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Private damages actions: Part 2

The Commission draws strong support from Community jurisprudence

*by **John Pheasant****

This article, the second in the series, looks at the Commission staff working paper which accompanies the green paper and the support which the Commission draws from European law and jurisprudence in the pursuit of it policy objectives.

The Commission recalls that the existence of a Community law remedy of damages against individuals for breach of articles 81 and 82 EC follows from the same principles as those which give rise to such a remedy against member states for breaches of other provisions of Community law. Such a remedy is founded on the fact that articles 81 and 82 EC create directly effective obligations on, and rights for, individuals. The principle of direct effect means that individuals can assert these rights and enforce these obligations directly before a court in a member state. The Commission refers to the judgment of the Court of Justice (ECJ) in the *Crehan* case and to the well-known earlier jurisprudence in *van Gend & Loos, Costa v ENEL* and *Francovich*.

Disclosure and production of documentary evidence

The Commission refers, for example, to the generally acknowledged difficulty that claimants face in obtaining evidence of an alleged antitrust infringement. This difficulty is seen as one of the major obstacles to standalone damages actions, ie actions in which the claimant is not able to rely on a pre-existing decision of a competition authority, whether the European Commission or one of the national competition authorities.

While the Commission points to the fact that judges in all EU member states have at least some power to order both parties to the dispute and third parties to disclose documents, these powers are limited in a number of the member states and, in practice, infrequently used except in the common law jurisdictions. The Commission might anticipate criticism from the legal community in civil law jurisdictions in relation to any proposal to enhance the ability of claimants in competition law litigation to obtain documentary evidence from the other party or, indeed, third parties. Accordingly, the Commission refers to other European (and international) initiatives to support its proposals. In particular, the Commission refers to Directive 2004/48 on the enforcement of intellectual property rights.

The Commission quotes article 6 (1) which states:

> "Member states shall ensure that, on application by a party which has presented reasonably available evidence to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information."

While the circumstances in which such disclosure may be ordered under article 6 (1) of the Directive may not represent, from the Commission's perspective, a sufficiently ambitious target in the context of potential actions for damages for breach of the antitrust rules, it nevertheless provides the Commission with a useful precedent at the European level. This precedent will serve the Commission in deflecting criticism from those jurisdictions and interest groups which may argue that normal rules of procedure in civil litigation should not be changed solely in order to facilitate claims for damages in a particular area of the law, here antitrust law.

Alleviating the claimant's evidential burden of proof

The Commission focuses on the objective of alleviating the claimant's burden of proof in cases of information asymmetry, ie where the defendant is in possession of a substantial body of relevant evidence to which the claimant does not have access. The Commission refers to the jurisprudence of the ECJ in *Aalborg Portland*. In that case, having paraphrased article 2 of Regulation 1/ 2003 on the implementation of the rules on competition laid down in articles 81 and 82 EC, the court concluded that:

> "Although according to those principles the legal burden of proof is borne either by Commission or the undertaking or association concerned, the factual evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged."

The Commission states that, in its opinion, it is arguable that the case presented by the claimant in situations of information asymmetry, eg information on price and commercial strategy, would be characterised as "factual evidence … of such a kind" referred to by the court in its judgment. The Commission concludes that, as a result, in situations of information asymmetry, it might be sufficient for the claimant to present facts which may constitute evidence of an infringement of the competition rules for the burden of proof then to be placed on the defendant to adduce the necessary explanations or justifications to prove that those facts do not constitute such an infringement.

The Commission's reference to, and reliance upon, the jurisprudence of the ECJ underlines the fact that, while the adoption of the options (or some of them) put forward in the green paper would, in one fell swoop, result in more uniform systems of civil procedure for damages actions in competition cases in Europe, the train has already left the station in the sense that there are a number of judicial and legislative

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precedents which already point in the direction in which the Commission wishes to see further developments. It is to be expected, therefore, that there will be progress towards the achievement of the Commission's policy objectives independently of, or at least in parallel with, the debate on the green paper itself.

