

Herbert Smith submission on the EC Commission White Paper on Damages Actions for breach of the EC antitrust rules

General

We welcome the Commission's proposals in its White Paper on Damages actions for breach of the EC antitrust rules, which we consider on the whole to be a series of measured and sensible proposals and which take on board a number of comments received on some of the options set out in the Green Paper. There is a clear effort to avoid the excesses of the US class actions system and a recognition that the primary role of private actions is to compensate the victims and to complement public enforcement rather than replace or jeopardise it.

Many of the proposals reflect current or proposed UK procedures and will therefore have greater implications for other jurisdictions.¹ In this respect we would ask the Commission to bear in mind that any special remedies for competition law may directly affect the civil procedures of the Member States and may impact on other areas of domestic law. Great care should therefore be taken to avoid adopting measures which interfere unnecessarily with national procedures and harmonising measures should only be considered in respect of those areas which have the greatest impact on the creation of a level playing field.

Indirect purchasers and the passing-on defence

We agree that, in order to have an effective system for compensation, it is necessary for indirect purchasers to have standing, as they have a legitimate interest in obtaining compensation for loss they have incurred as a result of an infringement. To deny indirect purchasers standing would also be incompatible with EC law as set out in *Crehan*² and *Manfredi*³, where the ECJ stressed that it is open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

It follows from this that direct purchasers are only entitled to claim for those losses incurred and not passed on. Whilst we agree that the burden of proof should lie on the defendant to establish that a loss claimed by a direct purchaser has been passed on this should be subject to two conditions. First, the defendant should have access to evidence through disclosure of documents by the claimant to establish the passing on. We therefore support the reciprocal nature of proposed rules on disclosure (and sanctions for non-disclosure). Secondly, a direct purchaser should be subject to an obligation to properly investigate its claim and only make claims in respect of losses which it believes it can prove it has incurred. In other words a direct purchaser claimant should not be allowed to claim for the entire alleged overcharge in circumstances where it believes at least some of this overcharge was passed on.

To assist indirect purchasers by alleviating their burden of proof, the Commission proposes that indirect purchasers can rely on a rebuttable presumption that an overcharge is passed on in its entirety. Whilst we consider that the suggestion of placing the burden of proof on the defendant is a reasonable approach and will facilitate claims being brought by consumers, it is important that the defendant has adequate access to the relevant documents in order properly to investigate the extent to which an overcharge was in fact passed-on down the value chain. In this regard, the requisite

¹ It is notable that the IP Directive (referred to in the Staff Working Paper as model for disclosure rules) did not require specific implementation in the UK.

² Case C-453/99 *Courage and Crehan* [2001] ECR I-6297

³ Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619

Herbert Smith

evidence will frequently be in the control of third parties in the value chain who may, or may not, be parties to the claim. In a direct purchaser claim the parties to the claim (ie. the direct purchasers) will have the documents which will allow the defendant to establish whether the cost has been passed on. In an indirect purchaser claim it is the direct purchasers' documents which will be relevant to passing-on and they may not be party to the proceedings. While disclosure from such parties should be available under UK procedures, the same cannot be assumed in other Members States. The Commission proposals do not appear to address this dilemma which is crucial to the fairness of placing this additional burden on defendants.

As with direct purchasers, indirect purchaser claimants should also have a duty to investigate and disclose in their claim the extent to which they are able to demonstrate that losses were passed on. They should not be entitled to rely upon the presumption where they believe that some of the overcharge may not have been passed on.

Collective redress

In the White Paper, the Commission suggests a combination of two complementary mechanisms of collective redress: opt-in collective actions and representative actions brought by qualified entities. It is not clear at this stage whether the Commission proposes to move ahead with these proposals in the competition law sector or whether these collective redress mechanisms are to be part of the Commission's wider plans for introducing mechanisms for breach of consumer protection rules. Although this may ultimately result in some delay, we believe that the Commission's proposals in the White Paper should be considered together with these wider consumer collective redress proposals. We see no justification in principle why special mechanisms should be introduced for antitrust claims which are not available for other equally deserving claimants seeking to bring claims in, for example, mass tort, personal injury, product liability and securities litigation. Indeed, the creation of a new, special jurisdiction may have the unwanted effect of encouraging claimants and those promoting and funding claims to seek to shoe-horn claims with no genuine connection to the competition rules into the new jurisdiction.

The Commission should also provide further clarification as to how representative actions, collective actions and separate individual claims will coexist.

Opt-in collective actions

Opt-in collective actions in which victims decide to combine their individual claims for harm they suffered into one single action are already available in the UK, principally by way of group litigation orders (GLOs). A GLO enables a group of common claims, which give rise to common or related issues of fact or law, to be managed as a single case and are an efficient way of dealing with group claims. Once a GLO is made, a group register is established. Individual claimants must opt into the group to take advantage of any settlement or judgment. GLOs made in recent years include claims based on product liability, environmental liability, and industrial injury. To date, they have not been used in antitrust litigation, but we see no reason why the procedure would be unsuitable for competition law damages claims.

