

An Indirect Purchaser as an Eligible Person to Claim the Cartel Damages

1. Introduction

Considering the large scope of damages resulting from the violation of the competition rules, it is likely, that the number of private antitrust damage actions will keep increasing in the nearest future in Georgia. The key objective of this study was to investigate the legal status of the indirect purchaser of cartelized goods or services in the process of claiming the cartel damages. It is also to be mentioned that, there is not any perfect and complete substantive or procedural rules with respect to the cartel damages in Georgian Legislation. The article gives respective analysis of this issue and provides recommendations to solve these legislative problems.

The issue of private damage actions is of a higher importance in the reality of European Union. Hence, it is not a surprise that the case law of European Court of Justice and the practice of respective European Competition Authorities embrace the countless decisions that can serve as an example for the reformation of Georgian competition legislation in terms of private

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damage actions. This paper gives an appraisal of the recent developments of private damage actions of indirect purchaser in Europe. Based on these comparative analysis and argumentations the conclusion develops a set of proposals and recommendations in terms of amendments to the Georgian competition legislation that will be able to facilitate the individual damage actions of indirect purchasers in Georgia.

If an undertaking infringes competition rules, it shall traditionally assume the possibility of sanctions from the public law. The most important of these are fines that may be imposed by the competition authority. However, those, who conduct the anti-competitive activities, are not only faced with the probability of fines and other sanctions deriving from public law. Furthermore, they should also take into consideration the court actions brought by the private individuals, who have suffered losses as a result of an anti-competitive conduct. Victims of such infringements could be competing undertakings, direct and indirect purchasers, final consumers, etc. Following the purpose of the preceding article, only the peculiarities of the indirect purchasers' claim is considered as the main subject of this study. Noteworthy is also the fact that the role of indirect purchaser claims is also of a crucial significance to achieve the completely functioning private enforcement of competition law.

Following the objectives stated above the second part of the preceding article attempts to provide with the general overview of cartel damages. The third part investigates the difference between the damage claims of direct and indirect purchasers. The fourth part provides profound discussion to the peculiarities of the indirect purchasers' right to the compensation for the cartel damages.

2. General Overview of Cartel Damages

The right to claim the compensation for cartel damage is one of the basic and fundamental rights granted to the victims adversely affected by cartel. Victims of competition law infringements are usually entitled to claim the damages and it is of crucial importance to enable this right also under Georgian Competition Legislation in order to exercise and enforce the competition policy more effectively. In addition, the lack of special regulations in this

regard can lead to differences in treatment and to less foreseeability for the victims as well as the defendants, i.e. to a high degree of legal uncertainty.

With respect to this issue, it is to be mentioned that Georgian law on competition entails a very general provision, which provides the right of Undertakings, or other interested parties, to apply to a court, relevant authorities or officials and demand the elimination of a violation of the Georgian competition legislation and compensation for damage caused by such infringement, as well as appeal the decision of the Agency to a court (Art. 332 of Georgian Law on Competition). It appears that this rule has very wide and general character and does not give any special references to the legal ways of achieving the proper compensation of the damage. Furthermore, on the basis of this rule, it is also very hard to determine the possible persons that are able to bring such kind of private actions. Thus, this provision creates lots of problems and troubles in terms of its practical use.

It is clear that Georgian Competition Legislation does not entail any effective legal vehicles for the compensation of cartel damages. The absence of the proper regulation and legal framework does not guarantee full protection of the consumer interests. Noteworthy is also the fact that in Georgia this issue has not yet become the subject of any judgment of higher court as well.

The legal opportunity for individuals to claim the cartel-related damages is envisaged by the most of the EU member states. One of the most famous judgments of ECJ on the case “Courage and Crehan” was the main incentive for the most of these states to elaborate the significant amendments to the Competition legislation.

In “Courage and Crehan” the court noted that “any individual can rely on a breach of Article 85(1)¹ of the Treaty before a national court...”² Furthermore, the court also stated that „the full effectiveness of Article 85 of the Treaty 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 contractor by conduct liable to restrict or distort competition.”³

¹ Article 101 of current addition of TFEU.

² ECJ Case C-453/99, *Courage and Crehan*, ECLI:EU:C:2001:465, Para. 24.

³ ECJ Case C-453/99, *Courage and Crehan*, ECLI:EU:C:2001:465, Para. 26.

3. Difference between the Damage Claims of Direct and Indirect Purchasers

It is beyond of the shadow of the doubt that an anti-competitive agreement causes damages to the interests of final consumers or other purchasers. In this regard, it is important to make distinction between the direct and indirect purchaser of particular goods or services. Direct purchasers are the persons that acquire particular goods and services directly from the cartel members. On the contrary, indirect purchasers acquire cartelized goods and services not from the cartel members, but they purchase them from direct purchasers or from other person on the downstream markets.