Fault requirement

The Commission also considers whether, in addition to the necessity to prove the infringement, there should be a requirement to demonstrate fault on the part of the defendant. The focus on this issue in part reflects concerns expressed by some member state governments that liability to damages for an antitrust infringement might be considered excessive and unfair in certain circumstances where, for example, the defendant genuinely did not know that their actions would constitute an infringement. The example commonly given is the case of networks of agreements which, because of their cumulative effect, at a certain point fall within the prohibition of article 81(1) EC. The Commission is aware of the practical difficulties which can sometimes exist in measuring foreclosure effects in such cases.

In the working paper, however, the Commission refers to the fact that, in EC competition law, there is no requirement of fault to show that there has been a violation of article 81 or article 82 EC. The Commission confirms that, in the case of article 81 EC, this flows as much from the text of the provision itself (which condemns agreements having the "object" or "effect" of restricting competition) as from the case law of the Community courts. It is equally interesting that, in the case of article 82 EC, the Commission refers in this context to the first *Hoffmann-La Roche* case, which refers to abuse as an "objective concept", notwithstanding the Commission's own introduction of the concept of intent in the context, for example, of predatory pricing and the *AKZO* case.

The Commission also refers to damages claims based on violations by member states of their treaty obligations. The Commission refers, for example, to the ruling of the ECJ in the *Brasserie du Pecheur* case in which it was held that Community law confers a right to claim compensation if three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties. The Commission quotes the following passage from the court's judgment:

> "The obligation to make reparation for loss or damage caused to individuals cannot, however, depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of Community law. Imposition of such a supplementary condition would be tantamount to calling in question the right to reparation founded on the Community legal order."

The Commission points out that a sufficiently serious breach of Community law is a prerequisite for liability of acts of public authorities, but that, if a public authority has acted with only considerably reduced or even no discretion, like all private undertakings, the mere infringement of Community rules may suffice to establish a sufficiently serious breach. The Commission refers in this context to the judgment of the court in the *Camar* case.

The approach of the Commission and its reference to the jurisprudence of the court suggests that it is not in favour of the introduction of a fault requirement in damages actions. The Commission provides further support for this proposition by referring to the concept of strict liability in the Product Liability Directive. The Commission refers specifically to information asymmetry as one of the reasons why the strict liability rule was introduced in the field of product liability.

The passing-on defence

The Commission appears to be leaning towards a prohibition of the passing-on defence (ie the defence that the claimant has suffered no, or only limited, loss since it has passed on any increase in price resulting from, say, cartel activity to its customers) while allowing at least indirect purchasers who are final consumers to bring representative actions.

The Commission's thesis is that Community law provides for a rule against unjust enrichment but not, when the case law is closely analysed, a passing-on defence.

The Commission refers first to the statement of the ECJ in *Crehan* that Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by it does not entail unjust enrichment of those who enjoy them. Secondly, the Commission accepts that the passing-on defence has been acknowledged by the ECJ in actions for the non-contractual liability of the Community (article 288(2)EC – eg *Ireks-Arkedy*) and actions for the recovery of illegally levied duties by undertakings against member s tates (eg *Just, Michailidis* and *San Giorgio*).

The Commission then advances the proposition that the ECJ itself has placed such conditions on the operation of the passing-on defence that it could be argued that, when it exists, it is redundant. In support of its proposition, the Commission recalls that most of the relevant case law is not in the field of competition, and that the case law is limited to stating that Community law does not preclude a rule of national law which seeks to prevent unjust enrichment. In this latter respect, the Commission relies on the opinion of Advocate General Slynn in *Bianco* and makes the point that passing-on does not necessarily result in the unjust enrichment of the claimant because it can equally result in a reduced volume of sales as the claimant has to raise its prices to its customers; in other words, the overcharge may not represent the totality of the claimant's loss. The Commission concludes, after reference to the ECJ's judgment in *Weber*, that there is no passing-on defence in Community law; rather, there is an unjust enrichment defence which requires both proof of passing-on and proof of no reduction in sales or other reduction in income.

Conclusion

The working paper offers a fascinating insight into the Commission's approach to the pursuit of its policy objectives and its determination to meet potential objections to a number of its options with arguments based on Community law and jurisprudence.