Withering on the Vine?

The Fate of Complaints in the post-Modernization Context: What Complainants Should Know

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All good things come to those who wait ...

Time Lapse in years (Complaint – Prohibition/commitment decision)

Average time lapse: 5.5 years
… and bad news may come a little sooner.

Average time lapse: 3.5 years
50 ways to reject a complaint

Grounds for rejection (post 2004 decisions)

- behaviour ended
- concerns addressed by commitments
- civil law claim filed in member state
- NCA dealing or dealt with the case
- NCAs or national courts well-equipped to pursue
- limited economic importance
- disproportionality of further investigation
- improbability of establishing an infringement
- lack of evidence
Dominant company A provides a key technical input to OEM customers, which in turn sell to final consumers.

A’s OEM customers are based in different Member States.

Competitor B tries to sell its product to A’s customers, but is rejected time and time again.

Some of A’s OEM customers tell B’s sales force in confidence that they like B’s product and would like to include a product based on B’s technology in their range, but are worried about A’s reaction.

Some OEM customers say that substantial discounts are conditioned on them buying only from A, while others say that A would no longer supply them if A learned that they were also sourcing from B.

B complains to the European Commission.
Inherent difficulties
• Complainant has very limited access to direct evidence of the infringement
• Customers may not be forthcoming for fear of retaliation (unless they believe that
  the Commission will order effective relief)

Difficulties stemming at least in part from current features of EC procedure
• Court-like process allows defendant strategic response at early stage
• Uncertainty about the degree of protection for confidential information
  • Competitive effects analysis often based on victims’ internal documents
  • Defendants (or at least their lawyers) now get far-reaching access to those documents
    through confidentiality rings
• Reluctance to conduct dawn raids
• Transfer to NCA mid-stream unlikely to be an option
• Delay undermines confidence in effective remedy
A few suggestions for improvement

- “Pre-notification” – open conversation about merits of complaint, Commission enforcement priorities and alternative venues at early stage of process
- Greater use of dawn raids and formal information requests for prima facie meritorious complaints
- Better assurances of anonymity and careful case management
- Moving priority cases more quickly