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Introduction

On September 27, 2011, the ECtHR dismissed the action brought by the company A. Menarini Diagnostics Srl (“Menarini”), with which it challenged the compatibility of the Italian system of judicial review of antitrust decisions adopted by the national competition authority (Autorità Garante della Concorrenza e del Mercato (AGCM)) pursuant to national competition law with art.6(1) of the European Convention on Human Rights and Fundamental Freedoms (ECHR). Menarini may have important repercussions at the EU level, in particular upon the current discussions on the possibility of giving a binding effect, in the context of private damages actions, to final decisions from NCAs or to judgments finding an infringement of arts 101 or 102 TFEU. This article explores the impact that Menarini has for these discussions, in particular the extent to which the ECtHR’s ruling could contribute to the resolution of a number of critiques raised in relation to the Commission’s proposal. The findings of the case could also contribute to raise renewed awareness and interest in one of the most highly debated items of the Commission’s proposal. Although it is uncertain whether the Commission’s White Paper proposal could eventually lead to the adoption of specific EU legislation, Menarini may have, in any event, the indirect impact of facilitating follow-on actions, as the in-depth judicial review and control that ECtHR judges now require over NCA decisions may have the effect of strengthening their value as evidence in subsequent private damages actions. In what follows, Section 1 summarises the Menarini judgment and its key findings. Section 2 briefly describes the Commission’s White Paper and, more extensively, the proposal to give binding effect to a final NCA’s decision finding an infringement of arts 101 or 102 TFEU in subsequent damages action raised in front of national courts, or to any final judgment by a national review court upholding the NCA’s decision. Section 3 analyses the implications of Menarini for the on-going discussions on the binding effect of NCA decisions and judgments in the context of private damages actions.

The ECtHR judgment in Menarini

Background

On April 20, 2003, the AGCM imposed a fine of €6 million on Menarini for having operated with other four pharmaceutical firms, between 1997 and 2001, a complex price-fixing and market-sharing arrangement in the market for diagnostic tests for diabetes. Subsequently, Menarini challenged the decision, without success, in front of the competent Italian courts (i.e., the Regional Administrative Tribunal of Latium, the Council of State, and the Court of Cassation). Having exhausted all national remedies, the applicant brought its case before the ECtHR. Menarini’s main contention was that the Italian system of judicial review of the AGCM’s antitrust decisions infringed its right to a fair trial under art.6(1) ECHR, in so far as it did not allow the company to have access to a court with powers of full judicial review, nor to obtain a judicial re-examination of the AGCM’s decision. The ECtHR’s judgment first examines the issue of the applicability of art.6(1) ECHR and of the admissibility of Menarini’s application, then turns to analyse the merits of the applicant’s arguments and, thus, whether the Italian courts had exercised their powers of full judicial review, or to obtain a judicial re-examination of the AGCM’s decision. The ECtHR’s judgment and its key findings.
The applicability of article 6(1) ECHR to antitrust decisions adopted by the AGCM

Under art.6(1) ECHR, “[i]n the determination … of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” In order to assess the admissibility of Menarini’s action, the ECtHR had to ascertain whether the fining decision adopted by the AGCM could be considered a criminal charge. In accordance with the ECtHR’s case-law, a fine can be defined as “criminal” according to the following alternative criteria: (i) the legal qualification of the measure under national law; (ii) the nature of the measure, independently of its domestic classification; and (iii) the nature and severity of the penalty imposed on the basis of such measure. These three alternative conditions—the so-called “Engel criteria”—are used to establish whether the sanctions imposed have a punitive and deterrent effect, and whether the level of the sanction and the stigma of the offence are important. Accordingly, although fines imposed by a NCA against undertakings for their violations of competition rules may not be criminal within the meaning of domestic law, proceedings in relation to antitrust infringements can be considered “criminal” within the autonomous meaning of art.6(1) ECHR.

In Menarini’s case, the ECtHR applied the Engel criteria and found that the anti-competitive practices attributed to the applicant were not sanctioned under Criminal law but on the basis of Italian competition law, which is administrative in nature, thus the first criterion was not met. As to the second criterion, concerning the nature of the infringement, the ECtHR held that the relevant rules were designed to preserve a public interest such as the maintenance of competition on the market. It also stated that the AGCM’s activity aimed to defend general interests of society normally protected by Criminal law. The ECtHR then turned to the nature and severity of the sanction, and found that it had a punitive purpose—the punishment of illegal conduct—and was preventive in nature, by deterring the interested company and third parties from reiterating the conduct in question. The ECtHR concluded that, in light of these considerations and of the high amount of the sanction, the latter had to be considered criminal in nature. The ECtHR therefore considered art.6(1) ECHR to be applicable to the case under examination and, thus, Menarini’s application admissible. It then turned to the merits of Menarini’s contention and to the issue of the compatibility of the judicial review exercised over the AGCM’s measure with art.6(1) ECHR.


The compatibility of the judicial review exercised by the Italian administrative courts in Menarini’s case with article 6(1) ECHR

In light of ECHR case-law, the notion of “criminal charge” encountered an extension through time and a distinction has been made between hard-core Criminal law and cases not strictly belonging to the traditional categories of Criminal law (i.e., administrative penalties, prison disciplinary proceedings, custom law and competition law). As the ECtHR has had occasion to state: “[t]he autonomous interpretation adopted by the Convention institutions of the notion of a criminal charge by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the Criminal law, for example … Competition law.” According to this distinction, where the penalties complained of by the applicant do not belong to the category of “hard core” criminal sanctions, such as antitrust fines, art.6(1) ECHR is complied with where either the administrative authority imposing the sanction in question is capable of offering all the guarantees enshrined therein, or where, in the alternative, the decision issued by the non-judicial body is subject to a review from a judicial authority that meets the requirements of art.6(1) ECHR, including independence, impartiality and the possibility to exercise full judicial review powers. In other words, under the ECHR, the imposition by an administrative authority—as are the Commission and the NCAs—of a fine characterised as criminal in nature is not per se incompatible with the ECHR in so far as the decision imposing it is open to challenge before a court who can offer all the guarantees afforded by art.6(1) ECHR. In Menarini the ECtHR recalls this principle and clarifies that among the most important features of a system of full judicial review, there is the power to examine all questions of fact and law relevant to the dispute and to modify the contested decision. Next, the ECtHR acknowledges that, in the framework of the Italian system of judicial review, no administrative court can substitute its own legal qualification of the facts and technical evaluation to that of the AGCM. However, it observes that, in the case under examination, the Italian administrative courts did not carry out a simple review of the legality of the AGCM decision, but thoroughly reviewed Menarini’s claims in law and in fact, the evidence upon which the adoption of the decision was based, and the soundness and proportionality of the
AGCM’s choices, thus verifying its technical assessments. Additionally, the ECtHR notes that the Italian courts had full jurisdiction with regard to the level of the fine imposed on Menarini, and thus could have modified the latter had they found it to be inadequate or not proportionate in relation to the infringement in question. In light of the above, the ECtHR concluded that the AGCM’s decision was subject to the scrutiny of judicial authorities enjoying powers of full judicial review and, consequently, no infringement of art.6(1) ECHR could be detected.

Dissenting and concurring opinions

One of the most remarkable features of ECtHR judgments lies in the possibility for judges, in case of disagreement, to attach their own dissenting or concurring opinion to the final decision of the court. In the case at hand, Judge Pinto de Albuquerque provided a dissenting opinion containing a detailed analysis of the Italian judicial system in which he concludes that the judicial review exercised by the Italian administrative courts, being limited to a review of legality, does not satisfy the requirements of a system of full judicial review. In particular, his opinion underlines that the Italian administrative courts could only annul a decision when affected by an irregularity, but could not substitute their own technical evaluations to that of the AGCM. Hence, they cannot exercise a thorough review of the discretionary choices of the AGCM which are at the very heart of the imposition of competition law sanctions. In that regard, Judge Pinto de Albuquerque stresses that the Italian administrative courts merely adhered to the technical evaluations of the AGCM and did not carry out a new assessment. Conversely, the classical concept of full jurisdiction entails the possibility of reassessing all factual and legal aspects that relate to the attribution of liability. According to his opinion, the applicant did not thus have the possibility to formulate its contentions in front of a judicial authority offering the guarantees enshrined in art.6(1) ECHR.

Interestingly, Judge Sajó delivered a concurring opinion, which shares the considerations exposed by Judge Pinto de Albuquerque but sides with the majority’s conclusions that the Italian judges had exercised a judicial review which satisfied the requirements of art.6(1) ECHR. According to Judge Sajó, the Italian legal framework only provided for a formal review (a review of legality or a “weak” judicial control). However, in the case at hand, the Council of State had effectively conducted an in-depth analysis of the merits of the case which satisfied the requirements of art.6(1) ECHR. In addition, national judges had the power to annul the administrative decision imposing the sanction. Judge Sajó went on by noting that if, on the one hand, in exercising this control on the merits the Council of State used a terminology which could have led to think it was exercising a weak review, on the other hand, it didn’t act accordingly and performed a meticulous review. What matters, according to Judge Sajó, is that the rights enshrined in the ECtHR have been effectively protected by the judges, and not the terminology used or provided for by the legislation. In other words, national judges should in any case perform a full review (in case even ignoring legal constraints to their powers).

Before examining in further depth the implications that Menarini has for the system of private enforcement of EU competition law, the section below examines the Commission’s White Paper and its proposal to render binding NCA decisions and judgments finding an infringement of arts 101 or 102 TFEU.

The Commission’s White Paper

The Commission’s White Paper and the binding effect of final NCA decisions and judgments finding an infringement of articles 101 or 102 TFEU

The Commission’s White Paper

In the past years the Commission has taken a number of steps to stimulate the debate on the possibility to establish under EU Law an effective legal framework enabling victims to obtain reparation for the harm suffered as a result of a breach of the EU antitrust rules and to effectively exercise their right to compensation. According to the Commission, the absence of an effective legal framework for antitrust damages actions hampers the full enforcement of EU antitrust rules, and has a negative bearing on vigorous competition in the internal market. On April 2, 2008 the Commission published the White Paper on damages actions for breach of the EU antitrust rules (the “White Paper”). The White Paper is a short 10-page document that summarises the Commission’s proposals to address perceived obstacles to the development of private antitrust enforcement in Europe. The White Paper is accompanied by various supporting documents, including a Staff Working Paper, summarising the reasoning underlying the Commission’s proposals, and an Impact Assessment, analysing the benefits and costs of the various policy options considered in developing the White Paper.

The White Paper’s express aim is “to improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of


a breach of the EC antitrust rules”. To this end, and based on the outcomes of several public consultations, the White Paper suggests specific policy choices and measures that are meant to achieve effective minimum protection of the victims’ right to damages under arts 101 or 102 TFEU in every Member State, to create a more level playing field, and to provide greater legal certainty across the European Union.

The binding effects of NCA decisions and judgments

Among a number of proposals, the White Paper suggests introducing a rule that would give binding effect to a final NCA’s decision finding an infringement of arts 101 or 102 TFEU in subsequent damages action raised in front of national courts. In particular, the Commission proposes to require Member States’ national courts to accept a final infringement decision adopted by a NCA under arts 101 or 102 TFEU, or any final judgment by a national review court upholding the NCA’s decision, as irrefutable proof of the infringement in follow-on damages actions.

This measure, if adopted, would create a parallelism with art.16(1) of Regulation 1/2003 which, codifying the Masterfood case-law, provides that the Commission decisions on the compatibility of an agreement or practice with arts 101 or 102 TFEU have a binding effect on national courts. Whenever the Commission finds a breach of arts 101 or 102 TFEU, victims of the infringement can, by virtue of established case-law and art.16(1) of Regulation 1/2003, rely on this decision as binding proof in civil proceedings for damages. In these cases, the burden of proof is substantially alleviated since the claimant can take advantage of the already existing Commission decision finding an infringement.

The aim of the Commission’s proposal is to increase legal certainty and the effectiveness and procedural efficiency of actions for antitrust damages. It is intended that this will be achieved by facilitating legal actions by consumers, who would no longer have to provide proof of an infringement. In the Commission’s view, if defendants can call into question the final decision of a NCA, the courts seized with requests for damages would be required to duplicate the factual and legal analysis of the NCA, resulting in considerable extra costs, delay and uncertainty for the victim. The proposal would ensure, among others, the more consistent application of arts 101 or 102 TFEU across the European Union; and legal certainty, while contemporarily shortening proceedings, decreasing costs and avoiding duplication of analysis.

The Commission, in formulating its proposal, took into account that “it is not the general rule in the Member States that decisions of administrative bodies (such as most NCAs) are legally binding on national courts in civil matters.” For example, in the United Kingdom and Germany national law gives binding effect to decisions taken by the NCA, the OFT or the Bundeskartellamt, respectively. In Germany, this rule extends also to decisions taken by any other NCA in the European Union. However, in most other Member States, there are no rules by which a civil court conducting an action for damages for breach of the EU antitrust rules must have regard to the NCA’s decisions. The fact that NCA decisions are not binding does not exclude the reality that national courts, in the context of private damages actions, may consider a NCA’s views on the law and facts in persuasive terms.

Against this background and to ease the required legislative reform in some Member States, the Commission has subjected the proposal to a number of conditions. In particular: (i) the NCA must be a

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12 White Paper, s.1.2.
13 While in stand-alone actions claimants have to prove the existence of an infringement of competition law before the question of damages is addressed, in follow-on actions, the burden of proving the infringement is alleviated as the claimant can take advantage of the existence of a competition authority decision finding an infringement.
14 White Paper, s.2.3.
15 The fate of the rule concerning the binding effect of NCA decisions is yet to be determined. This is highlighted by the fact that the EU legislator has adopted an unclear position on the matter. On March 26, 2009, the European Parliament issued a Resolution on the White Paper in which it made an obscure statement on the issue of binding effect: “[b]elieves that a National court should not be bound by a decision to the National competition authority of another Member State without prejudice to rules that provide for the binding effect of decisions that were adopted by a member of the European Competition Network, applying Articles 81 and 82 of the Treaty and in relation to the same subject-matter”.
16 See Recital 22 and art.16(3) of Regulation 1/2003; according to art.16 of Regulation 1/2003, in order to avoid the risk of conflicting decisions, national courts “cannot take decisions running counter to the decision adopted by the Commission.”
17 See also Masterfood Ltd v HB Ice Cream Ltd (C-344-98) (“Masterfoods”).
19 See Commission Staff Working Paper, para 142.
21 By way of example:
   - In France, decisions and opinions rendered by the Conseil de la concurrence have de facto a strong persuasive authority on French courts. As recalled by the French competition authority “Même si, en droit français, la décision de condamnation prise par le Conseil de la concurrence, même devenue définitive, ne s’impose pas au juge de la réparation, celui-ci pourra utiliser cette dernière comme un élément utile qui contribuera à emporter sa conviction sur l’existence et la qualification de l’infraction” (Avis 21 septembre 2006, relatif à l’introduction de l’action de groupe en matière de pratiques anticoncurrentielles, para. 78).
   - In Italy, the Supreme Court’s case-law has considerably lightened the burden of proof on the plaintiff if the evidence he produces includes a prior Italian NCA decision finding the existence of an infringement. In this circumstance, the burden is reversed on the defendant who may adduce evidence to the contrary (see Sentenza No. 1926/2011 Cassazione, terza sezione civile; see also Sentenza No. 10211/2011 Cassazione, terza sezione civile, which establishes that the defendant cannot avoid discharging its burden of proof by adducing evidence that concerns the same facts and circumstances already taken into account by the Italian NCA to formulate its decision).

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competition authority within the European Competition Network (ECN): (ii) the NCA’s decision must be final, meaning that all national avenues of appeal against the decision have been exhausted; and (iii) the rule will apply only where the damages action relates to the same practices and the same undertakings as covered by the NCA’s decision.22 If these conditions are met, the final decision must be accepted in every Member State as irrefutable proof of the infringement in subsequent civil proceedings for antitrust damages; and a final judgment by a review court upholding the NCA’s decision, or itself finding an infringement, would have the same binding effect.

Criticisms against the Commission’s proposal

The Commission’s proposal has been subject to a number of criticisms.23 In particular, reservations have been expressed that binding national courts to follow decisions of NCAs from other Member States requires judges deciding upon private damages actions to have faith in the robustness of judicial review carried out in every Member State.24 Specific concerns have been expressed in relation to those countries where the appeal court enjoys a more limited review jurisdiction.

In anticipation of these criticisms, the Commission has foreseen in its proposal certain safeguards. In particular, national courts can avoid the binding effect of NCAs’ decisions in two ways: through referral to the Court of Justice for a preliminary ruling under art.234 TFEU; and (ii) by reference to a new public order exception, analogous to the one contained in art.34(1) of (EC) Regulation No.44/2001 on the recognition of civil and commercial judgments,25 if the right to fair legal process was not guaranteed during the proceedings leading to the NCA’s decision and any subsequent review court proceedings. In the former case, the domestic court hearing the damages action would retain the possibility to refer questions regarding the NCA’s interpretation of arts 101 or 102 TFEU, to the ECJ for a preliminary ruling pursuant to art.234 TFEU. In the latter case, with a view to safeguarding a defendant’s rights of defense, as recognized by the ECHR and by the EU Charter on Fundamental Rights, Member States would be entitled to decline to enforce a foreign NCA’s decision if it has been issued without providing to the defendant sufficient procedural safeguards.26

Notwithstanding the safeguards foreseen by the Commission, a number of participants to the public consultation questioned whether a court in one Member State should be bound by a decision in another where the underlying decision has been taken by an NCA that did not respect procedural safeguards (in terms, e.g., of independence, of separation of investigatory and decision-making stages or of right of defense27), or has not been subject to the same level of scrutiny on appeal as it would have been had the decision been taken in the first Member State.28 According to these criticisms, the Commission’s suggested rule would remove existing checks and balances without sufficient consensus across Member States on what the appropriate level of judicial review should be in terms of effectiveness before an antitrust decision becomes binding on national courts in civil damages proceedings.29 Not all national courts are in fact empowered to determine the merits of the case, and thus to substitute the NCA’s decision with their own and to impose or increase penalties. One particular area of concern is that certain appeal courts may demonstrate a particular deference to the NCA’s economic expertise, exercising a judicial review which is normally limited in outcomes to setting aside the decision and thus verifying whether or not the agency erred in its decision; i.e., whether the NCA’s decision is irrational, illegal or affected by procedural impropriety. According to the most critical commentators this amounts to a form of judicial self-restraint that is unwarranted and may be in violation of fundamental rights, in particular the right to a fair hearing in front of an independent and impartial tribunal.

Implications of the Menarini judgment for this debate

A number of findings the ECtHR judges make in Menarini are interesting for the debate outlined above and could potentially be used by the Commission to respond to a number of critiques raised against its proposal.

22 The Working Paper clarifies that binding effect should only be granted to decisions relating to “(i) the same agreements, decisions or practices that the NCA found to infringe art.81 or art.82, and (ii) to the same individuals, companies or groups of companies which the NCA found to have committed this infringement (normally, the addressee(s) of the decision)”; See Working Paper, para.154. This does not exclude that a prior infringement decision in a similar case may be admitted as evidence, and may even be highly persuasive; it may not, however, constitute binding proof of the infringement and the court will need to reach its own determination on that issue.
23 For an overview see the contributions received by the Commission during the public consultation available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments.html [Accessed October 3, 2012].
24 See the comments on the White Paper presented, among others, by the Association of European Competition Law Judges, pp.5–6; Allen & Overy, p.6; American Bar Association, p.43; American Chamber of Commerce to the European Union, p.5; Herbert Smith LLP, p.4; Howrey LLP, p.12; Law Society of England and Wales, pp.6–7; and the UK Competition Law Association, p.5.
26 A number of respondents have raised doubts that the two instruments can be considered sufficient as: (i) art.234 TFEU concerns only issues relating to the interpretation of Community law and does not cover the ascertainment of facts and the standard of proof; and (ii) according to the ECJ the public order exception in Regulation 44/2001 has to be interpreted in a very restrictive way and can be used only in exceptional cases; see the comments to the White Paper presented by Assonime Associazione fra le società italiane per azioni, p.7.
27 See, among others, the comments to the White Paper presented by the American Chamber of Commerce to the European Union, p.4; and by Freshfields Bruckhaus Deringer LLP, p.6.
28 See, among others, the comments to the White Paper presented by the Association of European Competition Law Judges, pp.5–6; the American Chamber of Commerce to the European Union, pp.4–5; and Freshfields Bruckhaus Deringer LLP, p.6.
29 See, among others, the comments to the White Paper presented by the American Chamber of Commerce to the European Union, p.4.
The precedent that Menarini sets is all the more interesting as the Italian system of judicial review of the NCA’s decisions has been cited in the past as direct example of a review system that could potentially raise concerns if NCA decisions were rendered binding in follow-on damages actions in other Member States. In Menarini the judges concluded that the review exercised by the Italian courts had been adequate and compliant with art.6(1) ECHR to the extent that, not only had the national judges thoroughly reviewed Menarini’s claims in law and in fact, the evidence upon which the adoption of the decision was based and the soundness and proportionality of the AGCM’s choices, thus verifying its technical assessments, but had also full judicial review powers with regard to the level of the fine imposed, and thus could have modified the latter had they found it to be inadequate. In the first place, the importance given to the existence of full judicial review powers in relation to the determination of the fine is particularly relevant from a public policy perspective, as compliance with art.6(1) ECHR would require national systems from now on to foresee such extensive powers of judicial control over sanctions imposed by NCAs when these could be considered “criminal” in nature. If Member States do not already empower national courts to annul, reduce or increase NCA penalties, compliance with the right to a fair trial would require them to adapt their systems in this direction. This effect of the judgment is, however, less relevant in the framework of private damages actions as the imposition by the NCA of a fine is not a decisive factor taken into account by national judges in awarding damages. The main concern for applicants in damages actions, which is also a condition sine qua non for any award, is proving an infringement of competition law.

Menarini’s impact for the private enforcement of EU competition law spells out thus on a different level which concerns the intensity with which national judges are required to review NCAs’ decisions in order to comply with art.6(1) ECHR. After Menarini it can in fact be contended that a situation where a NCA decision, which is “criminal” in nature, is formally subject only to a review of legality and not also to full judicial review, would not qualify per se as a violation of the right to a fair trial enshrined in art.6(1) ECHR and, similarly, of art.47 of the EU Charter on Fundamental Rights which establishes the right to an effective remedy before a court. The ECtHR manifests in fact its intent to scrutinize what national judges reviewing NCA decisions are actually doing and the extent of the control they exercise; this beyond the formalistic definition of their powers or the judges own choice of language which may repeatedly refer to the NCA’s discretion. Moreover, in Menarini the judges identified what can be considered a “minimum standard” of judicial control of NCA decisions that is required for any review to be compatible with art.6(1) ECHR. To this end, courts must carry out a review of both the law and the facts, must have the power to assess the evidence, to annul the NCA’s decision, and alter the amount of the fine. In practice this would entail that courts must establish whether the evidence relied on is factually accurate, reliable and consistent, and also whether the evidence contains all the information which must be taken into account in order to assess a situation, and whether it is capable of sustaining the conclusions drawn from it. ECtHR judges are thus incentivizing national judges reviewing NCA decisions to abandon any form of self-restraint and to conduct a case by case in-depth analysis (which arguably would in turn force NCAs to issue well founded and better grounded decisions in order to pass the more stringent judicial review). In this light, Menarini could be viewed as stimulating judges to adopt stronger precedents, sufficiently reasoned and well founded to the point that they are able to pass the potential scrutiny of ECtHR judges. This is relevant for the discussions on the binding effect of NCA decisions as the existence of a minimum required standard of review for compliance with art.6(1) ECHR would ensure that judgments concerning NCA decisions that circulate in subsequent damages actions have been, at least theoretically and in the good faith intent of the judge in question, the product of intense scrutiny. Giving binding effect to NCA decisions in follow-on damages actions should thus be considered less troublesome, as the ECtHR judges have set a relevant benchmark, mandating a particular intensity of review that cannot be ignored by national judges.

In addition, interested parties remain free to contest the compatibility of any judgment with art.6(1) ECHR, if and when convinced that the measure is not compliant with the level of review required by this provision, provided all other admissibility criteria are fulfilled. The question may in fact nonetheless arise whether, in any particular case, the national courts reviewing the NCA’s decision have adequately exercised their jurisdiction and thus have effectively complied with the ECHR. In light of the above, applications to the ECtHR would have to focus on demonstrating how the judicial review exercised by the courts in a particular case was in fact actually limited to a mere review of legality. In such a case, interested parties would have to demonstrate that the national court could not and effectively did not substitute their own technical evaluations to those of the NCA, but could only annul the decision if they had found it to be affected by an irregularity. Hence, the courts did not

30 See the comments to the White Paper presented by the Association of European Competition Law Judges, pp.5–6. This is due to the circumstance that the Italian administrative courts to which decisions of the Italian competition authority are appealed cannot by law replace the competition authority’s findings for their own, but can only annul the decision if they find that the authority’s assessment is affected by logical defects, or lack of inquiry or motivation.

