

European Judicial Training Network

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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: 20, 21 and 22 June 2012

Spanish Judicial School  
Carretera de Vallvidrera 43-45  
08017-Barcelona

*Director of the course*  
**David Ordóñez Solís**  
Doctor of Law  
Senior Judge. Administrative  
Court Number 4 of Oviedo

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**Thursday, 21 June 2012**

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**15:00 h** Quantifying Antitrust Damages by National Courts

**Mr Antonio Creus Carrera**  
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Con el apoyo de la Comisión Europea (Dirección General de Competencia)  
*With the support of The European Commission (Directorate General Competition)*  
Avec le soutien de la Commission européenne (Directorat général de la concurrence)

Quantification of damages arising  
out of competition infringements by  
national courts & Bird & Bird

**Red Europea de Formación Judicial**

- C-453/99, Courage:

- "The full effectiveness of Article 85 of the Treaty (now Article 81 EC) and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition."

- C-295/04 – C-298/04, Manfredi:

- "it follows from the principle of effectiveness and the right of individuals to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss ( *damnum emergens* ) but also for loss of profit ( *lucrum cessans* ) plus interest. "

- 2005:
  - *Green paper – Damage reparation for infringements of EU competition rules.*
- 2008:
  - White paper - Actions for damages for the breach of Community rules on competition
- 2011:
  - Draft guidance document: Quantification of damage in actions for damages for breach of Articles 101 or 102
- **A directive to harmonize the damages recovery in competition matters?**

# US vs. EU

## US:

- “Privatization” of competition law in exchange for treble damages→ Sherman Act (*treble damages*)
- The private enforcement as main tool
- Illinois Brick Co. v. Illinois: “The court of appeals affirmed the dismissal of petitioners’ damages claims on the ground that petitioners, as indirect purchasers, are barred from recovering damages. Only the ‘direct purchaser’ from a monopoly supplier [can] sue for treble damages.”

## EU:

- If you recover a sum of money, it must have been "lost" in the beginning
- No treble damages, the bases is damages individually suffered
- Public enforcement as the main tool

# Article 101 vs. 102

- 101:

- Passing-on
- Generally greater standard of proof

- 102:

- Exclusionary practices:
  - Exclusive agreements
  - Tying and bundling
  - Predatory prices
  - Refusal to supply and margin squeeze
- Exploitative practices:
  - Abusive/Discriminatory prices: the right price?
  - Other ways of discrimination

# The real problem? The sugar case (1)

- Spanish Competition Authority: 15/04/09 → Expte 426/98 → Agreement on sugar sale price.
- Valladolid Appeal Court (Decision N. 261/2009 October, 3rd):
  - The damage: the difference between the price of sugar that the plaintiffs paid to ACOR, from September 1, 1995 and the one that should have been paid according to the normal price in the market.
  - The assessment involves an enormous difficulty → *it does not mean it is not possible*
  - *The plaintiffs' expert has made an assessment that in the opinion of this Court is appropriate, and this determines that we will agree to what is requested in the claim.*

# The real problem? The sugar case (2)

Madrid Appeal Court (Decision n. 370/2011 October, 3rd ):

- Passing-on: *although there is no evidence, such transfer must be assumed for the evidence cited above*
- Opportunity that the applicants had to assemble the product object of the suit by other foreign producers
- *Existence of overpricing? The expert report which supports the claim of the claimant does not make a comparative examination of the prices paid by the applicants to other Spanish and foreign sugar factories, it must be concluded that the damage caused has not been justified*



# Other issues

- Follow on vs. Stand alone
- Action for damages → The lesser evil?
- Why seek for damages if they can be avoided? → Interim measures
- Others tools:
  - Arbitration
  - Settlement agreement
  - Mediation

*“Each year a large number of small businesses and ordinary people in the EU are effectively deprived of their rights as economic actors and citizens. Together we can forge a new shield to defend their rights and protect their interests”*

Thank you for your  
attention & Bird & Bird

Antonio Creus

Partner

Bird & Bird

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