

Private enforcement of Community competition law: modernisation and the road ahead

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I – Background

The decentralisation of the enforcement of Community antitrust law set in place by Regulation 1/2003⁽¹⁾ ('the Regulation') envisages enforcement not only by the competition authorities of the Member States, but also a complementary role for enforcement through litigation between private parties before the national courts. When drafting its proposal for the Regulation, the Commission was aware that its monopoly on Article 81(3) represented a major obstacle to more extensive application of the competition rules by national courts.⁽²⁾ The Regulation eliminates the exemption monopoly of the Commission, and as a result national judges will be able to rule on whether Article 81(3) is applicable. Article 6 of the Regulation states that national courts shall have the power to apply Articles 81 and 82 (in their entirety). The elimination of the exemption monopoly and the related abolition of the notification system will stimulate private parties to have more frequent recourse to national courts in actions for damages. Moreover, Article 3 of the Regulation provides that national courts shall apply Community competition law to anticompetitive behaviour which may affect trade between Member States where they apply national competition law to such behaviour. It is anticipated that private enforcement will thus increase as a result of the Regulation.

Indeed, recital 7 of the Regulation explicitly foresees the possibility of private actions for damages for breach of Community competition law. It provides as follows:

National courts have an essential part to play in applying the Community competition rules.

When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States.

The recent Commission Notice on complaints emphasises the complementary nature of public and private enforcement of the competition rules.⁽³⁾ The Notice states that 'the Commission holds the view that the new enforcement system established by Regulation 1/2003 strengthens the possibilities for complainants to seek and obtain effective relief before the national courts.'⁽⁴⁾ Moreover, the notice states that 'public enforcers cannot investigate all complaints'.⁽⁵⁾

The recent case law of the Community courts has also emphasised the importance of enforcement by private parties of Community competition law. In its ruling in *Courage v Crehan*,⁽⁶⁾ the ECJ held that national courts must provide a remedy in damages for the enforcement of the rights and obligations created by Article 81 EC. The Court held as follows:

The full effectiveness of Article [81] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [81(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.

Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert,

(1) Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty, OJ L 1, 4.1.2003.

(2) White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty of 28 April 1999 at para 100.

(3) Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.4.2004, pp 65-77, part II A and B (paras 7 to 18). Cf. in particular para 9: 'Regulation 1/2003 pursues as one principal objective that Member States' courts and competition authorities should participate effectively in the enforcement of Articles 81 and 82'.

(4) *Ibid*, para 18.

(5) *Ibid*, para 8.

(6) Judgment of the ECJ of 20 September 2001 in Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I.

which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community. ⁽¹⁾

The central role of private enforcement to modernisation and the importance of private enforcement as a complementary enforcement mechanism to public enforcement was highlighted by Commissioner Monti in his interview in the recent special edition of the Competition Policy Newsletter ⁽²⁾ and his speech at the European Competition Day at Dublin in April. ⁽³⁾ The Commissioner emphasised that the possibility for victims of anticompetitive behaviour, including consumers, to claim compensation for losses caused by such behaviour would strengthen the deterrent effect of the competition rules and help to create a stronger culture of compliance with, and enforcement of, those rules. The lack of private enforcement in Europe has been identified by commentators as a principle weakness in the EU competition enforcement system. ⁽⁴⁾

II – The advantages of private enforcement

It is anticipated that greater private enforcement of Community competition law would have *inter alia* the following advantages: ⁽⁵⁾

- It would increase deterrence against infringements and increase compliance with the law.
- The victims of illegal anticompetitive behaviour would be compensated for loss suffered.
- Private enforcement is an effective way to deal with certain types of cases, especially those involving a commercial dispute between two parties and those where the claimant has close access to evidence concerning the defendant's business activities.
- The Commission and the national competition authorities do not have sufficient resources to deal with all cases of anticompetitive behaviour.

- Actions before the courts can offer speedier interim relief to undertakings than public proceedings.
- Courts can order the unsuccessful party to pay the successful party's legal costs. An undertaking's legal costs are not recoverable in the case of a complaint to a public authority.
- Private actions will further develop a culture of competition amongst market participants, including consumers, and raise awareness of the competition rules.