31 In light of art.52(3) of the Charter, this right must be interpreted as providing as much protection as that provided by the ECHR. Article 52(3) of the Charter states that: “[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection”. Thus, if any of the rights correspond to rights guaranteed by the European Convention on Human Rights, the meaning and scope of those rights is to be the same as defined by the Convention, though EU law may provide for more extensive protection.
exercise a thorough review of the discretional choices of the NCA which were at the very heart of the imposition of the sanction. In case of similar actions being raised in front of the ECtHR, the judge in the follow-on damages action should be given the possibility, where not already provided by national law, to suspend proceedings if it considers it necessary to await the ECtHR’s solution prior to its decision on the award of damages; or, where this possibility is not exercised, Member States should have a procedural instrument in place permitting the reversal of a decision if necessary.

As to the specific concern that various respondents to the White Paper have expressed that an administrative decision should not bind civil judges in subsequent damages proceedings for reasons relating, for example, to the separation of functions and the independence of judges, it can be questioned whether these considerations are in practice a concrete hurdle to the recognition of binding effects of final NCA decisions. NCA decisions can in fact be appealed by the direct addressee(s) of the measure and/or other interested parties affected by their determinations. If the latter renounce this possibility, they are implicitly accepting the correctness of the decision’s findings and of the conclusions drawn from them. In this event, the binding effect of the NCA’s decision in a follow-on damage action can be considered a natural consequence of the acquiescence of the parties to the NCA’s determinations, in particular in relation to the finding of an infringement. If, on the other hand, the measure is appealed in front of a judge, all the considerations illustrated above on the adequate intensity of the judge’s powers of review would come into play and offer an adequate solution to the possible concerns relating to a potential lack of uniformity among Member States on the different forms of judicial control exercised.

Conclusions

Public and private enforcement are (and should be) closely intertwined since judges (and NCAs) should ensure together the protection of market players. Menarini concerns public enforcement, but its effects spill-over in the area of private enforcement in the form of positive externalities. We believe this judgment is able to alleviate most of the criticisms raised against the Commission’s proposal to render NCA decisions and subsequent judgments binding in damages action for antitrust infringements. In any event, Menarini is already able to help claimants in follow-on actions since they could rely (at least in principle) on decisions issued and reviewed in compliance with the ECHR. As such, it is more unlikely that judges in charge of awarding damages could deviate from their more reasoned and accurate findings. Hence, Menarini could “kill two birds with one stone”, as better public enforcement would make the private enforcement of competition law easier and more effective.

32 See, among others, the comments to the White Paper presented by White & Case LLP, p. 9; and by the Association of European Competition Law Judges, p. 5.
Disclosure of Leniency Materials by EU Competition Authorities: Protection in the Face of Civil Damages Claims

Richard Pike
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Access to documents; Cartels; Confidential information; Disclosure; EU law; Leniency programmes; National competition authorities; Private enforcement

The Heads of the European Competition Authorities (ECA) met on May 23, 2012 and resolved to protect leniency materials held on the investigation file from disclosure to third parties seeking to bring civil damages actions against decision addressees.

The ECA’s resolution sets out the joint position that protection of leniency materials is essential so as not to undermine effective anti-cartel enforcement by discouraging potential leniency applicants from coming forward. The ECA considered it necessary to articulate this joint position in view of the judgment of the Court of Justice of the European Union in Pfleiderer that leniency materials may in principle be disclosed and it is a matter for national courts to determine whether they should be on the facts of the case before them.

Relevant law

Articles 101 and 102 of the TFEU prohibit anti-competitive behaviour in the European Union and there is scope for substantial fines and civil claims where these provisions are infringed. The European Commission has published a leniency notice (the “Leniency Notice”) that sets out a framework for rewarding co-operation in the Commission investigation by undertakings which are or have been party to secret cartels affecting the Community. As such, entities that are party to a secret cartel may apply to the Commission for leniency, and if they are the first party to the cartel to make such an application, may benefit from complete immunity in respect of the fine. Nearly all Member States have similar statutory prohibitions on anti-competitive behaviour and policies on leniency in respect of infringing activity.

There are two types of leniency, with the first type being more generous. The Commission may grant the first type of leniency, amounting to complete immunity from prosecution (Type A), where an undertaking notifies the Commission of its membership in a cartel and provides information which supports a Commission investigation. The Commission may grant the second type of leniency, offering participants a reduction in fines (Type B), in situations where it already has some knowledge of the cartel and the circumstances surrounding it, but the information provided is nevertheless useful. This structure incentivises entities that are party to a secret cartel to apply for leniency as early as possible and make full disclosure so as to get the best chance of providing information to the Commission that it does not already have.

During the leniency process, only other addressees can access corporate statements; they may not copy these statements; and they may solely use them for the purposes of their defence in that particular case. However, various European and national legal provisions including Council Regulation (EC) No.1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (the “Regulation”) give rights of access to documents held by competition authorities, including the Commission. Increasingly entities bringing private civil claims for damages resulting from competition law infringements are relying on the Regulation and similar provisions so as to apply via the courts for access to documents held on the investigation file, including leniency documents, in order to help them prove their claims. Since the damages claimed in such actions can potentially exceed any fine, there is a concern that potential leniency applicants might determine not to come forward and/or might be less forthcoming in their statements rather than risk the information they have shared with the Commission being used against them later in a civil claim.

The Commission has long taken the stance that leniency documents should not be disclosed to third parties on the basis that this might undermine the effectiveness of leniency programmes. The recent Pfleiderer judgment acknowledged this concern but determined that arts 11 and 12 of Council Regulation (EC) No.1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in arts 101 and 102 of the TFEU (which compel close co-operation and exchange of information between
national competition authorities and the Commission with regards to enforcement proceedings for arts 101 and 102 TFEU) do not prevent those actors adversely affected by a breach of competition law from accessing leniency application documents. The Court of Justice of the European Union concluded that, rather, national courts should balance all interests protected under EU law and decide whether to allow access in any given case based on governing principles of national law.

Although on a reference back to the relevant German court, Pfleiderer was denied access to the leniency documents in the circumstances of that case, the doors were clearly opened for others to make applications. A limited amount of leniency material has since been released to claimants in at least one other damages case (the National Grid judgment).

A subsequent decision of the General Court in EnBW Energie Baden-Wurttemberg (Case T-344/08) on May 22, 2012, has created further concerns. In that case, the General Court decided that art.4 of the Regulation is not sufficient to exempt leniency materials from disclosure to damages claimants after an infringement decision has been taken. The case is an appeal to the Court of Justice of the European Union, and it may be also that other provisions of the Regulation will provide some degree of protection, but the decision certainly seems to increase the risk of disclosure.

The Heads of the ECA’s Resolution

The Pfleiderer judgment created uncertainty over whether national courts would take a consistent approach as to the disclosure of leniency materials. The Commission apparently took note of this and included in its work objectives for 2012 a commitment to

“present a specific proposal on antitrust damage actions. This initiative will clarify the interrelation of antitrust damages actions brought before national courts with public enforcement by the Commission and national competition authorities and set common standards and minimum requirements for national systems of antitrust damages actions to ensure that rights are enforceable in a coherent manner across the EU.”

The Commission specifically noted that it intended to clarify the interrelation of public and private enforcement with a view to protecting leniency programmes.

The ECA resolution on May 23, 2012, might be seen as a first step in that plan for clarification and as indication of the direction of travel. The ECA acknowledged in the resolution that there is a relationship between civil damages claims and leniency programmes, in that potential leniency applicants will often consider the impact of cooperation upon any relevant civil damages proceedings, and resolved to protect leniency documents from disclosure to civil claimants.

The ECA resolution explained that effective recovery of damages from cartels strengthens EU competition law by discouraging cartels. While leniency programmes and damage claims are therefore complementary in both acting to deter cartel activity, damage claims normally follow on from public enforcement, which in turn relies on leniency programmes, and the promotion of one should not undermine the other. The resolution therefore concluded that protection of leniency programmes is necessary to facilitate successful follow-on damages claims as, if cartels are never uncovered, their members cannot be sued for damages. The ECA concluded that

“as far as possible under the applicable laws in their respective jurisdictions and without unduly restricting the right to civil damages, the ECA take the joint position that leniency materials should be protected against disclosure to the extent necessary to ensure the effectiveness of leniency programmes”.

Wider implications

The ECA’s resolution acknowledges that, ultimately, this is a matter for national courts applying national law (and it remains open to national courts to order disclosure of leniency materials if they consider it appropriate). Nonetheless, the resolution is useful in confirming a single policy position on the part of Member State national competition authorities as to the impact disclosure as a matter of practice might have on the effectiveness of leniency programmes.

National courts still must balance the interests of civil damages as compared with leniency programmes but are likely to take the resolution into account when weighing the importance of not undermining the effectiveness of leniency programmes. The resolution clarifies the aims of leniency programmes, including “preventing further damage being inflicted on businesses and consumers and helping cartel victims to bring forward their claims for damage”, and confirms that protection of leniency materials during damages claims in fact satisfies these aims. This statement of policy is useful for national courts tasked with deciding whether to grant access to leniency documents.

We understand that the Commission intends to consult on its wider proposals on leniency documents in the autumn of 2012. It remains to be seen whether the proposals will cover the effect of the Pfleiderer case as well as the effect of Pfleiderer.

\footnote{National Grid Electricity Transmission Plc v ABB Ltd [2009] EWHC 1326 (Ch) (judgment of June 12, 2009).}
Proposals for Reform to Private Competition Law Claims under UK Law: All Change Please?
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Alternative dispute resolution; Competition Appeal Tribunal; Group litigation; Leniency programmes; Private enforcement

On July 24, 2012, the public consultation period closed on proposals by the United Kingdom’s Department for Business, Innovation & Skills (BIS) to reform a number of aspects of the law governing private court actions for competition law infringement. The consultation was launched on April 24, 2012, with a 70-page document (the “Consultation Paper”), which set out BIS’s often far-reaching proposals and listed 34 specific questions on which BIS sought views. Taken together, the proposed reforms offer a potentially radical re-balancing of the competition law regime in favour of claimants.

Background

The right of claimants to bring an action in England and Wales before the High Court for a breach of competition law has long been recognised in both EU and UK law, with potential remedies including compensatory and injunctive relief. In 2003, the previous Labour government introduced two new forms of statutory claim, through amendments to the Competition Act 1998. These established a general right for injured parties to bring a monetary claim before the Competition Appeal Tribunal (CAT) and enabled specified representative bodies to bring monetary claims on behalf of affected consumers. In each case, an action can be brought only following, and in reliance on, a prior infringement decision by a competition authority (a “follow-on” action).

Several follow-on claims have been brought before the CAT under the first of these provisions, leading to two damages awards, as well as a number of settlements. In addition, competition law arguments are being raised with increasing frequency in High Court claims, whether in the context of follow-on actions, stand-alone actions (which do not rely on a prior infringement finding by a competition authority) or as part of a wider dispute in which a variety of legal arguments are raised. The attempt to encourage collective actions on behalf of consumers has largely failed, however, with only one such claim having been brought in almost ten years and the only body that has been authorised to bring such claims stating that the regime is ineffective. Existing High Court procedures have also so far proved unsuitable for aggregating large numbers of competition law claims.

On this basis, it is likely that, whereas the current UK regime offers reasonable prospects of redress for well-funded companies, consumers and small businesses are not being compensated for harm that they suffer at the hands of companies that infringe competition law. This has apparently contributed to a belief within the current coalition government, and particularly within BIS, that further, more radical, changes are needed. These proposed reforms may therefore be seen as a complement to the government’s changes to the public competition enforcement regime, which are currently before Parliament.

The policy objectives for encouraging private competition claims

Competition law’s overall policy objective is best described as making markets work better, to the ultimate benefit of consumers. This goal may be pursued in a number of different ways, including through punishment of infringers, deterrence of infringement, advocacy (especially to discourage actions by public bodies that reduce competition) and delivering redress for the victims of anticompetitive conduct. Although the Office of Fair Trading (OFT), as the main UK competition authority responsible for enforcing competition law, pursues all of these objectives to some extent, its focus tends to be on detecting and punishing infringers, and thereby deterring others.

In the words of the Minister of State with responsibility for the reforms at the time the consultation was launched (Norman Lamb MP), BIS’s policy objectives are to drive

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3 While similar rights are recognised by all UK courts, including for example the Scottish Court of Session, for simplicity this article focuses on the position in England and Wales.
4 Section 47A Competition Act 1998.
5 Section 47B Competition Act 1998.
6 Healthcare at Home Ltd v Genzyme Ltd [2006] CAT 29, judgment of November 15, 2006 (first award of interim damages, of £2 million), and 2 Travel Group Plc (in liquidation) v Cardiff City Transport Services Ltd [2012] CAT 19, judgment of July 5, 2012 (first final damages award and first award of exemplary damages, totalling £94,000).
7 See Court of Appeal judgment in Emerald Supplies Ltd v British Airways [2010] EWCA Civ 1284.
8 Headed by a Liberal Democrat Secretary of State, the Rt Hon Dr Vince Cable MP, who leads a ministerial team that includes the Liberal Democrat Under-Secretary of State for Employment Relations and Consumer Affairs, Jo Swinson MP, who is responsible for competition policy.
9 The OFT’s competition enforcement powers are shared with the UK’s sectoral regulators, as well as with the European Commission at an EU level. It is also notable that the OFT is due to be merged with the Competition Commission, to create a new Competition and Markets Authority. For simplicity, this article refers to the OFT throughout.
growth and innovation “by empowering small businesses to tackle anticompetitive behaviour that is stifling their business” and to “promote fairness by enabling third parties that have suffered loss due to anti-competitive behaviour to obtain redress”. These are to be achieved by a series of reforms to make it “easier, simpler and quicker” for private individuals and businesses (particularly small and medium-sized companies (SMEs)) to bring a case based on allegations of competition law infringement before the courts, rather than relying on enforcement by a public authority, such as the OFT.

**The proposed reforms**

The four key elements of the proposed reforms are:

- to expand the jurisdiction of the CAT to make it easier for stand-alone and follow-on competition claims to be brought before it, including by giving it powers to grant “fast track” injunctions to SMEs to protect them from allegedly anticompetitive behaviour and introducing legislative presumptions concerning the financial impact of cartels;
- to introduce opt-out collective actions for competition law claims;
- to promote alternative dispute resolution (ADR) in competition disputes; and
- to ensure that reforms to encourage private enforcement do not undermine the public enforcement regime, particularly with respect to protecting the leniency regime.

**Expanding the role of the CAT**

As noted above, the CAT’s jurisdiction to hear follow-on competition claims currently extends only to follow-on actions; that is, claims relating solely to issues on which a prior finding of infringement has been made by a competition authority. Any stand-alone actions, where an infringement has not already been found by a competition authority must therefore be brought before the High Court.

This principle has been applied restrictively in practice, meaning that the CAT has refused to hear any arguments that go beyond the strict limits of the specific infringement on which the claim is based. In addition, the policy of the CAT not to grant consent for claimants to initiate proceedings while appeals are pending means that anyone wishing to bring a follow-on action before the CAT is usually required to wait for all appeals against the decision on which the claim is based to be exhausted before lodging a claim (a process that can take six years or more, for EU enforcement cases). In contrast, a claim can be initiated at the High Court at any time.

As well as enabling a claimant to start its claim earlier, this situation has important jurisdictional implications, since it helps ensure that England and Wales is the forum “first seised” of an action and thereby prevents defendants from deploying tactical measures (including the infamous “Italian torpedo”), in an attempt to ensure that proceedings are heard in jurisdictions that are more convenient for them, rather than the claimant. These twin limitations have certainly contributed to the fact that the CAT has in practice proved to be less popular as a forum for competition law claims than was originally hoped.

BIS is proposing to deal with this by allowing the CAT to hear stand-alone as well as follow-on actions, and is also proposing to implement a dormant statutory provision enabling the transfer of competition cases from the High Court to the CAT, to give more flexibility in terms of case allocation. In addition, it is proposed that the CAT will be given the power to grant interim relief, such as injunctions, as well as monetary compensation. These are sensible and welcome developments. There are clear grounds for utilising the CAT’s established expertise and practical experience in dealing with competition cases to the benefit of both claimants and defendants. The ability to move competition cases from the High Court to the CAT will complement the existing ability to move cases in the other direction and need for injunctive relief, rather than damages, is an important element in many competition cases.

It is unlikely, and indeed undesirable, that these changes will lead to the CAT becoming the sole forum for competition claims, however. The requirement that a claimant in a follow-on action before the CAT must wait for all appeals to be exhausted before bringing a claim appears set to stay. In addition, the High Court will continue to be an attractive forum. The Chancery Division judges in particular have gained significant competition law expertise, including in some instances through sitting as CAT members, and now include amongst their number a competition law expert, who in his previous career as a barrister edited a leading competition law text book.

There is also a notable difference in the amount of upfront work required from a claimant to bring an action before the CAT compared to the High Court: a fully reasoned claim must be lodged before the CAT within a strict time limit, whereas before the High Court the claimant can simply submit an endorsed Claim Form, stating that the particulars of claim will follow. Finally, in cases involving both competition and non-competition claims (which are common), it may still make more sense to bring the claim before the High Court. There will, therefore, clearly still be a role for the High Court in competition cases, which is to be welcomed.

**Fast track route for SMEs**

As noted above, the policy behind the reforms is heavily supportive of SMEs and their role in delivering economic growth. The most radical manifestation of this policy is the proposal to give SMEs a “fast track” for bringing competition claims before the CAT to provide them, in

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9 An approach upheld by the Court of Appeal in Enron Coal Services Ltd (In Liquidation) v English Welsh & Scottish Railway Ltd [2009] EWCA Civ 647.
BIS’s words, with “fast access to injunctive relief in order to alleviate the immediate pressure on the SME caused by anti-competitive conduct”. Such a procedure would allow the CAT to grant swift interim injunctions, and possibly damages, on the basis of limited pleadings and a hearing lasting a maximum of two days. The current disincentives for bringing claims would be addressed by capping the claimant’s liability for the defendant’s costs if its claim is unsuccessful to a maximum of £25,000 and by allowing the CAT to waive the usual requirement for a claimant seeking an injunction to undertake to compensate the defendant for costs it suffers as a result of an injunction being granted, if the injunction ultimately proves to have been wrongly awarded.

This proposal has so far proved to be one of the most controversial put forward by BIS and raises many questions, most of which are not answered by the Consultation Paper. One of the main reasons that stand-alone competition actions are slow and expensive is that it is hard to prove an infringement of competition law. Such difficulties arise both from the lack of evidence of an infringement in many cases (cartels, for example, are by their nature secret) and from the complexity of distinguishing anticompetitive from benign conduct. The latter issue is particularly evident in abuse of dominance claims, which is the category of infringement that BIS is most concerned about, as far as the impact on SMEs is concerned. In such cases, it is necessary to prove both that the defendant is dominant on an economic market and that the conduct engaged in was abusive. Usually both of these must be demonstrated by reference to extensive economic evidence, in the face of a defendant with the resources and incentives to resist an infringement finding. While BIS does acknowledge these issues in the Consultation Paper, it does not propose to change the substantive test for anticompetitive conduct, which is largely set by EU law, and hence the reforms will not alter this basic reality. While this is undoubtedly the right approach, the tension between these positions is bound to cause difficulties in practice.

By attempting to use procedural (rather than substantive) rules to tilt the playing field in favour of SME claimants against defendant businesses, these proposals risk facilitating at least some unmeritorious claims and, through the granting of injunctions on limited evidence, to the prohibition of behaviour that may well be lawful. Although any such prohibition of conduct is intended to be temporary, an injunction is often a prelude to a permanent pre-trial settlement in the claimant’s favour, given the immediate and ongoing cost to the defendant’s business of the imposition of an injunction and the high cost of a trial. The ability of the CAT to grant injunctive relief will be of particular concern to defendant companies operating in fast-moving markets, since a restriction on their normal business practices, even for six months, could have a significant and lasting effect on their ability to compete with rivals.

By creating an attractive redress route limited to SMEs, there is also a risk of satellite litigation over who is able to take advantage of it, given that it is not always clear what is, or is not, an SME. This also begs the question as to why such a procedure should be closed to companies that are only slightly larger than whatever threshold is adopted for defining an SME. Indeed, the OFT has proposed in its comments on the Consultation Paper that this procedure should be extended in the other direction, by opening it to consumers and bodies that represent them.

Although BIS proposes that a claimant wishing to use the fast track procedure would need to pay a refundable deposit, and that the decision on whether to admit a claimant to the fast track would rest with a CAT chairman and would not be appealable, this may not be sufficient to avoid such concerns. At least BIS appears not to be attracted to the suggestion that such claims be preceded by a letter from the OFT confirming their validity, since this would inevitably distract the OFT from its own enforcement activities and delay proceedings. Unsurprisingly, the OFT is also critical of this aspect of the fast-track proposal in its own comments on the consultation, while being supportive of the proposal overall.

**Presumption of loss and the passing on defence**

BIS has rightly identified that the need to quantify the loss suffered as a result of anticompetitive conduct can be a major challenge for claimants. Its response is to propose the introduction by legislation of a rebuttable presumption that a cartel increased prices by a fixed amount of 20 per cent. This presumption could be rebutted by the defendant (or indeed the claimant, if it wished to claim a higher amount), by presenting the necessary evidence. BIS notes that this presumption might particularly encourage follow-on cases, given that quantum is often the primary issue of dispute in such cases.

The introduction of a presumption of loss would represent a major departure from current practice, where the interests of justice require that a claimant bears the burden of proving its losses before it can recover. While it would undoubtedly help in achieving the stated aim of enabling victims of anticompetitive conduct to obtain redress, by lowering the burden and cost of bringing a competition case, it represents a fundamental interference in the defendant’s ability to defend itself against a claim, as well as creating a risk that a claimant would recover more than its loss. The challenges can also be overstated, given judges’ proven ability to engage in a detailed assessment of loss and apply a “broad axe” to reach a just

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Collective actions

As noted above, collective actions can currently be brought before the CAT only by recognised representative bodies on behalf of consumers seeking compensation for harm arising from a competition law infringement. Crucially, affected consumers must individually “opt-in” to any action before they can recover damages. It is not sufficient that they are members of a defined “class”.

BIS rightly concludes that this model has failed to promote collective actions and thereby increase the ability of consumers to obtain redress. There has only been one such representative action to date: a claim by the consumer body Which? against JJB Sports for involvement in an anticompetitive arrangement affecting replica football kit. This action saw 130 claimants (fewer than 0.1 per cent of those estimated to be affected) signing up, for which they were reported to have received £20 each, under a settlement with JJB. Following this uninspiring outcome, Which? (which is the only body currently authorised to bring such claims) publicly announced that it would not attempt such a claim again under the current regime.

BIS is now proposing a number of changes to encourage collective actions, namely:

- allowing collective actions to be brought on behalf of businesses as well as consumers;
- allowing collective actions to be brought in both standalone and follow-on cases; and
- allowing collective actions on an opt-out, rather than an opt-in, basis.

Introducing an opt-out regime is the most radical change proposed by BIS, as it would allow for a representative body to bring a claim on behalf of a defined group of claimants and damages would be calculated by reference to the estimated size of that group, without all the individual claimants needing to be identified. All members of the group would be bound by the final decision, unless they chose to opt out from the action and bring their own claims independently. This would deal with the key weakness of the current system, namely that individual losses may well not provide a sufficient incentive to opt into a legal action, even if this is made as straightforward as possible. By enabling opt-out actions, the representative body can simply proceed with bringing the claim, and worry about how to distribute any final award or settlement once it has been achieved.

To avoid some of the perceived drawbacks of the US class action system, BIS proposes that the ability to bring opt-out actions should be given only to bodies which could reasonably be considered as representative of the claimant group, such as trade associations or consumer groups, rather than law firms or third-party litigation funders. While this is likely to reduce the scope for abuse, it is also likely to dull the financial incentives to bring claims and places significant reliance on representative bodies to take the initiative in bringing claims, based largely on their altruistic desire to protect the interest of those they represent.

Allowing businesses as well as consumers to bring collective actions is seen by BIS as a further important step in facilitating redress, as well as increasing the deterrence effect of the regime. Although the rationale for this step is slightly weaker than for consumers, since it is generally assumed that the harm that flows from cartels ultimately ends up with consumers one way or another, this is a sensible step. By the time that harm does reach the consumer, it may be extremely difficult to show causation or quantify the harm, due to the number of intermediate steps in the manufacturing and distribution chain. Allowing the potentially large numbers of businesses who may have suffered loss along the way to bring a collective action should also help to ensure effective redress.

Concerns have been expressed that opt-out collective actions could fuel potentially unmeritorious claims and lead to defendant companies settling simply to avoid lengthy and costly litigation, without the strength of the claimants’ case being tested at trial — which is perceived as an undesirable aspect of the current US system. To cite just one recent example, Visa, MasterCard and a number of banks agreed to a settlement worth US$7.25 billion in response to a US class action on behalf of approximately seven million retailers. On the announcement of the settlement, MasterCard’s general counsel Noah Haft stated that MasterCard decided to settle, despite having

conclusion where losses cannot be precisely specified. In addition, introducing a presumption concerning the level of price increases would present difficulties in a case where claims were brought by direct and indirect purchasers, since it is not clear how the presumption would be applied in such circumstances. As a result of these concerns, this aspect of the reforms may ultimately prove to be unsustainable. It is therefore unsurprising that initial indications from BIS, post consultation, are that this proposal is unlikely to be pursued.

