Private damages actions in the EU

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Private damages actions have been at the forefront of the European Commission's antitrust agenda for several years. Considerable time and effort has been spent to develop a legal framework to facilitate such actions. To date, however, the EU has not adopted any legislation. Instead the law in this field has been developed by the courts of the Member States.

Over the past five years, the Commission has been developing legislation to facilitate the bringing of private claims before national courts, both as 'stand alone actions', where the claimant has the burden to prove antitrust infringement, and as 'follow-on actions', where the claims are brought on the back of exisiting infringement decisions. In 2008, the Commission published a White Paper[1] and a Staff Working Paper[2] aimed at ensuring: "…more than is the case today, that all victims of infringements of EC competition law have access to effective redress mechanisms so that they can be fully compensated for the harm they suffered." It emphasised that: "Improving compensatory justice would […] inherently also produce beneficial effects in terms of deterrence of future infringements and greater compliance with EC antitrust rules."[3] Subsequent to the White Paper, the Commission produced a Private Damages Directive, which, according to press reports, was scheduled to be adopted in October 2009. The Directive was heavily influenced by the UK legislation specifically aimed at facilitating private damages actions. With the enactment of the Enterprise Act 2002 (the Act), the UK has a system in place which makes infringement findings of not only the Commission, but also the Office of Fair Trading (and industry regulators such as the Office of Rail Regulation (ORR)), binding on English courts. Moreover, the Act provides claimants with the option of bringing actions before a specialist tribunal, the Competition Appeal Tribunal. Another feature extends the limitation period for bringing an action to two years after the time for appeal of the infringement decisions has expired.

Following opposition from Member States, the EU Directive was withdrawn at the start of October 2009, days before it was due to be adopted. The Commission has thus spent significant time and resource but has yet to adopt legislation in this field. Instead, the law has been developed by the national courts. To date, the courts have focused primarily on jurisdictional matters and points of procedure rather than substance, a reflection of the fact that many damages actions have settled before trial. In this note, we focus on three matters of importance to both claimants and defendants: jurisdiction, disclosure and class actions.

Jurisdiction

Given the nature of competition claims, particularly those relating to cartels, which often operate on a pan-European or global basis, it is inevitable that disputes concerning jurisdiction will arise. One such dispute has arisen with respect to the Synthetic Rubber Cartel.[4] In January 2008, the Commission decided that companies within six corporate groups had fixed prices and shared customers for synthetic rubber. A damages claim was brought before the English High Court. While three of the defendants were domiciled in England, none of these were addressees of the Commission's cartel decision. It was argued that the defendants had been selected as a tactical device under Article 6(1) of the 'Brussels Regulation',[5] which allows a defendant to be sued in another Member State to which it is domiciled where claims are so closely connected that they must be heard together to avoid the risk of irreconcilable judgments. The High Court concluded that, where a subsidiary has sold the goods which are the subject matter of the infringement in the UK, it was sufficient that the "single economic unit" to which the subsidiary belonged had knowledge of the offending agreement and, hence, the High Court had jurisdiction.

The defendants also applied to have the proceedings stayed on the basis that proceedings for a declaration of non-infringement had already been launched in the Italian courts (known as an 'Italian torpedo').[6] The High Court, however, declined to grant a stay. First, while the defendants in both actions had a similar interest, these interests were not exactly aligned. Second, the purposes of the two sets of proceedings differed. Third, the Italian proceedings had been dismissed at first instance and

it was by no means certain that the appeal would succeed. Fourth, certain defendants to the English proceedings had already submitted to jurisdiction, so allowing a stay would not avoid irreconcilable decisions. Finally, it noted that Italy was not the "centre of gravity" of the case as the cartelists were based in a number of states. This case is of particular note given that none of the cartelists were domiciled in England. It shows that the High Court (i) applies its jurisdiction widely; and (ii) will be reluctant to stay antitrust damages proceedings unless the applicant has strong reasons. Similarly, in *Provimi*[7] the High Court applied its jurisdiction widely and held that as long as it had jurisdiction over one of the claimants in the action, it would allow related claims against non-English defendants to be brought in the same action.[8]

