Madrid Competition Litigation Seminar

MCLS24 - CONCLUSIONS

The fifth edition of the Madrid Competition Litigation Seminar took place on 6th and 7th May 2024 at the San Pablo CEU University Madrid campus, organized by Hitchings & Co., under the direction of the MCLS Steering Committee, in collaboration with the San Pablo CEU and with sponsorship by Compass Lexecon and Burford Capital. The seminar was attended by **140 delegates** from **12 European countries**, including judges, regulators, academics, experts, funders, in-house counsel and private practitioners specialized in antitrust litigation.

MCLS24 has provided a valuable opportunity to consider and address key institutional, procedural and substantive challenges in antitrust private enforcement, in particular in an era of mass litigation and collective actions. **We wish to thank** all the participants and speakers for their invaluable contributions.

The key conclusions from MCLS24 can be summarised as follows:

Civil procedure and EU law

- Procedure is key to the effective and efficient resolution of complex competition claims across different jurisdictions and to ensuring a satisfactory level of quality and consistency in the adjudication of EU competition law matters.

- The procedural autonomy of the EU Member States is framed and influenced by EU and comparative law, particularly in questions like access to evidence and disclosure or case management.

- This relationship and reciprocal influence between EU and national procedural systems gives rise to a fascinating process of convergence between different European civil traditions; one which we are already witnessing. Courts, indeed, share common challenges. We are thus faced with a type of litigation which, arising in different Member States, presents the courts and the administration of justice with common challenges. Inter-jurisdictional and inter-disciplinary discussion contributes to fomenting a common legal culture and achieving these common goals. Initiatives like the ELI/Unidroit Model Rules, the AECLJ, EU competition law training programmes or conferences like MCLS all play a useful role.

Jurisdiction and court specialization

- The specialization and adequate resourcing of competition tribunals is essential in ensuring the achievement of the goal of effective, efficient and consistent resolution of private antitrust claims. The experience of specialized court models, notably the Competition Appeal Tribunal in the UK or the Competition, Regulation and Supervision Court in Portugal, has been positive. The number of competent Spanish courts (over ninety currently) should, accordingly, be reduced.

- Court specialization and centralization will avoid what some perceive as certain negative aspects of forum shopping. This will have to be balanced with the legitimate freedom of parties to choose where and whom to sue -in cases of joint and several liability- within the possibilities recognised to them by procedural and substantive law.

- In order not to lose the benefits of the specialization already achieved over the last twenty years in Spain, subject-matter jurisdiction for collective actions relating to competition law should be attributed to the Commercial Courts in the forthcoming Spanish Collective Actions Law, and not to the ordinary Civil Courts of First Instance as currently contemplated in the draft before Parliament.

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Case management and party cooperation

- The active role of judges in case management is crucial to ensure an effective and efficient resolution of competition disputes, which are characterised by their technical complexity. This need will be particularly accentuated in the context of collective actions. The adequate interpretation and application of procedural rules, taking into account the demands of EU law and the special demands of substantive law and claims in this area, is necessary to achieve the 'flexibility' and management required for the prosecution of these complex disputes. Judges are called to adjust their "mindset".

- Case management measures being trialled in the UK to streamline mass litigation include: "umbrella proceedings" to address an issue common to connected claims (such as, pass-on), "issues based" proceedings organized so as to adjudicate multiple claims on an issue-by-issue basis, or test claims.

- The parties' duty of good faith in procedural conduct (a principle, for instance, of Spanish procedural law) requires, in complex litigation of this sort, that parties collaborate among themselves and with the court. Such collaboration should be directed to achieving the goal of effective justice and avoiding procedural abuses. It should not be confused with the parties' entitlement to defend their interests and rights fully and effectively. Such collaboration may extend, for instance, to the use of procedural agreements, or mediation, as tools to streamline, or resolve, disputes more efficiently.

Transparency and open justice

- The transparency of procedural processes and judicial rulings, both within individual countries and across jurisdictions, contributes to consistency in the resolution of cases and the development of know-how. This requires the prompt publication of all relevant rulings. There does not currently exist an adequately representative database of competition law court rulings in Europe.