Another option to make life easier for claimants tentatively put forward by BIS would be to limit the ability of defendants to present a “passing-on defence”, under which the claim of a direct purchaser from a cartel member is reduced by the amount by which the purchaser was able to “pass on” any overcharge to its customers by raising its own prices. The evidential difficulties faced by a claimant in dealing with such a defence are viewed as one further factor that discourages damages actions. Although banning the passing on defence is presented as an option by BIS, it seems relatively unenthusiastic about changing the existing position, which is that such a defence is available before UK courts. The status quo is also favoured by the OFT. As a result, this proposal also appears unlikely to be adopted.
“strong defences to all claims” in order to avoid “years of litigation and uncertainties”. MasterCard was, he said, “best served by an amicable solution”.11

BIS, however, believes that any risks of a US-style litigation culture can be minimised by preserving the loser-pays rule in collective actions, not allowing treble or punitive damages and not allowing contingency fees (where the claimants’ lawyers receive a percentage of the final damages award, over and above their basic fees). Although BIS justifies these limitations by reference to the leading role of public enforcement in the United Kingdom in ensuring punishment of infringements and subsequent deterrence, it is interesting to note that the OFT has stated in its comments on the Consultation Paper that not allowing contingency fees “unnecessarily restricts the funding arrangements open to potential claimants”.

There has also been significant debate over what should be done with any funds that remain unclaimed by class members, following an award or settlement. While the size of the total fund will be set by reference to the estimated size of the total losses of a defined class of claimant, it is likely that many potential recipients of a share of the fund will not come forward to claim this, whether because they are not aware of the right to claim, because they have lost their proof of purchase, because of inertia or due to a perfectly rational cost/benefit analysis that it is not worth the effort. This may result in the majority of the fund remaining unclaimed. The Consultation Paper notes that there are different ways of dealing with this problem, including the “cy-près” approach, under which funds are allocated in a way that is seen as the “next best recipient” to individual claimants (such as a charitable foundation); payment to the Treasury; repayment to the defendants or payment to a single, default recipient with a generally positive public purpose. Although BIS is relatively open on this point, its preferred option is for the last of these options, with the Access to Justice Foundation identified as the recipient that, in its view, is the most appropriate. According to BIS, a large number of consultation responses supported this proposal, although many of these appear to have arisen from a co-ordinated campaign aimed solely at achieving this objective.

**ADR**

The Consultation Paper also considers ways in which the use of ADR could be encouraged in competition litigation. Forms of ADR include mediation, arbitration and early neutral evaluation, each of which offers an alternative to full-blown court litigation that may be attractive to parties, depending on the circumstances and their willingness to engage in the process. BIS is generally supportive of the use of ADR in competition proceedings in principle, while holding back from making it mandatory. This is sensible, given the need for parties to support the use of ADR for it to work.

It has been suggested, including by the Confederation of British Industry, that a form of collective settlement, possibly led by the OFT, could be developed as an alternative to introducing a full-blown opt-out collective action regime. This route is clearly unattractive to BIS, given its strong preference for opt-out actions.

More controversially, BIS supports giving a new power to the OFT to oblige businesses found to have infringed competition law to introduce a scheme to provide redress to victims of their anticompetitive behaviour, in return for a small reduction in fines in the order of five to ten per cent. While the OFT supports being given a role in facilitating voluntary redress, where businesses are willing to provide it, it is not in favour of this being mandatory, given the potential resource implications of forcing through a scheme in the face of unwilling parties. Without the OFT’s support for this proposal, BIS seems likely to adopt an approach that supports such schemes, rather than making them mandatory.

**Protection of the leniency regime**

The Consultation Paper recognises the importance of ensuring that public enforcement, including through the leniency regime, is not undermined by private competition actions. The leniency regime works by offering companies that have engaged in hard-core cartel activity an incentive to “blow the whistle” on their fellow cartelists, in the form of immunity from fines and potentially from criminal prosecutions of related individuals, in return for bringing a previously undiscovered cartel to the attention of the authorities. The main danger of encouraging higher levels of private court actions is that the cost of whistleblowing increases, by exposing all cartelists to potentially significant damages awards. The creation of confidential inculpatory documents in the course of the leniency process may also aid claimants, if they were to come into their hands. BIS is therefore proposing to protect leniency recipients from the usual joint and several liability that attaches to all members of a cartel and thereby limit whistleblowers’ exposure to the losses stemming from their own conduct alone. In addition, it is proposing that documents prepared for the purposes of making a leniency application should be protected from disclosure in private competition cases.

The OFT’s response to the consultation is supportive of these steps, while recommending greater use of the removal of joint and several liability. Despite the OFT’s enthusiasm, this could raise difficulties in practice, given the challenge of establishing which losses arise from the specific behaviour of individual cartel members, in a context where it is the action of the cartel as a whole that leads to prices being increased.

The OFT also recommends a number of steps to improve the coherence of the regime, and avoid private enforcement interfering unduly with public enforcement, including giving the OFT the ability to intervene in court.
proceedings and requiring court proceedings to be stayed while an OFT investigation is pending. These are sensible proposals that largely reflect the current position with respect to the role of the European Commission at an EU level. As the OFT notes, the interaction between public and private enforcement is currently being considered by the European Commission and an EU-level approach on key aspects, such as the binding effect of national authority decisions and access to leniency documents, is likely to be preferable to action on a national level.

**Conclusion**

The Consultation Paper is wide-ranging and contains a large number of proposals. Like the infamous curate’s egg, it is good in parts. While the overall thrust of improving the relative position of claimants to encourage greater competition litigation is clear, it is perhaps unsurprising that, in some instances, the proposals pull in different directions, given the sheer volume and complexity of the issues addressed. Many of the issues raised require a careful balancing of opposing interests and pressures. Although BIS has clearly given a lot of thought to its reform proposals, it is also unsurprising that much detail is left to be addressed at a later stage.

Several over-arching themes run through the Consultation Paper. As noted at the start of this article, BIS’s twin high level objectives are to empower small business to tackle anticompetitive behaviour and to enable third parties that have suffered loss to obtain redress. The first of these is addressed by the proposal for a fast-track procedure before the CAT, which is based on the belief that SMEs are currently suffering from abusive behaviour by dominant competitors and suppliers that is not currently being prevented by the OFT, due to its prioritisation on high impact cases. In contrast, the proposals to introduce opt-out collective actions and a presumption of overcharge addresses the second of these objectives, by focusing more on ensuring compensation for the ultimate victims of hard core cartels.

The legal and policy issues raised by these two objectives are quite distinct. It is often hard to prove the infringement in stand-alone abuse of dominance cases, due to the difficulty of distinguishing unlawful from benign conduct, which leads to factual, legal and economic complexity. Experience has shown that courts are nevertheless willing to engage on the substance and find that abuse has taken place in appropriate cases, especially where the claim is based on an allegation of abusive discrimination, rather than on a potentially trickier form of abuse, such as excessive pricing. In contrast, follow-on claims based on an abuse of dominance finding are relatively straightforward, since the abusive conduct tends to be aimed at a particular competitor, who will usually be the claimant. The fact that a successful abuse may have led directly to loss of business on the part of that claimant means that issues of causation and quantum are likely to be less challenging in such cases (at least relatively). Turning to cartel actions, standalone claims are virtually unknown in this area, due to the difficulty of uncovering evidence of anticompetitive conduct without the benefit of the tools of public enforcement, such as leniency programmes. In addition, even where there is a small number of directly affected purchasers, the scope for application of the passing on defence and the inherent uncertainty over the impact of a cartel on prices tends to lead to follow-on cartel damages claims facing greater difficulties relating to proof of the quantum of loss. The collective action challenge tends to be more acute in this area, due to the potentially large number of small claims.

Another theme that runs through the government’s proposals is the need to balance public and private enforcement. On the whole, the European system of competition law is based on enforcement by public authorities, with a relatively low level of private litigation. This has the benefit that the regime is relatively coherent and more likely to lead to a focus on the most harmful forms of anticompetitive conduct. On the other hand, it relies on public funding and is constrained by the limited resources of the competition authorities. In contrast, the US system is characterised by a much higher level of private competition law actions and less reliance on public enforcement. As well as having the obvious advantage that costs and litigation risks are borne by private parties, and hence activity is not limited by the level of public funds available, this system also ensures that at least some compensation reaches consumers. On the downside, there is a danger of incoherence, since the regime develops through judgments in individual cases. More importantly, as noted above, a system that incentivises private actions by tilting the playing field too far in favour of claimants risks encouraging unmeritorious claims that are settled before they are ever tested before the courts and imposes costs on defendant companies that are disproportionate to any harm caused. In practice, a significant proportion of awards does not reach consumers but is diverted to claimant lawyers or a variety of broadly beneficial causes. While the latter aspect may still be attractive, it is not necessarily the most efficient allocation of financial resources. In addition, although a high level of damages actions could increase the deterrent effect of competition law, and hence encourage compliance, it could also deter companies from blowing the whistle on cartels by increasing the cost of such a step, particularly if this leads to their confidential admissions being used against them in court proceedings. While it is easy to agree that both public and private enforcement are needed, and that each should complement the other, it is harder to get the balance right between the two.

A further theme is the need to balance the interests of claimants seeking redress with the legitimate interest of defendant companies in being able to run their businesses

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12 See, for example, the April 2011 judgment of the High Court in Purple Parking Ltd and Meteor Parking Ltd v Heathrow Airport Ltd [2011] EWHC 987 (Ch).
13 For example, a rail network operator that has purchased cartelised steel rails or an electricity grid operator that has purchased cartelised transmission equipment.
free of interference, provided that they do not break the law. Competition law often involves the assessment of difficult issues of law and fact. While the introduction of new presumptions could bypass these, and hence increase the incentives and rewards for claimants, they also risk giving rise to injustice against defendant companies and could hint at unwelcome “big is bad” populism. This theme is not unique to competition law and has produced extensive discussion over recent years. Discussions have tended to focus on the question of how the costs and risks of litigation should be balanced between claimants and defendants, with the desire to offer consumers greater access to compensation being balanced by the wish to avoid harming law-abiding businesses and “ambulance chasing” by lawyers. These discussions look set to continue, as public attitude towards big businesses (especially banks) becomes increasingly hostile, while the need for private sector led economic growth is more acute than ever.

Finally, BIS’s proposals need to be viewed alongside initiatives and emerging proposals for EU-wide reforms from the European Commission. While these remain at an embryonic stage, and face significant political obstacles, developments are long overdue in this front. As a result, while it is understandable that BIS has not waited to see what will eventually emerge at an EU level before launching its consultation, it is important that any UK reforms do not conflict with parallel EU initiatives, especially given the primacy of EU competition law. (BIS officials have since confirmed that they will take account of any EU initiatives on the treatment of leniency documents.)

Some of BIS’s proposals are radical, and have resulted in extensive and conflicting responses to the consultation. The introduction of opt-out collective actions, for example, would be a step into the unknown for the United Kingdom, although experience from the introduction of opt-out regimes elsewhere in Europe suggests that, so far, they have not led to the much feared “US style” litigation culture. Such self-restraint may reflect particular aspects of those national regimes that are not present in the United Kingdom. As a result, BIS will certainly be taking a risk if it does implement this aspect of the reforms. It is likely that the introduction of the fast track injunction procedure for SMEs will meet with considerable resistance from larger businesses and practitioners, given the potential impact on defendant companies (even in the absence of a proven competition infringement). This proposal may be attractive for smaller companies, however, who will like the idea of being able to get rapid relief against what they view as over-mighty competitors. Experience of such procedures in other countries, including Germany, suggest that the reality may not be quite as straightforward.

BIS is now considering the responses that it has received from interested parties and its own response, in the form of concrete legislative proposals, is still awaited, as at the end of October. It will be interesting to see whether any of the ideas outlined in the Consultation Paper are watered down or dropped altogether at that time, or during the subsequent legislative process.
A False Dawn for the CAT?

Rodger Burnett
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Abuse of dominant position; Anti-competitive practices; Competition Appeal Tribunal; Exemplary damages; Jurisdiction; Limitation periods; Private enforcement

Introduction

When the Competition Appeal Tribunal (CAT) was created by s.12 and Sch.2 to the Enterprise Act 2002 which came into force on April 1, 2003, there were high expectations that this specialist tribunal, set up to deal with competition complaints considered too complex for the lay courts, would be the default venue for competition claims. There were other advantages too, such as the limitation period: before the High Court, the period was six years from the date that the cause of action accrued, while before the CAT it was two years from the date of the decision.1 It was believed that these advantages would ensure that the CAT became the venue of choice for private damages actions.

However, the limitation placed upon the CAT’s jurisdiction of being permitted to hear only follow-on claims meant that, by definition, fewer claims could potentially be heard before the CAT than before the High Court, who could hear both follow-on and stand-alone claims. Added to that, we have seen decisions that further narrowed the scope of the CAT’s jurisdiction while other decisions have highlighted the flexibility of the High Court’s approach, both of which have served to further reduce the appeal of the CAT.

As a consequence of these decisions, the CAT’s star has waned while that of the High Court has waxed, and claimants no longer see the CAT as their first choice. This article will take a look at three recent developments that may lead to an improvement of the CAT’s popularity with claimants: the changes proposed by the recent BIS consultation, the recent decision in 2 Travel Group Plc2 and the recent decision in Deutsche Bahn.3

Narrow jurisdiction

One of the first decisions to reveal the narrowness of the CAT’s jurisdiction was that of the Court of Appeal in Enron 1. Lord Justice Patten, giving the leading judgment, found that the jurisdiction of the CAT was limited to the specific findings of infringement made by the regulator, and that these were to be distinguished from the findings of fact as to the conduct of the defendant. This meant that the claimant was not able to rely on the wealth of information contained in the decision concerning the anti-competitive practices of the defendant against the claimant or the findings of the regulator in relation to unlawful price discrimination. Instead, it was deemed necessary for the regulator to have specifically identified each infringement by the defendant against the claimant with each relevant time period.

Lord Justice Carnwath, who agreed with Lord Justice Patten, added that it was important that in drafting such a decision the regulator should leave no doubt as to the nature of the infringement (if any) that had been found. In making this statement, he appeared to confuse the motivations of the regulator for those of the claimant. It is unlikely that, when drafting an infringement decision, the regulator will have the time or resource to set out in detail, for each potential claimant, the precise infringements made against them by the defendant and the precise time periods. This fact was acknowledged by Lord Justice Jacob in the second appeal before the Court of Appeal in Enron 2 when he said:

“In this context it must be remembered that the party claiming damages is not a party to the proceedings before the regulator. Facts about causation and damages, which will normally include an investigation into whether and if so how the infringing conduct affected that particular party, are not necessarily a part of the regulator’s inquiry. If one is not careful there could be an injustice: findings made by the regulator on incomplete evidence followed by an impossibility of attacking them later.”4

The decision by the Court of Appeal in Enron 1 drastically reduced the scope for damages actions before the CAT, an effect that was explicitly acknowledged by the Department for Business, Innovation & Skills (BIS) in its recent consultation on private actions in competition law.5

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1 Hausfeld & Co. LLP.
2 Rule 31 of the Competition Appeal Tribunal Rules states: (1) A claim for damages must be made within a period of two years beginning with the relevant date. (2) The relevant date for the purposes of para (1) is the later of the following: (a) the end of the period specified in s.47A(7) or (8) of the 1998 Act in relation to the decision on the basis of which the claim is made; (b) the date on which the cause of action accrued.
4 Enron Coal Services Ltd v English Welsh and Scottish Railway Ltd [2009] EWCA Civ 647.
Awaiting outcome of appeals before the European courts

Another decision which served to highlight the limits of the CAT was that of Emerson Electric Co where the CAT held that the time for bringing a damages action against Morgan Crucible had not in fact yet begun to run, due to the fact that the other proposed defendants’ appeals were still pending before the Court of First Instance (CFI). The claimants therefore sought permission to claim against Morgan Crucible before the time period had begun to run. The CAT considered the arguments raised by the claimants and refused to grant permission on the grounds that, among other things, the nature and scope of the appeals brought before the CFI might in certain cases be significant, such as where the appeal challenges findings which are relevant to the finding of infringement. If so, granting permission would carry a greater risk of injustice and inefficiency in the event that the decision were to be ultimately wholly or partially annulled.

In stark contrast, the High Court in ABB Ltd decided that a case could proceed as far as the close of pleadings. This case was a follow-on action based on a European Commission decision against a number of parties, including one or more members of the groups represented by the defendants. A number of these appealed the decision and sought a stay of all further proceedings in the action pending the conclusion of their applications to the CFI and any subsequent appeals to the European Court of Justice (ECJ). In making its decision, the Chancellor compared the position of the parties if a stay were granted with the position if it were not, taking into account the alternative possibilities that the appeals to the CFI/ECJ were successful in whole or in part, or not. Having considered the effects on the parties, he concluded that the claimant would sustain some prejudice from the further delay which would ensue before its claim could be heard, the extent of which could not be foreseen and could not be compensated. In so making this decision, he highlighted the importance of allowing disclosure in order to enable the parties to be on an equal footing.

Jurisdiction over a wide group of defendants

The greater flexibility of the High Court was evidenced in other ways also, such as in the decision by the Court of Appeal in Cooper Tire. In this case, the defendants had appealed the decision of the Commercial Court that it had jurisdiction over the claims despite the English domiciled defendants not being addressees of the Commission’s decision, and its decision that it was not required to stay the English proceedings until the outcome of the Italian proceedings. The Court of Appeal upheld the Commercial Court’s decision thus widening the range of defendants against whom proceedings could be brought. It also established that it would not relinquish jurisdiction easily.

The decisions referred to above have played a part in claimants choosing increasingly to litigate before the High Court instead of before the CAT. The article will now turn to the first of the three factors—the BIS consultation—which may increase the appeal of the CAT.

BIS consultation

BIS has been consulting on a number of changes to the rules relating to private damages actions. Its aim is to encourage private-sector led challenges to anti-competitive behaviour, which in turn will complement the United Kingdom’s public competition regime. One of the four areas in which it is proposing to make changes is the rules relating to the CAT, in the hope that this will encourage more claims to be filed there. The other areas are the introduction of an opt-out collective actions regime for competition law, the promotion of alternative dispute resolution (ADR) and the protection of whistleblowers and leniency recipients. For the purposes of this article, this section will focus only on the changes to the CAT’s regime.

Changes to the CAT’s regime

In introducing the changes to the CAT, BIS acknowledges the current under-use of the CAT and stakeholder feedback concerning the CAT’s restrictive rules. It notes in particular those rules which mean that cases that, despite being primarily follow-on, could not be heard in the CAT as the claimant wished to introduce one or more aspects of evidence or damages not contained in a prior infringement decision. Specific reference was made here to the Court of Appeal judgment in Enron 1, referred to above. The government stated that it believed that the CAT had capacity to take on extra cases.

The changes being proposed by the government would bring the CAT in line with the practice in the High Court; these include allowing claimants to file stand-alone claims before the CAT, the implementation of s.16 of the Enterprise Act which would allow the High Court to transfer claims to the CAT, and giving the CAT the power to issue injunctions. The consultation also proposes the introduction of a fast-track model for SMEs: this would be cheaper as there would be no or limited court fees and costs would be capped, and quicker as cases would be heard within six months of being accepted and limited to a two-day trial. Another significant advantage for SMEs would be the ability of the CAT to swiftly grant interim injunctions.

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4 Cooper Tire and Rubber Company v Shell Chemicals Ltd [2010] EWCA Civ 864.
**Ability to hear stand-alone claims**

To take these in turn, allowing the CAT to hear stand-alone claims is likely to have a significant impact on its workload. As explained above, it is a rare and lucky claimant indeed who is able to refer to an infringement decision that covers the entire claim that he would like to make, with the correct time periods and products, and that has used the language the Court of Appeal has indicated must be used before an infringement can be inferred. In many cases, the decision will fail to cover the entire period or product range the claimant believes was part of the infringement; the Commission may have chosen not to look at that period or product, or it did look at that period or product, but the defendant succeeded in having it struck out of the infringement decision. The claimant will often, therefore, need to employ a combination of a stand-alone and follow-on action, which automatically means that the case must be heard in the High Court. Allowing the CAT to hear stand-alone claims is therefore likely to make it more attractive to claimants.

**Injunctions**

Allowing the CAT to issue injunctions will further bring it in line with the High Court. This power is considered to be of particular importance for smaller claimants who are more concerned with gaining injunctive relief against a larger business partner, than with obtaining damages.

**Ability to transfer cases from High Court to the CAT**

Implementation of s.16 of the Enterprise Act so as to permit the High Court to transfer cases to the CAT may increase the number of cases. However, it is worth noting that the CAT’s power to transfer cases to the High Court has been utilised on only one occasion so far, in *WH Newson*.[12] It is debatable, therefore, whether (absent other changes) it will have a significant effect on the number of cases before the CAT. On the other hand, the additional changes being made to bring the CAT in line with the High Court may make transfers to the CAT more possible; for example, only cases that met all the conditions attached to litigating before the CAT could be transferred there, which would exclude a large part of the cases before the High Court as they might contain elements that are stand-alone only. Having removed this difference, and others, transfers may take place more often.

**Fast-track model at the CAT**

The government has also proposed the introduction to the CAT of a fast-track model for SMEs: it would be cheaper than proceedings before the court as there would be no or limited court fees and costs would be capped, and quicker as cases would be heard within six months of being accepted and limited to a two-day trial. Another significant advantage for SMEs would be the ability of the CAT to swiftly grant interim injunctions. It considered that the CAT was the best place to establish this fast-track because it had the specialist expertise that the county courts would lack and the strong case management powers to allow cases to be processed quickly. If implemented, this change is likely to increase considerably the number of cases before the CAT.

**Issues remain**

Notwithstanding the above changes, there remain some fundamental issues with the CAT which may serve to dampen their effect. We refer in particular to the CAT rules governing formal settlement offers, which are unsatisfactory in a number of ways. The most significant of these is that the rules permit the claimant to accept the offer at any point up to 14 days before the final hearing and provide that, by default, the claimant will be entitled to its costs up to the date of acceptance. This is a significant deterrent to the making of formal offers by defendants under r.43 because it requires a defendant to give an open offer to pay all the claimants costs up to the point 14 days before trial even if the claimant should or could have accepted the offer immediately at a very early stage in the litigation. There is no incentive for claimants to accept an offer earlier than 14 days before trial. Similarly, there is very little incentive to a defendant to make an offer under r.43 because the consequences of the claimant failing to beat the offer are only that it will be required to pay the defendant’s costs from the last date on which it was permitted to accept the offer, which would be 14 days before trial. Further, while there may be consequences for claimants in that the Tribunal may order those costs to be paid on an indemnity basis and/or subject to penal interest, it is under no obligation to do so.

**Cardiff bus: the first successful follow-on damages award from the CAT**

**Overview**

Another factor which may impact a claimant’s choice of venue is the CAT’s recent judgment in the case of *2 Travel Group Plc*, handed down on July 5, 2012. In finding for the claimants, the CAT awarded not only compensatory damages for loss of profits but also exemplary damages. This was the first time that exemplary damages had been awarded by the CAT under s.47A of the Competition Act 1998. The judgment is particularly interesting in its discussion of exemplary damages and the circumstances when exemplary damages may be appropriate in abuse of dominance cases. Being able to claim for this head of damages may influence a claimant when choosing a venue for his private damages action.

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11 *Euron v EWS* [2009] EWCA Civ 647.
12 Case No: 1194/5/7/12, Order of the Chairman July 24, 2012.
facts

Cardiff City Transport Services Limited (trading as Cardiff Bus) was established in 1986 from a hive-off from a local authority of its municipal bus operations. It operated bus services on routes within Cardiff, amongst other places. 2 Travel Group Plc (“2 Travel”) was established in 2000 and sought to provide a no-frills commercial service targeted at senior citizens and young mothers in Cardiff.

At about the same time as 2 Travel introduced its commercial services in Cardiff, Cardiff Bus started to operate a no-frills service (known as “white services” as they were provided in white buses). Cardiff Bus priced its “white services” below its normal services and below 2 Travel’s prices for three out of four fare zones and was loss-making. Following 2 Travel’s exit from the market in December 2004, Cardiff Bus ended its own no-frills service. The OFT found that Cardiff Bus had abused its dominant position by providing these “white services” and further abused its dominant position by engaging in predation. Despite this, Cardiff Bus did not receive a fine as its turnover was less than £50 million and thus benefited from immunity under s.40(3) of the 1998 Competition Act.

CAT’s judgment

In January 2011, 2 Travel brought a follow-on claim in the CAT for damages for loss of profit, loss of opportunity, wasted management and staff costs and exemplary damages.

After a 10-day trial the CAT concluded that Cardiff Bus’ behaviour was unlawful and that its conduct was in cynical disregard of 2 Travel’s rights. The CAT rejected Cardiff Bus’s argument that its intention was simply to operate a “differentiated” no-frills service and to test the market. According to the CAT, Cardiff Bus’s intention was solely to exclude 2 Travel from the Cardiff market.

