Private Antitrust Damages in Europe: As the Policy Debate Rages, What are the Signs of Practical Progress?

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European Commission's initiative

In December 2005, the European Commission (the 'Commission') published a Green Paper[1] exploring alleged obstacles to the bringing of successful private actions for damages in antitrust cases in Europe and setting out a series of options for addressing these obstacles. Following a consultation period, during which the Commission received more than 140 responses, it is now drafting a White Paper, which will set out concrete proposals to further its initiative.

As the debate on the Green Paper and related national initiatives continues, the interested observer might be forgiven for asking precisely what the Commission's initiative is. On the one hand, the initiative is to facilitate the bringing of successful, meritorious private actions for damages where there has been an infringement of competition law in Europe. On the other hand, the initiative is to supplement public enforcement by the Commission (DG Comp) and the national competition authorities (NCAs) through so-called 'private enforcement', namely actions by private litigants, be they businesses or consumers, to enforce their rights directly in national courts and specialist tribunals where there has been an infringement of

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1 Commission Green Paper: Damages actions for breech of the EC antitrust rules; (SEC 2005) 1732.

competition law. While the two aspects of the Commission's initiative are not mutually exclusive, there is an increasingly lively policy debate, which focuses on the appropriateness of encouraging private actions for the purpose of supplementing public enforcement. Equally, concerns are expressed over the potential adverse consequences for good business citizens of proposals to modify existing judicial systems to facilitate, and thereby encourage, more litigation. These policy debates focus, for example, on the compatibility of the Commission's initiative with growing acceptance of 'responsive regulation' and risk-based enforcement policy.[2]

Before analysing the policy debate surrounding the Commission's initiative, it is appropriate to recall that the right to compensation where loss has been occasioned by a competition law infringement in Europe is now firmly established through the case law of the European Court of Justice (ECJ), notably in the *Crehan*[3] and *Manfredi*[4] cases. Accordingly, the issue is not whether potential claimants who have suffered such loss should be entitled to bring private actions in national courts but whether and, if so, in what circumstances they are currently dissuaded from doing so by rules of national procedure that render outcomes too uncertain and the potential cost of pursuing an action disproportionate to the potential award of damages.

Accordingly, while the policy debate is important and will influence the choices made by the Commission and national governments, there is little doubt that modifications will continue to be made to national legal systems and the procedural rules governing litigation in national courts to address issues that are seen to tilt the balance too much in favour of the defendant to the detriment of the claimant with a meritorious case. In the remainder of this article, the author will examine, first, some of the relevant policy issues; secondly, a number of the practical issues identified in the Discussion Paper of the Office of Fair Trading (OFT), *Private actions in competition law: effective reddress for consumers and business* (April 2007)[5]; and thirdly, possible next steps.

2 'Interaction between public and private enforcement', presented at Cartel Enforcement and Antitrust Damage Actions in Europe Conference, 8 March 2007, Brussels.

3 Case C-453/99 *Courage v Crehan* [2001] ECR I-6297.

4 Case C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (2004).

5 OFT Discussion Paper, *Private actions in competition law: effective redress for consumers and businesses* (OFT 916, April 2007).

Policy issues

The Commission and its Commissioner for Competition, Neelie Kroes, have clearly indicated that their initiative is designed to encourage a competition culture rather than a litigation culture. The Commission has spoken of the excesses of the US antitrust litigation model and has vowed to avoid them.[6] Commentators have pointed to the inherent contradiction in the Commission's description of its objective. The adoption of amendments to national procedural rules for the purpose of supplementing public enforcement by private enforcement necessarily contemplates an increase in private litigation. Experts in regulatory policy question whether the alleged deterrent effect of more private actions for damages would be material and, even if it were, whether, from a policy perspective and having regard to an efficient allocation of resources, it is appropriate to rely on private enforcement to supplement public enforcement.[7] There is much discussion, for example, about the absence of sufficient and reliable empirical evidence to identify the enforcement deficit allegedly resulting from the limited resources available to the Commission and NCAs to pursue all of the competition law cases that they ideally would be able to pursue in furtherance of the European Community's economic and competitiveness objectives as agreed in the Lisbon agenda and the policy statements that have followed it.[8]

Faced with the complexities of the policy debate and the obvious difficulties in identifying the requisite empirical evidence on the basis of which to produce an analysis of the relative merits of persuading national governments to increase public funding for DG Comp and the NCAs as opposed to facilitating more private litigation in the antitrust arena, it is not surprising that more recent statements by Commission officials tend to focus more on the objective of removing impediments to the rightful recovery of damages by businesses and consumers whose loss has been caused by an antitrust infringement. Increasingly, compensation is seen as a sufficient justification in itself for the Commission's initiative and parallel initiatives by NCAs and their governments. The language used, for example in the OFT's Discussion Paper, tends increasingly to refer to the complementary relationship between private actions for damages and public enforcement and less to the goal of supplementing public enforcement by private

6 Neelie Kroes, 'More private antitrust enforcement through better access to damages: an invitation for an open debate', Brussels, 9 March 2006.