Representative actions by qualified entities

The Commission is also proposing the introduction of representative actions which are brought by qualified entities on behalf of identified or identifiable victims. The White Paper does not state whether these representative actions are to be available on an opt-in or opt-out basis. The Staff Working Paper refers to the need to have mechanisms in place to inform consumers of representative actions, which appears to suggest opt-out claims.

Herbert Smith

We believe that such an opt-out model departs from the compensation objective which is one of the underlying principles of the White Paper. An opt-out model effectively seeks damages for consumers who do not want such damages and US experience is that a part of any award or settlement in any opt-out class action goes unclaimed. This would also not sit easily with some of the recent statements made by the Commissioner for Competition. In a speech made at the European Commission/ IBA Joint Conference on EC Competition Policy last year, the Commissioner stated as follows⁴:

"Certain features of the US private competition litigation system are simply not compatible with our European traditions. The two examples I cite most frequently are treble damages for all infringements and the opt-out class action, in which one single individual can bring an action on behalf of an unidentified class of persons. I would not support the introduction of either of these features in Europe".

A number of issues would need to be addressed if an opt-out system were intended:

- the question of jurisdiction, i.e. which consumers/businesses would be covered by an opt-out action filed in a Member State: would it be only those consumers/businesses in the Member State(s) in which the representative body operated? Would it cover only those claimants which the representative body was seeking to represent for example consumers and not small business? Certification of the class is likely to be complicated and will be exacerbated where the potential claimants are not confined to one Member State; represent different constituencies (consumers, small business, large businesses); or are at different levels in the supply chain (direct and indirect purchasers). Interaction with the Brussels Regulation needs to be thought through;
- how to address uncertainty of the scale of liability and inflation of claims which in turn makes settlements more difficult to achieve and makes the system more costly for business;
- an opt-out system results in financial incentives for intermediaries, including third party investors/funders to bring large claims on which their remuneration can be based – controls need to be introduced to avoid conflicts of interest emerging;
- the distribution of damages and of the surplus. The collection and distribution of funds which do not go towards the compensation of victims but instead are awarded on a cy-près principle to causes that have some connection with the subject matter of the dispute does not aim at redress for victims, but instead crosses the line between compensation and punishment and is ultimately in the nature of a penalty. There is also the risk of creating a principal/agent conflict where the representative body may have a separate interest in the proceedings (such as the management and distribution of cy-pres funds) from the people it is representing; and
- the need to consider the implications of introducing opt-out for other areas of law, as noted above.

If necessary, the Commission could allow the opt-out approach for cases where it is relatively easy to establish the likely number of affected consumers and where the scale of damage is similar for each party. Where damages vary widely from consumer to consumer the opt-in approach is more suitable.

⁴ Commission/IBA Joint Conference, Brussels, 8th March 2007, Speech/07/128

Designation of representative bodies

In principle, and subject to our reservations regarding the introduction of opt-out actions across Member States, we have no objections to the proposal for mutual recognition of representative bodies as long as the criteria to be met by the group wishing to be given representative body status are sufficiently harmonised throughout the EU and are objective, transparent and non-discriminatory. We support the suggestion that representative bodies could be authorised by the courts to bring representative actions on a case by case basis as well as the proposal for consumer associations being certified permanently to take representative actions. The UK has a similar system in place for specified bodies bringing actions under section 47B of the Competition Act.

Access to evidence

The Commission states that it aims to strike a balance between providing victims of anticompetitive behaviour with sufficient access to evidence to make their case, while being careful not to import an unduly onerous disclosure regime. This will not affect the UK where extensive inter partes disclosure is already available, and from that perspective the proposal to introduce a minimum level of disclosure, combined with judicial control of relevance and proportionality seems sensible. It would of course represent a profound change in a number of Member States where civil justice regimes have developed without concepts of disclosure. We are not convinced that it is the role of the Commission to introduce blanket changes to national civil procedure regimes which risk upsetting the balance developed in those regimes.

Moreover, the introduction of a specialised regime for competition cases would again risk incentivising claimants to bring claims as competition actions that have very little connection with competition rules.

In considering this issue further, it is also important to recognise that certain types of documents which would be considered protected from disclosure in jurisdictions such as the UK (e.g. on grounds of legal privilege), may not be subject to protection under national rules in jurisdictions where no developed concepts of disclosure have arisen. The lack of legal privilege in such jurisdictions is often tied to the absence of disclosure and if disclosure rules are to be changed, then substantive changes may be required to concepts and applications of privilege in some of the Member States.

We support the Commission's statement that, if changes are to be considered, then for reasons of equality of arms, this minimum level of disclosure (and sanctions for non-disclosure) in antitrust damages cases should be available not only to support claims of claimants but also defences by defendants.

Binding effect of NCA decisions

We have reservations about the Commission's proposal to make final decisions of NCAs binding in the courts of another Member State for follow-on actions.

There will be concerns about the varying procedures and standards of proof adopted by differing NCAs, and whether these allowed a sufficiently fair hearing and a subsequent right of appeal on the merits for the undertaking found guilty of an infringement. Issues may also arise around the correct translation and interpretation of decisions in another language.

