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Antitrust Law: Damages Cases in Europe

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On April 3, the European Commission (E.C.) published a white paper on damages actions for breach of the European antitrust rules. The white paper is the last in a series of E.C. examinations of the knotty problem of how to make antitrust litigation a reality across Europe to achieve "justice for consumers and businesses, who lose billions of euros each and every year as a result of companies breaking EU antitrust rules. These people have a right to compensation through an effective system that complements public enforcement, whilst avoiding the potential excesses of the US system." E.C. press release, April 3, 2008.

At the moment, there are very few antitrust damages actions in Europe, generally brought by large companies. A U.S. consumer or small company is far more likely to be able to recover losses suffered due to antitrust abuses than a European one. In Europe, companies engaged in antitrust abuses (such as cartels) are largely able to count on not being held to account in the civil courts. Procedural and legal hurdles make it difficult for victims of antitrust abuses to seek redress.

Some European countries, such as the United Kingdom and Germany, have begun adapting their legal systems to make antitrust litigation a reality. This article will compare proposals in the white paper with the current system in the United Kingdom, which is one of the most developed in terms of antitrust litigation. Despite being relatively developed by European standards, even the United Kingdom has not yet developed a satisfactory system that allows consumers to seek redress in court.

Proposals are conservative by American standards

The initiatives of individual European countries (including the United Kingdom) and the E.C.'s white paper are conservative by American standards. The proposed European model deliberately avoids certain key aspects of the U.S. model of antitrust litigation, such as treble damages and class actions, because the E.C. and member states are concerned about creating a U.S.-style litigation culture. The question is whether this conservative approach can deliver real benefits to consumers and make antitrust litigation a practical reality in Europe. While all want to avoid the "excesses" of the U.S. system, there are notable differences between Europe and the United States that would be likely to slow any flood of litigation. It is difficult to imagine that a successful damages claim would be brought in Europe without a finding by the E.C. or a national competition authority that there had been an antitrust abuse. European courts are unlikely to award damages at U.S. levels. These differences (as well as the different legal culture in Europe) raise the question of whether a bolder approach might not be necessary in Europe in order to deliver real results to victims of antitrust abuse.

The lack of discovery in Europe has been an obstacle to antitrust litigation because the facts are in the hands of the defendants. The white paper proposes that national courts should have the power to order parties to disclose precise categories of relevant evidence, but rules out U.S.-style discovery. The white paper's conditions for a disclosure order appear burdensome for potential claimants, such as the requirement that the claimant specify "sufficiently precise categories of evidence to be disclosed" and that the claimant has "satisfied the court that the . . .

disclosure measure is . . . relevant to the case and necessary and proportionate." These conditions place a burden on the claimant and risk potentially relevant evidence not being disclosed when the claimant has insufficient knowledge to specify a particular category of evidence.

The U.K. courts currently provide for standard disclosure that require a party to disclose the documents on which he relies and those that adversely affect his own case; the documents that adversely affect another party's case or support another party's case; and those that he is required to disclose by a relevant practice direction. Parties must sign a disclosure statement that they have complied with the disclosure rules. Proceedings for contempt of court can be brought for a false disclosure statement.

By U.K. and U.S. standards, the white paper adopts a conservative approach to disclosure. However, the requirement for any disclosure is new for most other (civil law) European countries and goes some way to levelling the playing field for those attempting to bring damages actions.

The white paper rejects the U.S. model of class actions whereby one party litigates on behalf of all victims, and instead proposes two complementary mechanisms of collective redress: representative actions brought by qualified entities, such as consumer associations, state bodies or trade associations on behalf of identified victims, or opt-in actions in which victims can combine individual claims into one action. Both options exist in the United Kingdom.

A recent U.K. case, *Consumers' Association* (*Which?) v. JJB Sports plc*, CAT (2007), No. 1078/7/9/07, illustrates some potential problems with the first mechanism proposed by the white paper: opt-in representative actions brought by qualified entities. In 2007, Which? brought a claim for damages on behalf of 130 consumers before the U.K. Competition Appeal Tribunal based on a decision of the Office of Fair Trading that JJB Sports had been involved in price fixing for replica football shirts. Which? sought compensatory damages for consumers for each shirt, and also exemplary damages. The case settled. So consumers who opted in were eligible for 20 pounds per shirt, and JJB Sports also agreed to set money aside for refunds to any consumers who proved that they had bought a replica shirt during the relevant period. On May 15, Which? ruled out any more representative actions, saying that further damages claims were unlikely unless an "opt-out" regime became available because only under such a model could a plaintiff gain the scale needed to make a viable case.

The fact that a consumer association found opt-in antitrust litigation too burdensome under the U.K. system does not bode well for the white paper proposal that individual consumers join their cases for trial. One potential solution is an opt-out system for use when individual losses are small and an opt-in system when the compensation stakes are higher. The experience of the *Which?* case should cause the E.C. to consider whether the white paper proposals are sufficient to empower consumers to bring damages actions.

The white paper proposes that, in contrast to the U.S. system, both direct and indirect consumers should be allowed to bring damages claims, based on case law of the European Court of Justice, which ruled in Joined Cases C-295-298/04, *Manfredi* [2006] ECR I-6619, that "any individual who has suffered harm caused by an antitrust infringement must be allowed to claim damages before national courts." This approach is attractive, but can lead to complicated (and costly) litigation. The white paper makes clear that a "passing on" defense, which allows the infringer to prove that the claimant suffered no loss because he passed on the overcharges to his customers, must be available. However, to reduce the burden on the ultimate consumers at the end of the chain, the E.C. proposes a rebuttable presumption that the overcharge was

passed on. Then the defendant can try to prove no pass-on to the final consumer.

Multiple damages were considered and dropped

In the green paper that preceded the white paper, the E.C. had proposed as an option that some victims should be able to claim multiple damages as in the United States. This would have been a novel concept for the majority of E.U. countries. The proposal for multiple damages has been dropped in the white paper, which now suggests single damages for actual loss, loss of profit and interest, based on *Manfredi*.

Under the European law system, national courts decide on the appropriate measure of damages, provided that twin principles of effectiveness and equivalence are respected. So individual member states could provide for exemplary damages in competition cases. The U.K. High Court recently considered the possibility of the award of multiple or exemplary damages in *Devenish Nutrition Ltd. v Sanofi-Aventis SA,* [2007] EWHC 2394 (CH.). However, the U.K. High Court concluded that there were European law rules that prevented the award of exemplary damages by a national court in cases in which a defendant had already been fined for its conduct. The fact that the U.K. High Court relied on European law rules suggests that the same rules should prevent the award of exemplary damages in other E.U. national courts when defendants have already been fined.

The proposals in the white paper are far from radical from a U.K. perspective; indeed, recent (albeit limited) experience in the United Kingdom suggests that some aspects of it may not be sufficient to allow consumers to be compensated for antitrust abuses. However, given that several of the proposed changes are likely to be considered radical in some (civil law) European jurisdictions, it may not be realistic for the E.C. to spearhead more major change across the varied European landscape. It may be that a better solution is for some European countries to push forward with more far-reaching reforms, which can then be used to inform progress at a European level. The search for a "genuinely European approach" to antitrust damages actions continues.

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