7 eg C Hodges, 'Competition enforcement, regulation and civil justice: what is the case?' (2006) 43 *Common Market Law Review* 1-27.

8 *Ibid.*

enforcement. This shift in the debate has clear implications for the nature of the amendments to national procedural laws, which, one way or another, will undoubtedly be proposed in the Commission's White Paper and in parallel national discussions such as those initiated by the OFT's paper.

If the objective is to ensure that those entitled to compensation are not defeated in their legitimate claims by procedural rules, which weight the dice against them, there will be less emphasis on the need to provide incentives to private litigants to bring claims. The incentivisation of potential litigants becomes relatively less important as the emphasis moves away from the goal of supplementing public enforcement by private enforcement. This may best be illustrated by distinguishing between the different types of antitrust claim that might typically be brought in a national court. Such claims may be distinguished on two different levels: first, claims can be categorised by reference to the nature of the antitrust infringement in question; secondly, by reference to whether an antitrust authority has already taken a decision finding there to have been an infringement ('follow-on actions') or not ('standalone actions').

With regard to the first categorisation, there are important distinctions between actions for damages resulting from cartel activities, vertical restrictions (for example in contractual relationships between suppliers and distributors or other customers) and the abuse of market power by one or more companies in a dominant position. With regard to cartel activity, it is frequently said that potential claimants will more likely than not find it difficult to adduce the evidence necessary to pursue a claim for damages in the absence of a decision of a competition authority that has exercised its powers of investigation to collect the necessary evidence. The Commission has indicated that it considers itself to be better positioned than private litigants to conduct investigations into international cartels and that it therefore proposes to continue to make cartel enforcement one of its major priorities. On the other hand, a private litigant may have significantly fewer, if any, evidentiary obstacles when contemplating the initiation of proceedings in the context of a vertical relationship where the alleged infringement of competition law is contained in the contractual documentation between the parties (for example in a licence of intellectual property rights or a distribution agreement with territorial restrictions, non-compete clauses, etc). For this reason, DG Comp and NCAs, including the OFT, have signalled that, save in cases that may give rise to important points of policy or novel points of law, potential business claimants should expect to see a complaint to the competition authority in a vertical, contractual case turned down by reference to its enunciated enforcement priorities and therefore expect to seek relief, if at all, in the national courts. The pursuit of a claim for an

abuse of dominance in the absence of a decision of the relevant competition authority appears to be increasingly unlikely save in the most blatant of cases where both the economic theory and the relevant jurisprudence are clear and uncontroversial. One of the consequences of the Commission's initiative to introduce a more economics-based approach to the application of Article 82 EC[9] (particularly in the field of exclusionary abuses) is that cases are likely to become more complex and their outcome less certain. The need to identify consumer detriment (as opposed to mere competitor detriment) and the opportunity for the putatively dominant company to raise efficiency defences will impose significantly higher burdens on those seeking to prove an abuse of dominance.

It is therefore likely that, for the foreseeable future, standalone litigation for the recovery of damages in national courts will be limited mainly to vertical cases involving contractual relationships between the parties while the pursuit of damages resulting from international cartel activity and the abuse of dominance will largely be reserved to follow-on actions. While there will clearly be exceptions to this division, it is anticipated that the identified trend will have a significant impact on the nature of the amendments to national procedural laws to remove obstacles to the successful pursuit of meritorious claims for damages in antitrust cases.

OFT's Discussion Paper

These introductory comments provide an important backdrop for a consideration of the issues raised by the OFT in its Discussion Paper, *Private actions in competition law: effective redress for consumers and business.*[10]

The introduction to the OFT's paper states that its purpose is: 'to inform the ongoing debate within the UK and elsewhere on the issue of how to make redress for consumers and business for breaches of competition law more effective.'[11]

The paper continues:

> 'Most of the main structural and legal elements for effective private actions in competition law are already in place in the UK. However, consumers and small and medium-sized businesses (in particular) face a number of practical barriers which have to date made them reluctant to take action to enforce their rights. A more effective system would

9 DG Competition discussion paper on the application of Art 82 to exclusionary abuses, December 2005.

10 See n 5 above.

11 *Ibid*, para 1.1.

