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***A Reformed Approach to Article 82:
The Impact on Private Enforcement***

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I. Private Enforcement of Article 82

1. Consequences of the *Courage* and *Manfredi* Judgments

Although the *Courage*¹ and *Manfredi*² judgments of the European Court of Justice dealt with the enforcement of Article 81, there can be no doubt that the principles set forth in these judgments also apply to the private enforcement of Article 82. In the words of the Court in *Courage*, the “full effectiveness” of Article 82 and the practical effect of the prohibition laid down in Article 82 would be put at risk if it were not open to *any individual* to claim damages for losses caused by an abuse of a dominant position. Consequently, national law has to provide all means necessary for the efficient private enforcement also of Article 82.

2. Relevant Areas of Private Enforcement of Article 82

a) Invalidity of Abusive Agreements

Although Article 82 does not provide for an equivalent of Article 81(2),³ its effectiveness requires that national law provide for the nullity of abuses of dominance in the form of agreements or any other acts which may have effects in civil law, e.g., unilateral declarations by which a party terminates an agreement. Most national laws provide for the nullity of any acts which violate legal prohibitions such as that contained in Article 82.

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¹ C-453/99, *Courage v Crehan* [2001] ECR I-6297

² Joined Cases C-295/04 to C-298/04, *Manfredi and Others v Lloyd Adriatico and Others*, judgment of the ECJ of 13 July 2006, not yet reported.

³ Article 81(2) states that “[a]ny agreements or decisions prohibited pursuant to this article shall be automatically void.”

b) Injunctive Relief

Even more than in cases of violations of Article 81, the effectiveness of Article 82 requires an efficient system of injunctive relief against abuses of dominance at an early stage. The experience of German competition law in cases of abuse of a dominant position, and especially of a position of “superior” market power below the threshold of dominance, is an example of very efficient control of abuses at an early stage by means of injunctive relief granted by the courts. Injunctive relief should not require that the abuse of a dominant position has already occurred if it is imminent. Nor should it be necessary to show that damages have already been caused, or to establish fault on the part of the dominant firm. For an efficient application of Article 82 it is also helpful to have the possibility of obtaining preliminary injunctions, provided that, if the court in the ordinary procedure subsequently decides not to confirm such an injunction, the plaintiff compensates the defendant for damages suffered as a consequence of the preliminary ruling.

c) Claims for Damages

Private enforcement of claims for damages in cases of infringements of Article 82 is as important as in the case of infringements of Article 81. However, plaintiffs are faced with even greater difficulties as regards access to evidence and satisfying the burdens of proof with respect to:

- the existence of dominance;
- the abuse of dominance;
- the existence of damages and the amount of claims;
- the causal link between the abuse of dominance and the damages; and
- fault.

For an efficient private enforcement of Article 82, it is important to establish a reasonable system of rebuttable presumptions or rules that shift the burden of proof.

d) Stand-alone and Follow-on Actions

It follows from the clandestine character of cartels that most private enforcement against infringements of Article 81 has been and very likely will continue to be follow-on actions after a cartel has been detected by competition authorities, in particular as a consequence of successful leniency programmes. By contrast, infringements of Article 82 are not normally clandestine acts. The abusive practices of dominant firms are committed in the open marketplace,

and their economic consequences are immediately relevant for competitors, purchasers, suppliers and final customers. It is therefore very likely that an efficient system of private enforcement of Article 82 will lead to more stand-alone actions compared to the field of Article 81. Such stand-alone actions, in turn, can be expected to relieve the competition authorities of their workload to a greater extent than actions in connection with Article 81. The benefits of efficient private enforcement of Article 82 should encourage efforts to enhance such enforcement, notably by means of workable guidelines. They also underline the need to introduce rebuttable presumptions or workable rules for shifting the burden of proof, provided such procedural devices are economically reasonable.

3. Standing

The *Courage* and *Manfredi* judgments provide useful guidance for purposes of defining who is entitled to initiate a lawsuit in cases of violation of Article 82. The following rules can be established:

a) Actual Purchasers/Suppliers

Abusive prices or tying and bundling practices are directly aimed at actual purchasers and/or suppliers. As the Court stated in *Courage*,⁴ and as was confirmed more recently in the *Manfredi* judgment,⁵ *any individual* suffering losses from the violation of the competition provisions is entitled to claim damages provided that there is a causal link between the abusive practice and the loss suffered. Consequently, actual purchasers and suppliers have sufficient standing to bring actions against abuses of dominant firms.

b) Potential Purchasers and Suppliers

In cases of abusive refusals to supply, there is no question that the party requesting the supply has sufficient standing to claim damages or to initiate an action for injunctive relief. It is especially in these cases where injunctive relief may become an important means for the private enforcement of Article 82.

c) Actual or Potential Competitors

In cases of exclusionary abuses, predatory pricing, single branding, rebates, or tying and bundling, the standing of actual or potential competitors has to be

⁴ *Supra* note 1, para. 24-26.