III – Successful private action in Europe to date

The case law in Europe showing successful claims for damages for breach of Community law to date is limited. It should be noted though that many actions may be settled out of court and details are rarely public, as secrecy is normally a condition of settlement, so that the small number of known cases may represent only the tip of a much bigger base of litigation.

In the English courts it appears that, prior to the judgment of the Court of Appeal in the *Crehan* case (see below), there had been one action for breach of Community competition law in which infringement has been established, the Article 82 action brought by Hendry and Williams against the snooker world governing body, ⁽⁶⁾ though in that case no damages were awarded. On 21 May this year the English Court of Appeal gave judgment in the *Crehan* case, ⁽⁷⁾ the same proceedings in which the ECJ had established the principle of the availability of damages for breach of Community competition law in an earlier Article 234 reference. The Court overturned the earlier judgment of the High Court ⁽⁸⁾ and found that the claimant was entitled to damages to the amount of just over £130,000. This is the first case in the English courts in which damages have been awarded for breach of competition law.

⁽¹⁾ *Ibid*, paras 26 and 27.

⁽²⁾ Policy Newsletter special edition, 'The EU gets new competition powers for the 21st century'.

⁽³⁾ Speech entitled 'Proactive competition policy and the role of the consumer', Dublin Castle, Dublin, 29 April 2004.

⁽⁴⁾ See for example the interview with Professor (Ordinario) Luigi Prosperetti in *Corriere della Sera*, 19 April 2004 ('*Tra i due Antitrust preferisco Monti*') in the context of the Microsoft case.

⁽⁵⁾ See also para 16 of the Notice on complaints.

⁽⁶⁾ Judgment of the High Court of 5 October 2001 in *Hendry, Williams et al v The World Professional Billiards and Snooker Association Limited*.

⁽⁷⁾ Judgment of the Court of Appeal of 21 May 2004 in *Crehan v Innpreneur* [2004] EWCA 637.

⁽⁸⁾ Judgment of the High Court of 26 June 2003 in *Crehan v Innpreneur et al* [2003] EWHC 1510 (Ch).

In Italy by contrast there does not appear to have been any successful damages actions for breach of Community competition law. ⁽¹⁾

In Germany the only such action which could be characterised as successful was in fact a declaratory action and no damages were awarded. In *British Telecommunications plc. and Viag Interkom GmbH/Deutsche Telekom* ⁽²⁾ the court held that the defendants had acted in breach of Article 81(1) prior to the effective date of the exemption granted to a telecoms joint venture by the Commission and that they could be liable in damages pursuant to Section 823(2) of the German Civil Code in conjunction with Article 81(1) and under Section 1 of the *Gesetz gegen Wettbewerbsbeschränkungen* (GWB). However, no damages were actually awarded because the claimants had only sought before the District Court a declaratory judgment that they were entitled to damages. Subsequently, pending appeal of the proceedings to the Bundesgerichtshof, the claimants withdrew the action following a settlement.

There appear to be more successful damages actions to date in France than in the other principal European jurisdictions. ⁽³⁾ For example, in 1996, in *Eco System/Peugeot*, the Paris Commercial Court awarded damages of approximately € 245,000 to Eco System for losses in its operating results caused by Peugeot's infringement of Article 81 as established by the European Commission in an earlier decision adopted in 1991. The most notable French case to date is perhaps that of *Mors/Labinal*, which concerned the supply of tyre pressure indication systems for aircraft. In 1998 the Paris Cour d'Appel awarded damages of approximately € 5 million to the claimant for breach of both Articles 81 and 82. ⁽⁴⁾ The same court had previously decided, in 1993, that there had been an

infringement of those provisions. ⁽⁵⁾ The Cour d'Appel in its 1993 judgment had decided on liability and ordered the defendants to pay a provisional amount of damages while referring final assessment of quantum to a later hearing.