- It was announced at MCLS24 that, in order to address this problem, the AECLJ will shortly launch a new database of competition law judgments in Europe. The database will include summaries and will be searchable. It is hoped that existing legal obligations on courts to notify judgments (e.g., to the national competition authority in Spain) will permit the adequate supply of decisions to that and other databases.

Litigation funding

- The funding of the costs (and the insurance of the risks) of litigation by funders (and insurers) has become a fact of competition litigation in Europe. It is explicitly contemplated in collective action legislation (including the draft Spanish law) and is already the subject of some judicial rulings around Europe.

- Far from being a threat to the administration of justice, funding can be an effective tool for facilitating access to justice. Its availability enables access to justice for litigants who might otherwise lack the financial means to bring complex legal actions or have no incentive to take action when the value of individual claims is disproportionately low.

- At the same time, it is necessary to foster a proper understanding of funding mechanisms by the courts, which should adopt a balanced and cautious assessment of them to ensure that the interests of the administration of justice are adequately served. In this regard, it is advisable to ensure an appropriate level of transparency about the role of funding in the process and, in general, to adopt mechanisms to create an atmosphere of trust between all those involved (funds, parties, associations and counsel).

Quantification of collective harm

- Collective actions are an appropriate means to articulate claims for redress arising from anti-competitive wrongdoing affecting a plurality of consumers. In Spain, the current draft law on collective actions for the protection of consumers' rights and interests includes competition law infringements within its objective scope.

- As the most advanced European case law testifies, the quantification of collective damage raises new legal questions. Is it necessary to quantify the concrete damage suffered by individuals or is it possible to calculate an aggregate damage to the market? To what extent does the compensatory principle apply?

- Depending on the circumstances of the case, the final distribution of damages awards may involve the application of different criteria to the quantification of the damage and, in addition, different criteria for identifying consumers who can claim damages and the evidence they should present. Consideration should also be given to the question of how undistributed funds should be allocated; e.g. whether they should be returned to the defendants, destined to access to justice foundations, etc. In some national systems, this matter is already determined law.

- In cases of mass litigation - individual actions by a group of affected parties - the criteria for quantifying harm may, in practice, not be so different from those to be applied to a proper class action. Indeed, the adoption of similar approaches may be appropriate in parallel cases where the issue to be resolved concerns the effects on the market of the same infringement and the evidence is essentially the same. In such circumstances, it may be possible and advisable to orient the handling of individual proceedings to a more cohesive procedural approach (e.g. through the coordination of proceedings or of disclosure exercises), provided procedural rules allow, or the parties so agree, and without prejudicing the rights of defence and the principle of proportionality.

Relationship between NCA decisions and private litigation

- Unlike Commission decisions, the decisions of National Competition Authorities (NCAs) do not have binding effect under EU law until they become final. This raises questions around their probative value in private litigation, the operation of limitation periods and rights of access to the file pending their finality.

- Depending on the applicable administrative law principles and the scope of judicial review in each country, NCA decisions may enjoy a presumption of validity and/or be *prima facie* evidence of anti-competitive behaviour, even if they have been subject to judicial challenge.

- The jurisprudence of the CJEU indicates that, as a matter of EU law, NCA decisions should be granted probative value and that parties should be able to access evidence on the administrative file in private proceedings, pending the decisions becoming final and binding.

- Proper and coherent coordination of the complementary spheres of public and private enforcement is important for the effective application of EU competition law. This requires a nuanced and considered approach on the part of national courts.

Digital markets litigation

- Private competition litigation in digital markets is of increasing relevance in Europe. This area raises a whole series of new challenges of both a procedural and substantive nature and major questions about the role and scope of competition law.

- Such cases are frequently not based directly or entirely on prior regulatory decisions and may require the assessment of complex factual and legal issues by national courts (such as the definition of relevant markets or the determination of counterfactual scenarios in fast moving tech markets). Lessons can be learned from the experiences of both regulators and national courts addressing this new wave of cases around Europe and internationally.

- It is important consider to what extent local procedural regimes and practice, in particular collective action and mass litigations case management mechanisms, may need to be adapted to cater for the challenges this new area poses.