



3rd International Conference on Competition Law and Policy

Athens, May 29–30

“Binding Effect of Decisions Adopted by National
Competition Authorities in Antitrust Damages
Litigation”

Emmanuela Truli

Dr. Juris (Munich, Germany), LL.M. (Columbia, NY)

Deputy Head of Legal Services, DG Comp., HCC*

* All views expressed in this presentation are strictly personal



OUTLINE of the presentation

I. Notion

II. Who had this idea in the first place?

III. Alternatives?

IV. White Paper – exact scope of binding effect

V. Pros

VI. Cons

VII. Final comments




I. NOTION

What do we mean by:

“Binding Effect of Decisions Adopted by National Competition Authorities (“NCAs”) in Antitrust Damages Litigation” ?

– NCA Decisions find on infringements of Art. 81/82 EC Treaty

– Finding of the NCA re: infringement is binding on national courts deciding subsequent (“follow-on”) claims for civil damages of the victims of such infringement (NCA decision finding = irrebuttable proof of illegality and thus respective requirement for liability fulfilled)



II. Who had this idea in the first place?

- **Art. 16 (1) Reg. 1/2003 for Commission Decisions**
(Commission decision finding an infringement under Arts. 81/82 EC constitutes a binding act to which decisions by national courts must not run counter, unless the decision is annulled by the ECJ)
- **Sections 47A and 58A of UK Competition Act**
(Inserted by sections 18 and 20 of the UK Enterprise Act 2002
Scope: decisions of the OFT or the court on appeal binding on civil claims before UK courts)
- **Section 33 (4) of German Competition Act**
(scope: all NCA decisions of member-states or the courts on appeal binding on German civil courts)
- **Green Paper on Damages Actions for Breach of EC Anti-trust Rules (COM(2005) 672 final)**
- **White Paper on Damages Actions for Breach of EC Anti-trust Rules (COM(2008) 165 final)**



III. Alternatives

- I. Current situation: de facto persuasive authority of NCA decisions
- II. Green Paper alternative proposals:
 - Rebuttable presumption
 - Binding effect (irrebuttable presumption) → WP:

“National courts that have to rule in actions for damages on practices under Article 81 or 82 on which an NCA in the ECN has already given a final decision finding an infringement of those articles, or on which a review court has given a final judgment upholding the NCA decision or itself finding an infringement, cannot take decisions running counter to any such decision or



IV. White Paper: Exact scope of binding effect – part 1

- **Final Decisions** (no judicial review measures available any more)
- **Finding of infringement is binding. Rejection of complaint is not**
(decisions declaring the innocuousness of a certain practice because it does not fall under Art. 82 or 81 (1) or fulfills conditions of art. 81 (3) EC Treaty not binding!)
In this and other respects we should not be speaking about “binding effect of NCA decisions” but about “binding effect of an NCA finding of an infringement”!
- **NCA decision binding on courts called to decide on damages claims only – not on claims e.g. to declare nullity of an agreement or requesting other remedy (goal of provision → encouragement of damages claims only)**
- **Notion of “cannot run counter”?**
- **Material scope: Identical – not just similar facts (same agreement, decisions or practices)**



IV. White Paper: Exact scope of binding effect – part 2

- **Personal scope: Identity of litigants? Claimant not necessarily complainant. But same infringers** (Binding effect conferred on prior infringement decisions only if the parties in the follow-on civil litigation were the addressees of those decisions and were thus fully heard). Issue: Allocation of liability within a group of companies?
- **Territorial scope: Binding effect limited to the territorial scope of the decision?** (NCA decision finding is binding only as regards anti-competitive effects of an agreement or practice in the jurisdiction of the NCA) – not clearly stated but hinted in the White Paper
- **Court of another Member State may refuse to accord binding effect exceptionally on “fair legal process” grounds (Art. 34(1) Reg. 44/2001)**
- **Staying of proceedings while NCA decision pending?** According to German court of appeals decision no such obligation (independence of private enforcement)– Working Paper: courts “encouraged” to consider appropriateness of staying the proceedings or not.



V. Pros

- Has cost benefits
- Is time-saving
- Promotes procedural efficiency
- Enhances effectiveness of such actions
- Reduces risk for claimant
- Encourages anti-trust litigation
- Ensures legal certainty (no conflicting decisions)
- Brings greater uniformity in Art. 81/82 EC Treaty application



VI. Cons

- Constitutional issues? (separation of powers)
- Independence of the judiciary? (and “turning courts into mere assessors of damages”)
- All NCAs provide same guaranties of independence?
- Same level of sophistication (same quality of decisions) in all NCA decisions?
- Different standards of proof/procedural rights/review of NCA decisions across Europe
- Private enforcement subjected to public enforcement (“unsettling of balance between the two”)
- Increasing probability (motives) for the filling of an appeal of NCA Art. 81/82 EC Treaty decisions
- Incentive for delayed raising of the claim after appeal procedures completed?
- Increased pressure on NCAs? (liability of NCA?)
- Interaction with commitment decisions? (Prospective litigants’ right to appeal against such?)
- Decisions on national law? (appeals on issue of effect in the common market– or introduction of same rule?)



VII. Final comments

Resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules:

The European Parliament

- “believes that a national court should not be bound by a decision of the national competition authority of another Member State”
- “observes that training and exchange programmes should lead to the convergence of decisions so that acceptance of another national competition authority's decision should become the norm”



Thank you