2 Travel was awarded damages of just under £100,000. This amount included compensatory damages for loss of profits of £33,818.79 (with a 2 per cent interest above base rate) and exemplary damages of £60,000.

In relation to exemplary damages, the CAT clarified that such an award should be made cautiously, where compensation is inadequate to punish the defendant for its outrageous conduct. The CAT justified the relatively small amount of exemplary damages awarded to 2 Travel stating that exemplary damages had to bear some relation to the compensatory damages being awarded and have to take into account the economic resources of the defendant. For the purposes of the present case, the CAT took into account the relatively small size of Cardiff Bus and the fact that, as an entity with an association with a local authority, Cardiff Bus would no doubt take very full account of the judgment.

Exemplary damages in particular

In Rookes,13 Lord Devlin identified the following three categories of case where an award of exemplary damages may be appropriate:

1. Oppressive, arbitrary or unconstitutional conduct by “servants of the government”.
2. Conduct calculated to make a profit which may well exceed the compensation payable to the claimant.
3. Cases authorised by statute.

2 Travel contended that it was entitled to exemplary damages under the first two of these three heads. The CAT ruled that Cardiff Bus could not fall within Lord Devlin’s first category but held that the case fell within the second category concluding that there was a clear inference that Cardiff Bus knew that it was doing something illegal (para.595). The requirement of the knowledge, at the time of the infringement, of a subjective state of mind was attributed to the executive directors of Cardiff Bus, Mr Kreppel and Mr Brown.

The Devenish case

The CAT judgment in Cardiff Bus can be contrasted with that of the High Court in Devenish14 which was the first case to deal with the award of exemplary damages for breaches of competition law, and where the court decided that exemplary damages should not be awarded. In reaching its decision, the CAT considered the Devenish case at length, although it was not a case concerning the Chapter II prohibition but an infringement of art.101 TFEU. The High Court refused to award exemplary damages for the reasons set out below.

The defendant, Aventis (formerly Rhône-Poulenc) had been granted full immunity in regard to its participation in the cartels in vitamins A and E because it was the first company to co-operate with the Commission and provided decisive evidence in the case of these two products. This was the first time that the Commission granted a 100 per cent reduction of a fine under the terms of the Leniency Notice. A fine of €5.04 million was, however, imposed on Aventis for its passive participation in the vitamin D3 infringement, on which it provided no information to the Commission.

In his judgment which was upheld by the Court of Appeal15, Lewison J. did not award exemplary damages to Devenish because to do so would infringe the principle of ne bis in idem, the principle that prohibits the same person from being sanctioned more than once for the same unlawful conduct. Although Devenish argued that

15 Devenish [2008] EWCA Civ 1086.
some of the defendants, against whom exemplary damages were sought, had had their fines commuted to zero as a result of the application of a leniency notice—and therefore that they had not been sanctioned at all—Lewison J. rejected this submission on the basis that the Commission had decided in principle that fines should be imposed on the Aventis companies. Despite the application of the Leniency Notice, and the commutation to zero of those fines, the starting point for the application of the Leniency Notice was the finding of unlawful conduct coupled with the imposition, in principle, of a fine.

Lewison went on to say that that exemplary damages had the same aim as the Commission’s fines: deterrence and punishment. The CAT did not consider this to be a barrier: it accepted that, in the general scheme of competition enforcement, punishment and deterrence were matters for the public authorities, but it did not consider that this precluded an award of exemplary damages under s.47A in an appropriate case.

**Impact on the appeal of the CAT**

It should be noted that *Cardiff Bus* and *Devenish* are not direct parallels. *Cardiff Bus* was an abuse of dominance case under Chapter II rather than a cartel in breach of Article 101 of the Treaty on the Functioning of the European Union, and there was no question of whistleblowing. In contrast, the leniency and whistleblowing regime played a key part in Lewison J.’s judgment: he did not want to impose a penalty that would discourage whistleblowing. There are limits, therefore, to the extent to which claimants seeking damages in cartel cases can assume from the *Cardiff Bus* judgment that the CAT will be willing to award exemplary damages.

In its judgment, the CAT stated that it was under no illusions but that this judgment was likely to incentivise the bringing of claims for exemplary damages in competition cases. It tried to keep Pandora’s Box sealed by stressing that every future claim for exemplary damages would be assessed individually; but nonetheless was matters for the public authorities, but it did not consider that this precluded an award of exemplary damages under s.47A in an appropriate case.

**Deutsche Bahn, judgment of the Court of Appeal dated July 31, 2012**

**Introduction**

The last factor to be examined in this paper is the Court of Appeal ruling in *Deutsche Bahn* which reversed an order by the CAT striking out the claims by *Deutsche Bahn* and the other claimants for damages against Morgan Crucible in relation to the latter’s illegal participation in the Carbon Graphite cartel.

**The judgment**

The Court of Appeal, with Lord Justice Mummery providing the lead judgment, unanimously found in the claimants’ favour that the CAT had erred in law in holding that claims had been brought outside of the CAT’s two year limitation period. The hearing turned upon what constituted a “decision” of a regulatory body (in this case the European Commission) that a relevant prohibition had been infringed pursuant to s.47A (6)(d) of the Competition Act 1998.

Morgan Crucible, as a non-appealing immunity applicant, argued that the “decision” from which the two-year limitation period should begin to run was what it deemed to be the individual decision addressed to it rather than any decision addressed to the cartelists as a whole. Consequently, it argued that this ran from the expiration of the period for it to appeal to the General Court of the European Union. Conversely, the claimants submitted that the “decision” meant the decision on infringement addressed to all the cartelists and so time began to run from the expiration of the appeal process initiated by all the defendants substantively appealing the Commission’s decision. On this construction the claimants were still within time to bring a claim against Morgan Crucible.

Mummery L.J. concluded that s.47(6)(d) referred “quite generally to a decision that a relevant prohibition has been infringed” and did not refer in terms to a decision that “a particular party or addressee has infringed competition law”.17

**Impact on the appeal of the CAT**

The judgment clarifies the previously complex issue of how the CAT’s limitation provisions operate when some but not all addressees appeal a Commission decision. It also marks a turning point for prospective claimants in follow-on competition claims as it will open the door for further actions that, following the CAT’s previous ruling on this matter, were time-barred. It may have an effect on future applicants as it extends the time previously thought to be the deadline, which may mean a greater number choosing the CAT over the High Court.

**Update**

Morgan Crucible was denied permission to appeal to the Supreme Court by the Court of Appeal. It subsequently filed a request for permission to the Supreme Court on August 28, 2012. The Supreme Court typically makes a

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17 Paragraph 110 of the judgment.
decision within six or eight weeks on such applications, but given the Court holidays, a decision is anticipated to come out in mid-November.

Conclusion

This article has taken a close look at a few recent developments in the field of competition claims and whether they will lead to claimants being more likely to file a claim in the CAT than the High Court. In our opinion the changes set out in the BIS consultation have the potential to greatly increase the popularity of the CAT as a forum for litigating follow-on competition claims. If implemented, many of the perceived advantages of bringing a claim in the High Court will be removed, opening the door to stand-alone claims and to mixed stand-alone and follow-on claims, arguably the most significant of the proposals. The fast-track model also has the potential to increase the flow of traffic to the CAT. However, it will take some time for these changes to be implemented, assuming that all those proposed are passed, and even longer to bed down. Further, unless there are also amendments to the procedure by which formal settlement offers are handled then some claimants may continue to prefer to litigate before the High Court.

In our opinion the recent cases of Cardiff Bus and Deutsche Bahn, while not deterring claimants from using the CAT, will probably only operate at the margin. If being part of a global cartel is not on its own sufficient to warrant an award of exemplary damages then it becomes difficult to conceive of too many scenarios where a defendant’s behaviour will render it liable to pay exemplary damages. Similarly if the case of Deutsche Bahn has any impact we believe it will operate in the short-term by opening the door to actions that were previously time-barred.
in the context of contract and other disputes that result in claims for damages, this would seem to be the facet of competition cases where the CAT enjoys least advantage over commercial courts. Damages claims are not easy to decide, but a detailed understanding of competition law is generally not critical to reaching an assessment of the extent to which one party has been wronged by another’s unlawful action.

To sum up, the substantive case for the BIS Consultation’s proposal to allow the CAT to judge private actions on whether an infringement occurs seems soundly based.

Protection for SME complainants

Section 4 of the BIS Consultation outlines a possible “fast track” route for SMEs to enable them to bring private competition law actions against large companies more easily. This proposal is linked to the proposed extension of the CAT’s powers, since the BIS Consultation seems to rely on the CAT’s greater flexibility on procedure to provide this fast track facility in a way that would not be open to the commercial courts.

The intended target here appears to be dominant firm conduct that excludes smaller rivals (especially SMEs) from being able to offer effective competition. The focus of the BIS Consultation’s discussion is less on the ability of such firms to claim damages but more on their ability to seek injunctions to stop the exclusionary conduct. Paragraph 4.28 of the BIS Consultation asserts that “What SMEs need most is the opportunity to compete fairly so they can survive and grow”. While it is hard to object to the potential benefits of a thriving SME sector, however, a closer look at the BIS Consultation’s discussion and proposals reveals an alarming absence of substance behind these good intentions.

Identifying the market failure

First, it is important to identify what the nature of any market failure is that justifies the proposed intervention. What beneficial role could fast track procedures play that is not already fulfilled by OFT enforcement and existing private actions options? The BIS Consultation does not address this key question directly, but we can infer that its rationale for intervention is in some way linked to the fixed costs to the individual Claimant of initiating a private action that alleges a breach of competition law. Paragraph 4.28 of the BIS Consultation’s proposal to allow the CAT to judge private actions on whether an infringement occurs seems soundly based.

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2 This is not to say that the CAT will always deal better with competition arguments than a non-specialist court. There are instances in which the fresh perspective of a good non-specialist body can provide useful insight on competition issues.

3 RBB Economics, London. I am indebted to my colleagues Iestyn Williams and Bojana Ignjatovic for their comments on an earlier version of this paper.
because the cost of the public funds committed to such enforcement is greater than the total welfare benefits that are expected to arise from such intervention. Typically, however, the potential private gains to a single claimant in a private competition law action will form only a part of the overall welfare benefits that arise from bringing some anti-competitive conduct to an end. But if that is the case, one would not expect private enforcement to succeed where public enforcement had already been ruled out on cost-benefit grounds. It is not clear why as a matter of public policy one would one even want to encourage intervention (whether private or public) to take place if the costs of doing so exceed the benefits.

The BIS Consultation’s attempt to square this circle is its proposal to change the parameters of private actions through a “fast track” approach. This proposal raises a number of legal and procedural issues that lie beyond the expertise of an economist, but the essential thrust of this proposal is that under the fast track proposals the costs (and other dimensions such as the allowable timetable and number of experts) of the exercise are artificially capped.

Of course, imposing such constraints might reduce the expected costs of bringing a case below the relevant thresholds so that an action that was unwieldy previously now becomes commercially attractive. But curtailing the investigation process through the fast track route presumably also entails some loss of quality in the scrutiny and analysis that is brought to bear on the infringement allegation. If not, then one would surely wish to impose the fast track approach as the norm across all competition law actions, including public enforcement.

It is notable, for example, that the OFT’s enforcement efforts under Chs I and II have consumed time and resources that far outstrip the truncated dimensions proposed in the BIS Consultation’s fast track criteria, indicating that it is hard to resolve real world cases within these constraints.

To use a cricketing analogy, the fast track proposal imposes a 20:20 format on what would otherwise be a five-day Test Match contest. Experience tells us that the outcome of such a change in format might well be exciting, and that it will bring with it some crowd-pleasing attributes, but these merits come at the expense of significant compromises in the predictability of outcomes and in the ability of the contest to ensure that the best team wins. The serious point here is that the fast track proposals must increase the risk that private actions will generate the wrong result, and the cost to economic efficiency and welfare of any such increase in the error rate needs to be factored in to the assessment of its desirability. Similarly, imposing a fast track process that has less predictable outcomes could affect firms’ conduct and attitudes towards risk, quite possibly leading to unintended consequences such as chilling the intensity of competition or innovation in favour of “safety first” business practices. Yet discussion of these important elements is notably missing from the BIS Consultation.

### Questioning the merits of SME protection

Secondly, it is necessary to ask some hard questions about the likely merits of the SME complaints that are being left unanswered by the current system. Paragraph 4.19 of the BIS Consultation admits that “a significant number of SMEs who currently believe they are victims of anti-competitive behaviour actually have no strong competition case to bring.” But that should sound a warning to the government to proceed more cautiously towards helping SMEs to make such complaints. The BIS Consultation notably fails to provide any evidence that a competition problem does exist. On the contrary, the illustration next to para.4.24 of the Consultation cites the following illustration of the kind of behaviour by big firms that might form the basis for an SME complaint:

“A farmer owned a large amount of land which he had inherited from his father. His father had previously agreed a deal with a large outdoor advertising company to allow advertising on the farm land for a term of approximately 30 years, despite the fact that the Vertical Block Exemption stipulates that an agreement of this nature cannot be longer than 5 years. This was preventing the farmer taking advantage of a higher-priced offer from a rival company.”

However, the fact that the Block Exemption does not apply to agreements that have a duration in excess of five years does not (contrary to the impression created by the BIS Consultation) render all such agreements anti-competitive, and any such interpretation would chill many pro-competitive contractual arrangements. Indeed, on the limited information provided in the above illustration it appears highly unlikely that the SME farmer in question would have a legitimate competition complaint. It is also highly significant that, if this complaint were to succeed, the motivation for the farmer’s complaint would be the low prices that the farmer received under the existing contract and the outcome would be to grant the farmer an ability to walk away from that agreement with the result that prices would increase. There can of course be circumstances in which valid competition policy intervention leads to higher prices, but since the overall aim of competition policy is to secure

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1. One exception to this conclusion would arise if there is some wider demonstration effect from bringing a case that would assist the resolution of other valid cases or deter anti-competitive conduct in other comparable cases. However, the OFT’s enforcement criteria already provide for allowing public enforcement to occur in such circumstances.

2. Or translate this analogy to a broader audience, consider the adoption of a sudden death penalty shoot-out in place of a 90-minute match between opposing football teams.

3. In the unlikely event that any anti-competitive foreclosure effects arose from this long term agreement, the victims would in any event be third party advertising firms that were prevented from doing business, and not the SME farmer. In any event, it seems exceptionally implausible that inability to access a single small farmer’s property would foreclose any meaningful advertising market.
lower prices and better consumer welfare outcomes one ought to be at least suspicious of interventions that have the opposite effect.

This illustration is by no means exceptional within the context of the BIS Consultation. Paragraph 4.32 of the BIS Consultation states that the proposed fast track model would focus on securing “non-monetary resolutions such as injunctions”. Yet in almost every case and illustration cited, the BIS Consultation envisages injunctions that would allow the SME complainant to prevent the introduction of a new product by a competing firm or to protect the SME from the consequences of “unfairly” low prices.

Notably, all of these illustrations cited by the BIS Consultation involve actions that would protect SMEs from competition and would have the immediate effect of denying consumers the benefits of unfettered competition. In short, the proposals set out a fundamentally protectionist framework to assist SMEs. It is therefore hard to escape the conclusion that the authors of the BIS Consultation have been captured by an essentially protectionist SME lobby whose interests are in the main antithetical to the normal objectives of competition policy. At the very least, proponents of this protectionist lobby ought to be put to much stricter proof that their interventions would contribute to consumer welfare. The evidence we see in the Consultation, in common with experience more generally of such protectionist lobbying, does not inspire confidence that this test would be satisfied.

**Encouraging collective actions**

When it comes to private actions for damages, the BIS Consultation states that the primary aim should be to create a framework that allows consumers and businesses that are adversely affected by competition law infringements to be able to obtain redress for the commercial damage they have suffered. The clear objective here is to enable private parties to achieve compensation, an objective that is distinct from the primary objective of public enforcement, which is (see BIS Consultation para.3.8) to deter anti-competitive conduct.

A private actions framework that aims to facilitate compensation must be capable of following the effects of anti-competitive conduct down through the supply chain, since there is no doubt that the true impact of many competition law infringements can be passed on to some extent from the immediate customers of the infringing firms to their customers, and so on down to end consumers. This raises two major problems, both of which are identified indirectly in the BIS Consultation.

First, it is often a factually very complicated matter to assess how the effects of anti-competitive activity (say a supra-competitive price due to a horizontal cartel) are ultimately distributed between immediate customers (who purchased the cartelised good) and indirect customers (who in turn purchased the products of the immediate customers, an input of which was the cartelised good). The more links there are in the vertical supply chain, the more complex it is to measure how these effects work themselves out. This complexity is magnified by the fact that the participants at different levels of the downstream supply chain will be competing against one other in their claims for the damage.

Secondly, in the typical case the effects become more diffuse as they move down the supply chain, so the damage suffered by each individual entity becomes smaller in absolute terms. For products that are ultimately sold to individual consumers, the damage to each individual can often be very limited, even if in aggregate that damage is substantial when spread across multiple consumers.

Both of these factors present major challenges to the viability of private actions that are aimed at securing compensation. The most significant BIS Consultation proposal to deal with this problem is to offer some encouragement for collective actions by classes of affected parties. It proposes to do so by introducing an opt-out provision that would make it easier for those bringing collective actions to secure the necessary critical mass of similarly affected consumers. However, in an effort to suppress the influence of private actions claim specialists only bodies such as trade associations or consumer groups that can reasonably be considered to be representative of the affected consumers would be able to take advantage of such provisions.

Again, such proposals raise legal and procedural issues on which economists are perhaps not best placed to comment, but if the government is serious about creating a framework to facilitate compensation-related private damages actions it is hard to see how this objective could be achieved without some positive encouragement to collective actions. Allowing a group of similarly affected end users, each of whom suffers a small absolute damage from the infringement, to aggregate their claims is the logical way to overcome the difficulty associated with the high fixed cost of making such a claim and avoiding the wasteful duplication of effort that would be associated with multiple claims on the same substance.

The question is whether such encouragement will solve the aggregation problem, but create other distortions by tipping the balance too far in favour of Claimants. Paragraph 4.10 of the BIS Consultation rightly states that “[a]llowing for higher than actual damages can distort the grounds to settle” and Annex A to the BIS Consultation contains a fuller discussion of the risks associated with an unwanted lurch towards the dreaded “compensation culture”. It seems plausible that the BIS Consultation’s caution in avoiding a move towards US-style treble damages and in limiting the classes of entity that can mount a collective action will control this risk of an overshoot from too little to too much private litigation. However, there are so many uncertainties in the system and the way it might operate under the proposals that it may not be possible to assess this until the new regime is tried out.
The BIS Consultation’s proposed presumptions on pass-through and cartel impacts

Even if a collective opt-in arrangement succeeds in aggregating many small end-user claims into a value that makes the litigation stakes worthwhile for the claimants, the BIS Consultation recognises that the practicability of making a private damages claim that compensates the victims of competition law infringements also depends on keeping the claim itself suitably simple. With this in mind, the BIS Consultation proposes two separate legal presumptions that are intended to shift the balance of power from defendants to claimants:

- First, it discusses the option of imposing a presumption that damages are passed through the chain in their entirety, all the way to the end user.
- Secondly, it suggests applying a presumption that the uplift on selling prices caused by a cartel infringement should be at least 20 per cent.

The intention seems to be that such presumptions should form a kind of default position in the event that the point is not contested, or that the judge decides that the factual record is too complex to reach an informed view. However, in order for a presumption to play a legitimate role there must be some relationship between its ability to simplify the legal assessment, and the extent to which it represents the true picture that would emerge in the absence of such measurement difficulties. There must, however, be doubts as to whether either of these presumptions will improve the accuracy of private actions, and there is a strong possibility that they would have the unintended effect of increasing, rather than reducing, the cost and complexity of bringing private actions.

The pass-through presumption

A presumption that all damages are passed all the way through to the final user is intended to help end consumers to claim damages. It would certainly appear likely to hamper private damages claims from direct purchasers, the category of third parties that is most likely to have suffered a sufficiently large and immediate impact to be able to justify the expense of a private damages claim. Pass through arguments are used primarily by defendants in such claims to diminish the size of the damages that their immediate customers have suffered, and as such this aspect of the proposal would have the unintended consequence of benefiting those who have infringed competition law.

Whether this dampening impact would be offset by an increase in claims from consumers further down the supply chain is open to question. The BIS Consultation appears to have a simple textbook model in mind in which raw materials are supplied to manufacturers who then supply to retailers who sell to ultimate consumers. Some real world industries do indeed conform to this framework, but many do not, and that leaves open substantial scope for arguments as to where in the vertical chain the buck should stop.

Further, since the degree of pass-on depends on a number of complex factors including the shape of the demand curve and the nature of competitive interaction between rival suppliers, an assumption of 100 per cent pass-through is likely to apply only in exceptional cases. Hence, the presumption will, whatever its legal status, be seen by economic experts and judges as obviously unreliable.

It is doubtful whether a presumption that bears such a weak relationship to reality could play a useful practical role in resolving disputes between opposing parties. Even if it formed the starting point for a dispute, if that starting point is manifestly far away from the ultimate destination it will encourage the deployment of significant amounts of effort and cost as the parties to a dispute seek to find a more realistic solution. Hence, the notion that a pass-through presumption will ease the end consumer’s task of obtaining damages is unlikely to hold true. The fact that the BIS Consultation makes no firm recommendation on adopting this pass-through assumption is to be welcomed, since there is a danger that if adopted it would lead to greater confusion on damages claims and have at best limited scope in pushing disputes towards a quick conclusion.

The 20 per cent price uplift presumption

Recognising that damages claims in fact rely on establishing complex counterfactuals, the BIS Consultation also proposes to insert a general presumption that the effect of a cartel infringement will be to have a 20 per cent uplift effect on the prices charged by infringing firms. Paragraph 4.43 justifies this 20 per cent price uplift presumption as follows (emphasis added):

“The Government recognises the fact that the damage caused by cartels varies from case to case and that any given figure is unlikely to be correct for all cases. However, the figure of 20% represents the lower end of the range that the current economic literature suggests prices can be raised by and is therefore considered a more appropriate starting point than the current apparent presumption that a

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\[8\] Indeed, the public policy rationale that underlies US case law under cases such as Illinois Brick deliberately denies pass-through claims precisely because of concerns that taking pass-through into account will dilute claims and deter private actions.

\[7\] Even with complete pass-on, however, it is possible to observe some damage suffered by direct customers, associated by loss of sales volume.

\[6\] Consider, as an illustration, how the proposal might affect a follow-on action from the alleged cartel in the car windscreen market. Windscreen manufacturers sell the car-telised products to car manufacturers who sell (via distributors) to car buyers. Many car buyers are end consumers, but many are also private entities such as taxi firms who sell their services to consumers who include lawyers who in turn pass their disbursements on to their clients, and so on.

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cartel has caused no damage. The figure of 20% was also indicated as the average in the recent draft EU guidance paper.”

However, this presumption would be problematic for a number of reasons.

First, there would be substantial uncertainty in distinguishing between cases where the 20 per cent presumption did and did not apply. The term “cartel infringements” covers a potentially wide variety of conduct and circumstances, many of which could fall well short of a classic horizontal price-fixing cartel. For example, competition authorities have shown increasing interest in pursuing conduct such as horizontal information exchanges as “object” infringements, and have carried out a number of investigations into vertical and “hub-and-spoke” agreements on the (frequently unjustified) grounds that they are akin to horizontal cartels. However the economic studies the BIS Consultation refers to focus on “classic” hardcore cartels, not on these more complex types of conduct. Crucially, economic theory strongly suggests that information exchanges, for example, are generally less likely to have significant effects on competition than hardcore cartels. Moreover, there is no clear bright line test for distinguishing between “proper” horizontal cartels and these other potentially anti-competitive forms of conduct. As a consequence, one might expect that vigorous debate on whether a 20 per cent price effect presumption would even apply in any particular case would attract a great deal of unproductive effort which would add to costs but provide little real illumination.9

Secondly, the BIS Consultation’s claim of the existence of an “economic literature” consensus around the 20 per cent impact is, contrary to the confident assertion above, highly controversial. It is based essentially on a survey article of numerous individual studies of horizontal cartel impacts, many of which fall well short of the rigorous standards that would be required to form the basis for a reliable public policy conclusion. Moreover, the survey sample on which the study in question has been assembled has been criticised for biasing the estimate systematically in favour of relatively high impact estimates. This is because studies that find substantial cartel effects are more likely to be published, and therefore to be included in the survey sample, than those finding little or no effect.10 The BIS Consultation’s contention that a 20 per cent impact lies “at the lower end of the range” is particularly surprising, since no one who has studied the impact of cartel infringements would deny that a substantial proportion of attempted cartels fail substantially or wholly in achieving their aims. Indeed the studies the BIS consultation refers to clearly dispove the notion that there would be a “minimum” effect of cartels. Rather, to the extent that such studies offer any robust conclusion, they clearly show that the effects of cartels on prices differ substantially across cases, ranging from zero to 50 per cent and more.