⁵ *Supra* note 2, para. 61.

decided. Again, under the *Courage* and *Manfredi* judgments, there is no doubt that actual or potential competitors have sufficient standing for private enforcement, namely as regards applications for injunctive relief. In these cases, the question is whether a plaintiff has sufficient standing in a case where the abuse of the dominant position refers to a market other than that in which the plaintiff is active. For example, the German courts have ruled that standing is not limited to participants on the dominated market but may also extend to participants on “third markets” if a causal link between the allegedly abusive behaviour and the negative impact on competition in the third market can be established.

d) Purchasers/Suppliers of Actual Competitors

Whereas the above cases seem relatively easy to assess, the question is whether purchasers and suppliers of actual competitors which are only *indirectly* affected by the abusive practices of the dominant firm have sufficient standing. It follows from the *Courage* and *Manfredi* judgments that the standing of such purchasers cannot be ruled out. In these cases, the “passing on” defence problems arise if the direct purchaser or competitor also claims damages.

4. Causation

In order to establish that the abusive practices have caused losses, the plaintiff has to provide sufficient evidence that the defendant’s behaviour was the relevant cause for such losses. In rapidly changing market situations this may put a difficult burden of proof on the plaintiff. This is especially so if the plaintiff’s business has collapsed and the plaintiff alleges that this collapse was caused by the defendant’s abusive behaviour. A defence to be expected in such cases will point to the plaintiff’s own inefficient business decisions. In cases where the plaintiff alleges to have been deterred by the dominant firm from entering into a certain market, claiming the loss of anticipated profits, the burden of proof includes a demonstration of the plaintiff’s preparedness to enter the market in question, given that there may be many other reasons why an operator chooses not to enter a market.

5. Calculation of Damages

The methods of quantifying damages may differ across cases concerning the various forms of abusive practices:

a) Abusive Prices

In the case of abusive prices, direct purchasers may quantify their damage by calculating the difference between the abusive price and the hypothetical, “but for” price. Here the same difficulties as in cases of infringements of Article 81 are bound to arise. The “before and after” method compares prices before and during the infringement, while the “yardstick” approach compares the prices in the market affected by the abusive practices to similar but unaffected markets. All methods show deficiencies if market conditions are unstable or if markets are too different to isolate the effect of the dominant undertaking’s practice. A cost-based method would calculate the dominant undertaking’s per-unit cost of production, adding an appropriate profit margin. It goes without saying that the establishment of an “appropriate profit margin” may be highly controversial.

b) Tying and Bundling

In cases of abusive tying and bundling, the damage may be calculated by reference to the price for the unwanted products or services, or by reference to that price plus additional losses suffered due to reduced sales when the buyer is induced to buy fewer units of the wanted goods. If the buyer is a competitor, the damages could be calculated by referring to the losses of profits incurred due to the restricted demand for its product.

c) Predatory Pricing

In cases of predatory pricing, competitors may lose market share and sales, and it may be eventually driven out of the market. Damages sustained by such competitors would have to be calculated on the basis of lost profits.

d) Single Branding and Rebates

Where the abuse takes the form of single branding or an unlawful rebate scheme, the dominant undertaking’s competitors lose market share and profits because the purchasers in the downstream market will divert their purchases away from the competitors and towards the dominant undertaking. Damages will therefore be calculated as the difference between the profit made during the period of the rebate scheme and the likely profit which could have been made in its absence.

e) Refusal to supply

In the case of a refusal to supply, the undertaking which has been denied access to products or services will presumably request injunctive relief and must therefore establish that the criteria under which the defendant must grant access are satisfied. This can be substantiated by referring to the access conditions that have applied to third parties. Where damages are sought, the basis for the calculation would be the loss of profits during the period in which access has been abusively denied.

f) Margin Squeeze

In abusive “margin squeeze” cases, a vertically integrated dominant firm supplies third parties active on the downstream market and uses its dominance in the upstream market by setting prices in a way that renders downstream rivals’ activities unprofitable. The plaintiff must establish its damages by calculating the difference between its actual profit margin and its hypothetical margin.

6. Joint and Several Liability

Joint and several liability could only arise in cases of collective abuses of joint dominance, which may be rare in practice.

II. Impact of the Draft Guidelines on Private Enforcement of Article 82

In assessing the impact of the (future) draft guidelines on private enforcement, the simple question is whether the guidelines make private enforcement easier or not. Having regard especially to the important role of private enforcement in fighting against abusive practices at an early stage through injunctive relief, it is doubtful whether the guidelines will make life easier for plaintiffs.