> benefit not only those categories of potential claimant, but would also promote a greater compliance culture and ensure that public enforcement and private actions work together to the best effect for consumers and for the economy.'[12]

It is interesting to note that these statements by the OFT, while referring to the promotion of a greater compliance culture, lead with the reference to making redress for breaches of competition law more effective. 'Redress' in this context refers particularly to the right to compensation but will also include the possibility of securing injunctive relief in appropriate circumstances.

The emphasis given by the OFT to redress is reflected in its approach to compensation, for example when it states that: 'it is well established that private actions involve claims for damages that are compensatory in nature.'[13]

While the paper refers also to the possibility of the award of restitutionary damages, exemplary damages and other forms of relief, such as the equitable remedy of accounting for profits, the clear message is that, save in exceptional circumstances, the general principle should continue to be the award of compensation to place the claimant in the position in which it would have been but for the infringement of competition law. This approach steers away from the potentially controversial question of a general rule for multiple damages as contained, for example, in one of the options in the Commission's Green Paper[14] where the Commission speaks of the possibility of double damages at least for certain hard core infringements. The concept of multiple damages is controversial for different reasons. First, treble damages were introduced in the United States as a way of increasing the deterrent effect on potential infringers who may otherwise be tempted to calculate the risk of detection and to take the view that, if the risk of detection is relatively low, then the deterrent effect of compensating a victim for actual loss, but no more, is also relatively low. The risk of paying treble damages, on the other hand, materially alters the risk calculation. The second aspect of the controversy is unjust enrichment for the claimant. The OFT points to the ECJ's judgment in *Manfredi*[15] as support for the principle that national rules may include rules to avoid unjust enrichment in private actions based on competition law.

The emphasis in the OFT's paper, therefore, is on practical measures to ensure that potential claimants with meritorious claims are able to exercise their rights to recover compensation.

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12 *Ibid*, para 1.2.
13 *Ibid*, para 2.11.
14 See n 1, option 23.
15 See n 4, para 6.19.

The OFT accordingly limits its consideration of the issues raised by the Commission in its Green Paper essentially to the following:

- representative actions;
- costs and funding arrangements;
- evidential issues and applicable law;
- effective claims resolution and the interface with public enforcement.

In the context of representative actions, the OFT notes that representative follow-on actions are already possible under section 47B of the Competition Act 1998 (the 'Competition Act') in the UK Competition Appeal Tribunal (CAT). The OFT therefore focuses on whether designated bodies, or bodies granted permission by the courts, should be permitted to bring standalone representative actions on behalf of consumers and to bring both follow-on and standalone representative actions on behalf of businesses. With regard to costs and funding arrangements, the OFT refers to existing 'conditional fee' arrangements and asks whether it should be possible to allow a percentage increase on fees of greater than 100 per cent if a case is won and examines the possibility of clearer guidance on *ex-ante* costs-capping orders, allowing the court to cap the parties' liability for each other's costs. On evidential issues and applicable law, the OFT focuses on the possibility of making an infringement decision of an NCA applying Articles 81 and 82 EC binding on a national court in another jurisdiction either on an EU-wide basis or alternatively on a reciprocal basis. The OFT explores shifting the burden of proof that a claimant has passed on the whole or a part of the loss claimed to the defendant raising that argument. The OFT discusses the possibility of allowing a claimant to choose the applicable law in cases in which choice of law rules would add to the complexity of, and may discourage, private actions. The OFT also considers issues of document disclosure while recognising that the system in the United Kingdom already provides a solution to the information asymmetry issues identified in the Commission's Green Paper.[16]

The OFT also explores alternative ways of enabling potential claimants to seek redress, including the establishment of a Competition Ombudsman, and explores the interface between providing incentives to leniency applicants to come forward to a competition authority with evidence of an infringement and the rights of private litigants.

16 See n 1, para 2.1.

Representative actions

The key issue considered by the OFT is whether potential claimants, be they consumers or businesses, are discouraged from seeking redress simply because the loss that they have suffered individually is relatively small compared with the costs of litigation notwithstanding that the aggregate of all such individual losses is very considerable and would justify litigation in the event that a claim could be brought in a cost-effective and efficient manner.