The 20 per cent figure (and indeed higher figures, such as the 20–35 per cent range cited by the OFT in its recent consultation on penalties) has been widely quoted by DG COMP and (as the BIS Consultation notes) is reproduced in the economic study that was commissioned by DG COMP on private actions.11 However, repeated citation of a study does not make it more reliable. If the 20 per cent impact presumption was soundly based on empirical evidence, this would itself raise much more substantial issues about the adequacy of the public enforcement regime, since it would suggest that basing fines on a figure set at 10 per cent of a company’s relevant turnover would systematically fail to allow competition authorities to provide adequate deterrence. As a simple illustration, if a company perceives there is a 50 per cent risk of detection, the fines for a cartel infringement would need to be set at a level more than double the expected gain in order to provide deterrence. On the BIS Consultation’s assumption that cartels typically create a 20 per cent price uplift, that would imply a need for average fines to be set at a level above 40 per cent of the infringer’s normal turnover in the affected markets.

This in part reflects the reasoning behind the OFT’s recent consultation on competition law penalties in which the OFT proposes to raise the starting point for fines from 10 per cent to 30 per cent of relevant turnover.12 Even this three-fold increase would appear to be inadequate if the 20 per cent presumption were valid (unless one believes that the risk of detection is close to 100 per cent). As we discuss further below, the real requirement here is for a more serious assessment of the actual impact of different forms of competition law infringement. In this respect, it is interesting that recent Judgments by the CAT have tended to be critical of the OFT’s approach to setting fines, and have led to fines being reduced significantly below the levels set by the OFT even when it used 10 per cent of relevant turnover as the starting point.

Thirdly, given the lack of robust evidence behind the 20 per cent presumption, it would be subject to the same practical questions as those raised above in relation to pass-through. If the 20 per cent presumption held sway, it would seriously risk providing an opportunity for unjust enrichment for damages claimants, thus creating a risk of the very distortions in the incentive to settle cases that para.4.10 of the BIS Consultation identifies as potentially harmful. More likely, the absence of any robust basis for the 20 per cent presumption would in most cases lead to defendants hotly contesting the validity of any claim that

9 Alternatively, it might be envisaged that the presumption would apply to any form of anti-competitive conduct that was deemed to meet an “object” test. But if so that would magnify the already strong objections to relying on the economic literature to justify this presumption.


relieved on the 20 per cent presumption. Thus, while the presumption might alleviate the initial load on claimants when putting together a claim, the high probability of a vigorous rebuttal from the defendants could be expected quickly to escalate the debate to a full review of the merits of any such claim. Hence, the idea that the presumption “would reduce the need to assemble extensive economic evidence” (BIS Consultation para.4.41) scarcely seems plausible.

Ultimately, a legal presumption on damage impacts that is not well supported by the evidence will clearly attract substantial levels of defendant effort, and if (as seems likely) the presumption is consistently overturned, this will surely come to undermine the ability of such a measure to affect the outcome of cases.

Measures to facilitate redress

Finally, one of the most interesting initiatives in the BIS Consultation is the proposal to give competition authorities the (discretionary) power to oblige infringing businesses to provide redress to those adversely affected by their unlawful actions. If this proposal is implemented, this power would be enforced after an infringement had been found. The details of how such a scheme would work are not fully explained, but the Consultation appears to envisage a process within which the OFT would play an important role encouraging infringing firms to reach a damages settlement as a way to avoid a costly private action for damages.

This notion that the OFT could play a more prominent role in private actions emerges almost as an after-thought in the BIS Consultation. But the idea that deterrence objectives of public enforcement and the compensation objectives of private enforcement might be integrated within a common framework has an inescapable logic. Having opened up this Pandora’s Box, however, the BIS Consultation then tries hard to shut it. Paragraph 6.39 of the Consultation insists, for example, that the OFT should remain oddly disassociated with the detail of any such settlement despite its key role as the facilitator of any redress arrangement. Specifically, it states that the OFT “would not attempt to quantify individual loss” and that the power to implement a settlement would be “entirely independent of any fines or other sanctions imposed.” The BIS Consultation also asks for views on whether an offer by an infringing company to pay redress should be taken into account when the OFT sets the level of the fine for the infringement, although para.6.43 is strongly inclined against any such offsetting mechanism on the grounds that “[c]ompensation for damages, to which victims are legally entitled, should be seen as additional to, and not as a substitute for the fine.”

Such statements fail to give proper consideration to the relationship between penalties for deterrence and compensation. It is correct to say that the compensation objective behind private actions is different from the deterrence objective that drives public enforcement, and that the financial penalties on infringing firms that are appropriate to achieve these different objectives will not coincide exactly. However, that does not justify the BIS Consultation’s suggestion that the two should be considered as “entirely independent” of one another.

To illustrate, consider a simple case in which an unlawful cartel elevates prices paid by consumers by £100 million, and the cartel members perceive they face a 50 per cent risk of detection. Any punishment for the infringing firms in this cartel that lies below £200 million will fail to provide optimal incentives for deterrence—in fact if penalties lie below this threshold participation in the cartel would (on purely financial criteria) be the rational commercial choice. However, the correct level of compensation payments to affected customers would simply be the £100 million impact of the cartel. In this sense, one can see that the penalties for deterrence and compensation are not perfect substitutes for one another.

However, suppose that two such cartels in different industries are detected and prosecuted by the OFT, but that cartel A is then subject to a follow-on damages action whereas customers affected by cartel B judge that it would not be cost-effective to mount a claim. This could result in the members of cartel A facing total penalties of £300 million whereas those involved in cartel B would pay only £200 million. If £200 million represents the optimal level of deterrence, the risk is that the element of double-counting in the case of cartel A creates a sub-optimal incentive structure (or, in simple terms, a punishment in excess of the crime).

The key insight here is to recognise that private actions work as a partial substitute for fines, and the obvious public policy solution in cases prosecuted by public bodies would be to fund the compensation out of the money collected in fines. This argument is mentioned (see paras 6.42–43) but the BIS Consultation provides no real reason for rejecting it.

Perhaps one reason for the BIS Consultation’s reluctance to acknowledge the case for linking fines with compensation is that this might shed unwelcome light on the failure of existing fining principles to take serious account of the actual economic impact of competition

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13 BIS Consultation para.4.40 refers to the scenario in which neither side chooses to offer any economic evidence, happy to rely on the 20 per cent presumption. But it would be extraordinary if this scenario ever applied.

14 There are analogies with other controversial presumptions that are frequently invoked in competition law, such as the presumption that firms enjoying market shares in excess of 40 per cent are “presumed” dominant on some readings of the art.102/Ch.II case-law. There are few if any instances where this presumption has persuaded the allegedly dominant firm to give up on efforts to argue that the presumption can be rebutted.

15 In practice, the relationship between optimal fines and damages could be somewhat more complex. For example, it is clearly legitimate on deterrence grounds to elevate the price of the infringer is a repeat offender, or to discount fines where this is part of an effective leniency programme. But the introduction of such complications does not invalidate the benefits of considering fines and damages in a consistent framework.

16 Note that if damages were paid from revenues collected in fines, that could also have the benefit of continuing to protect leniency applicants, whereas, as is discussed at s.7 of the BIS Consultation, independent private action liability for such applicants risks undermining the incentives that have made the leniency approach so effective in uncovering cartel activity.
law infringements. In a policy environment in which the government is keen to promote private compensation, this disconnect between fines and impact seems, however, increasingly hard to justify.

Paragraph 6.31 of the BIS Consultation stresses that “the Government would not wish the OFT to become so involved in the business of quantifying the degree of loss suffered by consumers or businesses that this led to an impairment in carrying out its other functions.” This point is well taken, but it ignores the substantial benefits that would arise if the OFT engaged more with assessing the likely effects of competition law infringements. Financial sanctions that are set with no reference to the likely effects run a serious risk of failure to provide optimal levels of deterrence, and tend to undermine the legitimacy of enforcement actions. Moreover, the investigating body on a cartel case has a uniquely good opportunity to assess and evaluate the likely impact of the conduct in question. Yet it is remarkable how little information on effects can be gleaned from cartel decisions when it comes to follow-on actions, and the difficulty of assembling the relevant market data, often several years after the infringement has ceased to operate, is in practice a material barrier in constructing robust estimates during private damages actions.

There is an intrinsic link between this question and the broader question, raised above in relation to the proposed 20 per cent price uplift presumption, of how fines should be set for competition law infringements. It is hard to disagree with the principle that fines should reflect the “seriousness” of the infringement, and yet the actual approach to determining fines comprises a series of essentially mechanistic steps based on affected turnover that seem to be designed to minimise any risk of a real debate on the economic impact of the conduct in question.

Even the argument that this mechanistic approach avoids the scope for disagreement and delay does not seem to be supported by recent Competition Act evidence. Specifically, in different ways the recent CAT Judgments in the separate cases involving cover pricing practices in the construction industry, and recruitment consultants in the construction industry, have resulted in substantial reductions (of between 50 and 90 per cent) of the fines that had been levied by the OFT.\(^\text{17}\) The reasons for the reductions were very different in the two cases, but in both cases they reflected a recognition that the OFT’s mechanistic turnover-based approach to setting fines had failed to reflect the actual likely impact of the infringements.\(^\text{18}\)

These (and other) CAT judgments provide a clear signal to firms involved in cartel infringements that the appeals process provides scope to secure significant reductions in fines that are set on the basis of mechanistic rules based on affected turnover, because such rules will often fail to match the actual impact of the infringement. As things currently stand, Appellants against the level of fines are forced to concentrate their arguments on the formalistic framework that has been set out to determine the calculation of fines, but behind the artificiality of this debate is a set of substantive questions on the likely impact on customers and consumers of different forms of anti-competitive conduct. It is encouraging that the CAT has exercised its discretion within the current framework to apply such significant adjustments to OFT fines that it felt did not have a meaningful connection with the impact of the offences involved. But if it is ultimately the economics that drives such adjustments, it would be more rational to adopt an approach to fines that reflects a more effects-based assessment.

The inability of the OFT’s current framework for determining fines to ensure that penalties match the adverse impacts of competition law infringements raises issues that may go beyond the BIS Consultation’s intended agenda on private actions. However, when considering the desirability of a policy that deters wrongdoing and compensates its victims, it becomes increasingly hard to justify disassociating these linked themes.

These policy strands could be better aligned by requiring the OFT to take more explicit account of likely effects when levying fines, while recognising that it would also be appropriate to adjust any effects-based penalties to reflect other legitimate policy objectives of ensuring deterrence, punishing recidivism, and providing incentives for leniency applicants. Then, if a process is to be inserted to enable the OFT to facilitate compensation, it would be logical to allow some portion of the money collected in fines to fund the compensation that is paid to the victims of this unlawful conduct.

To take this step it would be necessary (and justified) for the OFT to take a more hands-on approach in linking fines to the impact that infringements have on market outcomes. An approach to policy that made more effort to integrate the different but related objectives of deterrence through public enforcement and compensation for victims through a private actions regime would not be easy to develop. But it could ultimately address many of the problems associated with the current tensions between private and public enforcement.

\(^{17}\) See CAT judgments on the Construction cartel (Kier et al) appeals of March and April 2011, and the CAT judgment in the Recruitment consultants cartel (Hays et al) of April 2011.

\(^{18}\) In the construction cover pricing cases, the CAT was influenced by the fact that the infringement was likely to have “limited adverse effects”; in the recruitment consultants case the seriousness of the cartel was not questioned, but the CAT baulked at the fact that, due to an oddity in the way in which turnover was reported by the cartelists, the appellants’ arguments for basing the fines on an alternative turnover measure based on value-added would provide a “more meaningful” basis for the fines.
Developments in the Litigation of Competition Law in the United Kingdom

Gustaf Duhs

Introduction

Certain quotes suggest that the relationship between Americans, litigation and the antitrust laws has not always been an easy one. Abraham Lincoln counselled “Never stir up litigation. A worse man can scarcely be found than one who does this.” The author Ambrose Bierce described litigation as “A machine which you go into as a pig and come out of as a sausage.” The writer and critic Isabel Paterson stated that “As freak legislation, the antitrust laws stand alone. Nobody knows what it is they forbid.” Notwithstanding these sentiments, competition practitioners in the United Kingdom have long aspired to levels of private enforcement to rival those in the United States. The UK government is now looking to take significant steps to increase the levels of private enforcement of competition law in the United Kingdom.

This article examines the current position in relation to private enforcement in the United Kingdom and the key recent developments in relation to it. The article goes on to consider the position overseas (and particularly in the United States) to speculate as to whether we might see a significant increase in competition law private actions in the United Kingdom as a result of recent developments.

Any overview will necessarily be broad brush, and may to a certain extent be misleading.

The current position in relation to private enforcement of competition law in the United Kingdom

In order to understand the present and speculate as to the future it is helpful to consider briefly the past. Although there is little commentary on the historical position in relation to private enforcement of competition law, there are a number of very good studies on this subject carried out by Professor Barry Rodger that are worth briefly considering, along with an overview of the recent pattern of UK Competition law cases. What that and more recent case law suggests is glacial progress in terms of the prevalence and success of private litigation of competition law in the United Kingdom.

1970–2004

In the period from 1970–2004, research by Rodger suggests “90 ‘competition law’ cases, where judgments have been delivered.” Of these 16 were designated as successful and seven as partially successful.

To put it another way, in a 30 year period up to 2004 there were on average three competition law related cases a year resulting in judgments, and of these only around 25 per cent were successful in relation to the competition law argument.

The author does however claim a dramatic increase in 2004 in terms of both the number and the success rates of cases:

“The most recent year in the study, 2004, is the most interesting in relation to England and Wales, primarily because there is a dramatic increase in the number, three, and percentage, 43 per cent, of successful cases, although these cases are of varying significance.”

Subsequently, empirical research (by way of an anonymous questionnaire) was undertaken which provided some limited information on 43 settlements in the United Kingdom between 2000 and 2005 inclusive. “[Settlement] figures suggest that there has been a fairly dramatic increase in recent years, with the figure of 14 settlements, or 33.3 per cent, in 2005, particularly notable.”

Looking more widely, the Ashurst report on claims for damages in 2004 found 60 “judged cases for damages across the European Union, 28 of which resulted in an award being made”. This suggests a success rate across the European Union of 47 per cent.

2005–2008

In carrying out similar research into the prevalence of private competition law litigation in the United Kingdom for the period 2005–2008, Rodger found: “There have..., been 41 judgments, although this may give a slightly distorted view when compared to the earlier data—in fact there have been 27 cases, some involving multiple judgments or appeals.”

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This equates to on average just under seven cases per year, with a steady number between 2005 and 2007 and an increase in 2008 which led the author to speculate: “perhaps the marked increase in 2008 indicates that we may be witnessing early signs of a surge in competition law claims.”

In relation to success rates Rodger noted: “The ‘success’ rates have increased considerably … with 18 successful and three partially successful rulings out of the total of 41 judgments, spread fairly evenly across the four-year period.” That equates to a success rate of just over 50 per cent. This appears to be a significantly higher success rate than that found in a study in relation to German competition law litigation covering the same period, which suggested that in Germany in the period 2005–2007, “parties who brought forward allegations of anticompetitive conduct succeeded or partly succeeded in 37.2 per cent of all proceedings in the sample. The majority of antitrust claims were lost.”

In relation to the types of cases that had been brought, Rodger notes a preponderance of competition law being used defensively (i.e. as a defence to claims for example for breach of Intellectual Property or Contractual Infringement) in the period up to 1999, and a trend towards more competition law claims being made, noting that “this trend has clearly been continued between 2005 and 2008 with 29 of the 41 judgments involving claims”.

Of the claims in the period, six separate cases in the United Kingdom (or 22 per cent) were follow-on claims. Contrast this with the reported position in Germany where only “eight cases, or 2.2 per cent of the sample followed the prior decision of a competition authority”.

Looking at the level of private enforcement on an EU-wide basis, the External Impact study associated with the Commission White Paper of 2008 indicated that there had been 96 antitrust damages actions across the European Union between May 1, 2004 and the third quarter of 2007. This appears to be a significant increase as compared to the number in the Ashurst report (60 cases over all years).

2009–2012

A review of online resources suggests that Rodger’s anticipated surge in cases has not materialised, with 17 Competition law related cases in the High Court and 15 claims in the Competition Appeal Tribunal (CAT) from the end of the 2005–2008 survey to August 2012 (i.e. 32 claims overall) or on average around eight claims per year.

Of these cases, 15 involving alleged breaches of Competition law have been finally determined and six of these might be deemed at least partially successful (where settlement is taken as success). That amounts to a success rate of 40 per cent. There is a marked contrast between success rates in the CAT (five out of eight or over 60 per cent success rate) and the High Court (one out of seven or a 14 per cent success rate). This is likely to derive from the relative ease of achieving a positive result in follow-on actions.

Conclusion on the current position

What one might glean from this brief statistical overview of Competition law enforcement over the last 42 years is:

- 2004 saw a very dramatic increase in cases. This is likely to be based at least to some degree on the introduction of statutory follow-on actions in the CAT (introduced by the Enterprise Act 2002) as well as other initiatives associated with ‘modernisation’ of the competition regime.
- The average number of cases in the United Kingdom is certainly increasing year upon year albeit at a relatively slow rate over the last decade at an average of about one additional case resulting in judgment every three years.
- Although there appeared to be a marked increase in success rates after 2004, success rates over the last decade have been generally steady at around 40–50 per cent, and this broadly follows the same pattern as in the rest of Europe.
- There is a very marked contrast between success rates in the High Court and the CAT.

So having regard to this relatively modest development of Competition law litigation to date, the interest in encouraging change, and in recent developments in relation to Competition law litigation in the United Kingdom is understandable.

Recent developments in competition law litigation in the United Kingdom

The consultation from the Department for Business, Innovation & Skills (BIS) in respect to private actions in Competition law has been the subject of extensive commentary, and it is not my intention to consider this in depth in this article. Nonetheless the suggested initiatives can be briefly summarised as follows:

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The widening of the role of the CAT. In summary this initiative includes:
— transferring cases from the High Court to the CAT;
— allowing the CAT to hear stand alone cases directly (currently the CAT only has jurisdiction to hear follow-on cases or cases transferred to it by the High Court);
— allowing the CAT to hear applications for injunctions;
— introducing a fast track route for SMEs facing anti-competitive behaviour.13

Putting in place statutory presumptions:
— on the quantum of loss in cartel cases; and
— on the availability of passing on defence and indirect purchaser claims.14

Initiatives to encourage a collective actions regime for competition law by:
— changing from an ‘opt-in’ model for collective actions to an ‘opt-out’ model for collective actions;
— allowing collective actions to be brought on behalf of businesses as well as consumers;
— allowing collective actions to be brought in stand alone as well as follow-on cases.15

Encouraging Alternative Dispute Resolution (ADR). This centres around:
— the promotion of ADR in competition law cases;
— enabling formal settlement offers that would have an impact on costs awards;
— enhancing the power of competition authorities to facilitate consumer redress (as happened in the independent schools case).16

Ensuring that the private enforcement regime complements the public enforcement regime. This revolves around:
— continuing to encourage leniency applications while upholding the right to redress;
— ensuring there are consistent decisions between public and private enforcement.17

The ultimate aims of the reforms are summarised in the consultation document as follows:
“The Government is fully committed to maintaining the public competition authority at the heart of the enforcement regime. However, it believes that, in certain limited circumstances, private actions can complement public enforcement, enhancing the benefits of the competition regime to our economy.

The aim of these proposals is therefore two-fold:
• Increase growth,
  by empowering small businesses to tackle anti-competitive behaviour that is stifling their business.

• Promote fairness,
  by enabling consumers and businesses who have suffered loss due to anti-competitive behaviour to obtain redress.

By complementing the existing high quality public enforcement regime, private actions can contribute to maintaining a highly competitive economy, supporting growth and innovation.

The primary need from government is to create a framework whereby individuals and businesses can represent their own interests, rather than to extend its own involvement in competition law. Empowering and enabling businesses and consumers to take direct action against anticompetitive behaviour will be essential to establishing a private actions regime that complements public enforcement.”

The tabled reforms are therefore extensive and the aims of the reforms appear on their face to be uncontroversial.

With impeccable timing, the government’s consultation has been shortly followed by the landmark judgment in Cardiff Bus.18

In summary, in the Cardiff Bus case the OFT took a decision that the bus company Cardiff Bus had predated against a new entrant (2 Travel Group Plc), thereby abusing its dominant position in the market in Cardiff.

Relying on that decision, 2 Travel Group subsequently sued Cardiff Bus by way of a follow-on damages action in the CAT.

The judgment marks the first time any court in the United Kingdom has awarded damages for breach of competition law (albeit that there have been some high profile settlements in previous cases).20 However much of the focus in the case has been on the fact that exemplary damages were awarded. Exemplary damages were awarded amongst other things based on the test in Rookes v Barnard that the defendant had a “cynical disregard for a plaintiff’s rights and had calculated that the money to be made out of his wrong doing will probably exceed the damages at risk”.21

The exemplary damages awarded against Cardiff Bus were £60,000.

In making the award the court stated that the following were relevant to the quantum of damages:

“We consider that:

i. Whilst exemplary damages do have to punish and deter, we consider that they also have to bear some relation to the compensatory damages being awarded, which in this case are low.

ii. In assessing the amount of exemplary damages, it is important to have regard to the economic size of the defendant. In some cases, a defendant may be so economically powerful that exemplary damages will have to be of an order of magnitude sufficient to make that defendant take notice. Here, we do bear in mind that Cardiff Bus is a relatively small company.

iii. As an entity with an association with a local authority, Cardiff Bus will no doubt take very full account of the Judgment, even if exemplary damages are (in numerical terms) quite low. In these circumstances, we consider that the punishment and deterrence effect of exemplary damages can be obtained by an award of exemplary damages at a level that is relatively low.”

Cardiff Bus was also liable to pay for revenue that the court found 2 Travel had directly lost as a result of Cardiff Bus’s behaviour - namely £33,818.79 plus interest.

Of course BIS’s consultation is significant, and Cardiff Bus is a very important case in the history of private damages actions under competition law in the United Kingdom. Many experts have consequently predicted a dramatic increase in the number of cases being litigated. Indeed even before the judgement in Cardiff Bus, BIS was predicting a potentially significant growth in private enforcement as a result of its tabled reforms, “BIS estimates in its impact assessment that the benefit to the economy of introducing an effective private actions regime could be around £66.1 million, and would provide on average £26.2 million of redress each year to businesses and consumers that have suffered loss”.22

It remains to be seen whether this figure, which represents the equivalent of 260 Cardiff Bus judgments a year, constitutes an exaggeration. It is probably fair to say that the significance of recent developments may be overstated.

First, looking at the consultation, one might speculate that the United Kingdom does not tend to favour radical solutions and reforms to competition law have in the recent past tended to be less radical than first envisaged (see by way of example the BIS’s recent reforms to public enforcement of the competition regime, where a large number of the initially tabled reforms have not been finally adopted by BIS). Some of the current reforms do not sit particularly comfortably within the UK legal system. It is for example difficult to envisage the United Kingdom changing its position on the passing on defence and indirect purchaser claims to forbid them (as they do at federal level in the United States), or favouring presumptions in relation to loss. It is not fully apparent that encouraging competition law litigation is so important or central to the economy that a significantly distinct procedure will be created in relation to it.

In relation to the Cardiff Bus case, while the payment of damages and exemplary damages in particular is no doubt ground-breaking, the amounts that were ultimately awarded (around £100,000) are certainly not extensive compared to the amounts initially being claimed against Cardiff Bus of circa £50 million. From a purely financial perspective, whether the case was worth bringing and therefore should incentivise other cases, is likely to depend on the recovery of costs in the case, which has been settled in private. In relation to the exemplary damages award, the court also issued the following health warning:

“We are under no illusions but that this Judgment is likely to incentivise the bringing of claims for exemplary damages in competition cases. That is a matter for future Tribunals. We would only emphasise that the mere fact that an infringement of competition rules has been found is insufficient to justify the pleading of such a claim. In any case where exemplary damages are sought, it will be necessary to plead, and to plead with specificity, facts and matters alleging that the competition law infringement in question was executed either

20 For example: Healthcare at Home v Genzyme, and The Consumers’ Association v JJB Sports Plc.
21 Cardiff Bus at [461].
intentionally in breach of the law or recklessly so as to be regarded as sufficiently outrageous as to fall within Lord Devlin’s second category.”

The exemplary damages award in the Cardiff Bus case was also based on a number of factors that one is unlikely to see often replicated; in particular what the court regarded as fairly flagrant (at least reckless) breach of competition law, coupled with no fines being levied by the regulator due to the small size of Cardiff Bus.

Looking more widely, and at the recent developments in US anti-trust litigation in particular, there are a number of other factors that might suggest that the increase in levels of private enforcement of competition law in the United Kingdom will be more modest than some have predicted.

**Recent developments in US anti-trust litigation**

Litigation practitioners frequently look to the United States with some envy. As commentators have maintained:

“Historically, a range of factors have combined to ensure that private enforcement is effectively the default setting for antitrust enforcement in general, namely the wider litigative culture, the significant period of development of antitrust law and economics, and the specific characteristics of US civil procedure: the rules on discovery, the funding of actions, the availability of class actions and the existence of treble damages actions, together with clarification (and modification) of the legal position in relation to issues such as the passing-on defence and standing for indirect purchasers.”