There are some examples of successful damages actions for breach of Community competition law from other European jurisdictions. In a judgment of the Swedish Supreme Court of 2002, ⁽⁶⁾ the Swedish Civil Aviation Administration (Luftfartsverket) was obliged to repay SAS approximately € 66 million (SKr600 million) and SAS was relieved from paying approximately € 44 million (SKr400 million) to the Luftfartsverket on the basis of a finding by the court of a discriminatory pricing practice on the part of the Luftfartsverket relating to Arlanda airport. ⁽⁷⁾ In the Netherlands, in *Theal BV and Watts/Wilkes* ⁽⁸⁾ the claimant filed a complaint with the Commission and also sued for damages before the national courts. Prior to the eventual adoption by the Commission of a decision finding that the defendants' practice of precluding parallel imports was in breach of Article 81, ⁽⁹⁾ the District Court of Amsterdam decided that the defendants were in breach of Article 81 and awarded damages to the claimant. ⁽¹⁰⁾

IV – Some obstacles to private enforcement

In the *Crehan* judgment, the ECJ gave some potential guidance as to the remedial and procedural conditions for private actions for breach of Community competition law, but there are a number of outstanding questions which remain unanswered and are, at present, left to national law. Some aspects of these issues are outlined below.

⁽¹⁾ There have however been successful actions for damages for breach of national antitrust law in Italy: see *Telsystem/SIP-Telecom* (judgments of the Corte d'Appello of Milan of 18 June 1995 and of 24 December 1996), *Albacom/Telecom Italia* (judgment of the Corte d'Appello of Rome of 20 January 2003) and *Bluvacanze Spa/I Viaggi del Ventaglio Spa et al* (judgment of the Corte d'Appello of Milan of 30 April 2003).

⁽²⁾ [1998] CMLR 114 (Landgericht, Düsseldorf).

⁽³⁾ There are also, as in Italy, recorded successful actions for breach of national competition law before the French courts (see for example the *UGAP/CAMIF* case, judgments of the Paris Cour d'Appel of 13 January 1998 and 22 October 2001).

⁽⁴⁾ CA Paris, 30 September 1998, *Europe*, December 1998, comm. no 410.

⁽⁵⁾ CA Paris, 13 May 1993, *Europe*, July 1993, comm. no 300, upheld by the *Cour de Cassation* on further appeal (Cass Com, 14 February 1995, *Bull IV*, no 48, *Europe*, April 1995, comm. no 146.)

⁽⁶⁾ *Luftfartsverket v SAS* (Case T33-00).

⁽⁷⁾ The repayment remedy in this case may be distinguishable from a pure damages claim.

⁽⁸⁾ Judgment of the Amsterdam District Court of 11 January 1979 (unreported).

⁽⁹⁾ Decision of 19 February 1977 (OJ L 39/19).

⁽¹⁰⁾ Damages were to be assessed in a separate procedure, but because of the defendant's subsequent bankruptcy this never occurred.

Standing

In the case of *Max Boegl Bauunternehmung et al/Hanson Germany*, ⁽¹⁾ the Berliner Landgericht held that purchasers of cement at cartel prices could not claim damages unless they had been individually targeted by a market-sharing cartel. The court reasoned that it was not enough that prices in the market in which the purchasers were buying were affected as a whole by the cartel. A requirement of individual targeting may restrict, in particular, the scope for inter-state actions. Standing under the law of some of the other major civil law jurisdictions, such as for example Italy, also appears to be narrow. It should be noted however that the *Max Boegl* judgment is under appeal before the Kammergericht. ⁽²⁾ Furthermore, the current draft ⁽³⁾ of the 7th amendment to the GWB in Germany, which is intended to amend the GWB in light of EC modernisation, provides that market participants are to be protected by Articles 81 and 82 EC even if they are not directly targeted by the infringing behaviour. In contrast, in the recent *Provimi* judgment, ⁽⁴⁾ the English High Court held that a claimant has standing to sue the subsidiary of a carteliser even where, firstly, the subsidiary implemented the cartel price without knowledge of the cartel, and secondly that claimant made no actual purchase from the subsidiary in question (see further below in relation to the latter point, which also concerns causation).

