The case received much attention in Germany and elsewhere as a successful attempt to install a class action type of private antitrust enforcement action in Germany, using traditional means of German civil law and procedure.

Successful damages actions against energy provider for abuse of dominance

OLG Düsseldorf, VI-2 U (Kart) 8/06, April 16, 2008

LT Abuse of dominant position; Electricity supply industry; Gas supply industry; Germany; Heating; Market definition; Tenders

This decision is part of a series of recent cases concerning the product market definition in the area of natural gas and heat supply. In the decision, the second antitrust chamber of the Düsseldorf Court of Appeals concluded that there are separate heat markets for the supply of natural gas, electricity, fuel oil and district heat.

The defendant was a municipal utility that supplies nearly all end customers in its network area, including the company V, with district heat and natural gas. When V issued separate tenders for its supply with natural gas, electricity and district heat, the plaintiff submitted the best offer with regard to natural gas, while the defendant's offer was the best with regard to electricity and district heat. After V informed the defendant that it intended to conclude a natural gas supply contract with the plaintiff, the defendant announced that, in this event, it would significantly increase the prices charged to V for district heat (and electricity). Against this background, V concluded a supply contract with the defendant covering natural gas, district heat and electricity. The plaintiff brought an action asking for damages and an injunction, asserting that it had lost the natural gas contract due to the defendant's anti-competitive behaviour.

Unlike the *Landgericht Düsseldorf* and the Court of First Instance (which had rejected the action in its entirety), the Court of Appeal granted both damages and the injunction based on the German Act against Restraints of Competition. The Court of Appeal found that the defendant had abused its dominant position in the relevant product market for the supply of district heat. The Court of Appeal dismissed the defendant's argument that it had no dominant market position because the product market had to be defined as a single heat market covering gas, electricity, fuel oil and district heat. In this respect, the Court of Appeal concurred with a recent judgment of the antitrust chamber of the German Federal Supreme Court, but dissented from the findings of other courts of appeal, including the first antitrust chamber of the OLG Düsseldorf and the antitrust chambers of the OLG Frankfurt and the OLG Celle, as well as the eighth civil chamber of the German Federal Supreme Court.

Hungary

Limitation of liability of the leniency applicant and calculation of amount of damages in the new Hungarian legislation

LT Compensation; Hungary; Joint and several liability; Leniency programmes; Limit of liability; Measure of damages; Presumptions; Private enforcement

On June 3, 2008, the Hungarian Parliament adopted an amendment to the Competition Act.[1] The amendment provides for express rules harmonising the leniency program and civil actions for damages in the course of private enforcement. The new rules diverge significantly from the proposals in the White Paper of the Commission. Furthermore, the amendment introduces a presumption for the calculation of the amount of damages caused by cartels.

The objective of the legislation is to reconcile two interests:

- undertakings shall not be refrained from filing leniency applications due to the high amount of claims for damages; and
- full compensation shall be ensured to the injured persons.

The Civil Code follows the principle of full compensation. Further, pursuant to the general rules of civil law, if the damage is caused by several persons, these persons shall be held liable jointly and severally.

In cases of claims for damages based on competition law infringements, the new Hungarian Competition Act provides:

> ''An undertaking that has been granted immunity from fines on the basis of Section 78/A *may refuse to reimburse the damages caused by violating Section 11*[2] *of this Act or Article 81 of the EC Treaty as long as the claim can be collected from other undertakings being held liable for the same infringement*. This provision does not prevent the claimant from commencing a lawsuit jointly against the infringing undertakings causing the damages. The lawsuit commenced to enforce the liability of the undertaking that has been granted immunity from fines shall be suspended until the final closing of the administrative lawsuit commenced to review the decision of the Hungarian Competition Authority establishing the infringement'' (s.88/D of the Competition Act).

Although the Hungarian legislation does not depart from the principles of joint and several liability and full compensation, the leniency applicant is, however, obliged to pay compensation to the injured parties if they are unable to collect their claims from the other parties of the cartel. Thus, the court would order that the plaintiff may request judicial enforcement proceedings against the leniency applicant only if the judicial enforcement proceedings against the other cartel members were unsuccessful.

The above provision of the substantive law is implemented in the procedural law in that the lawsuit brought against the leniency applicant shall be suspended until the competition law infringement is established in a final court judgment against the other parties of the cartel.

The Hungarian legislation is different from the approach proposed in the White Paper, according to which the leniency applicant's civil liability should be limited to claims by his or her direct and indirect contractual partners (s.2.9). Under the Hungarian provisions, the leniency applicant will in principle still be liable for all damages resulting from the anti-competitive behaviour irrespective of contractual relationships. However, as mentioned above, the claim for compensation can be enforced against the leniency applicant only if remedies cannot be obtained from the other cartel members.