Old estimates put the ratio of private as against public enforcement in the United States at 90:10. Whatever the current ratio, it is clear that private litigation of competition law is far more prevalent in the United States than in the United Kingdom. But this certainly does not tell the whole story. In the United States there has in recent years been a fairly dramatic reduction in the number of anti-trust cases filed. This reduction has been reported as follows:

“According to a recent analysis by Reuters of the largest private antitrust filings, in 2006 there were some 18 multi-district lawsuits consolidated in US district courts in varied industries such as SRAM and air cargo. By 2009, that number had dropped to 12, and by 2010 that number had dropped to four … from 2009 to 2010, the number of private cases filed in Federal district courts fell more than 33 percent, from 792 to 523. The number of cases filed in 2010 was less than the number of cases filed in any recent year going all the way back to 1992, when 481 cases were filed.”

This significant reduction in the number of cases being filed has not been attributed to what constitutes a fairly modest reduction in public enforcement in the period:

“As in our past reports, we were curious to know whether the change in the number of private antitrust cases was related to any change in the level of Federal enforcement. The number of U.S. government civil antitrust cases filed fell from 49 in 2009 to 47 in 2010, while the number of U.S. government criminal cases fell from 29 to 26 over the same period. It seems unlikely that these modest decreases in U.S. government case filings played much of a role, if any, in the sharp decrease in the number of private cases filed.”

Nor is it immediately apparent that the decline is directly related to the problems in the US economy, because the US economy grew in 2010, and there was not a commensurate rise in the number of private enforcement cases filed.

The better opinion, widely shared between commentators, appears to be that the decline in levels of private antitrust litigation relates to the increased difficulty of bringing antitrust cases in the United States. Historically the US system has been seen as a relatively easy system in which to plead a case. For example, in relation to damages for anti-trust, there was an easing of the burden of proving actual damages caused once liability has been established:

“Once a private antitrust plaintiff successfully proves by a preponderance the fact of its injury, it faces a less stringent standard in establishing the amount of its damages. A jury ‘may make a just and reasonable estimate of the damage based on relevant data’, so long as it is not based upon ‘speculation or guesswork’ (Bigelow v RKO Radio Pictures 327 US 251, 264-65 (1946)).”

However pleading of a case has become more difficult since the Supreme Court’s judgment in Bell Atlantic Corp v Twombly and the subsequent judgment in Ashcroft v Iqbal. Following those cases claimants in antitrust cases must allege

“enough factual matter (taken as true) that its claim is plausible. No longer may plaintiffs survive motions to dismiss by simply parroting the statutory

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23 2 Travel Group Plc (in liquidation) v Cardiff City Transport Services Ltd [2012] CAT 19; case number 1175/7/11.
25 See the US Georgetown Study of private enforcement between 1974 and 1983.
29 Ashcroft v Iqbal 129 S Ct 1937 (2009).
language of the Sherman Act in their pleadings. They now must provide more detail, and cannot rest on general labels and conclusions.\textsuperscript{39}

The effect of the higher pleading standards has been observed in a growing number of case terminations in the United States, with the biggest impact on interlocutory dismissals:

“The increase in case terminations suggests that Twombly may have had an effect on the disposition of cases that were already filed or the growing number of cases filed from 2004 to 2008 led to increased terminations with a lag of a year or more … in the three years before Twombly, the percentage of civil antitrust cases terminated by court action before, during or after pretrial proceedings ranged from 65 to 70 per cent. In the three years after the decision, though, that percentage ranged from 75 to 84 per cent. These data are consistent with the idea that Twombly has led to relatively more cases being terminated by court action prior to trial”\textsuperscript{31}

What this suggests is that, in spite of the availability of a number of procedural advantages in bringing cases in the United States (e.g. collective actions by way of opt-out and availability of treble damages), a key determinant in the level of claims being made is the difficulty in pleading anti-trust claims.

The difficulty of pleading anti-trust claims as a determining factor is also corroborated by evidence in relation to levels of litigation in Germany carried out by Peyer.\textsuperscript{32} Peyer highlighted that changes to the statutory framework did not result in a positive increase in the levels of litigation:

“ The drop of antitrust litigation is counterintuitive if we take into account the 2005 amendment of German competition law improving the conditions for individual antitrust claims. Decisions of other EU national competition authorities became binding in follow-on damages law suits and the “protective law” requirement, narrowing the standing for antitrust actions, was abolished. A decline of ligitated cases is at odds with the plaintiff-encouraging amendments in the ARC.”

Peyer suggests that this drop might be as a result of increased numbers of settlements, but interestingly also speculates that substantive changes in the approach to competition law to encourage a more economic approach may have led to this decline:

“ If we allow for an unknown number of settlements, which may have increased in the course of and after the reform, and an improved deterrence effect, the drop in litigated cases makes a little bit more sense. Whether and to what extent the on-going discussion about a more economic approach for the assessment of anticompetitive conduct has deterred litigation cannot be said. One could argue that if courts require more and (more) sound economic evidence, they burden the plaintiff with additional costs and risks and, thus may lessen the incentives to litigate.”\textsuperscript{33}

So what do the examples from the United States and Germany tell us? It seems that there may be inherent difficulties in litigating competition law claims. These inherent difficulties may have a significant impact on the number of cases, and making changes to procedural rules may not overcome them. Looking at these issues more closely, these challenges may be summarised as uncertainty in relation to competition law and difficulties in obtaining evidence and the resulting cost burden of litigating competition law.

The inherent uncertainty of competition law

Competition law cases are difficult to run and this stems from the law itself. Clearly it is a generalisation to say in respect of competition laws that “Nobody knows what it is they forbid.” They are undoubtedly however an area of particular specialism, and have been described as containing as much “lore” as they do “law”. The interplay between competition law on the one hand and economic analysis on the other make them unique as neither specialism in and of itself is likely to provide all the answers.

There are numerous examples from the public enforcement regime in the United Kingdom that demonstrate the uncertainty surrounding the law, for example:

• In Cityhook, the OFT closed a case because of internal disagreements between the case team and the internal peer review team on the law in relation to collective boycotts (and whether this constituted an object or effects based infringement).
• In the Tobacco case, following eight years of investigation and analysis, the OFT dropped the case on appeal because they could not establish a credible case on the evidence due in part to its uncertainty in relation to the law (in relation to resale price maintenance type restrictions).
• In Napp pharmaceuticals the OFT (to the surprise of many experts at the time) successfully defended an appeal of their decision that Napp had engaged in excessive pricing.

\textsuperscript{39} Andrew S Marovitz, Mark McLaughlin and Brett M Miller Mayer Brown LLP, US Chapter. Private Antitrust Litigation 2012—Getting the Deal Through.
\textsuperscript{31} Andrew E. Abere, Private antitrust cases decrease again in 2010 — filings are at their lowest level since 1992, Princeton Economics Group, inc available at http://www. econgroup.com/peg_news_view.asp?newid=44&pageno=

\textsuperscript{32} Peyer, Myths and Untold Stories—Private Antitrust Enforcement in Germany, CCP Working Paper 10–12.
\textsuperscript{33} Peyer, Myths and Untold Stories—Private Antitrust Enforcement in Germany CCP Working Paper 10–12.
These examples show that even a body that is central to the enforcement of competition law, and has a large and experienced resource of legal and economic expertise, occasionally struggles to get to grips with the substance of competition law. Furthermore the outcome of competition law cases are not always easy to predict.

Uncertainty has also been acknowledged on a number of occasions by the courts. For example in the case of *Attheraces Ltd v BHB*, the Court of Appeal issued the following warning:

“... The nature of these difficult questions suggests that the problems of gaining access to essential facilities and of legal curbs on excessive and discriminatory pricing might, when negotiations between the parties fail, be solved more satisfactorily by arbitration or by a specialist body equipped with appropriate expertise and flexible powers. The adversarial procedures of an ordinary private law action, the limited scope of expertise in the ordinary courts and the restricted scope of legal remedies available are not best suited to helping the parties out of a deadlocked negotiating position or to achieving a business-like result reflecting both their respective interests and the public interest. These are not, however, matters for decision by the court, which must do the best that it can with a complex piece of private law litigation.”

This is an issue that has also been acknowledged in the United States, for example in *Japanese Electronic Products Antitrust Litigation* it was ruled that highly complex antitrust suits may be

“...beyond the ability of a jury to decide, such that the due process rights of the party opposing a jury trial can override the Seventh Amendment right (to a jury) of the other party”.

Research in relation to settlement is also suggestive of the uncertainty of competition law litigation as being a major factor in leading to settlements. Indeed: “Twenty-four out of the 43 reported settlements, 55.8 per cent, cited this as a motivation behind settlement, a worrying high figure.”

Uncertainty as to the law played a large part in such settlement decisions:

“...asked what were the principal difficulties in pursing or establishing the competition law issues, and provided the following options, allowing more than one option to be selected for any dispute: (a) evidential; (b) economic; (c) legal uncertainty; (d) availability of expertise; (e) publicity; (f) other, please specify. The second most frequent response was legal uncertainty, which was 'selected in 19 cases, 44.2 per cent.'” The largest degree of uncertainty was in relation to evidence: ‘The most frequent response was (a) evidential, which was selected in 22 cases, 51.2 per cent’.

Clearly where the law is uncertain this places a greater emphasis on the standard of pleadings. This has previously been emphasised by the High Court:

“... it seems to me that particular care is to be expected of a party who pleads breach of s18 of the Act or an Article 82 offence. These are notoriously burdensome allegations. The recent history of cases in which such allegations have been raised illustrate that they can lead to lengthy and expensive trials. Mere assertion in a pleading will not do. Before a party has to respond to an allegation like that, it is incumbent on the party making the allegation to set out clearly and succinctly the major facts upon which it will rely.”

In *Attheraces v British Horseracing Board* [2005] EWHC 3015 the High Court held that while the standard of proof is the civil standard of balance of probabilities, the seriousness of an infringement of the competition rules required the proof of evidence to be “commensurately cogent and convincing”. This may be the same standard as is employed in all civil claims. However, competition law infringements tend to be viewed as particularly serious breaches of the law, giving rise to the potential for criminal or quasi-criminal sanction, and on this basis one might suppose that the party seeking to rely on evidence of an infringement may be subject to the a particularly high standard of proof.

The areas where the law is fairly clear and an infringement easier to determine (for example cartels) also happen to be beset by problems for claimants in obtaining evidence.

What is the impact of all this perceived complexity on the likelihood of litigation?

**The expense of competition law litigation**

The cost burden of competition law litigation is undoubtedly seen as relatively high. For example in *Wireless Group Plc v Radio Joint Audience Research Ltd* the court observed:

“The expense of bringing the present case to trial may be enormous. The pre-trial and trial costs of competition cases, with the need for expert evidence from economists, are notoriously high.”

The problematic issue of costs has also been noted by a number of commentators, for example:

34 *Attheraces Limited v the British Horseracing Board* [2007] EWCA Civ 38.
39 *BHB Enterprises Ltd v Victor Chandler (International) Limited* [2005] EWHC 1074 (Ch) at 43.
40 *Japanese Electronic Products Antitrust Litigation*.
“The English rule of cost-shifting, the likelihood of paying up-front costs and the other side’s costs if unsuccessful are major disincentives, compounded by the complexity and heavy costs involved in competition cases due to the economic and considerable documentary evidence required to advance a claim.”

It also appears that the uncertainty and cost has a negative impact on the chance of acquiring litigation insurance and disincentivises lawyers to act on a contingency fee basis, with experts commenting that “there is no sign that they are being routinely offered by lawyers or litigation insurers in competition cases.”

As previously mentioned (and especially given the low amounts of damages recovered to date), the true determinant of whether or not a claim is successful is likely to be the allocation of the cost of bringing that claim.

This burden is likely to be exacerbated by the general rising cost of litigation due to technology and the consequential deluge of information. Clearly competition law litigation is not immune from these pressures. Using cases from the United States as an example:

- In an antitrust case alleging anti-competitive activity in the microprocessor market, Intel Corp. produced electronic information equivalent to a pile of papers 137 miles high.
- More than 40 million pages of documents have already been produced in ongoing civil cases alleging a conspiracy to fix prices of TFT-LCD panels.

**Will the reforms to the litigation regime in the United Kingdom overcome the challenges presented by competition law litigation?**

So what is the solution to these issues and are they to be found in the reforms that are the subject of the current BIS consultation, or the award of damages in the *Cardiff Bus* case? Quite possibly. Reforms to collective actions may mean there are more consumers with standing to sue, and the case of *Cardiff Bus* shows that damages are a real possibility.

The greater role of the CAT is likely to result in more confident case handling. More effective use of interim proceedings can have a dramatic effect on reducing the burden of bringing claims. Certainly in Germany, Peyer suggests that interim relief plays a key role:

“Victims who actually sought compensation for the harm caused by anticompetitive conduct had the lowest chance of success.”

“On average, courts handed down their decisions after 17.01 months. Looking at the different remedies, the courts needed very little time in interim proceedings. Requests for interim relief were answered in 8.4 months while a decision on damages needed 28.98 months on average.”

The UK courts on the other hand, have traditionally been reluctant to grant interim relief. For example Goulding J. noted:

“We are concerned with commercial activities of an artificial person, a company, and, even if, through the denial of interlocutory relief, the company permanently loses a business formerly carried on, through the act of the defendants, I see no reason why a sum of money, if big enough, should not be proper compensation.”

So changes in this area would be welcome, and one assumes that the CAT, as a specialist tribunal, is more likely to have the confidence and expertise to handle interim applications authoritatively.

But most of the reforms, for example the suggested introduction of a fast-track route for SMEs facing anti-competitive behaviour, appear not to address or to underestimate the inherent complexities of competition law litigation. One might also speculate that the reforms that might have the greatest impact in easing the burden of bringing cases, for example assumptions as to the quantum of loss in cartel cases, are less likely to be adopted than other less controversial initiatives.

So the reforms may, depending on their final form, have some impact on making competition law cases easier to bring. But it seems that a clear message from the challenges identified above, and from overseas experience, is that creating greater certainty as to the law is absolutely key to creating the right incentives for competition law litigation. A key contributor to that is likely to be ensuring that there is sufficient precedent available, and a key generator of that precedent is public enforcement.

**The importance of public enforcement to private litigation**

Evidence of the key role played by public enforcement in private litigation is found in the clustering of cases both around previous related cases, and around the activity of public enforcers. Competition law litigation appears on many occasions to take its cue from recent similar cases or public enforcement trends. For example:
In the late 1980s, the Monopoly and Mergers Commission’s Inquiry reported on beer ties. Following this there was a spate of beer tie cases.  

In the 2000s, following notification to it (under the now abolished notification system) the OFT conducted a long running investigation into the Orders and Rules of racing. Simultaneously it investigated and took an infringement decision (overturned on appeal) in relation to the collective selling of horseracing rights. There followed a large number of cases in relation to sporting rights, horseracing and betting that one might consider as causally linked, or that had common actors.  

As well as civil cases, competition law litigation may also take its cue from criminal enforcement. It has been observed that in the United States “even the mere public announcement of a criminal investigation can spark private litigation.” In the United Kingdom, the Marine Hose cartel is an example. In January 2009, the European Commission fined a number of undertakings for their participation in a Marine Hoses cartel, including Dunlop Oil & Marine. Following a plea-bargain process in the United States, in June 2008 three Dunlop executives pled guilty and were convicted in the United Kingdom for their role in the cartel. In July 2009, the Libyan oil firm Waha Oil Company lodged a claim for damages against Dunlop in the High Court. 

So the key message from this is that private litigation of competition law is often closely connected to an effective public enforcement regime. In his article “Antitrust Antifederalism”, Daniel Crane criticised the US system, where he considered private enforcement had replaced public enforcement as the main mechanism for prosecuting competition law, stating that “the effect has been inconsistent and ineffective decision making.” In relation to the detailed criticism, Crane states the following:

“The privatization of antitrust enforcement has many negative consequences. Private litigants often have interests that conflict with those of the intended beneficiaries of antitrust law—i.e. consumers—and can misuse antitrust to facilitate rather than thwart anticompetitive behavior. Further, judges tend to limit their decisions in private litigation to the facts specific to each case. Thus, the fact that most antitrust liability rules are created in private litigation where courts err on the side of deliberate underinclusion tends to dilute the strength of antitrust norms in public litigation… About two-thirds of private enforcers of antitrust are aggrieved competitors or other businesses vertically related to the defendant (which I shall refer to as the competitor-distributor class); fewer than 20 per cent are consumers.” 

Crane therefore sees the beneficiary of the competition rules not as consumer welfare, but rather as a tool to benefit business at the expense of the consumer: “About a quarter of all antitrust cases settle, usually without the supervision of the courts. Antitrust settlements are prime opportunities for the competitor-distributor and defendant classes to make industrial peace, often at the expense of consumers.” 

Crane also suggests that any notion that a dominant private enforcement regime can effectively complement a subsidiary public enforcement regime is doubtful: “Proponents of private antitrust enforcement often justify their support on the grounds that government enforcers lack the time and resources to catch and prosecute every violation and, hence, private attorneys generally advance the deterrent goals of antitrust by providing additional layers of private enforcement. In this vision, private enforcers complement public enforcement by filling in the gaps that public enforcers cannot fill. However, the statistics suggest that the opposite is true—private litigation by far predominates over public litigation and public enforcers simply fill in small gaps in private enforcement. Far from complementing public enforcement, private enforcement overwhelms it. 

Indeed a preponderance of public enforcement, Crane argues, can have a negative impact on the substance of the law: “Because private litigation is frequent and public litigation is rare, courts often create antitrust liability rules in private litigation. The content of these liability rules is shaped by concerns peculiar to private litigation, such as abusive competitor suits, the risk that treble damage awards will chill vigorous competition, and the fear that setting the bar too low will encourage litigiousness. Thus, at least in recent years, courts have often established sharply underinclusive liability norms in private antitrust cases.”
The suggestion that some form of equilibrium of enforcement activity is found by making liability harder to prove where private enforcement increases might be viewed as consistent with recent US developments in relation to higher pleading standards.

Conclusion

To some extent the current debate in relation to public and private competition law enforcement echoes the wider debate in the UK economy on the extent to which the private sector is effectively able to replace the public sector or whether they are strictly complementary. In this context, examples from overseas suggest that it may not be possible or desirable to create a vibrant private enforcement regime for competition law without ensuring that it is matched by fully functioning and complementary public enforcement.

In this context, while change is generally to be welcomed, and recent developments are significant, the future success of reforms to the competition regime depends on the functioning of the whole (public and private) rather than the prioritisation of one part over the other.

An instantaneous increase in the number of private litigation cases on the back of changes to the procedure for bringing these cases should not be expected. Changes to certain aspects of the private enforcement regime, coupled with increased activity by the new Competition and Markets Authority after 2014, is however likely to lead to a steady but significant increase in the level of enforcement activity (both private and public) in the United Kingdom over the medium to long term.
Irish Innovations to Facilitate Competition Litigation: Ireland’s Competition (Amendment) Act 2012

Dr Vincent J G Power

Introduction

The nature of the enforcement of competition law can be classified as being: (a) either public or private in terms of the nature of the party initiating the action; and (b) either civil or criminal in terms of the nature of action itself. Typically, criminal enforcement is public while civil enforcement is private but it is possible to have public civil enforcement and, in some jurisdictions, private criminal enforcement. The position can be expressed graphically as seen in Table 1.

Table 1: Methods of Enforcing Competition Law

<table>
<thead>
<tr>
<th>Nature of the party initiating the action</th>
<th>Nature of the action</th>
<th>Example</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public</td>
<td>Criminal</td>
<td>A criminal prosecution by a public body in those states which allow such prosecutions and such a prosecution could result in a criminal conviction</td>
</tr>
<tr>
<td>Civil</td>
<td></td>
<td>A civil case initiated by a public body seeking, for example, an injunction or declaration (i.e. a civil remedy as opposed to a criminal one)</td>
</tr>
</tbody>
</table>

It is clear that civil and private competition law enforcement in Europe lags well behind criminal and public competition law enforcement either at the EU or the national levels. The European Commission, the Court of Justice of the European Union and the European Parliament have sought to encourage or facilitate civil and private competition law. Equally, Member States have sought to encourage or facilitate such litigation. However, to date, there has only been limited progress in developing private enforcement in Europe. For its part, Ireland has sought to facilitate private competition litigation through means, for example, of the Competition (Amendment) Act 2012 (the “2012 Act”). This statute has some interesting and innovative ways of facilitating civil and private enforcement. It is interesting to review the new statute and see what lessons, if any, can be drawn for other jurisdictions. It is worthwhile studying the new Irish innovations because earlier innovations in Ireland (e.g. the imposition of criminal liability on undertakings and their executives) led to the first conviction by a jury in Europe for cartel behaviour; indeed, because a modern competition law regime has been in existence in Ireland for over two decades, interesting lessons could be learned. The Irish regime provides explicitly that there may be a private action for damages in respect of an alleged breach of EU Competition law and this is very welcome because it would avoid any argument before an Irish court as to whether such a right exists already. It is submitted that while the Irish experiment in the 2012 Act is not perfect, it does address some issues which are worth bearing in mind in other jurisdictions and there could be

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2 The European Union still maintains the notion that its competition law enforcement regime is not criminal in nature. It is true that no-one is imprisoned for breaches of competition law but it is far from clear that the “fines” imposed by the European Commission are not penal in nature (e.g. fines running into the hundreds of millions of euros on particular undertakings are not “run of the mill” civil matters but are really criminal or quasi-criminal in nature (the question may well be asked, would the scale of the fines change much if the regime was expressed to be criminal in nature). See Hakopian, “Criminalisation of EU Competition Law Enforcement — A possibility after Lisbon?” (2010) 7(1) Comp. L. Rev. 157.


4 E.g. Joined cases Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cunotto v Fondiaria Sai SpA (C-296/04) and Nicolò Tricarico (C-297/04) and Pasqualina Margolo v Assitalia SpA (C-298/04) [2006] E.C.R. I-6619.


6 Various Member States have enacted legislation or made changes to facilitate or permit such actions.

7 On the two decades of Competition law in Ireland, see Power, “Irish Competition Law: A Practitioner’s Review of the First 20 Years of Modern Irish Competition Law” (2011) 18(10) C.L. Pract. 223. See also, in this context, Power, “Criminal Litigation of Competition Law in Ireland” [2008] G.C.L.R. 69. There have been six main competition law statutes in Ireland over time: the Competition Act 1991; the Competition (Amendment) Act 1996; the Competition Act 2002; the Competition (Amendment) Act 2006; the Competition (Amendment) Act 2010; and the Competition (Amendment) Act 2012. There were also amendments by such statutes as: the State Airports Act 2004; the Investment Funds, Companies and Miscellaneous Provisions Act 2005; the Communications Regulation (Amendment) Act 2007; the Credit Institutions (Stabilisation) Act 2010; and the Consumer Protection Act 2007; and the Credit Institutions (Financial Support) Act 2008.
lessons learned for other jurisdictions and improvements for the Irish regime itself. While this article will commence with an overview of the 2012 Act generally, the focus of the article is on the civil and private litigation aspects of the 2012 Act.

Overview of the 2012 Act

Essence of the 2012 Act

The 2012 Act entered into force in full on July 3, 2012. This new statute is short in length, wide in ambit and has effects which are potentially significant. Nonetheless, the essence of the 2012 Act may be summarised in the following terms: it increases penalties for breaches of competition law; it provides for new enforcement mechanisms; it seeks to facilitate follow-on actions for damages; but leaves the merger regime unchanged. The Competition Act 2002 (the “2002 Act”) (the current “backbone” of Irish competition legislation) remains the “Principal Act” but the 2012 Act makes a number of key amendments.

Background to the 2012 Act

As is well known, Ireland secured funding from the so-called “Troika” of the European Central Bank, the European Commission and the International Monetary Fund. Such funding comes with it the obligation to conclude an agreement which sets out the changes which the beneficiary State must make so as to restructure itself. Usually, there are provisions in such agreements relating to introducing or enhancing competition law in the particular jurisdiction. Ireland was no different. It is interesting to note that the terms of the agreement between Ireland and the Troika changed over time because the original contents of the agreement (in particular, the contents relating to the introduction of civil penalties proved to be unworkable (at least in the confines of the 2012 Act). Ultimately, the commitment imposed on Ireland under its arrangements with the Troika was to adopt legislation which would strengthen and enhance the enforcement of competition law in Ireland. Ireland complied with that obligation by enacting the 2012 Act.

Scope of the 2012 Act

It is important to note that the 2012 Act covers not only “competition” generally and the Competition Authority in particular but it also covers the area of telecommunications so the statute applies not only to the Competition Authority but also to the Commission for Communications Regulation (“ComReg”). Hence, the statute refers to the “competent authority” so that it relates to both the Competition Authority and ComReg. It is important therefore that its implications for the communications sector are borne in mind as well as for the economy generally.

Increasing penalties

In respect of hardcore breaches of Competition law (e.g. price-fixing and market sharing), the maximum jail sentence has been increased from five years to ten years while the maximum fine has been increased from €4 million to €5 million in respect of undertakings with turnover of less than €50 million (as the maximum fine is 10 per cent of worldwide turnover, undertakings with a turnover greater than €50 million would have a maximum exposure of more than €5 million anyway). There is no doubt that increased penalties must act as a deterrent to those who plan to breach competition law and know that their actions would be in breach of competition law. However, two facts remain: first, there is a great need to ensure that anyone who could potentially breach competition law is aware of the rules and secondly, judges and juries should not be so deterred by a very high penalty that they would be afraid to convict where a conviction would be justified.