Discovery

The common law lawyer is under an obligation towards the court to disclose all evidence, both supportive and harmful to his case, ⁽⁵⁾ whereas lawyers in civil law systems are, generally speaking, obliged only to produce to the court those materials which are necessary to prove the case. The civil law lawyer cannot rely on the disclosure obligation on the other party to obtain the evidence needed to prove his case to the extent that the common law lawyer can. This is subject to the power in civil law systems for the parties to apply in certain circumstances to the judge for an order for disclosure of material from the other parties to the proceedings or from third parties. In

this case however, it appears that the order in question often has to be made in respect of pre-identified documents. This is key in limiting the potential for discovery of evidence in such a system. Therefore, the potential claimant in civil law jurisdictions needs to have at his disposal sufficient evidence to satisfy the burden of proof before launching an action, ⁽⁶⁾ whereas the common law system offers more scope for launching actions on the grounds that evidence favourable to the claim might be found during discovery.

Collective actions

Some form of collective action can enable consumers and other parties with a small individual claim to bring an action. Otherwise, such parties may not have sufficient incentive to bring a claim, particularly when set against the possibly high legal costs involved. Class actions as recognised in US procedure are not common in the procedural systems of the Member States of the EU. The key feature of a US class action is that an individual, including a lawyer, can bring a claim on behalf of an unidentified group of plaintiffs. Instead, the principal EU jurisdictions tend to favour, if anything, representative actions brought, in the field of antitrust actions, by consumer associations. Provision to this effect exists for example in the antitrust laws of the UK and Germany. In the UK, consumer associations specified by the Secretary of State can bring actions for damages on behalf of two or more individual consumers before the Competition Appeal Tribunal (the specialised competition court established by the Enterprise Act) on the back of an infringement decision made by a public authority (either the Office of Fair Trading or the European Commission). ⁽⁷⁾ General English civil procedure also offers the Group Litigation Order (GLO) mechanism ‘to provide for the case management of claims which give rise to common or related issues of fact or law’. ⁽⁸⁾

In Germany, the present section 33 of the GWB allows for an action for an injunction to be brought before the courts by ‘associations for the promotion of trade interests provided the association has

⁽¹⁾ Judgment of the Berliner Landgericht of 27 June 2003 (AZ 102 O 134/02 Kart).

⁽²⁾ AZ 2 U 13/03 Kart. It is understood that the hearing is scheduled for November.

⁽³⁾ Draft dated 26 May 2004.

⁽⁴⁾ The judgment of the High Court of 6 May 2003 in *Provimi Limited v Trouw (UK) Limited et al* 2003 EWHC 961 (Comm).

⁽⁵⁾ Civil Procedure Rules (CPR) 31.6 for standard disclosure in English civil proceedings.

⁽⁶⁾ The French *Nouveau Code de Procédure Civile* states explicitly (Article 146(2)) that requests for documents from the other party or third parties cannot be made ‘en vue de suppléer la carence de la partie dans l’administration de la preuve’.

⁽⁷⁾ Section 47B of the Competition Act 1998, as inserted by section 19 of the Enterprise Act 2002.

⁽⁸⁾ CPR 19.10 (Group Litigation Orders are covered by CPR 19.10-19.15).

legal capacity'. The current draft of the 7th amendment would extend the possibility for bringing injunction actions to consumer associations as well. The present section 33 applies strictly only to breaches of German competition law, ⁽¹⁾ but the provisions of the new draft s33 would apply to breaches of EC and national competition law. There is no actual provision for trade or consumer associations to bring damages actions in either the present or the proposed s33 (the UK antitrust procedural rules cover instead damages actions and not actions for injunctive relief). The proposed 7th amendment would though establish the possibility for trade and consumer associations to bring actions to recover the infringer's profits in relation to breach of national and EC competition law, though the associations would have to then transfer the proceeds of these actions to the Treasury. ⁽²⁾

In Sweden, recent legislation ⁽³⁾ provides for different types of collective action, including actions brought by a non-profit-making association that represents consumer interests in disputes between consumers and undertakings, and private actions brought by an individual on behalf of a group. However, other provisions of Swedish law restrict at present the standing of consumers to bring antitrust actions.