In principle, due to the cartel agreements, price competition is limited and reduced. Therefore, the prices obtained through the cartel are higher than the market prices that can be achieved under the competitive environment. Undertakings, that do not have to compete on the merits due to the cartel, will not use their Price reduction margins and the prices remain higher. It means that the direct consumer is forced by cartel to acquire particular goods and services with the higher prices that harms their interests and causes appreciable material damage to them.

But it is also to be taken into consideration that any overcharge deriving from the cartel agreements will be passed on further to the lower levels of the distribution chain and will end up at the final customer.⁴ Passing on typically occurs through the price increase on the downstream markets by the direct purchasers. It means that the incremental costs will be compensated when the direct purchaser (2nd market level) sells the cartelized goods or services with higher prices to his own customers – indirect purchasers (3rd market level).

It corresponds to the interests of the cartel members to show that the plaintiff (direct purchaser) did not absorb the overcharge and instead passed on his higher costs to his customers by charging them higher prices.⁵ It means that they can invoke as a defense that the loss of the direct purchaser has

⁴ *Whish Richard*, Bailey David, Competition Law, 7th edition, Pg. 300.

⁵ *Pollock Earl*, Automatic Treble Damages and the Passing-on Defense: The Hanover Shoe Decision, 13 Antitrust Bull. 1183 Pg. 1186.

been passed on to the downstream markets and thereby the direct purchaser has not suffered any loss or harm. In the legal literature, this approach is known as the “passing-on defense.” The milestone of this approach is the finding that the undertakings that increase their prices through cartel agreement cause damage to purchasers or to final consumers who were obliged to buy the cartelized goods and services at a higher price.⁶

In this case, the burden of proof is transmitted from the direct purchaser to the defendant (cartel member). In other words, with respect to the excessive price damage, direct purchaser is only obliged to prove that the fixed price (the cost which was necessary to purchase the cartelized goods or services) exceeds the competitive price of that goods and services. In contrary, the perpetrators of the competition law infringements, that are subject to compensation claims are committed to prove that the overcharged prices were passed on to the downstream markets, to indirect purchasers (passing-on defense) and that they have not suffered the damage due to the cartel.

The passing on defense may have the two-fold effect on the sequence of events: First of all, if the defendant (cartel member) is capable of to prove, that the amount of the overcharge had been passed on, then the plaintiff did not suffer the loss due to the overcharge and his claim should be dismissed. Secondly, even if the defendant shows that the part of the overcharge had been passed on, the plaintiff’s damages should be reduced proportionally to the extent that his customers absorbed the overcharge.⁷

Furthermore, the German federal court has also stated that the benefits to the injured party arising from a passing-on of the cartel-related overcharge prices on its customers should be taken into consideration in order to define the actual loss suffered by him. The burden of proof of the existence of all the necessary prerequisites for the passing-on lies with the infringer.⁸ Noteworthy is also the fact that, the judgment entails the finding that the passing on

⁶ *Erdem Ecuement*, Passing-on defense and indirect purchaser rule in compensation claims arising from competition law. <http://www.erdem-erdem.av.tr/publications/newsletter/passingon-defense-and-indirect-purchaser-rule-in-compensation-claims-arising-from-competition-law/> (27.07.2018)

⁷ *Pollock Earl*, Automatic Treble Damages and the Passing-on Defense: The Hanover Shoe Decision, 13 Antitrust Bull. 1183 Pg. 1186.

⁸ BGH Urteil v. 28.06.2011, Kartellsenat_KZR_75-10_KORE304172011 – „*ORWI*“,“ Para. 64.

defense is excluded, when the decrease of the amount of the harm is caused only by the special commercial skills or achievements of the direct purchaser and has nothing to do with the cartel agreement.⁹ For such cases applies the principle – favorable resale due to the own performance is not to be considered as decrease of the harm.¹⁰

4. Particular Aspects of Indirect Purchasers' Claim

As we have mentioned in the previous subchapter, cartel members can argue that the overcharge has passed on from the direct purchaser to the downstream markets. It means that, the plaintiff did not absorb the illegal overcharge, but rather passed it on to his own customers (indirect purchasers) in the form of higher prices.¹¹ In this case, it is considerable, that indirect purchasers should be able to enjoy the right to bring an action for compensation against the cartel members as well, for the damage that has been passed on to them. This broad concept of the damage actions with respect to the preceding issue derives also from the case law of the European Court of Justice too. The latter stated that the full effectiveness of the Article 101 (1) TFEU would be adversely affected if not everyone could claim the compensation for the damage caused by an anti-competitive agreement, or may have arisen through other conduct.¹²

For the purposes of the preceding article, it is to be determined, what kind of damage can suffer indirect purchaser due to the cartel. It is clear that the restriction of supply of goods and services, market sharing or price fixing by means of cartel agreement has a regular effect in the form of higher prices and a lower diversity of goods and services for direct purchaser.¹³ The latter (2nd market level) in turn, usually tries to transmit the increased costs to its customers (3rd market level). If he manages to do so, the conditions on the

⁹ BGH Urteil v. 28.06.2011, Kartellsenat_KZR_75-10_KORE304172011 – „ORWI“, Para. 60.