Imposition of costs on those convicted of breaching competition law

The 2012 Act has an innovative provision imposing liability for costs (or, more accurately, some costs) on those convicted of breaching competition law. Section 8(11B) of the 2002 Act (as inserted by s.2 of the 2012 Act) contains a new provision whereby a person who is convicted of certain offences under the 2002 Act may be liable for costs (or, more accurately, some costs) on conviction. The 2012 Act has an innovative provision imposing

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7 Competition (Amendment) Act 2012 (Commencement) Order 2012 (SI 236 of 2012).
8 It has just 10 sections.
9 It covers both civil and criminal issues.
10 E.g. persons convicted of breaching competition law may be forced to pay the costs of the investigation of such a breach.
11 E.g. there have been provisions on competition law in the Troika agreements relating to both Greece and Portugal.
12 These are “civil” fines imposed by a court where a case based on the civil standard of proof (i.e. on the balance of probabilities) rather than the criminal standard (i.e. beyond reasonable doubt) was proven. The idea of civil fines which was advocated strongly by the Competition Authority was clearly rejected by the Irish Government because the provision was not included in the 2012 Act. They may have been rejected because they would probably have been unlawful without an amendment to the Constitution of Ireland which would require a vote of the people.
13 There is still a need to enhance awareness of competition law in Ireland.
This is an interesting provision. It does not bind the court to award costs. It could be very difficult to apply in practice. It is worth taking some examples. First, if there was a cartel of five undertakings with one of the five obtaining immunity then do the other four also have to pay the costs of the Authority’s investigation of the fifth undertaking? Secondly, if there was a cartel of five undertakings but only three of the five undertakings were prosecuted and convicted then would the undertakings be liable for all of the costs or three fifths of the costs? Thirdly, what if a cartel is investigated with members being prosecuted and convicted over time; what if two participants were convicted first and the rest were convicted later, would the first two bear the liability for the whole investigation? What if a step taken in the investigation was ultimately not necessary or evidence compiled during that step was not used? There is no doubt that it will be a difficult provision to apply in practice.

It is also a relatively limited provision. It involves the person who is convicted being potentially liable for the costs of the competent authority but not the costs of the Garda (i.e. the Irish police force), the Director of Public Prosecutions or any one other than the competent authority. This means that there is likely to be a substantial amount of money expended by the State which cannot be recovered (e.g. the Garda team, the solicitors and the barristers involved). If the Oireachtas was intent on such costs being recovered then the section should be amended to address that gap which has been left in the legislation (whether by accident or otherwise).

If other jurisdictions were seeking to copy this provision, it is suggested that the provision be more specific and more extensive. That is to say, it should encompass all costs involved and the provision should address the issues identified above in regard to only some parties being prosecuted and so on.

Civil and private competition enforcement in Ireland: the pre-2012 regime

Private civil enforcement of competition law through litigation has been a feature of Irish competition law since the enactment of the Competition Act 1991. Private actions to enforce Irish Competition law have been a possibility since the enactment of s.14 of the Competition Act 1991 (which became, in large measure, s.14 of the 2002 Act). Indeed, until the criminalisation of competition law by means of the Competition (Amendment) Act 1996, private civil enforcement was the Irish Parliament’s preferred method of enforcing Irish competition law. Parliament may have chosen private civil enforcement because it would mean that State funds were not used to fund enforcement. However, the experiment of relying on private enforcement largely failed because private actions were (and remain) relatively rare. So, as early as 1996, Ireland had to alter the focus and rely much more on public enforcement using both the civil and the criminal law regimes with the emphasis on the criminal law regime.

Overview of the new regime for civil and private enforcement in the 2012 Act

Sections 3 and 4 of the 2012 Act amend s.14 of the 2002 Act. Sections 3 and 4 of the 2012 Act separate out the civil and private actions into three types of action: (a) s.14 of the 2002 (as amended by s.3 of the 2012 Act) would deal with private actions only; (b) a new s.14A of the 2002 Act (inserted by s.4 of the 2012 Act) would deal with actions by a “competent authority”; and (c) a new s.14B of the 2002 Act (inserted by s.4 of the 2012 Act) would deal with commitment type civil actions. Before examining these three types of action, it is useful to look at another innovation in the 2002 Act—one relating to res judicata.

Criminal convictions as res judicata

Instituting private competition law proceedings is notoriously difficult. Section 8 of the 2012 Act seeks to address this difficulty in part. One of the difficulties facing anyone tempted to bring a follow on action was the necessity to prove the facts again (unless the defendant accepted the facts as found in the conviction). Section 8 of the 2012 Act provides that the finding in proceedings under Pt 2 of the 2002 Act (the “Principal Act”) of a breach of Ireland’s Competition Acts would be res judicata for the purposes of subsequent cases. In specific terms, the section provides:

“(1) Where, in proceedings under Pt 2 of the Principal Act, a court finds, as part of a final decision in relation to the matters to which those proceedings relate, that an undertaking contravened section 4 or 5 of that Act, or Article 101 or 102 of the Treaty on the Functioning of the European Union, then, for the purposes of any subsequent proceedings (other than proceedings for an offence) under that Part, the finding shall be res judicata (whether or not the parties to the said subsequent proceedings are the same as the parties to the first-mentioned proceedings).

(2) In this section “finding” includes a conviction for an offence, whether or not that conviction is consequent upon a plea of guilty by an accused person.”

Subsection (2) was added to the Act during its passage through the Oireachtas.

This will be a fascinating provision to apply in practice. It is interesting to parse it. First, the provision on res judicata applies only against an undertaking and not

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14 The awarding of costs in such a case might well be described as a judicial act and therefore involving the exercise of a judicial function and it could therefore be argued (though it is not entirely certain that this is so) that the awarding of costs should be left to the court’s discretion.
against an individual manager or director. Secondly, the provision on res judicata requires proceedings under Pt 2 of the 2002 Act. Thirdly, one cannot plead a Commission decision as res judicata because s.8(1) refers to a “court”. This is a pity. However, what if a Commission decision is appealed to the General Court or the Court of Justice of the European Union (CJEU) and the appeal is denied then is it the case that a “court” had found that an undertaking has contravened arts 101 and/or 102 of the TFEU? It makes no odds. The Irish court cannot treat, at least under s.8 of the 2012 Act, the finding of the General Court or CJEU as res judicata because the proceedings before those courts were not under Pt 2 of the 2002 Act.

On balance, s.8 of the 2012 Act is not unhelpful but it will not do as much as one might expect in terms of progressing matters in terms of private actions. It is limited because convictions in Irish competition law cases involve a conclusion by the jury that the person is “guilty” but it does not involve the publication of a decision of the type which the European Commission publishes outlining the facts in relatively great detail; by contrast, the follow-on plaintiff has only the verdict of “guilty” to rely on. However, the plaintiff could at least appraise itself of the evidence adduced at trial (the jury’s verdict does not indicate which of that evidence was accepted and what was not accepted).

Civil enforcement route 1: private action by “aggrieved person” against undertakings and others (e.g. managers)

Introduction

Section 14 of the 2002 Act (as amended) provides for persons (whether or not undertakings) aggrieved by an arrangement or abuse of dominance prohibited under Irish or EU law to have a right of action against not only an undertaking but also against “any director, manager or other officer of such an undertaking”. It is useful to analyse this right as it now exists following a number of amendments by the 2012 Act.

Plaintiffs

Section 14(1) of the 2002 Act (as amended by s.3 of the 2012 Act) provides that any person who is aggrieved in consequence of any agreement, decision, concerted practice or abuse which is prohibited under s.4 or 5, or by art.101 or 102 of the TFEU, prohibited under s.4 or 5 shall have a right of action under s.14(1) for relief. This explicit recognition in Irish legislation of a right to sue for a breach of competition law has been in existence since the 1991 Act and was an important and welcome innovation because otherwise plaintiffs might have to convince a judge that such a course of action was not only possible but essential.

Defendants

The defendants against whom a s.14(1) civil action may be taken are:

“(a) any undertaking which is or has at any material time been a party to such an agreement, decision or concerted practice or has done any act that constituted such an abuse,

(b) any director, manager or other officer of such an undertaking, or a person who purported to act in any such capacity, who authorised or consented to, as the case may be, the entry by the undertaking into, or the implementation by it of, the agreement or decision, the engaging by it in the concerted practice or the doing by it of the act that constituted the abuse.”

This is an important provision because it means that civil actions may be brought not only against undertakings but also against directors, managers and others. If another jurisdiction were to embody s.14(1) in their own law, it is suggested that such a jurisdiction ought to include reference to the possibility of suing an association of undertakings because s.14(1) does not recognise that possibility.

Court to hear the action

Section 14(3) provides that an action may be brought in the Circuit Court or the High Court. However, s.14(4) goes on to provide that where an action under s.14(1) is brought in the Circuit Court any relief by way of damages, including exemplary damages, shall not, except by consent of the necessary parties in such form as may be provided for by rules of court, be in excess of the limit of the jurisdiction of the Circuit Court in an action founded on tort. This latter element (s.14(4)) arises because the Circuit Court’s maximum jurisdiction in terms of damages to be awarded is €38,092.14. In practice, civil claims are likely to be in the High Court.

General reliefs in a private action under section 14

Any plaintiff needs to know what reliefs are available. Section 14(5) of the 2002 Act (as amended by s.3 of the 2012 Act) provides that the following reliefs, or any of them, may be granted to the plaintiff in an action under subs.14(1): (a) relief by way of injunction or declaration (including a declaration in respect of a contravention of s.4 or 5 or art.101 or 102 of the TFEU that has ceased); and (b) damages, including exemplary damages.

15 Section 14(10) of the 2002 Act as inserted by s.3(i) of the 2012 Act provides that the term “injunction”, when used in s.14 of the 2002 Act, means: (a) an interim injunction; (b) an interlocutory injunction; or (c) an injunction of definite or indefinite duration.
**Special reliefs in the case of an abuse of dominance**

Section 14(7) of the 2002 Act (as amended by the 2012 Act) provides that without prejudice to s.14(5) of the 2002 Act, where in an action under s.14(1), it is finally decided by the court that an undertaking has, contrary to s.5 of the 2002 Act, or art.102 of the TFEU, abused a dominant position, the court may, by order, either: (a) require the undertaking to discontinue the abuse; or (b) require the undertaking to adopt such measures for the purpose of—

(i) its ceasing to be in a dominant position, or (ii) securing an adjustment of that position, as may be specified in the order (including measures consisting of the sale of assets of the undertaking) within such period as may be so specified. This provision is very interesting because it permits not only the bringing to an end of the abuse of the dominance but also the dominant position itself.

**Presumption that management consented to Acts**

Section 14(8) of the 2002 Act provides that where in an action under s.14(1), it is proved that the act complained of was done by an undertaking it shall be presumed, until the contrary is proved, that each (if any) director of the undertaking and person employed by it whose duties included making decisions that, to a significant extent, could have affected the management of the undertaking, and any other person who purported to act in any such capacity at the material time, consented to the doing of the said act.

**Defence that the act complained of was at the behest of a statutory body**

There is a useful defence to any undertaking or its employees being sued for breach of s.14(1)(9). The provision states that in an action under s.14(1) for damages, it shall be a good defence to prove that the act complained of was done pursuant to a determination made or a direction given by a statutory body. It is quite likely that defendants will claim this defence more than they would be able to prove that the defendant has been authorised explicitly by the statutory body but it is important that the defence exists.

**Civil enforcement route 2: right of action by a competent authority**

Interestingly, there is a statutory right of action for a competent authority (principally, in this context, the Competition Authority but it could be ComReg). The right is contained in s.14A of the 2002 Act (as inserted by s.4 of the 2012 Act).

Section 14A(1) of the 2002 Act provides that the competent authority shall, in respect of any agreement, decision, concerted practice or abuse that is prohibited under s.4 or 5 of the 2002 Act, or by art.101 or 102 of the TFEU, have a right of action under s.14A(1) for relief. A claim may be made under s.14A(1) against either or both of the following:

(a) any undertaking which is or has at any material time been a party to such an agreement, decision or concerted practice or has done any act that constituted such an abuse;

(b) any director, manager or other officer of such an undertaking, or a person who purported to act in any such capacity, who authorised or consented to, as the case may be, the entry by the undertaking into, or the implementation by it, of the agreement or decision, the engaging by it in the concerted practice or the doing by it of the act that constituted the abuse.”

Section 14A(2) of the 2002 Act provides that an action under s.14A(1) may be brought in the Circuit Court or in the High Court. Interestingly, the comparable provision relating to scale of damages in private actions (i.e. s.14(4) of the 2002 Act) is not contained in this provision about an action by a competent authority because it is not seeking damages or exemplary damages.

Section 14A(3) of the 2002 Act provides that relief by way of injunction or declaration (including a declaration in respect of a contravention of s.4 or 5 or art.101 or 102 of the TFEU that has ceased) may be granted to the competent authority in an action under s.14A(1). However, s.14A(4) provides that without prejudice to s.14A(3), where in an action under s.14A(1)

“it is finally decided by the Court that an undertaking has, contrary to section 5, or Article 102 of the Treaty on the Functioning of the European Union, abused a dominant position, the Court may, by order either—

(a) require the undertaking to discontinue the abuse, or

(b) require the undertaking to adopt such measures for the purpose of—

(i) its ceasing to be in a dominant position, or

(ii) securing an adjustment of that position,

as may be specified in the order (including measures consisting of the sale of assets of the undertaking) within such period as may be so specified.”

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16 Section 14A(6) provides that in s.14A the term “injunction” means: (a) an interim injunction; (b) an interlocutory injunction; or (c) an injunction of definite or indefinite duration.

Managerial involvement

Section 14A(5) of the 2002 Act provides that where in an action under s.14A(1), it is proved that the act complained of was done by an undertaking it shall be presumed, until the contrary is proved, that each (if any) director of the undertaking and person employed by it whose duties included making decisions that, to a significant extent, could have affected the management of the undertaking, and any other person who purported to act in any such capacity at the material time, consented to the doing of the said act.

Civil enforcement route 3: the commitments regime

Introduction

The 2012 Act has a new enforcement concept, namely, the court endorsed commitment agreement. There is a new s.14B inserted into the 2002 Act by s.5 of the 2012 Act to house this new tool. The new section enables the Competition Authority (or ComReg) to apply to the High Court to have commitments entered into (by undertakings) made an order of court. It would enable the Authority to accept commitments and then have those commitments made an order of court. A breach of those commitments would then constitute contempt of court.

Section 14B(1) of the 2012 Act provides that the section applies to “an agreement entered into by the competent authority with an undertaking”. The interesting feature of this formulation is that the agreement is with the undertaking and executives or directors of the undertaking would not be party to the agreement. It may have strengthened the provision if the subsection had provided that the directors would also have to be party to the agreement.

Section 14B(1)(a) of the 2012 Act provides that the agreement must be one entered into by the competent authority and an undertaking “following an investigation referred to in paragraph (b) of subsection (1) of section 30 [of the 2002 Act]”. This limits the Authority somewhat because the Authority must actually “carry out an investigation, either on its own initiative or in response to a complaint made to it by any person, into any breach of [the 2002 Act] that may be occurring or has occurred”. In practice, the limitation may not be all that significant but it is nonetheless an interesting dimension because it contemplates that an investigation has occurred but does not specify whether it is a long or short investigation.

The agreement would, according to s.14B(1)(b) of the 2002 Act as inserted by s.5 of the 2012 Act, require

“the undertaking to do or refrain from doing such things as are specified in the agreement in consideration of the competent authority agreeing not to bring proceedings under section 14A (inserted by section 4 of the Competition (Amendment) Act 2012) in relation to any matter to which that investigation related or any findings resulting from that investigation.”

It appears from the text of s.14B(2) of the 2002 Act that it is only the Authority which may apply to the High Court to make an order to render such an agreement binding.

Criteria for the granting of an Order

Before making such an order, the High Court has to be satisfied that certain criteria have been met. First, the High Court must be satisfied that the undertaking that is a party to the agreement has consented to the making of such an order. Secondly, the High Court must be satisfied that the undertaking that is a party to the agreement has obtained legal advice before consenting to the making of such an order. Thirdly, the High Court must be satisfied that the agreement is clear and unambiguous and capable of being complied with. Fourthly, the High Court must be satisfied that the undertaking that is a party to the agreement is aware that failure to comply with any order made under s.14B would constitute a contempt of court. Finally, the High Court must be satisfied that the competent authority has complied with various procedural requirements under s.14B(3) (the “Procedural Requirements”). One is not too troubled by the 45 day period because the undertakings could always commit to not breaching the regime during that period anyway.

This is a very welcome procedure. They may well be a way of resolving criminal prosecutions as well. They are also a better alternative to civil fines.

Procedural requirements for the granting of the Order

Section 14B(3) of the 2002 Act (as inserted by s.5 of the 2012 Act) sets out certain procedural requirements on the Competition Authority.

Where the Competition Authority proposes to make an application for an order under s.14B(2) in respect of an agreement under that section, the authority must, not later than 14 days before the making of the application:

(a) publish the terms of that agreement on a website maintained by the Competition Authority, and
(b) publish a notice, in not fewer than two daily newspapers circulating throughout the State:—
   (i) stating that it intends to make such application,
(ii) specifying the date on which such application will be made, and

(iii) stating—

(I) that the agreement to which the proposed application relates is published, in accordance with paragraph (a), on a website maintained by it, and

(II) the address of that website.

There is a delay in terms of a Commitments Order taking effect. Section 14B(4) of the 2002 Act (as inserted by s.5 of the 2012 Act) provides that such an order shall not have effect: (a) until the expiration of the period of 45 days from the making of the order, or (b) where an application is made to the High Court under s.14B(5) in respect of the order, until the making of a final determination in relation to that application.

Section 14B(5) provides that the High Court may, upon the application of any person (other than the competent authority or the undertaking to which an order under this section applies) made during the period referred to in para.(a) of subs.(4), make an order varying or annulling an order under subs.(2) if it is satisfied that the agreement in respect of which the order was made requires the undertaking to which the order applies to do or refrain from doing anything that would result in a breach of any contract between the undertaking concerned and the applicant or that would render a term of that contract not capable of being performed. It is interesting that breach of contract is the only basis.

Limitation on the Order

Section 14B(6) provides that the High Court shall not make an order under subs.(5) if it is satisfied that the contract or term of the contract to which the application for such order relates contravenes s.4 or 5, or art.101 or 102 of the TFEU. It would probably have been better to have a wider provision which said that the High Court would not make the order where to do so would be in breach of either EU or Irish law in general (e.g. to address, for example, art.106 of the TFEU).

Duration of the Order

The Order will not commence or take effect for 45 days. Once made, the order would expire after seven years but it may be extended for upto a further three years. The seven-year term is contained in s.14B(8) of the 2002 Act (as inserted by s.5 of the 2012 Act):

“Subject to any order under subsection (9), an order under subsection (2) shall cease to have effect upon the expiration of 7 years from the making of the second-mentioned order.”

The exception is contained in s.14B(9) of the 2002 Act (as inserted by s.5 of the 2012 Act):

“The High Court may, upon the application of the competent authority made not earlier than 3 months before the expiration of an order under subsection (2), make an order extending the period of the first-mentioned order (whether or not previously extended under this subsection) for a further period not exceeding 3 years.”

A breach of the commitments agreement would then be a contempt of court.

Impressions and assessment of the 2012 Act

The primary aim of the 2012 Act is to strengthen competition enforcement. It meets that aim. Though, the extent to which it strengthens it is limited. Penalties are increased but increasing penalties alone will not be enough. Greater comprehension and compliance are needed. Follow-on damages actions are made a little easier but there is a long way to go. In terms of private enforcement, the Oireachtas maintains its faith that private civil actions will be taken but it is far from clear that there would be any upsurge in the number of such claims simply by virtue of these amendments but they are laying the groundwork for such actions. More importantly, the increased possibility of public private actions being taken is the more important dimension. It is submitted that courts may be more willing to find undertakings in breach of competition law in civil cases than in criminal cases so extending the rights of public bodies is important not only in terms of civil actions but also in terms of the so-called “commitments” procedure. There is no doubt that there are some interesting ideas contained in the 2012 Act which will not only strengthen enforcement but could, more specifically, assist plaintiffs who have to sue on the basis of the changes made in the 2012 Act. Jurisdictions seeking to draw inspiration from the changes in the 2012 Act can draw inspiration but may need to augment the provisions to make them more effective.
BOOK REVIEWS


While business operations are becoming even more international, competition laws remain predominantly national. This leads to a situation in which, when addressing anti-competitive conduct competition authorities and private plaintiffs are often faced with various challenges posed by the transnational nature of such arrangements, often involving parties from different jurisdictions. Recognising their growing salience significant analytical efforts are being invested in recent years into identifying and analysing these challenges. A number of important publications emerged, further informing the on-going debate. These include, for example, David Gerber’s Global Competition (Oxford University Press, 2010), and Cooperation, Comity, and Competition Policy edited by Andrew Guzman (Oxford University Press, 2011). The recently published International Antitrust Litigation: Conflict of Laws and Coordination, edited by Jürgen Basedow, Stéphanie Francq and Laurence Idot, adds to the existing scholarship and makes its original and important contribution by looking specifically at international antitrust litigation through the private international law lens.

It is the eighth volume in the Hart’s series Studies in Private International Law edited by Paul Beaumont and Jonathan Harris. International Antitrust Litigation is the result of a research project funded by the European Commission and co-ordinated by the Université Catholique de Louvain. The project’s aims were threefold (p.9): (1) to identify and highlight the problems related to the international dimension of antitrust litigation; (2) to test the adequacy of existing EU instruments; and (3) to offer practical solutions to the identified challenges. On this latter point, the approach taken favours legislative interpretation over the legislative amendments, but when deemed by the contributors to be needed, the volume offers also some proposals of legislative nature. While the project’s main focus are the current and coming EU instruments in the dedicated field (p.8), the analysis extends further and encompasses some aspects of antitrust litigation in the US as well as those specific to transatlantic cases. While predominant is the private international law perspective, the research presented in this collection is not limited to private enforcement but also covers issues pertaining to coordination between private and public litigations and some of the issues relating to coordination within the European Competition Network, pointing out to the interplay between administrative and judicial procedures.

The project organisers, themselves editors of this volume, gathered an excellent team of eighteen contributors with considerable expertise in disciplines of competition law and/or private international law, and with background in academia as well as in legal practise. The authorship is largely diversified, including contributors from various EU Member States (both civil and common law jurisdictions) and the United States.

The structure of the volume reflects the underlying research project aims. The book is composed of an introductory chapter, two substantive parts and policy proposals. Part I, focusing on conflict-of-law issues, contains 10 contributions. The first three explore various competition law-related aspects of the Brussels I Regulation, such as categorization of cases and interpretation of special jurisdiction bases, concentration of actions, or prorogation of jurisdiction (and the threat of actions fragmentation). The reader will also find here an analysis of the lis pendens provisions and the issue of possible so-called torpedo actions. Similarly, the following three contributions analyse provisions of Rome I and Rome II Regulations, investigating the impact of rules on competition on international contractual and non-contractual litigation, as well as the relevance of the distinction between these two spheres. The following two chapters discuss the issue of collective redress in the EU context and the position and the potential of arbitration in the framework of EU competition law enforcement. The focus then shifts beyond the EU. The reader is offered the US perspective on the issue of (personal) jurisdiction and choice of law questions. The last contribution in Part I deals with the recognition and enforcement of foreign judgments, and the specific issues pertaining to antitrust judgments, such as punitive damages or collective actions.

Part II of the volume focuses on coordination issues and contains six contributions. The reader will find here first an analysis of the current regulatory regime governing access to evidence and files of competition authorities, both in the intra-EU context as well as in the scenarios reaching beyond the Union. The following contribution maps out and investigates the exchange of information and opinions between the European...
competition authorities, and both the EU and the national courts, offering in particular, but not only, a Swedish perspective. Information here is understood broadly and it is not limited to evidence. Another contribution addresses the issue of the US rules on discovery in the antitrust context. These are analyses both from the perspectives of (1) a litigant seeking discovery in the US for the purposes of a foreign litigation, as well as (2) a litigant in a US federal court seeking discovery abroad. The next three contributions in Part II focus on co-ordination within the European Competition Network (ECN). The first looks into co-ordination of public enforcement between the European Commission and the national competition authorities (NCAs). It also discusses some of the more problematic issues such as handling of leniency applications and the involvement of sectoral regulators. The next contribution explores concerns surrounding the implementation of the cooperation mechanisms within the ECN, and suggests a framework capable of reconciling effectiveness and accommodating due process rights. The last contribution raises the issue of recognition of foreign decisions within the ECN, analysing different possible relationships (such as NCA versus NCA; a court versus an NCA of another Member State).

The substantive parts of the book are followed by policy proposals offered in a brief, executive form. These contributions since they do not reflect all the issues discussed, but only “the few points on which the authors felt that it was necessary and feasible to formulate interpretative and/or normative guidelines” (p.10). The proposals do not include recommendations regarding the US system.

