

# Collective Redress for Competition Law Claimants

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The debate started by the European Commission's Green Paper on damages actions for breach of EC anti-trust rules, published in late 2005, has stirred vigorous discussion across the EU on two related issues: first, is it desirable to increase the extent of private damages and other actions for breach of the EC competition rules and, secondly, how should this be done without leading to 'US-style excess'?

The general response to the first question appears to be cautiously positive: there is a recognition that the EU must move forward from the 'state of total underdevelopment' of private claims for competition damages identified by the Commission's report in 2004 (the Ashurst report). There is also general agreement on the need to avoid 'US excess'. But there is much less agreement on how best to achieve these goals.

As the Commission prepares to put forward proposals in a White Paper on this issue, it is worth considering why greater private enforcement of EC competition law is thought desirable to complement the enforcement efforts of the public authorities (especially being clear as to the benefits it can bring) and what exactly is meant by the much reviled 'US excess'. Does it exist and, if so, what may be its causes? And how might an improved level of private law claims best be brought about – what are the current obstacles?

## Advantages of private competition law claims

The Commission and other public authorities (the UK Office of Fair Trading, for example) see greater private initiative by victims in enforcing competition law as a necessary complement to their own public enforcement efforts. There appear essentially to be three reasons for this:

- the primary aim of private enforcement is to achieve redress for those affected by cartels and other breaches of competition law. In contrast, the aims of public enforcement are to promote the public good and so to condemn conduct which infringes public law by imposing a public law penalty to deter further infringement not only by the acknowledged cartel members, but also by other businesses. Both private and public enforcement seek to promote economic efficiency by improving the functioning of the market. There is a policy recognition that both aims need to be pursued in a balanced way – this is not happening at present;
- successful damages claims (even those on a compensatory basis) increase the deterrent effect of the competition law regime overall; and so
- the resources available to private parties can be used as a complement to the (necessarily finite) resources available to the public authorities to pursue infringers and maintain market competitiveness. Greater private enforcement should, then, give public competition enforcers greater freedom to prioritise their activity where they think it will do most good.

If competition law isn't to be allowed to become the tool of large corporations and their advisers – simply another legal tool in the corporate strategist's box – a more effective collective mechanism to address anti-competitive behaviour and its effect on all businesses and consumers needs to be put in place urgently. At a minimum,

rules should be implemented to provide for more effective collective redress for claimants in follow-on cartel actions. However, stand-alone actions need to be properly encouraged and integrated into an effective enforcement regime because private claimants may uncover and pursue cartels where there is no government investigation.

The perception of one-sidedness in the spread of advantage earned from competitive markets (that all the gains go to the few and the burden is left to the many) is widespread in many parts of European society. Nicolas Sarkozy's widely reported comment at the conclusion of the recent intergovernmental conference in Brussels – 'Competition as an ideology, as a dogma, what has it done for Europe?' – clearly reflects a widespread feeling of powerlessness (and not just in France) at the onward march of global market forces.

Even public authorities find bringing competition enforcement action against powerful corporations difficult: an individual consumer alone has almost no chance of being able to do so. There is, then, a strong case for shifting the balance of litigation risk in favour of the 'little man' and small business. Some form of collective action needs to be put in place to correct market behaviour which distorts competition in the market and causes injury in some degree to all buyers in that market. How best to do this? Suggestions have included:

- *improved 'small claims' procedures for competition cases*: so, where the public authorities have acted in cases where consumers have been directly affected, individuals should be able to approach their local courts directly to claim their money back. However, in cases where this has been tried (for example, in France in relation to overcharges by mobile phone companies) the resulting overload on the national judicial system and inconsistencies in decision-making have led to serious concerns;
- *representative actions by voluntary associations*: many European countries have a long tradition of strong voluntary associations of consumers set up to advocate for consumer rights and protections. They may be well placed to bring actions for breach of competition law in the courts on behalf of their members. The Commission and some member states (for example, the OFT in the UK) have suggested that associations should be given a greater role here. Clearly, however, they are only able to take on a limited number of cases and will focus on those where individual consumers have suffered direct loss (a good example is the 'football shirts' case brought by Which? – the UK consumers' association – in the Competition Appeal Tribunal in London); and
- *group or class actions by named parties representing a larger number of victims of cartels*: there are two basic models here – the 'opt-in', where members of the group need to consent to action being taken in their name, or the 'opt-out', where the group of victims of the anti-competitive behaviour is defined in more general terms, and the members of that group are included in any redress award unless they state they do not wish to participate. These kinds of actions can be brought by groups of corporate purchasers as well as individuals and are therefore more suitable to encourage redress for cartel victims in intermediate goods and services industries.