Thus, the civil liability of the leniency applicant is limited as compared to the liability of the other members of the cartel. At the same time, the new Hungarian rules are also in compliance with the requirement of full compensation of the victims as set forth both in (i) the general principles of tort law; and (ii) the White Paper. The new legislation is applicable to damages caused after the entering into force of the amendment (September 1, 2008).

With respect to cross-border cartels, it shall be noted that the limitation of liability of the leniency applicant is applicable only if under the international private law rules the Hungarian law would govern the claim for the damages.

As regards the calculation of damages, the White Paper proposes in s.2.5:

> ''To facilitate the calculation of damages, the Commission therefore intends to draw up a framework with pragmatic, non-binding guidance for quantification of damages in antitrust cases, e.g. by means of approximate methods of calculation or simplified rules on estimating the loss.''

The new s.88/C of the Hungarian Competition Act establishes a reversible presumption relating to the effect of hard core cartel restrictions on prices:

> ''In the course of evidencing the effect of the infringement on the level of price applied by the infringer in lawsuits to enforce any civil law claim against a party of an agreement among competitors violating Section 11 of this Act or Article 81 of the EC Treaty, restricting the competition, aimed at fixing the prices directly or indirectly, sharing markets, fixing production or sales quotas, *it shall be deemed that the infringement affected the price by 10% unless the contrary is evidenced*.''

1 The Act is still yet to be announced due to the fact that the President of Hungary requested that the Constitutional Court make a preliminary review of the Act due to constitutional concerns of a specific provision (which sanctions the member of the management of the company that participated in the cartel and prohibits such persons from engaging in the management of any business association for two years). No concern was raised in connection with the provisions presented in the present article.

2 Section 11 contains the rules on prohibition of agreements or concerted practices restricting economic competition.

The above rule shall be applied in litigations commenced after September 1, 2008 (even if the damages were caused before).

This reversible presumption is favourable to the plaintiff facilitating the calculation of damages as the plaintiff does not have to provide evidence for the actual loss, unless the overcharged price exceeds 10 per cent. It is up to the defendant to prove that if there had been no cartel, the price would not have been lower.

Besides the presumption, as the official explanatory note explains, it is still for the plaintiff to prove that it complied with its obligation to mitigate damages (by searching for a cheaper source), and the damages were not passed on to third parties (it did not increase the prices it applied vis-a-vis its clients, or the price was increased, but this caused a decrease in its turnover).

The grounds of the 10 per cent presumption can be questioned. A cartel does not necessarily affect price levels. Further, the competition law infringement can be established even if the cartel was only capable of limiting or distorting competition. The level of 10 per cent also seems to be unreasonably general, because cartels are created in different circumstances. In a situation where the actual damage is lower than 10 per cent and the defendant is not able to evidence this, it will actually be forced to pay an exact sum regardless of the real amount of damages. Contrary to the official explanatory notes of the new legislation, there are no such difficulties with the collection of evidence on measuring the effect of the cartel on price increase, since the potential plaintiff could gain proper information about the market prices before bringing the lawsuit.

It is difficult to foresee the effect of such presumption in the course of litigations. In principle, such presumption could motivate private enforcement. It cannot be predicted whether the defendants would be able to avoid the application of the presumption by proving that the price without cartel would not have been 10 per cent lower.

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India

MRTP Commission initiates enquiry against Dish TV

LT Anti-competitive practices; Deception; Digital television; India; Sales promotion

Monopolies and Restrictive Trade Practices Commission (''MRTP Commission'') issued a notice to Direct-to Home (DTH) operator, Dish TV, a Zee group promoted company following a complaint by rival TataSky, a joint venture between Tata Group and STAR India. TataSky has alleged that Dish TV's ''free set-top box'' offer is an anti-competitive and deceptive act and is in violation of the provisions of the Monopolies and Restrictive Trade Practices Act 1969 (''MRTP Act''). In one of its advertisement campaigns, Dish TV claimed that it would provide free set-top boxes.

A similar case had also been filed by a consumer organisation on the same issue, in which the MRTP Commission has declined to pass any interim order.

At the proceedings before the MRTP Commission, TataSky submitted that Dish TV's advertisements were deceptive as the company claimed to be giving out free set-top boxes. However, in reality, this was not the case. It was submitted that the campaign was an act of ''unfair trade practice'' under the meaning of the MRTP Act and was against fair competition. Therefore, Dish TV should be restrained from continuing its advertisement campaign. TataSky also submitted a set-top box with the price mentioned on the box to the MRTP Commission in support of its claim.

In reply, the counsel for Dish TV submitted that TataSky was trying to mislead the MRTP Commission, as the set-top box is free with one scheme only. The MRTP Commission has granted time to Dish TV to file its reply.

Under the MRTP Act, an unfair trade practice means a trade practice which for the purpose of promoting the sale, use or supply of any good, adopts an unfair method or unfair or deceptive practice, including the practice of making any statement whether orally or in writing or by visible representation which materially