Antitrust Damages Actions in Europe
Pitfalls and Opportunities From a Corporation’s Point of View

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1. Introduction

In recent years, the volume of private damages actions has increased substantially in the national courts of EU Member States. In England and Wales, for example, the number of private damages claims has risen from a handful of lawsuits five years ago to, at present, over 30 active cases based on around 20 different antitrust infringements. The same upward trend in the past five or six years has been reported in Germany, France and the Netherlands, amongst others.

The growth in claims is driven in part by an initiative by the European Commission to facilitate antitrust damages actions and to raise awareness among potential claimants. This has included constant reminders of the availability of private damages actions in the Commission’s press releases announcing cartel decisions. The Commission has also published or commissioned a number of studies on the subject in the past six years. Most recently, the Commission has initiated consultations on some of the key obstacles facing claimants and has published a note on quantification of antitrust damages. More importantly to claimants, the level of Commission enforcement activity, particularly in the cartels sector, has increased substantially. In the years between 1990 and 1999, the Commission fined companies in 21 cartel cases. Between 2000 and 2009, this number had increased to 63. Commission infringement decisions are binding on national courts and contribute to the increase in litigation by removing the burden on claimants of proving violation of antitrust law by the defendants.

This rise in private enforcement is not without controversy. The move by claimants to access documents on the file of the Commission and national regulators creates a serious tension with cartel leniency programmes. It has been reported that companies involved in cartel investigations choose not to apply for leniency for fear that sensitive documents may later be disclosed to claimants, in particular so where full immunity from cartel fines is unavailable because another cartel member has already blown the whistle. There is also a general concern that the EU may be moving towards U.S.-style litigation,

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sometimes associated with unmeritorious claims brought by class action lawyers vying for the treble damages available under that system. This concern seems less of an issue; the risk of such development is low. Europe has a long established tradition – both in civil and common law – of damages actions serving to compensate parties who have suffered damages, but not to penalise the tortfeasors. This ensures that treble damages will not be introduced in Europe. Several other factors further reduce the possibility of such culture developing, even if these factors are not applicable in each European country, including claimants’ exposure to defendants’ costs in the event of unsuccessful claims; severe restrictions in European rules on document disclosure; and the absence of legislation that permits claimants to represent a larger group of claimants without their upfront consent (known as the “opt-out” system).

The increase in private actions has also raised the stakes for businesses, whether they are potential claimants or potential defendants. An undertaking which has purchased goods from suspected cartel members, directly or indirectly, will need to consider whether it wishes to pursue a claim for damages. Damages can be substantial and in some European cases have exceeded €100 million, so a General Counsel who, as a general matter, would be reluctant to litigate may find it difficult entirely to dismiss this option without serious consideration. Meanwhile, an undertaking which is being investigated by the Commission, or a national competition authority, will need to start thinking at an early stage about reducing its exposure to private damages actions.

Below we discuss some of the key practical considerations affecting both claimants and defendants in antitrust damages actions.

2. **Practical considerations**

2.1 **Limitation periods**

One of the first issues that parties must consider is when the relevant limitation period for the claim starts to run, whether it has been suspended, and whether it has expired. This is crucial, as there can be no damages claim if the limitation period has expired.

In many EU Member States, such as the Netherlands, France and the UK, the rules on limitation allow for the clock to start only when the claimant becomes aware of the infringement. Given that cartels are, by their nature, generally conducted in secrecy, this will be helpful to claimants who would otherwise be out of time in respect of some or all infringements. Defendants, on the other hand, may respond by arguing that the claimant should have known of the cartel at an earlier date, for instance by citing a high level of publicity surrounding the original investigation into the infringement.

The limitation rules of England and Wales are unusual in that claimants have a choice of two regimes with different limitation periods under which to bring a claim for damages. The statutory limitation period for bringing damages actions in the High Court is six years from the time when the damage occurred. Exception is made for concealment: where the defendant deliberately conceals a fact relevant to the claimant’s right of action, the limitation period does not start to run until the claimant has discovered the concealment or could with reasonable diligence have discovered it. Meanwhile, claims before the specialist Competition Appeal Tribunal (“CAT”) pursuant to s.47A Competition Act 1998 can be brought up to two years after the right to appeal the original infringement decision has been exhausted. The High Court is currently the preferred