### Is there 'US excess'?

The European perception of the US class action system seems to be that large, feral 'classes' of claimants roam the United States seeking out unfortunate companies to hold to ransom. It is, then, perhaps worth recalling some of the features of the US system:

- damages awards are set by jury in US antitrust cases: this means that they can be unpredictable and on occasion have exceeded even the plaintiffs' damage claim where the jury feels that the defendants behaviour has been particularly egregious;
- at federal and in most state courts the award handed down in antitrust cases by the jury after trial is automatically trebled – the courts have no discretion in this regard: this strongly contrasts with the position in European courts;
- although the US uses an 'opt-out' class system for civil damages claims in the antitrust field, the scope of the class is certified by the court (now, anti-trust cases are almost always adjudicated at the federal level – so promoting consistency across the US) because it is in the interests of justice for the case to be brought on behalf of that class; and
- most cases in the US lead to settlements: for early settlement, the amounts paid are usually based on some estimate of the total actual damage caused by the cartellists to the class – rather than the treble damages that would be awarded if the case came to trial.

The US system is, then, better subject to judicial control than is generally recognised. And, we suggest it is the combination of features in the US system – in particular the unpredictability of jury awards and the automatic trebling of damages awarded – which leads to the concerns expressed about the system in Europe. The 'opt-out' class device of itself does not lead to the issues which commentators now recognise are being addressed in the US system.

Other countries – notably Canada and Australia – have introduced opt-out classes without attracting the opprobrium reserved for the US system, and we suggest that this is precisely because they do not have the additional features of automatic treble (punitive) damages, with juries awarding them. And yet in both jurisdictions the opt-out class has proven to be a highly effective way of ensuring that victims of cartels (in particular) are able to spread the inevitable risks of litigation so as to obtain redress on a more level playing field against large and well-resourced defendants.

### A European response?

The European Commission position on whether to introduce the 'opt-out' class is mixed. The Commissioner for competition, Neelie Kroes has said in public that she does not believe that the opt-out class is appropriate at a European level. However, her consumer affairs counterpart, Maglena Kuneva, has indicated that the idea may be worth considering in the context of consumer redress.

At present, most of the procedural issues which need to be addressed to encourage more private competition damages actions lie within the competence of the member states. In its judgments allowing private parties to claims redress for breaches of EC competition law, the European Court of Justice has left national civil procedural rules largely intact. It has sought not to encroach on the competence of the member states in this area, provided that their laws respect the twin principles of effectiveness (the enforcement of directly effective EC law rights must not be made excessively difficult or impossible for those who enjoy them) and equivalence (procedures and remedies available in national law must be available for similar EU law claims).

Some member states already have mechanisms which come close to an opt-out class. The Netherlands' mass tort legislation allows settlements to be endorsed by the Amsterdam appeal court at the

request of the representatives of an 'opt-out' group of claimants. And Denmark has recently introduced an opt-out mechanism for claiming damages at the application of the Consumer Ombudsman. Clearly, there are the beginnings of a movement at the member state-level to allow actions of this kind to go forward.

The principle of subsidiarity – the Community shall take action only in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states and can be better achieved by the Community – suggests that, at least given the present state of EU legal development, the question of whether to allow class actions and how best to do this is probably best left to the member states. Legal systems and procedures still vary widely across the EU and an appropriate solution in one state may not work in others.

However, a high-level requirement to ensure that member states provide an effective means of collective redress for competition harm would be welcome – and the OFT has put this forward in its recent discussion document on private damages claims. Indeed, it is arguable that this is already a requirement of EC law – the seminal *Van Gend* judgment of 1963 allowed private litigants to bring claims in their national courts for breaches of (directly effective) EC law. If consumers and others are unable to claim against cartellists because the redress process in their member state is too risky an option for them, there may be a requirement to change the system in that state.

### Streamlining the system

But it must equally be clear that applying up to 31 different legal systems in 27 member states to allow aggrieved victims of cartels to obtain redress is not the most sensible or effective way forward. So, while respecting the procedural autonomy of member states as far as possible, the Commission should be encouraged in its effort to harmonise the system as far as possible and to ensure that decisions of courts are properly recognised throughout the EU. The Commission's policy to coordinate the action of national competition authorities has been remarkably successful in a very short time (a little over three years). Achieving the same degree of consensus as between national courts will be harder, but should be the ultimate goal. (See Green Paper (2005); Cohen, Milstein, Hausfeld & Toll's Comments on the Green Paper, 28 March 2006, pp1-5 (available at [www.cmht.com/pdfs/FINAL%20Green%20Paper%20032806.pdf](http://www.cmht.com/pdfs/FINAL%20Green%20Paper%20032806.pdf))).