Indirect purchasers

The law of some Member States, such as Italy ⁽⁴⁾ and Sweden, appears to limit standing to claimants who can show a direct injury, such that actions by consumers or their representative associations become significantly more difficult to bring. The effect of the German decision in *Max Boegl* (above) would appear to have a similar effect as to standing for consumers. However, it has been argued that under Community law recovery would not be limited to direct purchasers. ⁽⁵⁾

Proving the infringement

Establishing the infringement of Article 81 or 82 can be difficult for claimants. For example, in two notable recent actions before the English courts for breach of Community competition law, *Crehan* (before the High Court) and *Arkin*, ⁽⁶⁾ the judge found that there had been no substantive infringement of Article 81 (*Crehan*) or Article 82 (*Arkin*). However, as noted above, the Court of Appeal in *Crehan* subsequently overturned the High Court, finding that Article 81 had been infringed by the defendant. In doing so the Court of Appeal relied heavily on Commission decisions in different proceedings in relation to the same market and on the Commission's preliminary conclusions in relation to the agreement in question.

Burden of proof

It appears to be the case that discharging the burden of proof can be a deterrent to private enforcement. This is because it can be very difficult for claimants to amass sufficient evidence to prove their claim. ⁽⁷⁾ To help address this problem, in Germany section 20(5) of the GWB puts the burden of proof on the defendant to disprove the abuse in cases of abuse of dominance brought by SMEs where there appears to be a violation 'on the basis of specific facts and in the light of general experience'. The defendant is required to clarify those aspects of its business activities 'which cannot be clarified by the competitor... but which can be easily clarified, and may reasonably be expected to be clarified' by the defendant. This provision applies strictly only to national law. The French system provides for a different mechanism: the ministre chargé de l'économie can intervene to submit observations with a view to helping the claimant establish breach. ⁽⁸⁾ This appears capable of application in proceedings for breach of Community competition law, but does not appear to have been so invoked yet.

⁽¹⁾ See section 96 of the GWB.

⁽²⁾ s34a of the current draft.

⁽³⁾ The Act on Class Actions, 2002:599, which entered into force on 1 January 2003.

⁽⁴⁾ See *inter alia* the judgment of the *Corte di Cassazione* dismissing for lack of standing a consumer action seeking annulment of a bank loan for violation of Article 81 EC (*Corte di Cassazione*, Sez I, 4 March 1999, n 1811). The court held that Articles 81 and 82 protected primarily undertakings and not consumers.

⁽⁵⁾ See the General Report in the 1998 report of the FIDE on the application of Community competition law on enterprises by national courts and national authorities at p 44, referring to the case law of the Community court on the protection of Community law rights by the national courts.

⁽⁶⁾ Judgment of the High Court of 10 April 2003 in *Arkin v Borchard Lines Limited et al* [2003] EWHC 687.

⁽⁷⁾ Compare Article 2 of Regulation 1/2003, which provides that the burden of proving an infringement of Article 81(1) or of Article 82 rests on the party alleging the infringement, while the burden of proving that the conditions of Article 81(3) have been met rests with the party seeking to rely on that provision (i.e. the defendant).

⁽⁸⁾ Article L470-5 Com. Code.

Causation

It can be difficult to attribute loss specifically to the defendant's behaviour rather than to other factors such as a general economic slowdown or even the claimant's own business strategy. In the English case of *Hendry*, it appears to have been difficult for one of the claimants to argue successfully for the existence of damage caused by loss of a business opportunity. ⁽¹⁾ Attributing loss to the claimant's behaviour breaks the causal link and the English court found to this effect (obiter) in *Arkin*. In *Provimi* (above), the court held in relation to causation that selling on the market at a fixed price could be held to have caused loss to a purchaser, even though that purchaser did not purchase from the infringing undertaking in question. The court reasoned that in conditions of competition, the seller could be expected to provide the product at a lower price to the benefit (either direct or in terms of the downward pressure this would have put on prices charged by other sellers) of such purchaser.

Calculation of damages

It does not seem to be the case that the courts of any EU jurisdiction have developed a coherent approach to the quantification of damages in anti-trust cases. National courts appear often to address this issue by turning to the methods of calculating damages available in normal civil proceedings.

