

## *New EU Proposals Ease Way for Private Damage Actions for Violations of European Commission Competition Law*

At the time when U.S. President Theodore Roosevelt spurred passage of “antitrust” laws at the turn of the 20th century, few would have predicted that the U.S. model of a marketplace-oriented capitalist economy, buffered by protections against monopolization and restraint of trade, would 100 years later evolve into a model for the world. But that it surely has. From Japan to Europe, overseas competition authorities are embracing the U.S. approach to antitrust enforcement, albeit tailored to their unique circumstances.

Nothing epitomizes this trend more than the European Union’s recent decision to explore a paradigm shift in what is normally termed “competition law” across the pond – namely proposals to adopt a system of private antitrust enforcement through civil damages litigation in addition to, or perhaps in lieu of, the government-centric enforcement approach currently in vogue. When the European Commission (EC) Staff in December 2005 released a Green Paper proposing sweeping changes for private competition law litigation in the EU and member nation courts, European Union Competition Commissioner Neelie Kroes explained, “*Businesses and individuals who suffer losses because of illegal activities such as cartels have a right to compensation. Currently, this right is all too often theoretical because of obstacles to exercising this right in practice. This Green Paper sets out options for making that right a reality,*

*and so making companies that break the competition rules pay for the harm that they do.*”

The EC’s Green Paper, several years in gestation, delineates proposals to facilitate actions taken by private businesses and individuals for redress of damages caused by violations of EC Treaty competition laws that ban restrictive business practices and “abuse” of “dominant” market positions (Articles 81 and 82 respectively). Violations of these rules, in particular by price-fixing cartels, can cause considerable damage to companies and consumers, yet numerous obstacles thwart injured parties from taking action in their respective European national courts.

The Green Paper identifies some of these obstacles, such as access to evidence and the quantification of damages, and presents various options for debate for their removal. The options set out in the Green Paper would seek to ensure that companies and consumers were compensated for their losses, while avoiding frivolous claims. Comments on whether to adopt some or all of the Green Paper initiatives were filed April 21, 2006 and a decision by the EC is expected before year-end.

### **About the Proposals Contained in the Green Paper**

Private enforcement of EC Treaty competition law can take different forms, actions for damages only being one of them. The proposals represent a significant shift to a more American style of addressing competition issues, similar to

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the Sherman and Clayton Acts. The proposed enforcement capability promotes and facilitates private enforcement before national courts and is meant to complement, not replace, enforcement by national authorities. The activities of public authorities will continue to be of critical importance in, for example, bringing to light hidden anticompetitive practices such as price-fixing cartels.

According to the Green Paper's rationale, strengthening damage claims by companies and consumers offers several advantages. It ensures that businesses and consumers harmed by anticompetitive activity are compensated for their losses; it enhances the overall level of respect for EC competition rules by discouraging companies from engaging in anticompetitive activity; and it brings the benefits of EC law closer to the citizen.

#### **Access to Evidence by Claimants**

Limited access to evidence is one of the primary issues in private antitrust actions in the EU under current law of member states. The Green Paper proposes several options to deal with obligations of the defendant to turn over relevant documents to the claimant. The burden and standard of proof required could be adapted to allow more equity and less bias between the claimant and the defendant.

#### **Enforcing Damages Provides Other Advantages**

The EC Staff believes that the ability to recover compensatory damages is the linchpin to private enforcement of com-

petition law. It would help deter infringements and motivate compliance with the law. It would further develop a culture of competition among market participants and raise awareness of the competition rules which, in turn, would assist in making Europe more competitive. It would assist the Commission and the national competition authorities which currently do not have sufficient resources to deal with all the cases of anticompetitive behavior.

#### **Double Damages for Cartels Proposed**

In the U.S., damage awards based on offenses proscribed by U.S. federal antitrust law are trebled. While a jury decides on the award itself, the tripling of the verdict award is automatic. Seeking to avoid creating value incentives for frivolous litigation, the Green Paper did not propose treble damages, but rather introduced double damages for cartels. In the filed comments, this has not unexpectedly been the most controversial of the EC Staff's proposals.

The Green Paper emphasized that it seeks to encourage a competition culture, not a litigation culture. The Staff is aware that some fear that fostering private damage actions might lead to a "litigation explosion" and increase the risk of unmeritorious claims. Indeed, despite the Commission's demurrer, many observers predict that the overall effect of the Green Paper proposals would be to move the EU much closer to a U.S.-style legal environment in

which private litigation for antitrust violations is commonplace.

### **U.S. Private Enforcement Compared with the Green Paper**

The Green Paper makes clear that the EU is alarmed by the prospect of establishing a “litigation-friendly” environment similar to the U.S., however, it can no longer avoid recognition that constraints on private enforcement are hindering the effectiveness of Articles 81-82. The Staff cogently observes that EC/NCA relations in the EU are as politically and administratively sensitive as are federal/state relations in the U.S.

