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Consumers' rights to effective remedies in (EU) competition law

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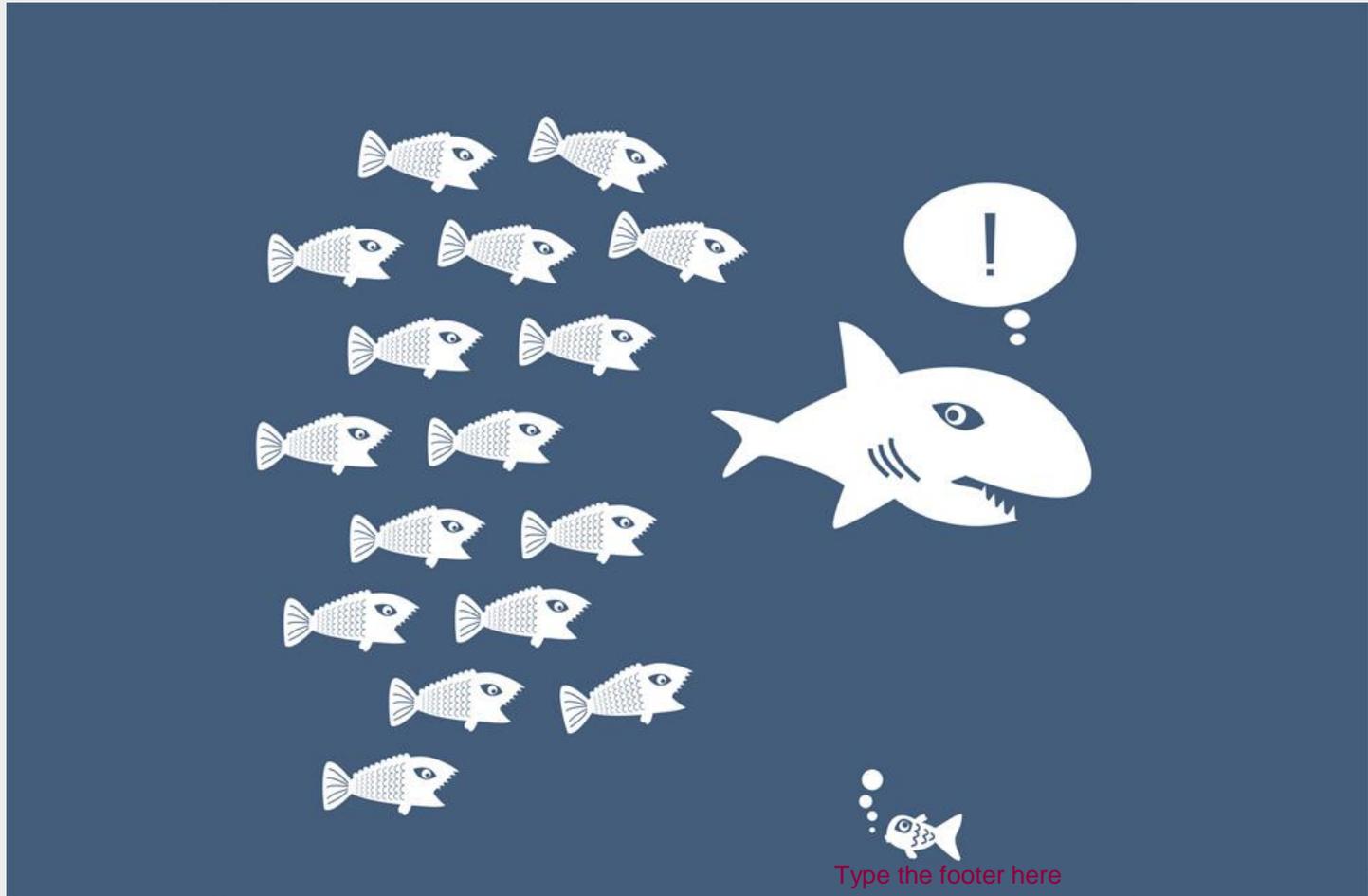
Enforcement of consumer rights in competition law: impact of Art.47 CFR

- Enforcement of competition law affects consumers' economic interests -> they suffer harm
- They have the right to an effective remedy (Art.47CFR)

HOW? → Complaints or Damages claims

- Complaints in administrative procedures of EU Commission or national competition authority
- Damages claims before the National judge

Article 47 CFR: What is the impact of the principle of effectiveness in competition law cases concerning consumers?



