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Antitrust Damages, European Competition Law and Judges: Private and Public Enforcement. Articles 101, 102 and 107 of TFEU and National Judges (REFJ1224)

Barcelona: 20th, 21th and 22th June 2012

Room 9-10
Spanish Judicial School
Carretera de Vallvidrera 43-45
08017-Barcelona

Director of the course
David Ordóñez Solís
Doctor of Law
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Thursday, 21 June 2012

15:00 H. Quantifying Antitrust Damages by National Courts

Ms Elsa Costa.
Judge
Tribunal Administratif de Cergy-Pontoise (Ille de France)

Biography:

Elsa Costa entered the administrative magistracy in 2005, with a Degree in Law from the Montpellier Law School and the Institute for Political Studies in Paris. She was a *Rapporteur* first, and then became a *Rapporteur Public*, specialising in fiscal litigation initially. Currently, she deals with contentious-administrative proceedings in general and, specifically, with delicate cases involving state and regional government liability. She is also a member of several administration commissions and selection boards, such as the ones at the *Haute Ecole des Avocats Conseils* [Higher School of Legal Advisors] of Versalles and *l'Ecole Nationale d'Administration* [National Administration School].

Lecture Summary:

The existence and quantification of damage for which compensation may be awarded is a major difficulty in actions for loss and damages, whose effectiveness depends largely on determining the right amount of compensation.

Currently, the competition authority does not take part in the loss assessment, which arises from a private enforcement in which it has no competence. In France, the reparation of damages arising from antitrust practices can be decided by civil and commercial courts, criminal courts and administrative courts, depending on the case concerned.

Studies of case-law make it clear that, to date, French courts take a conventional view of civil liability law and adjust compensation very closely to the damage sustained. Moreover, punitive damages are not contemplated in France.

Thus, compensation cannot be determined globally and most courts prefer to order an assessment in which an adjuster issues a report on the scope of the antitrust practices and the resulting amount of compensation. Occasionally, courts that legal resource before issuing a judgement, thereby allowing the victim a provision of funds and even compensation for part of the damage. Meanwhile the proceedings can continue, often with assessment by an expert.

French courts allow compensation for two types of damages: *damnum emergens* and *lucrum cessan*s. Any loss or damage caused, even if it is in the future, gives rise to compensation. To calculate the damage, courts define the appropriate market, calculate the undertaking's current market share, and assess the undertaking's share. If the antitrust practice has not been carried out, the court takes into consideration the undertaking's potential for development at the time of the events; in other words, the market share that could be reasonably expected.

Thus, the pre-trial evidence must be notified by the party who feels they have sustained damages. In French law, in fact, the parties who feel that they are the victims of loss or damages must demonstrate the scope thereof and, therefore, justify the amount of compensation they expect. This does not imply, however, that the courts have no room for action if one of the parties – the defendant, to be precise – shows inertia in this regard.

The court then has several methods by which it can determine the causal nexus between the antitrust practices and the damages actually caused. Courts prefer the appropriate causes (only the determining factor, the one that risked causing the damage, is taken into consideration) rather than the equivalence of the conditions (any concurring circumstance is taken into consideration). The methods employed by the courts to determine the causal nexus are: a comparison before and after; the observed degraded situation that should arise from the antitrust practices found by other means; a search for simultaneous circumstances and correlations, thanks to estimation and statistical models; and reference to comparable regulatory elements.

Finally, in a study of the decisions delivered in the past few years, it was found that a considerable number of cases restrict discussion on the assessment of damage. This is permitted in French law in its current state, since it requires minimal legal reasoning by the courts.

This manner of proceeding has the advantage of allowing a verdict on principle, whereas the victim has not sustained a loss. However, it also carries the risk of awarding compensation that is lower than the damages actually sustained by the victims of antitrust practices.

It can be verified, however, that when a court decides to resort to adjustment, the debate on the assessment of the damage becomes vaguer. The judges in administrative courts base their rulings are more elaborate reasoning, which is undoubtedly owing to a more systematic use of appraisal. Moreover, the reports submitted to them show a firmer commitment to the financial aspects.

Finally, although it is true that methods to measure economies and financial analysis can facilitate an evaluation, they do not provide solutions to evidence-related issues and their merits should not be over-emphasised. It is the court who should have control over the evaluation it decides to preserve.