The OFT states clearly that it is opposed to the introduction of US-style class actions that are typically funded by the plaintiff's Bar on behalf of a court-certified class, many of the members of which may not, despite obligatory publicity, be aware that their rights are being pursued on their behalf. The principal issue addressed by the OFT is that the type of representative action that it would support is one brought by a body authorised to bring such a claim based on predetermined criteria.[17] The OFT refers to the desirability of representative standalone actions for consumers and businesses and to the potential economies of scale resulting from the pursuit of representative rather than individual claims. The OFT refers to the possibility of introducing one or more models for identifying categories of claimant in each case (for example, providing that a representative action may be brought on behalf of consumers at large or, alternatively, that a representative action may only be brought on behalf of named consumers). The OFT also envisages that standing to bring a representative action would only be conferred where a body is either designated by the Secretary of State on an ongoing basis or is granted permission by the courts for a particular case or cases. The OFT envisages that bodies that might be interested in obtaining permission for a particular case could include central or local government purchasing agents or groups such as those whose members have suffered from the operation of cartels in the construction sector, and representative trade groups. All such bodies should, according to the OFT, be required to meet objective, transparent and non-discriminatory requirements similar to those already specified for follow-on actions for consumers under the Competition Act.[18]

While there is not inconsiderable debate about the demand from individual consumers and particularly small and medium-sized businesses for the facility of a representative action in either or both follow-on and standalone cases, the envisaged legislative changes to make such

17 See n 5, para 4.3.
18 *Ibid*, para 4.15.

representative actions a possibility seem sensible and a necessary precondition for the bringing of claim where the individual loss, whether to a consumer or a business, is small compared with the potential cost of litigation.

Needless to say, the prospect of representative actions and of different models raises the question of what should happen to damages that are awarded insofar as they cannot be allocated to individual consumers or businesses. Again, there is much discussion on the policy level between those who regard restitution, ie the disgorgement of unlawfully obtained gains, to be an objective of 'private enforcement' and those who consider the possible distribution of such damages to worthy causes, for example consumer education or research or even the financing of other representative actions, to be inappropriate and inefficient in policy terms. Inevitably, therefore, the final word on the types of model that might be endorsed for representative actions will be influenced by the discussion on whether the purpose of private litigation is merely to compensate those who have suffered loss and who would, but for identified obstacles, be prepared to bring an action or to supplement public enforcement by increasing deterrence.

Costs and funding arrangements

In the United States, one of the features of the antitrust litigation system that encourages plaintiffs' lawyers to pursue class action claims is the availability of contingency fee arrangements. These arrangements, when combined with other features of the US system, frequently lead to significant fees that contribute to the plaintiffs' lawyers' ability to fund future class actions. The OFT, in line with UK government policy and consistent with the general approach in Europe, is opposed to the introduction of US-style contingency fee arrangements but nevertheless wishes to explore other possibilities that would enable claimants with meritorious claims to pursue them.

The OFT identifies existing conditional fee arrangements, after-the-event insurance and loans to fund disbursements, expert witness fees and any premium for after-the-event insurance as worthy of further consideration.

The extent to which a professional funder should be liable for the costs of the opposing party is an important issue to which the OFT draws attention. This issue was addressed by the Court of Appeal in the *Arkin v Borchard Lines* case.[19] The OFT considers that an appropriate balance needs to be struck

19 EWCA Civ 655: [2005] 1 WLR 3055 at 38 *et seq.*

between the public interest in ensuring effective access to justice through funding arrangements and the interests of the defendants where they are successful in defeating the claim and are entitled to recover (a portion of) their costs.

Under current conditional fee arrangements in the United Kingdom, the claimant's lawyers can agree to receive no payment or less than normal payment if the case is lost but normal or higher than normal payment if the case is won. However, the current percentage increase on normal fees if the case is won can be no more than 100 per cent. The OFT considers that, while such an uplift may be sufficient to encourage lawyers to take follow-on actions, it may not be a sufficient incentive for them to take well-founded standalone cases. In exploring more generous options, the OFT considers it important for the court to retain ultimate power to approve the arrangements. There is no doubt that, by exploring the extent to which normal fees might be increased under such conditional fee arrangements, the OFT is contemplating amendments which would bring the UK system closer to the US system.