The German courts have also been reluctant to accept jurisdictional defences. In the case brought by Cartel Damages Claims AG (CDC) against six cement companies who were found to have participated in a cartel, the defendants argued that the local court in Düsseldorf had no competence to hear the issue as the agreements in question had been regional only and had not included Düsseldorf. The Regional Court of Düsseldorf held that it followed from the nation-wide scope of the cartel that competition within Düsseldorf had also been affected and the argument was rejected.[9]

Disclosure

Rules on disclosure vary substantially between common law and civil law countries. While civil law countries tend to restrict disclosure to specific documents, the English courts require each party to disclose (i) the documents on which it relies; and (ii) the documents which adversely affect its own or another party's case, or support another party's case. Recently, the Competition Appeal Tribunal in *Enron Coal Services Limited (in liquidation) vs. English Welsh & Scottish Railway Limited*[10] extended the scope of disclosure by ordering the ORR to disclose documents obtained from third parties during the investigation which lead to the decision upon which Enron brought its action.

In Germany, the parties disclose only the documents on which they rely, subject to any order the court decides to make with respect to specific

documents. However, German law allows the claimant to access the file of the Federal Cartel Office (FCO) if it can prove a legitimate interest. Exceptions to this rule exist, most notably that documents provided under leniency procedures are protected. In September 2008, the District Court of Bonn confirmed that this did not protect documents available to the FCO concerning the anti-competitive behaviour of the whistleblower, rather only documents produced by it.[11] Much like Germany, parties in France and Italy are required to disclose only those documents on which they rely, subject to any orders made by the court. However, the court may also order the disclosure of documents by the competition authority. For example, in November 2004, the Commercial tribunal of Narbonne ordered the national competition authority to deliver certain documents obtained in the course of temporary measure proceedings.[12] It follows that the difference in disclosure between common law and civil law systems is an important factor to bear in mind in the development of EU-wide litigation strategies.

Class actions

At an EU level, attempts have been made to introduce representative actions. The White Paper noted that there was a need for mechanisms allowing aggregation of individual claims as individual consumers and small businesses were often deterred from bringing action by the "costs, delays, uncertainties, risks and burdens involved". To address these issues, the Commission suggested a two-pronged approach: (i) representative actions which may be brought by qualified entities; and (ii) opt-in collective actions. The draft Directive was reported to have provided for an opt-out class action regime which would allow consumer associations or other officially approved not-for-profit organisations to bring claims on behalf of groups of consumers who would not be individually identified. In the absence of EU legislation, claimants have sought to develop measures that replicate some of the perceived advantages arising from class actions.

In *Emerald Supplies Limited vs. British Airways plc,*[13] which concerns the air-cargo cartel, the claimants brought an action in the High Court on behalf of direct and indirect plaintiffs. The High Court, however, allowed the defendant's application to strike out the representative element of the claim because (i) it could not be established that the claimants had the "same interests", as the class (defined in the particulars of claim) depended on the outcome of the action itself; (ii) the relief sought was not equally beneficial to all members of the class and there was an inevitable conflict between the claims of different members; and (iii) the avoidance of multiple actions based on the same or similar facts could be achieved equally well by a Group Litigation Order.

Class actions are permitted in the Italian legal system, which allows for an opt-in collective action in order to recover damages arising from (*inter alia*) a violation of antitrust law. The legislation does not limit such actions to be brought by representative bodies. These rules were adopted by the Italian Parliament in July 2009 and will enter into force on January 1, 2010.