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4 Limitation Act 1980, s.2.
5 Limitation Act 1980, s.32(1)(b).
6 Competition Appeal Tribunal Rules 2003, s.31.
forum for claimants in England and Wales, but the CAT remains important as an alternative for claimants who find themselves out of time in the High Court.\footnote{Currently, over 17 actions are pending in the High Court, compared with 11 in the CAT. Notably, no new claims have been filed in the CAT since January 2011. Source: \url{http://www.catribunal.org.uk}.}

### 2.2 Forum and Jurisdiction

Given the international nature of many cartels, a single infringement may involve defendants based in a number of different jurisdictions. From a claimant’s point of view, it will be important to bring claims against all defendants in a single forum, rather than having to pursue each in the defendant’s own country of domicile. The courts of many Member States are showing increased willingness to take jurisdiction over non-resident defendants.

In a series of cases beginning with *Provimi v Roche*, the English High Court has shown willingness to assert jurisdiction over claims from all parts of the world.\footnote{*Provimi Ltd v Roche Products Ltd [2003] EWHC 961 (Comm).} Provided that the High Court is able to establish jurisdiction over one or more UK-domiciled defendants (or "anchor defendants"), it will rely on Article 6 of the Brussels Regulation to bring the remaining, non-UK domiciled defendants to the claim within the jurisdiction of the English courts.\footnote{Article 6 of Council Regulation (EC) No 44/2001. A person domiciled in a Member State may also be sued where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.}

In *Provimi* and subsequently in *Cooper Tire*\footnote{*Cooper Tire v Rubber Company Europe v Dow Deutschland [2010] EWCA Civ 864.} and *Toshiba Carrier*\footnote{*Toshiba Carrier UK Ltd v KME Yorkshire Ltd [2011] EWHC 2665 (Ch).}, the courts faced an initial hurdle in establishing jurisdiction, since the cases were follow-on actions and none of the UK-domiciled defendants was an addressee of the original infringement decision, although all had foreign parent companies which were addressees. In *Provimi*, the High Court was able to establish jurisdiction over the UK anchor defendants by taking a wide approach to the circumstances in which a subsidiary could be held liable for a cartel agreement entered into by its parent. The Court held that there was arguable case that, as long as the subsidiary had implemented the cartel, it did not need to have done so knowingly.

In *Toshiba Carrier*, the High Court declined to rule that either *Provimi* or *Cooper Tire* was bad law. It held that, in any case, it would not have sufficient evidence to assess whether the subsidiary was an innocent party to the infringement until after disclosure had taken place. The High Court therefore declined to strike out the claim on jurisdictional grounds and instead decided to deal with the issue at a later stage in the proceedings. It remains to be seen how much consideration to the issue of jurisdiction the courts will be prepared to give when *Toshiba Carrier* reaches trial. Both *Provimi* and *Toshiba Carrier* indicate that the English courts are prepared to find arguments for asserting their jurisdiction.

The German courts have also shown willingness to apply Article 6 of the Brussels Regulation to bring foreign defendants within German jurisdiction, provided that the jurisdiction of the national courts has been established over at least one member of the cartel. A pending action in relation to the bleach cartel may test the limits of the...
willingness of the German courts to assert jurisdiction. In this case, the original anchor defendant has now settled and left the proceedings, leaving claims outstanding in the German court against five overseas companies. The court is currently considering whether it should refer the question to the European Court of Justice (“ECJ”) for a preliminary ruling on whether it can retain jurisdiction.

The French courts also generally take a wide approach to asserting jurisdiction over foreign defendants. French tort law allows a claimant to commence an action in the national courts provided that the anti-competitive practice took place or the damage was suffered in France. This applies notwithstanding the nationality of the defendants. A French claimant will therefore generally have the advantage of being able to draw defendants to its home courts.

As a final point on jurisdiction, parties should be aware of the provisions of the Brussels Regulation regarding related actions. Article 28 provides that, where related actions are pending in the courts of different Member States, the court seised second may at its discretion stay proceedings or, alternatively, may rule that the proceedings should be consolidated.

Parties to antitrust litigation should ensure that they are aware of whether any foreign courts have already been seised (i.e. whether there are claims pending in those courts), since a stay or consolidation of the actions could, for better or worse, seriously delay the litigation action.

