



Consequences of Infringement of EC Competition Law under Maltese Law

Professor Eugène Buttigieg

University of Malta



Infringement of EC Competition Law in Malta may trigger ...

- OFC investigations leading to a CFT infringement decision (public enforcement)
- Criminal proceedings instituted by the Police before the Court of Magistrates (public enforcement)
- Euro-defence challenging validity and enforceability of the terms of a contract in a private action based on the contract before the Civil courts (private enforcement - 'shield')
- Private action for damages before the Civil courts that may also include a request for an injunction to stop illegal practices (private enforcement - 'sword')



Consequences of Infringement: Nullity

- Automatic nullity and unenforceability *de jure* of agreement or decision if CFT or Civil or Criminal courts pronounce the agreement or decision to be an infringement of Art 81 EC
 - Severability – Case 56/65 *Societe Technique Miniere* – if the offending provisions of the contract may be severed from the remaining provisions, the latter part may remain valid and enforceable; but this depends on whether the applicable contract law allows this – Maltese law allows this (Art 1211 Civil Code)
- If CFT or Civil or Criminal courts pronounce an infringement of Art 82 EC and the abuse of dominance consists in an agreement entered into by the dominant firm with its customers (eg imposing tying, unfair trading conditions, discriminatory conditions etc), the illegal terms of the agreement are *de facto* null and unenforceable



Consequences of Infringement: Remedies

- Interim relief

- Interim measures by CFT to suspend restrictive practice if there is urgency and likelihood of serious, immediate and irreparable prejudice to the interests of an undertaking or of harm to the general economic interest
- Interim injunction by Civil courts in private enforcement actions (AG Opinion in Case C-264/01 *AOK Bundersverbund* para 105)



Consequences of Infringement: Remedies

- Definite remedies – with a view to putting the infringement to an *immediate and effective* end the CFT may issue
 - Cease and desist orders eg to stop predatory prices, discrimination, loyalty rebates, tying or export bans etc
 - Compliance orders that may be
 - behavioural remedies (eg dominant firm is ordered to supply customer or to license its IPRs) or
 - structural remedies (eg dominant firm ordered to sell part of its business) – these may be imposed only where there is no equally effective behavioural remedy or where this would be more burdensome for the undertaking than the structural remedy



Consequences of Infringement: Criminal Fines

- 1-10% of total turnover of the undertaking (or group of undertakings) in the affected market realised during the preceding financial year but the fine may not be less than €6,988.12
- Director or manager or other company officer responsible for infringement is liable *in solidum* with undertaking for payment of the fine



Consequences of Infringement: Damages

- Case C-453/99 *Courage Ltd v Crehan* and Case C-295/04 *Manfredi* – right to compensation under EC law for damages suffered as a result of breach of EC competition rules
 - so civil courts are obliged to safeguard and enforce this right
 - right belongs not only to third parties (consumers, customers, competitors etc) but in certain circumstances even to one of the contracting parties of the anti-competitive agreement
 - principle of national procedural autonomy – up to national law to regulate procedural matters eg allocation of jurisdiction, limitation periods, amount and nature of damages recoverable etc
 - principle of equivalence (non-discrimination) and principle of effectiveness (national rules must not make it impossible for the right to be exercised)



Consequences of Infringement: Damages

- Tort action under Civil Code (Arts 1029-1051A)
 - only way
 - Art 1033 – liability where, even without intent to injure, a person voluntarily or negligently acts in breach of a duty imposed by law (incl duty not to act in breach of Maltese and EC competition law)
 - Allows for both a standalone action and a follow-on action



Consequences of Infringement: Damages

- Ashurst Report incl Malta report (August 2004) – shows numerous obstacles to a successful damages action based on an infringement of competition law in all Member States which make recourse to this action very rare - <http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>
 - Would civil courts allow the passing-on defence?
 - Would an indirect purchaser have a right to sue for damages? Would the nexus be deemed too remote?
 - How easy would it be to show the causal link between the anti-competitive behaviour and the loss suffered?
 - How easy would it be to establish the quantum of damages (eg the difference between the price actually paid and what it would have been under competitive market conditions)?
 - Class actions or representative actions are not possible
 - Too much evidentiary burden on the consumer or competitor seeking redress when crucial evidence is in the hands of the defendant and so inaccessible or concealed



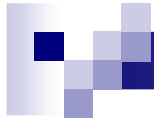
Consequences of Infringement: Damages

- Commission Green Paper (December 2005) followed by Commission White Paper (April 2008) - <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html> - White Paper recommendations:
 - Full compensation, i.e. compensation for actual loss (*damnum emergens*) and for loss of profit (*lucrum cessans*), plus interest from the time the damage occurred until the capital sum awarded is actually paid.
 - The passing-on defence should be allowed but indirect purchasers should also be able to claim
 - Collective redress should be available to consumers and small businesses through representative actions by qualified bodies such as consumer associations, trade associations, state bodies etc and opt-in collective actions whereby individual claims are combined into a single action, if the victims so wish
 - Minimum level of disclosure of evidence *inter partes*, i.e. court would have the power under specific conditions to order defendant and third parties to disclose certain evidence in order to offset the difficulties faced by the victim to access relevant evidence
 - In follow-on actions NCA decisions should be binding on courts just like Commission decisions are already binding on courts



Consequences of Infringement: Damages

- Where, as in our case, a national law requires a finding of fault, there should be a rule that once the victim has shown a breach of Art 81 or 82 EC the infringer would be liable in damages unless he can show that the infringement was the result of excusable error (excusable would be the case where a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition)
 - To facilitate the calculation of damages, the Commission 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
 - Other recommendations relate to limits on the level of court fees in respect of damages actions, changes to cost allocation rules to reduce uncertainty for potential claimants and encouragement of settlements to reduce costs as well as recommendations relating to commencement of limitation periods
- What's next? Soft convergence through voluntary action by Member States amending their laws or imposed convergence through a directive regarding at least some of the recommendations?



Thank you for your attention!