Judicial enforcement of consumer rights in competition law

- C-453/99 *Courage*, paras 23,25
- “the national courts whose task it is to apply the provisions of Articles 101 and 102 TFEU in areas within their jurisdiction, which produce direct effect in relations between individuals and create rights in respect of the individuals concerned, must ensure that those rules take full effect and must protect the rights which they confer on individuals”
- Joined cases C-295/04 to C-298/04 *Manfredi*
 - Principles of effectiveness and equivalence, **Art.47 CFR** not mentioned
 - Widely endorsed by Italian judges in later cases less so in other MSs



Indirect purchaser standing, passing-on defence, causality

- Ashurst study 2004
- Green Paper 2005
- Staff Working Paper: core function of causation, legal notion + evidence proving it
- Paras-273- 276 “ In the absence of Community legislation, the detailed conditions for the claim remain covered by national law. However, the application of national law in this matter depends on the double principle of equivalence and effectiveness. These principles and particularly the latter can influence notions of causation as existing in national civil law.”
- Shift burden of proving the infringement in situations of information asymmetry, lower the standard of proving the infringement where there is information asymmetry as between claimant and defendant.

Directive 2014/104/EU on damages actions

- Causation has not been directly addressed
- Burden of proof on causality and damage is on the consumer
- Recital 11: “All national rules governing the exercise of the right to compensation for harm resulting from an infringement of Article 101 or 102 TFEU, including those concerning aspects not dealt with in this Directive such as the notion of causal relationship between the infringement and the harm, must observe the principles of effectiveness and equivalence.”
- Article 14(2)) indirect purchasers are regarded to have proven that an overcharge paid by the direct purchaser has been passed on to their level where they are able to show *prima facie* that such passing-on has occurred i.e. whether or to what degree an overcharge paid by a direct purchaser from the infringer has been passed on to an indirect purchaser.

Indirect purchasers, passing-on defence

- Indirect purchaser claimants can use passing-on as an element of proof of causation in their claims for damages. The burden of proof lies with the claimant, but there is a rebuttable presumption of pass-on to the indirect purchaser in certain circumstances.
- Pass-on is intimately linked to the question of causation of harm and the possibility in many market situations that persons at different levels of the supply chain may have been negatively affected by an anti-competitive infringement.
- principle which permits national courts to attribute harm caused by an infringement between the different levels of the supply chain that have been affected by the infringement; i.e. principally between indirect and direct purchasers which have co-existing standing to claim.



Passing-on of overcharges (Art. 12 - 15)



- Both **direct and indirect purchasers** can claim.
- Infringer's "**passing-on defence**" is allowed.
- Indirect purchaser profits from a **rebuttable pass-on presumption**.
- Courts shall have the **power to estimate the share of pass-on** (Commission to help them through Guidelines).
- Courts shall **avoid both over-compensation and under-compensation**.
- Passing-on **does not affect** the right to claim compensation for **loss of profit**.

Competition

Consumers in remote position not dealt with

- Not indirect consumers of the infringers but so-called umbrella consumers and counterfactual (potential) customers, post-cartel pricing effects
- AG Kokott in C-557/12 Kone AG
- Broad causality rules
- Harmonization of national rules
- German procedural rule lifting to some extent burden of proof sec.287 Code of civil procedure



Quantification of damages

- Proof of damages is complex and difficult which can make bringing a claim for damages very risky
- Practical Guide on quantifying harm, SWD(2013) 205
- Within their respective legal frameworks, legislators and courts have often adopted pragmatic approaches in determining the amount of damages to be awarded, for instance, by establishing presumptions
- Hungary Section 88/C of Competition Act introduced a rebuttable presumption of 10% overcharge for cartel infringements in 2008

Impact on national case-law

- Italy: Court of Cassation cases many references to the principle of effectiveness
- Germany: flexible procedural rules
- ORWI (2011) indirect purchaser standing, passing-on defence
- Federal Court of Justice: it is well established case law that all indirect purchasers down to the level of the ultimate consumers have the right to sue
- Lottery(2016) the court can estimate the damages if the claimant is unable to prove the exact amount; the claimant only needs to establish a sufficiently firm factual basis for this estimation ie he was affected by the infringement
- German procedural law the court can apply a balance of probabilities for both the causal link between the tortious act and the damage and the exact amount of damages (Sec. 287 Code of Civil Procedure). Damages can be estimated based on verifiable facts

Tennet v ABB, judgement of 8 July 2016, Dutch Supreme Court.