2.3 Obtaining evidence to prove causation and quantum

The burden of proof in all Member States is on the claimant to prove the infringement, causation and quantification of damages, with the obvious exception that claimants will not have to prove the infringement if they are able to rely on an infringement finding in a decision of the Commission. To prove its claim, the claimant will need to collate extensive evidence, some of which may be in possession of the alleged infringers. This will be of particular importance to damages actions relating to cartels due to the secrecy typically surrounding the defendants’ conduct.

The first consideration for parties should be whether the standard disclosure regime of the jurisdiction will enable them to obtain the documents they require to prove their case. The disclosure regime in England occupies a middle-ground between the wide disclosure requirements in the US and the restrictive rules in most of continental Europe. In practice, English disclosure will catch almost all relevant pre-existing documents and will provide a basis for claimants to prove their claim.

By contrast, the German Code of Civil Procedure only allows parties to obtain disclosure of a document in the possession of a party or private third person by court order, and then only if the applicant provides a statement of the name of the document, its contents, the reasons why it is believed to be in the other party’s possession and the reasons why it has

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12 MLex EU Alert: German court considers ECJ referral on CDC’s bleach-chemical damage claim, 4 November 2011; Case No: 13 O 23/09 [Kart].

13 Council Regulation (EC) No 44/2001, Article 28. Actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

14 Civil Procedural Rules, rule 31.6. The Civil Procedure Rules require litigation parties to disclose to one another before trial a list of all documents which are, or have been, within their control upon which they intend to rely, and those which adversely affect their own case or adversely affect or support another party’s case.
probative value to the applicant.\textsuperscript{15} This narrow approach makes it difficult for parties to obtain evidence from the other side unless they know exactly what they are looking for.

The French system likewise does not have a standard procedure for pre-trial disclosure of documents. Article 9 of the French Code of Civil Procedure ("CPC") provides that a claimant must prove its own case and there is no general obligation of disclosure on the defendant. However, there is some scope for parties to obtain assistance from the court in obtaining evidence.\textsuperscript{16} Before the proceedings start, parties may also rely on Article 145 of the CPC, which permits the court to order preparatory enquiries to preserve evidence of the facts on which a claim is based or to establish the existence of such evidence.

Where the domestic disclosure rules are narrow, the claimant may wish to obtain evidence from the file of the Commission or the national authority which carried out the original investigation. In the case of \textit{Pleiderer v Bundeskartellamt}, the ECJ was asked to provide a preliminary ruling on the question of whether claimants could be allowed access to pre-existing documents submitted to the national competition authority during leniency discussions.\textsuperscript{17} The ECJ ruled that there was no blanket prohibition and that national courts should address the issue on a case-by-case basis.

Subsequently, in its dealings with actions brought against the gas insulated switchgear (GIS) cartel, the English High Court has considered whether the \textit{Pleiderer} approach can be applied to documents submitted during an investigation by the Commission, and not just documents of the national regulator.\textsuperscript{18} In its observations submitted in the GIS proceedings, the Commission interpreted \textit{Pleiderer} to apply by analogy to documents created for the purposes of Commission investigations.\textsuperscript{19} The High Court has ordered an \textit{in camera} review by the judge of the Commission’s file, who will then rule as to whether the documents should be disclosed. This mirrors the approach taken in U.S. cases, where U.S. courts argued that they could not assess the relevance of documents that the judge had not seen.

In France, the courts have in recent months taken a step back in their approach to the disclosure of documents from the file of national competition authorities. Previously, it had been assumed that national rules on administrative transparency would allow direct access to such documents by any citizen. However, in a recent case, the claimant, Ma Liste De Course, had to take an indirect route to allow disclosure to the court of redacted statements relating to the settlement of an antitrust investigation. Although it had already seen the documents, the claimant had to obtain an order from the courts requiring the French competition authority to disclose the documents, rather than disclosing the documents itself.\textsuperscript{20} This circuitous route was necessary to avoid a breach of Article L-463-6 of the French Commercial Code, which prohibits the disclosure of information which is part of an authority’s investigation.