1. Proving Dominance

In previous court practice, the main evidence adduced to establish dominance has been the defendant’s market share in the relevant market. Although this poses difficult questions, at least a competitor plaintiff normally has access to the relevant facts in order to submit sufficient evidence of the market shares of the allegedly dominant firm. As the courts have established certain guidelines as to which market shares indicate a dominant position, any weakening of the dominance test by giving less relevance to market shares and referring to competitive constraints faced by the allegedly dominant firm makes it more difficult for a plaintiff to prove market

dominance. The more “intangible” the factors that have to be covered by a plaintiff, the more difficult it will be for him to prove dominance. Only actual or potential competitors, who tend to be familiar with market conditions, may be able to meet such a challenge.

The courts could in practice rule that, where the plaintiff submits facts establishing a market share indicative of dominance, the burden of proof is shifted to the defendant. The defendant would then have to show that, in spite of its high market share, there are competitive constraints that exclude such a dominant position. With such an allocation of the burden of proof, the consequences of rendering the concept of dominance more complex could be alleviated.

2. Proving Abuse

a) General Approach

As of now the European Court of Justice has basically applied a form-based approach, however, without *per se* rules for all forms of possible abusive conduct. It goes without saying that this approach is advantageous for a plaintiff. If a certain type of conduct is generally regarded as harmful and therefore abusive, the burden of proof that there may be a justification for the behaviour rests with the defendant.

In its future guidelines, the Commission intends to move away from a strict form-based approach to an effects-based approach. The new approach concentrates on whether the conduct by the dominant firm results primarily in benefits or in harm to consumers (“consumer welfare balancing test”). The conduct will only be regarded as abusive if the disadvantages outweigh the advantages of the alleged abuse, which may take the form of lower prices, improved quality or improved total welfare from cost-savings. It goes without saying that such an effects-based approach makes life more difficult not only for the competition authorities (which, however, have ample means of investigating market conditions) but especially for private plaintiffs who in most cases will not have access to the facts necessary for the overall assessment and who, in most European jurisdictions, have no procedural means such as discovery to collect the necessary information.

b) Welfare Balancing Test and Burden of Proof

The disadvantages of the effects-based approach could be avoided by appropriate rules concerning the burden of proof. If the alleged abusive behaviour objectively increases the dominant firm’s market power in the first

instance, the burden of proving that the disadvantages for consumers are outweighed by efficiencies clearly should shift to the defendant. This rule would be in line with the rationale of Article 2 of Regulation 1/2003, under which the undertaking claiming the benefit of an exemption under Article 81(3) bears the burden of proving that the conditions of that exemption are fulfilled. It makes sense to apply this principle by analogy for purposes of establishing whether a prima facie case of abuse may be rebutted.

c) Establishing the Counterfactual and its Effects

As already mentioned, the new approach for the assessment of abuses requires the plaintiff not only to submit evidence of the behaviour allegedly distorting competition but also to analyze its anticompetitive effects. In comparison to the counterfactual, references to “realistic alternatives in the light of standard industry practice” are of no great help. There may already be doubts as to what constitutes “standard industry practice”. The closer the standard (and also abusive?) industry practice is to the actual conduct of the allegedly dominant undertaking, the less likely it is that the conduct will be found to increase the dominant firm’s market power.

The difficulties associated with defining the counterfactual will clearly increase the factual burden on private plaintiffs in Article 82 cases.

Those difficulties will increase if the *thresholds for the likelihood* of the conduct to produce consumer harm are increased. In cases of injunctive relief, only an *ex ante* likelihood can be a practical test in most cases. The thresholds for the assumption of likelihood of consumer harm should not be raised higher than those already established by the Community Courts and applied, for example, in the *BA/Virgin* case.⁶

The same applies to the time-frame of the analysis. To require a demonstration of negative effects well into the future would make a plaintiff’s task still more difficult. In practice, only foreseeable effects can be taken into consideration. In proceedings before a court, long-run effects are very difficult to evaluate, and consequently they may be discounted or disregarded.

⁶ Case T-219/99, *British Airways v Commission* [2003] ECR II -5918.

d) Efficiency Justification

Applying the general principles of Article 2 of Regulation 1/2003, there should be no doubt that the defendant must prove a sufficient likelihood of pro-competitive effects for the consumer.

e) “As Efficient Competitor” Screen

For price-based abuses, the Commission introduces the “as efficient competitor” screen. Only conduct which would exclude an “equally efficient competitor” is regarded as abusive. An “as efficient competitor” is a hypothetical competitor having the same costs as the dominant firm.