Herbert Smith

We believe that a more appropriate solution would be for the national court to take a decision on the necessary factual issues concerning the infringement in light of the specific circumstances in its market, with an ability to take into account the decision of the NCA but with no requirement to be bound by it. In our view, it is important that national judges are in a position to contribute to the substantive analysis in competition litigation cases as opposed to being confined simply to assessing the level of damages.

On the whole, we consider that there is no need for changes to the current system. The Brussels Regulation provides a regime whereby a claimant wishing to rely on a decision by the NCA of a Member State is able to sue in the courts of that Member State and then enforce that judgment in the courts of another Member State.

The Commission's proposal also leaves unanswered the question of what precisely should bind a national court within a decision of an NCA, i.e. whether it is just the finding of infringement or whether it also includes all the underlying factual findings regardless of whether such findings were central or peripheral to the NCA finding (which in turn is likely to be representative of the degree of investigation employed by the NCA in making that finding).

Damages

We welcome the Commission's approach in the White Paper on the scope of damages that victims of antitrust infringements should be assisted to recover, which should be compensatory and not punitive in nature. We consider that this appropriately focuses private actions on redress by way of "full compensation" for victims, without confusion with the policy objectives of punishment and deterrence which are the realm of public enforcement.

Although the Commission seems to leave open the possibility of exemplary damages, this would appear to be excluded by the 'ne bis in idem' principle in cases where a fine has been imposed by the regulator (see, for example, UK High Court in *Devenish Nutrition* case⁵).

We support the Commission's proposal to provide pragmatic, non-binding assistance on the calculation of damages, which should benefit both the national courts (particularly in jurisdictions where competition damages claims are less developed) and the parties. It is however important that any such guidance remains sufficiently flexible so as not to stifle the principles for calculating loss which are already applied in the various Member States' jurisdictions as well as to allow for evolution in the development of these principles and methods.

The common law as applied in UK courts takes a pragmatic view of the degree of certainty with which damages must be pleaded and proved. The point was made by Mr Justice Lewison in the *Devenish Nutrition* case, where the English High Court rejected the argument that the evidential difficulties of exact proof of loss on a compensatory basis justified recourse to exemplary and restitutionary damages. He emphasised that the courts will take a practical approach to the assessment of damages on a compensatory basis and will not require the proof of loss with great exactness.

The Commission itself states that, according to the case law of the Court of Justice, the principle of effectiveness precludes national court systems from refusing to award damages simply because the claimant cannot prove sufficiently precisely the amount of the harm suffered.

⁵ *Devenish Nutrition Limited*, [2007]EWHC 2394 (Ch)

Limitation periods

Harmonisation of limitation periods for private enforcement cases is an important factor in creating a level playing field. The Commission suggests that limitation periods should not start to run in the case of continuous or repeated infringements before the infringement ceases. It also suggests that time should not start to run before the victim of the infringement can reasonably be expected to have knowledge of the infringement and of the harm caused. It would be useful if the Commission would issue some further guidance as to when a victim can reasonably be expected to have such knowledge, mainly in order to avoid courts in different Member States taking divergent approaches.

In follow-on claims, the Commission proposes a new limitation period of at least two years, starting once the infringement decision on which the claimant relies has become final. This is in line with the CAT rules in the UK and we support this proposal.

Costs and funding of damages actions

We agree with the Commission that early resolution of cases should be encouraged.

We believe that cost rules should remain within the discretion of the national courts and that the "loser pays" principle should continue to apply in jurisdictions such as the UK. This operates as a sensible filter to exclude unmeritorious claims as well as an incentive for early resolution. Within this framework, the English courts have a wide discretion to use costs to manage litigation, including restricting and disallowing recovery of costs before as well as after they are incurred. Measures such as "costs capping" are already a feature of English litigation in appropriate cases. We do not consider that there should be special cost rules for antitrust damages claims, which would be difficult to justify as a matter of principle and difficult to apply as a matter of practice (e.g. in mixed cases).

The UK market for third party funding of claims is developing rapidly and funding is increasingly available to support substantial claims with good prospects of success. Funding has been used to support antitrust claims and this is an area which is likely to see further growth.

Leniency

We support the Commission's objective of ensuring that the attractiveness of leniency programmes is not compromised by disclosure in subsequent civil proceedings. In order to protect corporate statements by leniency applicants, it may also be necessary to amend Regulation 1049/2001 on public access to documents and to introduce a specific exception for leniency documents, given the CFI's narrow interpretation of the exceptions in Article 4 of this Regulation which it considers to apply only for as long as the inspections and investigations are still in progress.

The proposal that the civil liability for damages of the successful immunity recipient should be limited from the usual joint and several liability also represents an attractive solution to the tensions between the public policy objectives of leniency programmes and private enforcement. We support this proposal which should not adversely affect potential claimants who will be able to recover damages for the harm caused by the immunity recipient from that undertaking, and damages generally from the other cartel members who will remain jointly and severally liable.

HERBERT SMITH, JULY 2008