- passing-on defence is a valid defence
- through the concept of damage by means of equity reconciliation (6:95-6:97 Dutch Civil Code)
- through allocation of benefits (6:100 Dutch Civil Code)
- The Supreme Court leaves the judge free to choose between these approaches. Provided an assessment is made, however, as to what advantages and disadvantages relate to the event on which the debtor's liability is based such that they can be reasonably attributed to the debtor as a result of this event.
- Paras 4.18-20. reference to principle of effectiveness

Tennet v ABB, judgement of March 2017, District Court of Gelderland

- Cartelized product was not passed-on to indirect purchasers
- regulated – prices for the transport of electricity via the national grid also included the costs for fixed assets and had increased
- the damages would therefore ultimately have been incurred by the end-users of electricity, BUT they were unable or unlikely to bring damages claims
- ABB was the immunity applicant and that TenneT is state-owned, the District Court deemed it ‘unreasonable’ to award the passing-on defence because compensation paid to TenneT ultimately benefits all Dutch citizens and thereby to some extent the same end users who have suffered damages.

Administrative enforcement of consumer rights in competition law

- Public enforcement of competition law by EU or national authorities
- Consumers can participate as complainants or other third parties: holders of legitimate or sufficient interest (national law differs!)
- Relevance? => Access to information
- **BUT limited access to procedures: effective remedy?**
 - **1st limit:** the Commission's discretion in setting priorities of enforcement
 - **2nd limit:** procedure is not initiated against consumers: incidental effects of decision
 - Ensuing decision might affect their personal (especially economic) interests, however in an indirect way

1st limit: impact on coordination judicial and administrative procedures

- In administrative proceedings the Commission (often NCAs) can classify complaints according to different degrees of priority based on Union interest
- **Normally there is not a sufficient Union interest in examining a case when the plaintiff is able to secure adequate protection of his rights before the national courts**
 - T-24/90 *Automec II*. + Reg. 1/2003, Reg.773/2004, Notice on handling of complaints

■ **T-480/15 *Agria Polska*** para 82:

” any refusal by a national competition authority or the Commission to open an investigation, [...]cannot have the effect of limiting the applicants’ right to bring proceedings before the national courts for damages caused by infringement of Articles 101 and 102 TFEU.”

2nd limit to coordination: access to information v. damages claims

- Legitimate interest -> directly and adversely affected (Reg. 1/2003 Reg.773/2004 + Notice)
- Joined cases T-213/01 and T-214/01 *Österreichische Postsparkasse*
 - Different degree of intensity of the harm caused to their interests
- Access to documents → Limited disclosure (Reg. 1049/2001 T-2/03 *Verein für Konsumenteninformation*)
- *Pfleiderer* and C-536/11 *Donau Chemie*: **competing interests between leniency and damage claims**

Most extensive discussion of Art.47

AG Jääskinen in Donau Chemie

- “an absolute ban on access to the court files held by the Cartel Court, absent the consent of the parties, is a disproportionate impediment to the right of access to a court as guaranteed by **Article 47** and particularly when, as is indicated in the case file, the judgments of the Cartel Court are not made available to the public.”
- “the right of access to a court also includes ... a **‘power’** in the hands of national courts to consider all the questions of fact and law that are relevant to the cases before them.”
- Court in *Donau Chemie*:
- “access may be the only opportunity those persons have to obtain the evidence needed on which to base their claim to compensation”

Dialogue between administrative and judicial enforcement?

- Damages claims before national courts are (according to administrative enforcers) alternative or even more efficient avenue for potential complainants (consumers)
- Relevant ground to reject complaints on the basis of lack of sufficient (EU) interest
- Likelihood of damages claims by (final) consumers when access to information is limited?
- **This dialogue is crucial to safeguard effective judicial protection of consumers in competition law enforcement**

Inner limits: procedural status of consumers is ancillary

- Procedure is not initiated against them: incidental effects of decision
- Legitimate interest -> directly and adversely affected (Reg. 1/2003 Reg.773/2004 + Notice)
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