It goes without saying that, for a plaintiff in a private action, this test is difficult to meet. At the outset the plaintiff needs to have reliable information on the pricing conduct and the costs of the dominant undertaking. For that purpose, according to the Commission, both the revenues and costs of the dominant undertaking are relevant. In practice, a plaintiff may have access to information on the dominant undertaking’s revenues, but rarely on its cost structure. It must be emphasized that the rules of civil procedure in most Member States of the Community are very restrictive as regards granting access to information which constitutes business secrets of another undertaking.

The reference of the Commission to the cost structure of “apparently efficient competitors”⁷ will not make the plaintiff’s task any easier, as he will not have access to information concerning either the cost structure of the dominant firm or the cost structure of other competitors. Nevertheless, a competitor could try to use its own cost structure, although this would beg the question of whether it is in fact an “efficient competitor”.

The basic question which the Commission identifies is whether, under the “as efficient competitor” screen, all competitive advantages of the dominant firm have to be compared to its competitors, including benefits from network effects and information asymmetries, better access to financing or better economies of scale. The consequence of taking into account such competitive advantages would basically mean that only a “clone” of the dominant firm would qualify as an “as efficient competitor”. This would have

⁷ See *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses* (Dec. 2005), <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>, paras. 67, 103 and 164.

effects on both the factual and the legal side of price-related abuses. On the factual side, proving the infringement would be more difficult since not only cost-related issues – which are already difficult enough to establish – come into play, but also “intangible” issues difficult to measure objectively. On the legal side, including all competitive advantages would raise the bar the plaintiff must pass in order to meet the “as efficient competitor” screen.

A solution to part of the problem could consist of shifting the burden of proof to the defendant, at least with regard to the relevance of the other kinds of competitive advantages described above which it enjoys.

3. Impact on Standing

As noted above, according to the *Courage* and *Manfredi* judgments, national law must entitle any individual to claim damages for losses suffered as a result of violations of EC competition law, including Article 82. The focus of future guidelines on consumer harm cannot affect the interpretation of EC law by the Court of Justice. Nevertheless, the guidelines may have *de facto* consequences, and this also applies with respect to standing. The more remote a potential plaintiff is from the market, the more difficult it will be, e.g., for an indirect purchaser or the purchaser of goods from a competitor, to substantiate a complaint based on Article 82.

4. Impact on Fault

National law may require fault on the part of the defendant in connection with a claim for compensation of damages, whereas fault is normally not a condition for injunctive relief ordering the dominant firm to cease and desist from its abusive behaviour.

It goes without saying that the more “good faith” defences against alleged infringements of Article 82 are open to a defendant in an Article 82 damage case, the better his chances are of “excusing” his behaviour by referring to “reasonable” advice received from, e.g., economists indicating that the behaviour does not violate Article 82, thereby excluding fault.

5. Causation and Damages

The difficulties in defining the counterfactual, which have been set out above, will also have consequences for the establishment of causation and of the amount of damages. Defendants could bring forward the argument that damages should be quantified by reference to the losses that the plaintiff would have suffered if the defendant had chosen to undertake the cause of action which was the least costly or most beneficial for the defendant, assuming that both would have been lawful. The

court would have to establish a hypothetical course of action in order to decide on the causation issue and on the amount of the damages claimed. The reference to a counterfactual “realistic pricing scheme” could also reduce the amount of damages to be claimed by a plaintiff in comparison to a counterfactual scenario of “no rebates at all”.

The “as efficient competitor” screen will have an especially serious impact on the amount of damages which the plaintiff will be able to claim. Since damages have to be assessed by using the “but for” scenario, the present situation takes into account the scenario the plaintiff would have been in but for the infringement. If the plaintiff already competed on the market before the allegedly abusive behaviour, the court can compare the revenue gains by the claimant pre-infringement and during the infringement period. This information is usually easily available to the plaintiff. This approach will significantly change with the application of the “as efficient competitor” screen. If the plaintiff successfully establishes dominance, abuse and causation, it is foreseeable that the defendant will refer to the “as efficient competitor” screen also with regard to the calculation of damages. The benchmark of the damages suffered by an equally efficient competitor will certainly limit the amount of damages to be claimed by a plaintiff.

III. Conclusion

Under the new approach to the application of Article 82, which is based on effects and on harm to consumers, the arsenal of defences of the dominant undertaking as a defendant will be enlarged. It will also be more difficult for a plaintiff before initiating a lawsuit to ascertain whether the claim will ultimately be successful, since the effects-based approach requires the provision of information and a degree of economic analysis based on hypothetical assumptions and scenarios. It is clear that, compared to a form-based approach, an economic approach increases the difficulties for plaintiffs and may discourage private enforcement. To a certain extent, these effects can be reduced by developing reasonable rules for shifting the burden of proof based on sound economic findings.