\textsuperscript{15} German Code of Civil Procedure (\textit{Zivilprozessordnung}), s.142.
\textsuperscript{16} Article 10 of the CPC states that the judge may order any measures of inquiry deemed necessary to enable the judge to decide the case where it does not already have sufficient elements. Article 11 of the CPC allows a party to ask the judge to order the other parties to proceedings, or a third-party, to communicate any kind of document necessary to prove the facts alleged.
\textsuperscript{17} \textit{Pleiderer AG v Bundeskartellamt} (Case C-360/09).
\textsuperscript{18} M-\textit{Lex}, \textit{English court will review cartel data to rule on disclosure in switchgear damage claim}, 9 November 2011.
\textsuperscript{19} European Commission, Observations pursuant to Article 15(3) of Regulation 1/2003 submitted in claim no HC08C03243 before the High Court, November 2011.
\textsuperscript{20} \textit{Ma Liste de Courses v HighCo and Sogec}, judgment of the Paris Commercial Court dated 24 August 2011.
Access to the file is likely to remain a controversial topic, not least with ongoing attempts in the U.S. courts to gain access to Commission documents. However, accessing the case file will not alleviate the need for claimants to collate extensive, “real-life” evidence such as persuasive witness testimony and contemporaneous documents. For claimants in jurisdictions such as England and Wales, which have broad pre-trial disclosure, the case file will be of interest but less so than in civil law jurisdictions with their more restrictive disclosure rules.

2.4 Role of infringement decisions

A private action before national courts of Member States may be brought either as a “stand alone” action or as a “follow-on” action, which is brought in reliance upon existing infringement decisions against the defendants. Where the action is a follow-on action, the original decision will be crucial in dealing with the infringement and may also assist with proof of causation or quantum.

Infringement decisions of the European Commission bind national courts in private antitrust damage actions in that courts cannot contravene Commission decisions.\(^{21}\) The meaning of Commission “decision” has not been settled. It was held in the case of Betws Anthracite\(^{22}\) that English courts would be bound not only by the operative part of the decision, i.e. the finding of infringement, but also by the findings of fact by which the infringement decision was reached. The judgment did not go into detail as to what would be considered a binding finding of fact. In its second judgment in the case of Enron Coal Services v EWS in 2011, the English Court of Appeal found that there were three types of finding in the decision of a national competition authority: 1) the operative provisions of the decision, 2) findings of fact which are directly relevant to the infringement finding, and 3) peripheral findings of fact.\(^{23}\) The Court was held to be bound by the first two types of finding, but it could disapply the third. It is not yet clear whether the same approach applies to Commission decisions.

Whether the decisions of national competition authorities also bind the national courts is a matter of national law. Under the law of England and Wales, both the CAT and the High Court are bound by the decisions of the national regulators. However, in the High Court, there is nothing to prevent the claimant from seeking to prove facts that go beyond the scope of the original infringement decision. This contrasts with the CAT’s jurisdiction in s.47A, under which the court is effectively straitjacketed by the original decision and can only consider causation and quantum. This has led to a general perception of the CAT as a less attractive forum than the High Court.

In Germany, a final infringement decision by the Federal Cartel Office, or even the competition authority of another EU Member State, has a binding effect on the civil court ruling on a follow-on damage claim.\(^{24}\) In France, by contrast, decisions of the national competition authority do not bind French courts as regards the finding of an infringement, but they have strong authority. In the case of Verimedia v SA Mediametrie, the claimant brought a damages action following an earlier decision of the French Competition Council against the defendant. The claim was rejected at first instance but allowed in part on appeal in the Versailles Court of Appeal.\(^{25}\) The appeal Court held that the claimant’s

\(^{21}\) Regulation (EC) 1/2003, Article 16(1); see also Case C-344/98, Masterfoods.
\(^{22}\) Betws Anthracite Ltd v DSK Anthrazit Ibbenburen GmbH [2003] EWHC 2403 (Comm).
\(^{24}\) Act Against Restraints of Competition, s. 33(4).
claim for loss of business was sufficiently proven since the Competition Council’s original decision had identified the claimant as a victim of the infringement by the defendant.

Thus EU and national infringement decisions play a crucial role in damages actions. The scope of a decision’s binding effect will need to be determined. It can be expected that separate submissions and hearings will be required to determine which parts of an infringement decision should be binding on courts and the parties to the litigation. The effects of this can be dramatic. For example, if a court decides that an effects finding in a cartel decision – e.g. that the cartel resulted in an increase in price – binds the court, the burden on the claimant will reduce, while a finding to the contrary will raise the barrier the claimant needs to overcome before an award of damages will be made. It follows that a careful assessment of the binding effect of an infringement decision will be required by both sides to the litigation. In fact, the importance of the contents of a decision is such that a defendant may choose to appeal a Commission decision simply to have damaging recitals removed from a decision in order to improve its litigation position.

