

# What Can Private Enforcement teach Public Enforcement in Article 102 Cases?

## EU Competition Law Summit

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# Distinct features - differences from cartel litigation

## □ **Type of conduct – theory of harm**

- exclusionary – exploitation cases are extremely rare (e.g. Frankfurt CoA 2010 - 400% price increase in pharma, air tickets etc.)

## □ **Type of claimants**

- Actual/potential competitors – more rarely distributors – no cases of customers/consumers

## □ **Type of compensable harm**

- *Lucrum cessans*, loss of profit, loss of opportunity - *damnum emergens* rare (e.g. excessive price for a necessary input – margin squeeze)

## □ **Follow-on or Stand-alone?**

- Stand-alone prevalent – follow-on increasing

# Damages litigation – constituent elements

- The rationale behind damages litigation:
  - To put claimant back into the financial position that it would have been in “but for” the breach of the antitrust rules
- To this end, claimant must :
  - Prove an infringement (but see follow-on cases)
  - Prove that he suffered harm (not necessarily the same as the anti-competitive effects mentioned in an infringement decision)
  - Establish causal link between infringement and any harm suffered
  - Quantify the harm and thus the measure of damages

# Proving the infringement

- Art. 16 Reg. 1/2003 - Art. 9(1) + 9(2) Damages Directive (irrefutable + *prima facie* evidence)
- Scope of binding effect
  - Recital 34 “... *only the nature of the infringement and its material, personal, temporal and territorial scope as determined ...*”
  - *Enron* CAT + CA - bound by ORR’s findings on antitrust liability but civil liability was open - causality not met - Claimant had no necessary preconditions to enter the market (supply arrangements) and no previous experience in the sector/industry

# Harm + Quantification

- “Asymmetry” of standards of proof (cartel – abuse cases)
- Differences between authorities & courts – “harm”
  - Object-effect / anti-competitive harm / impact on the market ≠ individual harm → direct, concrete, personalised
  - Exclusion of potential entrants – extremely difficult to compensate (lack of observable data of performance in the market)
  - Less efficient competitors? They may have never been able to compete on the same scale as the dominant company, because of costs, quality and brand strength

# Causal link

## □ Usual problems

- Claimants may have not entered the market and/or expanded due to their inefficiency, lack of interest, potential self-limitations, or even because of neutral elements
- Contributory fault?
  - *Arkin ComCt 2003* (the claimant was the author of its own misfortune by seeking to stay in a loss-making market...)
  - *Verimedia CA Versailles 1998* (quantum of damages should be reduced due to the claimant's lack of knowledge of the market in which it was starting up)
- Harm may be due to general factors (e.g. economic downturn)

# A Swedish case

- **Svea Court of Appeal, *Yarps v Telia*, 29 June 2017**
  - The claimants argued Telia abused its dominant position through discrimination, refusal to supply and margin squeeze and should pay €38 million in damages
  - Wholesale market for ADSL broadband between 2000 and 2003
  - District Court awarded €6.7 million in damages for margin squeeze only
  - On appeal, the verdict was quashed and the Claimant was ordered to pay costs
  - The CoA's findings
    - Telia dominant in both upstream (wholesale) and downstream (retail) markets – although dominance downstream was not required (*TeliaSonera*)
    - There were no grounds for discrimination or refusal to supply
    - AEC test accepted as starting point (*TeliaSonera*, para. 46) – no analysis of Yarps's actual costs – comparison of the wholesale price per month applied by Telia to Yarps per private consumer access and Telia's own retail prices

# A Swedish case (cont'd)

- **Svea Court of Appeal, *Yarps v Telia*, 29 June 2017**
  - The CoA's findings
    - CoA preferred Telia's to Yarps's analysis regarding the applicable reference margin – District Court's LRAIC assessment was insufficiently robust
    - CoA used a lower margin and found that it would be sufficient for an as efficient competitor to provide the additional services (although it left no room for profit)
    - Effects-based analysis (*TeliaSonera*, para. 76, 'all circumstances')
    - *'it is apparent from the preliminary ruling that the circumstance alone, that the dominant company's pricing in purely mathematical terms leads to margin squeeze for competitors that are at least as efficient, is not in itself enough for the activity to be considered to amount to an abuse within the meaning of Article 102 TFEU'*
    - So, were Telia's pricing practices likely to hinder the ability of competitors at least as efficient as Telia to compete on the retail market for broadband connection services to end users?

## A Swedish case (cont'd)

- **Svea Court of Appeal, *Yarps v Telia*, 29 June 2017**
  - CoA: **no anti-competitive effects and consequently no harm to be compensated**
    - Telia's ADSL service was not an essential input – no indispensability – although not a condition for a margin squeeze abuse, still an indication of a '*high probability of abuse*' (*TeliaSonera*, paras 70-71)
    - Other parameters: part of the market affected – importance of customers – duration
      - small share (20%) of customers affected – '*not insignificant*' but no strong indication of abuse
      - short time period (11 months)
    - Yarps failed to adduce concrete evidence of anti-competitive effects although practices took place in the early 2000s
    - Absence of any anti-competitive intent (*TeliaSonera*, para. 88 '*all circumstances*') – Telia was making a loss on other agreements and wholesale price charged to Yarps was likely a better reflection of the actual costs of providing the relevant services

# Conclusions

- **Antitrust liability – civil liability are intertwined**
- **Even if binding effect – courts will be conservative (Swedish court case) – they may pay lip service to the binding effect rule but decide otherwise under the ‘civil liability analysis’**
- **Concrete harm v. abstract notions of harm**
- **Who’s right and who’s wrong?**
- **Is follow-on private litigation an ex post assessment of public enforcement?**