Case law of the English courts has indicated a preference for a straight-forward approach to the quantification of damages, rather than opting for sophisticated analysis, such as econometric analysis. In *Arkin* for example the judge stated (obiter) that in his view the court should take a 'common-sense' approach to the quantification of damages. ⁽²⁾ The claimants in *Hendry*, although successful in establishing an infringement, were unable to recover any damages partly because they did not provide any evidence of loss. Both the High Court and the Court of Appeal in *Crehan* gave great weight to the evidence of the claimant's expert accountant witness in relation to the quantification of the claimant's lost profits. The High Court had assessed quantum of damages at around £1,300,000 but the Court of Appeal reduced this to around £130,000. The principal difference between the two courts' methods of quantification was that the High Court awarded damages for loss of profits as between the date of the injury (when

Crehan surrendered the lease of the pub he was running) and the time of the judgment (i.e. an *ex post* approach), whereas the Court of Appeal assessed damage as at the time of injury on an *ex ante* basis and so did not award damages for lost profits for the period between the time of injury and the date of judgment.

The German court in *Max Boegl* appears to have indicated that evidence provided by the claimants on the measure of damage calculated by reference to a hypothetical market price was not sufficient. The court thus seems to have imposed a high evidentiary standard as to the calculation of damages. In order to help ease the claimant's evidentiary burden as to quantification of damages, the current draft of the 7th amendment in Germany provides that the profits made by the infringer from the infringement can be taken into account in assessing the damages due to the claimant.

As to the Italian cases, in *Telsystem/SIP-Telecom* the court stated the principle that the loss of opportunity to enter the market amounted to harm that should be compensated and left the calculation of damages to experts at a later hearing. The French courts dispose of a similar mechanism, leaving the quantification of damages to a later stage once liability is established. This happened in *Mors/Labinal*, where quantification was referred by the Cour d'Appel to a later hearing of that court, and the defendants were ordered to pay a provisional amount of damages in the interim. The English Court of Appeal in *Crehan* indicated that its assessment of quantum of damages was 'provisional' and said that it would if necessary hear further submissions from the parties on the issue. It also indicated that it would hear any further submissions of the parties as to the level of interest and tax on damages at a later hearing.

Passing on

The question of whether an antitrust defendant can argue as a defence that the claimant did not suffer loss on the grounds that he passed on the illegal overcharge to the next purchaser is an important one for the structure of private antitrust enforcement. There does not appear to be any case law directly on this point from any European jurisdiction in relation to actions for breach of EC competition law. In Germany, an earlier draft of the 7th amendment had provided explicitly for the exclu-

⁽¹⁾ Para 157 of the judgment.

⁽²⁾ Paras 591 and 596 of the judgment.

sion of the passing on defence, ⁽¹⁾ but this is not included in the most recent draft, on the grounds that under current law the passing on defence would be excluded by the courts.

V – The road ahead

The Commission is currently looking at the conditions under which private parties can bring actions before the national courts of the Member States for breach of the Community competition rules. It is commonly stated that in the US private action accounts for around 90% of competition enforcement, whereas as noted above, in Europe to date there have been very few successful actions in this field.

The objective of the exercise is to seek to encourage the enforcement of the Community rules on competition by means of private actions before the courts of the Member States. Work undertaken in relation to private enforcement of Community competition law should be seen in the

context of making the reforms brought about by Regulation 1/2003 effective in practice, and as an important further step in the promotion and enforcement of the competition rules throughout the Community. As stated above, private enforcement of the Community competition rules would act as an additional deterrent to anticompetitive behaviour, as well as compensating the victim for losses suffered.

Research is required to establish the nature and extent of the potential obstacles to private enforcement of the competition rules in the Community. At the end of 2003, the Commission commissioned a study to assist it with this work. ⁽²⁾ An interim report of the study was given to the Commission in March and the final report should be available to it this summer. Based on the results of the study and its own work, the Commission will, in the second half of 2004, commence work on the drafting of a Green Paper with a view to identifying potential ways forward.

⁽¹⁾ Draft dated 17 December 2003.

⁽²⁾ Open procedure COMP/2003/A1/22.