3. Funding of claims

A final issue is how private damages litigation is or may be funded. Of course, many large companies will have the funds necessary to launch or defend litigation. For other companies, that may not be the case, let alone for consumers or consumer organisations, which often lack the resources to litigate a damages claim. Over the last few years there has been significant growth in the litigation funding market. Europe, in particular the UK, is gaining credibility as a third-party funder market. In the UK, a number of companies have established themselves as facilitators of third-party funding, offering conditional fee agreements and 'after the event' ("ATE") insurance to protect against the risk of adverse costs. There are also a number of brokers active in the market able to provide advice on the various options available to a company seeking litigation funding.

A recent case in England, Arkin v Borchard,26 concerned the costs liability of third-party funders. Such arrangements will be upheld, provided they do not contain an element of impropriety (champertous). The decision clarified that a third-party funder's liability, assuming the funding agreements are acceptable, should be limited to the extent of the funding provided. However, if the agreement is found to be champertous then, as a matter of public policy, it will be void and unenforceable both by the third-party funder against the funded party and by the funded party against the third-party funder as to costs.

German law allows for third-party funding and several German companies fund proceedings in return for a share of any damages. A former ban on contingency fees was lifted in 2008. The test for whether such fees are acceptable is whether the claimant’s economic position would prevent him from otherwise bringing the claim.27

Under French law, lawyers are not permitted to act wholly on a contingency fee basis, though fees which are only partly based on the result of the case are permissible. The French National Bar Council has indicated that it views a contingency fee equal to 10% of the damages added to a fixed fee to be reasonable. Third-party funding of competition law claims is not expressly prohibited under French law but, in the past, it has not been common.28 However, it has been observed that there is a developing damages claims industry in France.

27 Act Amending the Prohibition of Contingency Fees 2008 (Gesetz zur Neuregelung des Verbots der Vereinbarung von Erfolgshonoraren).
28 The French Civil Code makes no express reference to third-party funding.
4. Concluding remarks

At present, there is no indication that the rise in private damages actions will abate any time soon. Claims are pending in national courts in relation to, among others, the elevator, bitumen, air cargo, sodium chlorate, gas insulated switchgear, LCD, paraffin wax, and Dutch beer cartels.

Given the increased likelihood of claims being brought, evidenced by the greater volume of damages claims being brought, the stakes for defendant businesses are higher than in the past. This will inform a business’ strategy when undergoing investigation. In particular, the risk of damages actions will influence a business’ approach when deciding whether or not to co-operate with the investigating body. A business which co-operates with the regulator in return for leniency will gain a full or partial reduction in its fine, but it will not have immunity from future private claims. Moreover, the fact that it has admitted involvement in return for leniency may subsequently leave it more exposed to private claims. It should be emphasised that leniency applications remain attractive, but businesses will need to include these additional factors in their calculations when deciding whether to co-operate with the regulator.

A settlement with the Commission, on the other hand, remains highly attractive, since one of the benefits is that the Commission will publish a streamlined infringement decision, which means less scope for prospective plaintiffs to rely on the full decision for their claims. In cases based on abuse of dominance, a business which offers commitments which are accepted by the Commission may escape an infringement finding altogether.29 It is perhaps unsurprising that early settlement is growing in popularity, with a fifth case recently being resolved under the EU settlement notice procedure.30

The tension between private damages actions and cartel leniency programs remains real and the Commission and Member States face a delicate task of striking the right balance in the promotion of these objectives. In this effort, the Commission may well propose legislation to guarantee the protection of corporate statements and documents prepared in the context of a leniency application from disclosure in damages litigation in national courts within and outside the European Union. The European Parliament is also debating whether the EU should adopt legislation to facilitate class actions being brought in Member States. It is expected to vote on its position in the first half of 2012. Supporters of a legislative approach, including Vice-President Joaquín Almunia, believe that this will further increase access to redress for private damages claimants in Member States.31

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29 See Case COMP/C-3/38 636, Rambus.
31 M-Lex, Almunia tells MEPs of need to ‘regulate’ damages actions, access to evidence, 22 September 2011.