The objective of International Antitrust Litigation was “to inquire into functioning and potential development of private international law techniques and instruments applicable for this specific kind of litigation” (p.1), and the volume delivers on this promise. It is an important piece of rigorous scholarship, raising numerous questions of great practical importance in international antitrust litigation. It is particularly valuable since it is first to offer such a comprehensive take on the issues related to such litigation in the EU context. It will be of interest not only to legal scholars, but also to policy-makers and practitioners. Both groups are likely to benefit from the identification of the existing challenges of the present regulatory frameworks, the suggested possible interpretation of problematic provisions, and the offered policy proposals.

Marek Martyniszyn
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CIVIL CLAIM FOR DAMAGES BASED ON A DECISION BY THE EUROPEAN COMMISSION: THE FRENCH SUPREME COURT UPHOLDS AJINOMOTO’S PASSING ON DEFENCE

Regional Developments

FRANCE

On May 15, 2012, the French Supreme Court upheld the decision of the Paris Court of Appeal of February 16, 2011, thereby confirming that the claimant in a civil action for damages bears the burden of proof when a passing on defence is raised.

The case arose out of the European Commission’s decision of June 7, 2000, fining Ajinomoto Eurolysine (“Ajinomoto”) along with four other synthetic lysine manufacturers, a total of almost €110 million for operating a global price-fixing cartel for lysine from at least July 1990 to June 1995.

Following the decision by the European Commission, two French cattle feed producers, SCA Le Gouessant and SOFRAL, which had bought lysine during the period of the anti-competitive practices, brought a civil action for damages against their direct supplier of lysine, Ceva Santé Animale (which bought lysine from Ajinomoto) and against Ajinomoto itself. Ajinomoto’s main defence consisted in arguing that the claimants had failed to prove they suffered losses from the cartel and that they had instead passed on any increases in price to their own customers. The Paris Commercial Court ruled in favour of Ajinomoto in a decision of January 22, 2008. Similarly, the claimants’ appeal against the decision of January 22, 2008, was dismissed by the Paris Court of Appeal in a decision of February 16, 2011 (see [2011] G.C.L.R., issue 1). In particular, the Paris Court of Appeal stated that the alleged victims must prove that they had personally suffered a loss directly linked to the practices at stake and that no harm would have been suffered if the alleged victims had passed on the illegal overcharges to their customers. The Court of Appeal held that neither SCA Le Gouessant nor SOFRAL, on which relied the burden of proof, provided sufficient evidence to prove that losses had been incurred and the amount of these losses.

SCA Le Gouessant and SOFRAL challenged this decision before the French Supreme Court. By a decision of May 15, 2012, the French Supreme Court upheld the decision of the Paris Court of Appeal and dismissed the claimants’ appeal.

In their appeal, the claimants argued that the burden of proof of a defence is on the defendant. Accordingly, they argued that the Court of Appeal could not state that the claimants bore the burden of proving that the illegal overcharges were not passed on to their customers without reversing the burden of proof in breach of arts 1382 and 1315 of the French Civil Code.

The French Supreme Court dismissed their challenge, ruling that the burden of proof of the harm suffered relies on the claimant in a civil action for damages. Therefore, the Court of Appeal was correct in requiring the claimants to prove they did not pass on the additional costs, insofar as, according to the findings of the Paris Court of Appeal, passing on costs to customers is a common commercial practice.

On another note, the French Supreme Court also upheld the decision of the Paris Court of Appeal regarding clearance of Ceva Santé Animale, on that the Court of Appeal had found that no allegation was actually made against Ceva Santé Animale by the claimants.

This is not the first time that the Supreme Court validated Ajinomoto’s use of the passing on defence. In a decision of June 15, 2010, (see [2010] G.C.L.R., issue 4), the French Supreme Court had actually reversed a decision by the Paris Court of Appeal for failure to assess whether the...
claimant had fully or partly passed on to its client the overcharge resulting from the lysine cartel, since, according to the French Supreme Court, awarding damages for anti-competitive practices must not lead to undue enrichment.

The new ruling by the French Supreme Court is also consistent with the principle of French law under which an alleged victim can claim damages only if it can prove and substantiate the alleged damages. However, the need to prove that costs were not passed on by the direct victims to their own customers might considerably reduce the chances of success of direct victims’ civil actions.

Hugues Vallette Viallard

Oriane Faure

ITALY


Abuse of dominant position; Data; Italy; Land registers; Public authorities; Services of general economic interest

On May 11, 2012, the Italian Supreme Court (the “Supreme Court”) upheld a ruling by the Court of Appeal of Turin of February 11, 2010 finding that the Italian Territorial Agency (the “Agency”) abused its dominant position in the market for the supply of data contained in the national land registry by restricting their re-utilisation and it, accordingly, awarded damages to the plaintiff. The Supreme Court dismissed the Agency’s grounds of appeal referring to the principles that the Supreme Court sitting en banc had established in a previous case (judgment No.30175 of December 30, 2011).

In particular, in that case, the Supreme Court found that the Agency had abused its dominance and recognised that the plaintiff was entitled to receive compensation for the damages suffered on the basis of three considerations. First, the Supreme Court identified two different areas of activity carried out by the Agency; the first is its public function concerning the maintenance of the national land registry, while the second covers all the other services it provides. Thus, although the Supreme Court considered the Agency to be a public sector body, it also stated that when it enters the market for the re-use of cadastral data, it must comply with competition law, as would any other private company. In fact, according to EU and national Competition law and jurisprudence, the notion of “undertaking” is very broad and so it basically encompasses any entity—regardless of its legal status or how it is financed—engaged in economic activity. Accordingly, when the Agency carries out market activities that do not pertain to its public task (which only concerns the maintenance of the national land registry), it is acting as an “undertaking” and, therefore, is subject to competition rules.

Secondly, the Supreme Court dismissed the Agency’s argument that it carries out activities that can be defined as “services of general economic interest”, and, as a result—according to art.8 of Law No.287/1990 and art.106 (2) TFEU—it is not subject to competition law. In fact, the Supreme Court noted that, when assessing whether a specific entity can benefit from the cited exemption, the fact that it is entrusted with a service of general interest is not sufficient given that the contested anticompetitive conduct has to be “specifically linked” to carrying out this institutional mission. Accordingly, after recalling the distinction between the two types of activities provided by the Agency, the Supreme Court concluded that the abusive conduct was carried out when the Agency was performing an economic activity falling outside the scope of the service of general economic interest with which it was entrusted.
Finally, the Supreme Court recognised that the Agency held a dominant position in the market for the supply of services on cadastral and mortgage information, given that these services could only be provided through the re-use of the information taken from the national land registry which is maintained by the Agency itself. Therefore, the decision to add unjustified restrictions to the re-utilisation of public information by requiring purchasers to enter into long-term agreements and by creating a charging mechanism based on the quantity and the quality of public information purchased was an abuse of dominant position. In this regard, the Supreme Court also rejected the Agency’s argument that its conduct represented the mere implementation of Italian law provisions (namely of Law No.311/2004). In fact, the Supreme Court found that, since those provisions were also contrary to art.102 TFEU and the Agency was part of the public administration, it not only could not have relied on such provisions, but it should have instead disapplied them, in compliance with the principle of EU law primacy.

Mario Siragusa

Erika Guerri

Philippe Croene

KOREA

KOREAN COURTS UPHOLD PLAINTIFFS’ CLAIM TO DAMAGES

Cartels; Causation; Credit cards; Foreseeability; Measure of damages; Private enforcement; South Korea

The Korean Court upheld the plaintiffs’ private action damages claim following the Korea Fair Trade Commission’s (KFTC’s) finding of the price-fixing cartels by credit card companies and VAN service providers (Seoul Central District Court, August 17, 2012 Decision, 2010 Gahap 122976 and others)

On December 5, 2007, the KFTC had announced that each group of seven major credit card companies and ten value added network (VAN) service providers engaged in a horizontal price-fixing cartel, respectively. Credit card companies typically enter into data and draft capture (DDC) service contracts with VAN service providers for collection and storage of sales checks and VAN service providers in turn sub-contract such task to VAN agencies. The KFTC had found that seven credit card companies agreed to reduce the draft capture (DC) service fee payable to VAN service providers under the DDC service contracts from KRW 80 per case to KRW 50. The KFTC further found that 10 VAN service providers, in turn, sought to pass over the reduction to VAN agencies (as subcontractors) by capping the DC service fee payable to VAN agencies at KRW 50.

117 VAN service agencies subsequently filed a private action claim against the seven credit card companies and five of the VAN service providers seeking to recover damages from their respective collusive agreements.

On August 17, 2012, the Seoul Central District Court upheld the substantial parts of the plaintiffs’ claims. The Court accepted the KFTC’s finding regarding the existence of cartels and their anticompetitive effect.

Notably, the credit card companies argued for the lack of causal relationship by claiming that it was the VAN service providers’ agreement that caused the loss to the plaintiffs instead of the credit card companies’ agreement. The Court rejected this argument but for the credit card companies’ agreement, the VAN service providers would not have agreed to reduce and cap the DC service fees payable to the plaintiffs. The credit card companies further argued that it was not foreseeable that the reduction in the DC service fees payable to the VAN service providers would have been passed over by the VAN service providers to the plaintiffs. The Court
again rejected this argument as the Court viewed that such outcome ought to have been foreseeable based on several factors including the parties' past practice.

As for the amount of damages, the Court awarded the difference between the level of DC service fee payable under the relevant cartels and the level of DC service fee that would have been payable but for the relevant cartels. In deciding the latter, the Court referred to the Court-appointed economic expert assessor’s finding based on the multiple regression analysis.

Youngjin Jung

Sangwook Daniel Han

MEXICO

AMENDMENTS TO MEXICAN CONSTITUTION
EXPANDED SCOPE OF LEGAL STANDING IN AMPARO PROCEEDINGS WITH RESPECT TO COMPETITION MATTERS

Constitutional rights; Locus standi; Mergers; Mexico

In July of 2011, art.107 of the Mexican Constitution was amended. Among the modifications, the scope of amparo’s legal standing was expanded. Previous to these amendments only those whose constitutional guaranties had been directly violated by a resolution of an authority (i.e. the parties of the proceedings) were able to seek protection. Today, thanks to the amendments, citizens or a collectivity who suffered an indirect harm by any such resolution may initiate an amparo motion against it.

As a breakthrough precedent, these reforms have recently been applied for a case which derives from a resolution issued by the Mexican Federal Competition Commission (FCC). Mexican courts admitted an unprecedented amparo motion by the Mexican Association for the Right for Information (MARI) against the merger of Grupo Televisa and GSF Telecom Holdings authorized by the FCC last June.

The merger was approved in the end by the FCC with conditions. The merger was notified on April 7, 2011, whereby Grupo Televisa was to acquire 50 per cent of the ordinary shares of GSF Telecom Holdings. The other 50 per cent is owned by Grupo Salinas. Prior to this acquisition, Grupo Televisa had no participation in the mobile telephony market. However, both Grupo Televisa and Grupo Salinas concur in other deeply concentrated markets, particularly: broadcast television, paid television, content production, advertising, and broadband internet.

The merger raised important competition concerns to the FCC. As consequence, on January 24, 2012, the FCC issued a resolution not authorising the merger because of it determined that it was likely that it harmed competition. Nevertheless, the parties filed a motion for reconsideration against such resolution, and in June 2012 the FCC authorised the merger subject to the application of certain conditions.

The MARI filed an amparo against FCC’s last resolution under the argument that it harmed the citizen’s rights of freedom of speech and information. On July 9, 2012, the Court admitted the amparo.

The admission by the courts of this amparo is an unprecedented action in Mexico, as previously the courts have had a restrictive interpretation on determination of legal standing in an amparo proceeding (i.e. formerly it was

1 For more information on these amendments: Suprema Corte de Justicia de la Nación, “Reformas Constitucionales en materia de Amparo y Derechos Humanos publicadas en junio de 2011” (Relación de tratados internacionales de los que el Estado Mexicano es parte en lo que se reconocen Derechos Humanos) available at http://www2.scjn.gob.mx/red/constitucion/ [Accessed October 3, 2012].
2 FCC’s file CNT-031-2011.
3 As the FCC pointed out within its resolution, Grupo Salinas and Grupo Televisa control 95 per cent of the broadcast television market.
admitted only when filed by those directly affected by a resolution; party thereto, e.g. Grupo Televisa and GSF). Nevertheless, after the amendments anyone (an individual or a collectivity) who suffers an indirect harm by a resolution of an authority may seek for protection. An example of this indirect harm is precisely the FCC’s authorisation of the instant merger.

Indeed, competition procedures are characterised for having an impact on the market as a whole. The admission of the MARI’s amparo by the Courts represents a huge precedent concerning the legal standing in the amparo with respect to economic competition proceedings and resolutions thereto in Mexico.

Lucia Ojeda Cardenas

NEW ZEALAND

COMMERCE COMMISSION V VISY BOARD PTY LIMITED [2012] NZCA 383 (COURT OF APPEAL)

This case concerned alleged cartel behaviour in the cardboard packaging industry. While involving the regulator, it has jurisdictional implications for private litigants in New Zealand where the alleged cartel conduct concerned occurred overseas and involved overseas defendants.

The New Zealand Commerce Commission (the “Commission”) brought penalty proceedings in New Zealand under the Commerce Act 1986 (the “Act”) after the Australian regulator had successfully pursued penalty proceedings against Australian packaging company, Visy Board Pty Ltd, in Australia (where Visy admitted cartel behaviour). The New Zealand Commission alleged the collusion extended to “trans-Tasman customers” and domestic New Zealand markets. Visy denied the cartel arrangements extended to New Zealand and protested the jurisdiction of the New Zealand Courts.

In the High Court, certain causes of action alleging contravening conduct in a “New Zealand trans-Tasman market” had been struck out because that Court concluded that the claims did not allege contravening conduct in “a market in New Zealand”: a necessary requirement of the Act, and therefore were outside the Commission’s jurisdiction.

On appeal, the Court of Appeal noted that the jurisdiction of the New Zealand Courts could be established in three ways: under r.6.27(2)(j)(i) of the High Court Rules where the act or omission to which the claim relates was done or occurred in New Zealand; under s.90(2) of the Act which provides for attribution of the conduct of directors, employees, or agents; or under s.4(1) of the Act, where the defendant is resident or carrying on business in New Zealand and its overseas conduct affects a market in New Zealand.

For each of the causes of action in question, the Court of Appeal concluded that one (or more) of the bases of jurisdiction was met. In doing so, the Court emphasised the preliminary nature of the jurisdictional inquiry (a “plausible” case is required and the Court will not determine disputed facts). The Court held that the required procedural threshold, to a “good arguable case” standard, was met. First, emails sent to New Zealand, telephone calls from Australia to New Zealand, and visits to New Zealand that involved obtaining information then used in preparing the allegedly anti-competitive tenders or meeting customers ultimately affected by such tenders amounted to relevant acts done in New Zealand. Further, Visy Board, although an Australian company, was carrying on business in New Zealand despite the existence of a separate New Zealand company (essentially because the New Zealand company was treated as a division of the business and because Visy Board had involvement in the New Zealand business) and the alleged conduct...
“related to, was concerned with, and was directed towards, a … market in New Zealand”, in particular such conduct was arguably intended to fix prices for goods in New Zealand.

The Court’s findings are consistent with a continuing trend towards setting a low bar at the jurisdictional stage in circumstances where New Zealand customers are affected by the conduct of parties resident overseas, notwithstanding the Supreme Court’s more cautious approach in Poynter v Commerce Commission [2010] 3 NZLR 300.

Simon Ladd

Lara Bird

UNITED KINGDOM

INDUSTRIAL TUBES CARTEL CLAIM: COURT OF APPEAL UPHOLDS STAND-ALONE DAMAGES CLAIM AGAINST ENGLISH “ANCHOR” NON-ADDRESSEE SUBSIDIARY: KME YORKSHIRE LTD V TOSHIBA CARRIER UK LTD [2012] EWCA CIV 1190

Overview
On September 13, 2012, the Court of Appeal dismissed an appeal by KME in which it had sought to strike out a claim brought by Toshiba Carrier UK Ltd (“Toshiba”) against its English subsidiary company, KME Yorkshire Ltd (“KME UK”) for damages arising from the Industrial Tubes Cartel. Toshiba had brought a claim in the High Court in London against KME UK, together with other KME subsidiaries and European based defendants who were each addressees of the Industrial Tubes Cartel Decision. Toshiba relied on KME UK as the “anchor” English defendant on which to bring its claim in London despite the fact that it was not an addressee of the Decision. The claims against the remaining defendants were then joined pursuant to art.6(1) of Council Regulation 44/2001 (the "Judgments Regulation") on the basis that they were so closely connected that it was expedient to hear them together.

The Court of Appeal dismissed the strike out application on the basis that Toshiba had pleaded a sufficient case for a stand-alone action against KME UK that it had knowledge of, and had taken steps to participate in the cartel arrangements, despite having very little evidence of its participation pending disclosure by the defendants. Strike-out applications by the remaining non-English Defendants were as a consequence also dismissed, it having been accepted that the upholding of the claim against KME UK was sufficient to establish jurisdiction against the non-English Defendants under art.6(1) of the Judgments Regulation.

Facts
On December 16, 2003, the Commission published a decision addressed to companies in the KME Group, Outokompu Oyj and Wieland-Werke AG finding that they had fixed prices and market shares for the sale of industrial copper tubes in breach of art.81(1) EC Treaty (now art.101(1) TFEU) between May 3, 1988 and March 22, 2001 (the “Decision”). The Decision was addressed to the German parent company of the KME Group, now KME Germany AG, together with its French and Italian subsidiaries. There were no English domiciled companies named as an addressee of the Decision.

On December 15, 2009, Toshiba Carrier UK Ltd and others brought a claim in the High Court in London seeking damages in relation to its purchases of industrial tubes during the period of the cartel. The claim was brought against each of the addressee of the Decision together with English subsidiaries of KME and Wieland-Werke AG.
On January 4, 2011 KME UK issued an application to strike out the claim under r.3.4(2)(a) of the Civil Procedure Rules or for summary judgment against the claimants asserting that Toshiba had not established an arguable case for its participation in the cartel in circumstances in which it was not an addressee of the Decision and Toshiba had no evidence of its participation. The remaining non-English domiciled defendants applied in turn to strike out the claims against them on the basis that if the claim against KME UK was struck out, there was no basis on which to establish jurisdiction for the claims against them in the English courts.

**High Court judgment**

On October 19, 2011, the Chancellor made an Order dismissing both applications, finding that:

- the pleaded claim against KME was sufficient to establish both a “follow-on” claim (where liability is based on the findings in the Decision) and a “stand alone” claim (where reliance is also made on allegations and facts outside of the Decision). Following previous judgments in *Provimi*¹ and *Cooper Tire*² he held that that it could not be said prior to the disclosure of evidence that the claimants had no reasonable grounds for bringing it nor that there were no real chance of success; and
- as a result, the claimants could rely on art.6(1) of the Judgment Regulation to establish jurisdiction for the claim against the non-English domiciled defendants.

The defendants applied to appeal the Judgment, permission to appeal was granted by the Court of Appeal and the appeal was heard on June 25–26, 2012.

**Court of Appeal judgment**

In a short judgment on September 13, 2012, Lord Justice Etherton dismissed the appeal by KME UK finding that:

- the allegations in the claim form and supplemented by correspondence were sufficient to establish a “stand-alone” claim against KME UK that it had knowledge of and participated in the cartel arrangements in breach of art.101 TFEU; and
- the Chancellor had been entitled to exercise his discretion to refuse to summarily dismiss the claim despite the lack of evidence currently available to KME UK to support the allegations pending disclosure by the defendants.

In dismissing the application for summary judgment, Etherton L.J. accepted the position of the claimants that,

“in view of the elaborate steps taken to conceal and ensure the secrecy of the illegal activity of the cartel, the Claimants are not in a position to further particularise their case until after the Defendants have made disclosure… .”

Following the previous approach by the Court of Appeal in *Cooper Tire* and *Sales J. in Nokia*,³ Etherton L.J. accepted that the inherent secrecy of cartels means that it is difficult for a claimant to support its allegation of participation until after disclosure of documents and concluded that the same “generous approach” was appropriate in this case.

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¹ *Provimi Ltd v Roche Products Ltd* [2003] EWHC 961 (Comm); [2003] 2 All E.R. (Comm) 683.
² *Cooper Tire & Rubber Company Europe Ltd v Shell Chemicals UK Ltd* [2009] EWHC 2009 (Comm).
³ *Nokia Corporation v AU Optronics Corporation* [2012] EWHC 731.
Etherton L.J. found it unnecessary on this basis to address the separate question whether it was sufficient that a subsidiary had implemented cartel arrangements on the basis that knowledge could be imputed from its parent company regardless of whether it had actual knowledge. In an obiter comment, he noted that there remained a difference on this point between the conclusion in *Provimi* that actual knowledge was unnecessary where the subsidiary is part of the same economic undertaking and implements the arrangements and the doubt expressed on this point by the Court of Appeal in *Cooper Tire* and suggestion that this point may in the future require reference to the European Court. Casting further doubt on *Provimi* Etherton L.J. expressed his view that there is no scope for imputing knowledge save in cases where the parent company exercised a “decisive influence” over the subsidiary.

Having upheld the claim against KME UK, the strike out claims by the remaining defendants were also dismissed, it having been accepted by the defendants that the upholding of the claim against KME UK was sufficient to establish jurisdiction against the non-English defendants under art.6(1) of the Judgments Regulation.

A decision on any further appeal is still pending.

**Commentary**

The Judgment is a further endorsement of the pragmatic approach which the English High Court has adopted in claimant cartel damages actions, leaving open the option for claimants to bring claims in the High Court in cartel cases where there is no English domiciled addressee of a Commission Decision, but English subsidiaries of the addressees were responsible for sales of cartel products in the United Kingdom. This helps remedy the problem that Commission Decisions often fail to consider the position of all of the subsidiary entities within company groups which were used to implement the cartel arrangements in countries in which they have been found to have targeted.

The judgment casts further doubt on the reliability of the earlier judgment in *Provimi* that implementation of the cartel arrangements by a non-addressee subsidiary would itself be sufficient in cases where there is no decisive influence by a parent company, but confirms that this will not leave claims vulnerable to early strike out where knowledge of and participation in the cartel by a non-addressee subsidiary is alleged.

The judgment also confirms the acceptance by the English Courts (and the defendants in this case) that once an arguable claim has been established against an English domiciled defendant, this allows claims to be joined against non-English domiciled Defendants under art.6(1) of the Judgment Regulation on the basis that the claims are so closely connected that it is expedient to hear them together.

The Court of Appeal Judgment in *Toshiba* was specifically noted by Etherton L.J. to relate only to claims commenced in the High Court. Judgment by the Court of Appeal is still pending in *Emerson Electric Company v Mersen UK Portslade Ltd* heard on March 8, 2012, in relation to the question of whether stand-alone claims can be brought against a non-addressee subsidiary in a claim for damages before the Competition Appeal Tribunal. The option to specifically amend the rules of the Competition Appeal Tribunal to extend to stand alone claims is also one of the points under review in a recent consultation by the Department for Business, Innovation & Skills on private actions in competition law.

Nicola Boyle

Victoria Yuan
In its recent consultation paper published earlier this year, the UK Department for Business, Innovation & Skills (BIS) has further explored the idea of strengthening the use of ADR in UK private competition law actions as a contributing factor to building an efficient and effective world-class private enforcement regime. BIS’s initiative is indicative of the UK Government’s commitment to ADR as an alternative means of enforcement in dispute resolution more generally and reflects the UK Government’s desire to expand the use of ADR to more specialist areas of private enforcement. To note in this context that as a matter of interest, the BIS consultation paper adopts a wide definition of the concept of ADR, to wit “all means of resolving disputes before a final ruling is made in court, including mediation, arbitration, early neutral evaluation and settlement”.

More specifically, BIS proposes the following innovations with a view to institutionalising ADR as a dispute resolution mechanism in the private enforcement of competition law in the UK:

- To make the use of ADR optional (albeit strongly encouraged as a first default option) rather than mandatory, given the strong consensual element in all ADR mechanisms.
- To encourage the use of ADR in particular in actions—whether follow-on or stand-alone—before the Office of Fair Trading (OFT) and Competition Appeal Tribunal (CAT).
- To facilitate the use of ADR in actions before the CAT by introducing a pre-action protocol for competition cases and by enabling formal settlement offers to be incorporated into the processes before the CAT.
- To allow interested business groups, representative bodies and other private and third sector organisations to contribute to the expansion and institutionalisation of ADR in the private competition law enforcement regime.
- To introduce a right to bring opt-out collective actions for breaches of competition law.
- To enable the OFT to introduce redress schemes that facilitate redress for individuals and smaller businesses and oblige infringing businesses to provide redress for loss suffered due to their anti-competitive behavior.

It will be interesting to see to what extent the reforms on ADR proposed by BIS will find implementation in the UK competition law regime. The Global Competition Litigation Review will keep reporting further developments going...
forward. To note that the BIS consultation paper has been the subject of more detailed analysis in a number of articles in the present issue of Global Competition Litigation Review.\footnote{See p.138–144; pp.145–150; and pp.151–157.}

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