There is already EC legislation (and abundant case law) on jurisdiction and the enforcement of judgments in civil and commercial matters (EC Regulation 44/2001). The European Parliament has also approved (in June 2007) the final text of a Regulation on the law applicable to non-contractual obligations – to complement the existing Rome convention on the law applicable to contracts. The new Regulation provides a special rule in relation to competition claims: where the general rule (the law applied is that of the place where the harm was suffered) would lead to multiple applicable laws, the claimant can instead (within certain limits) choose the law of the court seised.

But there are other areas where limited coordination of private law procedures does hold back legitimate private competition claims. What are the main areas where EC action now would be useful?

The Commission's Green paper on private damages actions (2005) identified a number of procedural areas where it thought that EU-level initiative might be required. Two of them stand out: indirect purchaser standing (and the related issue of the pass-on defence) and a greater degree of consistency in allowing claimants access to information.

Should the customers of customers of cartellists be allowed to sue: or are their claims always going to be too remote to justify

clogging up the court system with their claims? And in any case, don't direct purchasers have the most to gain from bringing a claim – so that they are more likely to do so? Considerations of this kind led to the US Supreme Court in 1977 in the notorious *Illinois Brick* case to hold that indirect purchasers should not have standing to sue in Federal court.

Many state legislatures disagreed – to date there have been 'Illinois Brick' repealer statutes in more than 20 US states, allowing indirect purchasers to pursue their claims under state (rather than federal) law. It was felt to be unjust to deny these (often smaller) claimants access to justice, especially where they had good evidence that they had suffered loss from a cartel.

There is as yet no direct ruling on this point at the European level. But, given the case law of the European Court of Justice giving the right to anyone who has been damaged by a breach of the directly effective EC law to claim compensation, we believe it is highly unlikely that the ECJ would follow the US Supreme Court and bar indirect purchaser claims.

This raises a number of procedural issues – not least, how should the damages paid by the cartelists best be divided between the victims. The Commission's Green Paper suggested a number of alternatives here – each with its advantages and drawbacks. The basic trade-off is between fairness (to both the various classes of claimants and to the cartelists themselves who might otherwise face significant double jeopardy issues) and simplicity of operation. There may be no 'best' answer here – what works in one set of circumstances might not in another. One of the Commission's suggestions – having a two-stage system firstly to establish the amount of damages and secondly to establish how it should be paid – may be the most appropriate way forward in many cases. But it may be unnecessarily complex (and therefore costly) in others – especially in non-cartel situations.

The second main area where action at the European level would seem appropriate regards access to evidence. Whilst there is general agreement that disclosure by the parties to the claim (and not from the public enforcement bodies) is the best way forward, there is no

common view among the legal systems of the member states as to how this can best be achieved. Some member states have very few requirements for disclosure of information in their civil procedures. Claimants are left to rely on what they themselves can gather either internally or from public sources. This will usually not be sufficient to proceed very far with a claim in an area as complex as competition law.

At the other end of the scale, English law recognises a very extensive obligation on the parties to litigation to disclose at an early stage – usually by listing the documents – all the information they may have which is relevant to the issues in dispute. This puts the parties on as near as possible a level playing field as far as access to evidence is concerned. The drawback is the cost (in both time and money) of the system. Not only is the burden on the defendant cartelists greater, the need to review all of the disclosure documentation (often at the early stages of litigation) means that costs are raised for claimants too. Again, this could act as a serious disincentive to bring claims in all but the simplest of cases. The Commission is likely to make some concrete proposals in this area – quite where the balance will be struck remains to be seen.

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There is a clear need for action at the European level to assist and support greater take-up of private civil damages claims against cartels. In particular, initiatives to support greater consistency in the treatment of indirect purchasers by member state courts and greater access to evidence early in the civil litigation process across the EU (and not just in the common law jurisdictions) would be most welcome.

We also believe that the Commission should continue to ensure that, within the broad framework of encouraging more businesses and consumers to claim redress collectively where they are the victims of cartels, member state initiatives in this area are also encouraged. Europe now has an excellent opportunity to create an effective redress system.