102 TFEU cases, mostly filed as *stand-alone* claims. In these cases, he argued, the parties and their representation are 'really alone' in providing sufficient substance to their claim. It may be noted at this point, that due to the rise of digital platform conduct as a relevant basis for incurring anticompetitive harm, this issue may only gain relevance. Insofar it will be interesting to see its interrelation with possible private claims following the new platform duties of the EU's recently adopted digital regulatory acts (for instance, the DMA, the DSA, the Data Act and the damages following the AI Liability Directive).

The ensuing discussion vastly exemplified antitrust lawyers' experience from different Member States, which were represented by Petra Leopold for Austria, the lawyers Peter Gussone of Germany, Ben Larsson for the UK, Julia Suderow for Spain, Miguel Sousa Ferro for Portugal, Joost Möhlmann for the Netherlands and Clemens Kerle for Norway. While Petra Leopold voiced disappointment that antitrust claims had been exempted from the recent Representative Actions Directive,[1] Peter Gussone criticized overly restrictive authoritative decisions on access to files in Germany. Ben Larsson pointed out that the UK's approach was the most similar to the U.S. discovery system. According to a recent CAT precedent, however, courts are currently directed towards a neutral expert-led approach (see UK CAT's ruling in *PSA/Autoliv*), similar to the above-mentioned confidentiality arrangements. Miguel Sousa Ferro voiced criticism of the highly individualized opinions towards proportional access by the Portuguese judiciary. Julia Suderow then charmingly presented the development of Spanish court decisions, coming from near-zero claims only a few years ago to a multitude of filings initiated by the Truck Cartel and the acceptance of collective actions. This was also conceded by Joost Möllmann, portraying the reasons for the Netherlands' popular court venue. While Dutch courts have nevertheless become stricter in the required nexus to the national venue, the EFTA court seems to have recently become more benevolent as a case presented by Clemens Kerle from Norway seemed to exemplify (see the pending EFTA Court case Låssenteret AS v Assa Abloy Opening Solutions Norway AS). The following debate still portrayed the requirement for a more harmonized procedural approach, preventing parties from *forum shopping* to successfully file antitrust damages.

Those speakers who used slides were kind enough to allow their publication, available here.

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[1] Note that private claims following the above-mentioned digital regulatory acts are nevertheless not exempt from this Directive, possibly allowing for collective action following DMA infringements against digital (gatekeeper) platforms.

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