The OFT also refers to the existing procedural rules, which permit the courts to depart from a strict application of the normal rule that 'costs follow the event', ie that the successful party can recover its costs from the losing party. The OFT explores the possibility for a structured use of costs-capping orders at an early stage in the proceedings. The OFT also contemplates that, if the claimant's lawyers are acting under a conditional fee arrangement, the court could, when making a costs-capping order, also prescribe the percentage increase recoverable from the other party. These measures would provide a degree of certainty in the costs liabilities of both sides at an early stage in the proceedings. Again, the OFT favours the retention of flexibility for the court to exercise its discretion in tailoring specific costs-capping and related orders to the circumstances of individual cases.

Evidential issues and applicable law

The OFT acknowledges that, in view of the existing disclosure obligations in the courts of England and Wales, claimants in competition cases should be able to overcome many of the information asymmetry issues identified by the Commission in its Green Paper.[20] The OFT points to the possibility of pre-action disclosure, the rules of standard disclosure once litigation has started and the possibility of disclosure orders against third parties. The OFT also reconfirms its commitment to protect documents created for the

20 See n 5, para 6.5.

purpose of leniency applications. The OFT, along with the Commission and other NCAs, takes the view that leniency applicants should not be placed in a less favourable position in private litigation than a party that has not sought leniency. Accordingly, while pre-existing documents provided to the OFT would continue to be discloseable in proceedings in the national court, a document, for example a corporate statement, produced for the purpose of the leniency application and provided to the OFT would not be discloseable.

The OFT also examines the possibility of legislation that would make decisions of other NCAs applying Articles 81 and/or 82 EC binding on a UK court. The particular circumstances in which such a rule might assist a claimant include where, under the arrangements for cooperation between the Commission and NCAs, it is agreed that a particular NCA will conduct an investigation and, if appropriate, reach a decision in a case with application in two or more Member States. The potential significance of such a rule should be assessed by reference to the decision of the House of Lords in the *Crehan* case.[21] The House of Lords clarified that a Commission decision would be binding on the national court only if it related to the same parties as represented in the national litigation and to the same subject matter. In the *Crehan* litigation, the English Court of Appeal had overruled the judge in the High Court (at first instance) for the reason that he had not followed the analysis and legal findings of the Commission in three decisions related to the beer market in the United Kingdom, which was the background to the dispute before the court. The House of Lords held that the Commission decisions in question related to agreements between other companies and that there would have been an infringement of the rights of defence of the parties to the national court proceedings if they had been bound by decisions of the Commission, which, for lack of legal standing, they would have had no opportunity to contest in the European courts.

Next steps

The OFT's discussion paper focuses on possible changes to the law and procedure in the United Kingdom, building on the existence of a court system and applicable rules that already provide the basis for claimants in competition law cases to bring successful actions for damages (and other forms of relief). The OFT's paper and parallel initiatives in other Member States (for example in Germany where constitutional law changes have been made to address a number of the relevant issues, including the binding

21 *Crehan v Inntrepreneur Pub Co* [2006] UKHL 38.

nature of the decisions of other NCAs on German courts) will be welcome developments to the Commission. Whatever specific proposals are made by the Commission in its White Paper, which is due to be issued at the end of 2007 or early in 2008, an important aspect of the Commission's focus on private actions for damages in competition cases is to heighten awareness in national jurisdictions of the relevant issues and to encourage a debate at the national level and not only at the European level with a view to implementing amendments that would lead to a more level playing field for claimants, at least in certain circumstances. At the same time, the Commission is continuing to play its cards close to its chest in terms of the scope and content of any proposals that it may make in the White Paper. There remains the possibility of horizontal legislation at the European level, which would affect all Member States. Equally, the Commission may identify issues that it believes should be addressed at the national level either through appropriate changes to domestic law and procedural rules or by guidelines to national judges hearing individual cases.

As the Commission, the NCAs and their national governments give further consideration to these issues, the national courts and most importantly the ECJ will be faced with relevant questions in litigation that has already been commenced or will be commenced. There is a real possibility that a number of important issues that would otherwise be addressed through Commission proposals and/or national initiatives will be addressed by the ECJ in the same way that it has answered important questions in the *Crehan*[22] and *Manfredi*[23] cases.

Accordingly, one way or another, and irrespective of the important policy issues that continue to be debated, it is likely that there will be further developments that will reduce the uncertainty and risks currently faced by at least some private claimants pursuing meritorious actions for infringement of competition law.

22 See n 3.
23 See n 4.