¹⁰ Oetker, Münchener Kommentar zum BGB, 5. Auflage, § 249 BGB Para. 263.

¹¹ *Howat Bruce* the Passing on Defense in Treble Damage Antitrust Suits, 1969 U. Ill. L.F. 377 Pg. 377.

¹² ECJ Case C-453/99, “*Courage and Crehan*,” ECLI:EU:C:2001:465, Para. 26; EuGH Urteil vom 13.07.2006, C-295/04 – C-298/04, Rz. 60 – *Manfredi*, EuZW 2006, 529.

¹³ ECJ Case C-204/00, “*Aalborg Portland A/S*,” ECLI:EU:C:2001:465 Para. 53.

lower levels of the markets will also be affected by the price level deriving from the cartel and the cartel damage will emerge on the lower market levels of the distribution chain (3rd market level) for the indirect purchasers as well.

It is also to be born in mind that a lot of obstacles and legal problems will step out if the indirect purchasers are granted the right to claim the cartel damages. The potential problem is, for example, that the number of the claimants will increase significantly. Another trouble is to determine precisely whether and in what extent the damage was passed on.

However, the German Federal Court has stated in its very popular “ORWI” judgment, that the obstacles mentioned above do not justify the limiting of the circle of claimants to direct purchasers. BGH justified the eligibility of indirect purchasers to claim the compensation, by stating, that the harmful effects of a cartel or other anti-competitive conduct prohibited by Article 101 TFEU are not often limited to the directly connected after market, but it is also to be taken into consideration that the consumers on the other downstream market levels are also economically affected and restricted in their selection and decision options.¹⁴

Another key challenge is also the risk of multiple liabilities for the same damage. The latter means that if in the first litigation, initiated by the direct purchaser, the cartel member is not able to prove the passing-on of the damage to the downstream market, the direct purchaser will be awarded full compensation. In contrary, in the second litigation, commenced by the indirect purchaser, if the latter shows that the overcharge was passed on, he will be awarded full compensation as well. Thus the defendant will face the twofold liability for the same overcharge.¹⁵ On the other hand, if the price overcharge or extra costs are passed on to the downstream markets, the direct purchaser is already compensated and a reward of damages will lead to the double compensation. In other words there will be the case of unjustified enrichment in favor of the direct purchaser while if the latter did not absorb the illegal overcharge, but rather passed it on to his own customers in the form of higher prices it means that he has suffered no harm.¹⁶

¹⁴ BGH Urteil v. 28.06.2011, Kartellsenat_KZR_75-10_KORE304172011 – „ORWI,“ Para. 26.

¹⁵ *Berggren Malin* the implementation of passing-on defense into EU Competition Law, Faculty of Law, Lund University. Pg. 41.

¹⁶ *Howat Bruce* the Passing on Defense in Treble Damage Antitrust Suits, 1969 U. Ill. L.F. 377 Pg. 377.

Noteworthy is also the fact that the main challenge for indirect purchasers and final consumers in terms of the litigation proceeding is to prove the causal link between the cartel agreement and the actual harm they've suffered, since the causality is the key precondition to achieve the compensation. In the other words, the price overcharge deriving from cartel agreement is to be adequate for the increasing prices on the downstream markets.¹⁷

5. Conclusion

As we have seen above the case law of the European Court of Justice pays a high tribute to the rights of the indirect purchasers and final consumers to bring the private actions against the perpetrators of the competition law in order to reach the respective compensation and to protect the interests of indirect purchasers. In this regard, it is also to be mentioned that Georgia is the EU associated country. The association agreement highlights the necessity of adequate enforcement procedures for competition law, which in itself could mean the development of effective tools for private individuals to claim the cartel damages. Due to that very reason, it is of crucial significance to carry out the substantial and fundamental reforms with respect to the indirect purchaser rights in this regard. Furthermore, the right of individuals to compensate the cartel damages is of great importance not only for the protection of the victims' interests, but it also serves to the better and more comprehensive enforcement of competition legislation.

It is also important to include the special rule in the Georgian Competition legislations with respect to the principle of passing-on defense. In particular, the burden of proof of the passing-on should be born with the cartel member. As it was mentioned above, the principle, in itself, means that the price overcharge deriving from the cartel is passed-on the downstream markets.

Such kind of transfer of burden of proof is able to make significant difference to the legal position of consumers and indirect purchasers. It will enable

¹⁷ *Füller/Enchelmaier/Kersting/Walzel*, in *Kölner Kommentar zum Kartellrecht*, Band 3 (Europäisches Kartellrecht, Art. 101-106 AEUV, Gruppenfreistellungs-verordnungen), 1. Auflage 2013. § 101, Para. 503.

them to claim the cartel damages easier. Furthermore, this will make the private antitrust litigation more predictable. Without any doubt, this measure will facilitate the private enforcement of competition law and provide a significant guarantee for proper competitive environment.