Class actions are not permitted in France, with the exception of representative actions by consumers associations. Uptake has been limited due to the complexity of the procedure. The French competition authority has supported the introduction of class actions and two parliamentary bills providing for such introduction were drafted in November 2006 and December 2007. They were subsequently withdrawn. The government continues to maintain that the introduction of a class action regime compatible with French civil law remains high on its agenda.

Class actions are not permitted in Germany. However, the courts in Germany have recently permitted a claim to be brought by CDC on behalf of numerous cartel victims.[14] Arguably, this represents the introduction of class actions by the back door. The claimant, CDC, is a Belgian company established in 2002 for the purpose of acquiring claims from cartel victims, bundling them together and bringing an action against the alleged perpetrators of the cartel. The defendants argued that CDC lacked standing because it was bringing the claim on behalf of 29 cartel victims, and not on the basis of its own rights. In an interlocutory judgment, the Regional Court of Düsseldorf ruled that CDC was permitted to bring the claims, as the rights had been assigned and CDC was therefore bringing a claim in its own right and in its own name.[15] All appeals by the defendants have been dismissed.

Notes:

1 Commission, White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008) 165, April 2, 2008.

2 Commission, Staff Working Paper on Damages Actions for Breach of the EC antitrust rules, SEC(2008) 404, April 2, 2008.

3 Commission, White Paper on Damages Actions for Breach of the EC antitrust rules, COM (2008) 165, April 2, 2008.

[4] *Cooper Tire & Rubber Company and others vs. Shell Chemicals UK Ltd and others* [2009] EWHC 2609 (Comm), judgment of October 27, 2009.

[5] Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, December 22, 2000.

[6] 'Italian torpedo' is a strategy based on Article 27.1 of the Brussels Regulation, which states that "where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established". According to the torpedo strategy, in the case of an antitrust violation involving a part or all of the European territory, the potential infringer files a preemptive action asking the Italian judge for a declaration of non-infringement. Normally, the task of the plaintiff is to exploit the notoriously slow Italian litigation procedure. Using this strategy, the plaintiff claims the Italian jurisdiction on the basis of Article 5.3 of the Brussels Regulation, which states that a person domiciled in a Member State may be sued in another Member State "in matters relating to tort, *delict*, or *quasi delict* in the courts of the place where the harmful event occurred or may occur". This approach was rejected by the decision of the Corte di Cassazione no. 19550 (December 19, 2003) in the case *BL Macchine Automatiche vs. Windmoeller und Hoelscher KG*, which stated that an action for a declaration of non-infringement is not a tort action and does not fall under Article 5.3 of the Brussels Regulation.

[7] *Provimi Ltd vs. Roche Products Ltd and other actions* [2003] EWHC 961 (COMM), judgment of May 6, 2003.

[8] On November 23, 2009, Nokia filed a claim before the High Court against 25 international defendants in relation to the LCD screens and cathode ray tubes cartels *(Nokia Corporation vs. AU Optronics Corporation and others*, filed with the High Court Chancery Division, claim no. HC09C04421, and *Nokia Corporation vs. Tatung Corporation and others*, filed with the High Court Chancery Division, claim no. HC09C04420).

[9] Regional Court of Düsseldorf, Case No. 34 O (Kart) 147/05, judgment of February 21, 2007.

[10] Case No. 1106/5/7/08, order of April 2, 2009.

[11] Case No. 51 GS 1456/08, judgment of September 24, 2008.

[12] Commercial tribunal of Narbonne, November 3, 2004 (Ref: 0193).

[13] [2009] EWHC 741 (Ch), judgment of April 8, 2009. Appeal pending before the Court of Appeal (A3/2009/1003).

[14] Regional Court of Düsseldorf, Case No. 34 O (Kart) 147/05, judgment of February 21, 2007; Higher Regional Court of Düsseldorf, Case No. VI U (Kart) 14/07, judgment of May 14, 2008.

[15] Regional Court of Düsseldorf, Case No. 34 O (Kart) 147/05, judgment of February 21, 2007.

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