The most conspicuous differences between U.S. private enforcement and the Green Paper proposals are (a) the absence of automatic cost and fee awards for successful plaintiffs, and (b) limitation of exemplary (double) damages to cartels. This suggests strongly that even EC Staff is unwilling to propose the U.S. treble-damage system available under the Clayton Act. It also indicates that DG Competition, the EC Staff’s competition law division, may have reservations against private damages enforcement of monopolization cases.

Although the Green Paper covers antitrust standing, it does so only in the context of price fixing and other “overcharge” actions. U.S. law, in contrast, has developed a complex body of standing decisions which generally require “antitrust injury,” thus precluding suits by competitors who are benefited by a challenged practice (i.e., a merger that

increases concentration and thus prices) or have been injured without a corresponding market-wide exclusionary effect. Given the EC’s more tolerant attitude historically towards competitors as complainants, how this aspect of private competition law in EU will unfold is not easily predicted.

### **Other Issues**

The Green Paper opens for discussion whether defendants should be permitted to argue that a claimant did not suffer any loss because the overcharge was “passed on” to its customers. Whether or not those final customers should be able to bring claims, which under U.S. law are prohibited, has been another controversial issue of the Staff’s proposals. The availability of such a defense substantially increases the complexity of damages claims and indirect customers, in particular, face evidentiary problems.

The Green Paper opens the debate on whether there should be a requirement to prove fault on the part of the defendant, that is, whether proof of the potential violation should be sufficient in all cases or only in the most serious cases.

Class actions are mentioned as a means to provide an incentive to individuals to bring claims despite potentially high litigation costs. Only rarely will the damage suffered by an individual be greater than the potential costs of litigation. The Staff notes that the availability of class actions is not only likely to lead to better protection of consumer interests, but also to save time and money, by

consolidating many small claims into one action. One rule suggested would allow unsuccessful claimants to only pay costs if they acted in a manifestly unreasonable manner.

The Green Paper emphasizes that increased private enforcement should not result in decreased public enforcement. It seeks optimum coordination of private and public enforcement.

### **Other Upcoming EU Competition Issues: EC Competition Policy Paper**

EU ISPs, telecoms, and media companies will soon be asked to adjust their practices to conform to a Commission consultation policy paper aimed to ensure open markets for online media distribution. The policy paper, due imminently, is said to address network neutrality, digital rights management, and other media distribution issues. Debate already exists over a recent Commission legislative proposal to expand current content regulation in effect for TV broadcasts to cover other online services. While debate continues, entities operating in both the U.S. and EU will have to consider how to coordinate EU and U.S. online distribution.

### **ADDENDUM**

#### **Contrasts Between the European Union and Equivalent U.S. Laws and Regulations**

#### **U.S. Sherman and Clayton Acts Compared with EU Articles 81-82**

Under the U.S. Sherman and Clayton Acts, an agreement is generally assumed to be lawful unless it is proven to be anti-

competitive and firms with market power are permitted to compete aggressively on the merits. European Commission antitrust enforcers are more inclined to block restrictive agreements and restrain activities by monopolists.

Section 2 of the Sherman Act (“attempted monopolization”) can identify a “dangerous probability” that a dominant firm could obtain a monopoly. By contrast, EU Article 82 does not, until a dominant position is actually obtained by a monopoly intent company. EC competition authorities thus lack power to “nip monopolies in the bud.” Most U.S. states have “mini-Sherman Act” statutes closely paralleling federal antitrust laws. State laws are enforced both by state attorneys general and private litigation. EU Articles 81-82 can also be enforced by competition authorities of the member states (NCAs). However, in the absence of EC-level rules, private litigation depends on enabling legislation and the procedures of member state courts.

#### **U.S. Enforcement Procedures Compared with EU Enforcement Procedures**

The EU system provides more leverage to competition authorities than in the U.S. but less potential relief to private competitors and consumers. This has led, especially in the merger area, to several recent high-profile transactions (such as GE-Honeywell) in which the EC and DOJ/FTC differed markedly in their respective conclusions.

It also makes participation by U.S.-centric global firms in the EC

enforcement process problematic, since U.S. companies frequently seek greater transparency and speed than DG Competition is accustomed to offering. Noteworthy is a relatively recent agreement among the EC and the U.S. antitrust authorities adopting a “best practices” approach to the coordination of merger review. This parallels a similar compact between DOJ/FTC and state antitrust authorities in the U.S.

### **U.S. Antitrust Policies Compared with EU Antitrust Policies**

A dominant firm that engages in aggressive yet plausibly efficient business conduct is more likely to be subject to enforcement oversight in the EU than the U.S. On the whole, European authorities are more likely than American enforcers to view bundling and other practices of a “dominant undertaking” as problematic because U.S. courts (and thus competition authorities) require affirmative proof of inefficiency in order to constrain merits competition by firms with market power.

The EC’s adoption of “Guidelines on the Assessment of Horizontal Mergers” in December 2003 is similar to U.S. merger guidelines both in structure and emphasis on economic principals. For example, both have parallel concentration tests, approaches to efficiencies and tests for anticompetitive effects (the EC’s selection of a “significant impediment to effective competition” standard is virtually identical to the U.S. “substantial lessening of competition” merger test).