

The European Antitrust Review

2010

Published by Global Competition Review
in association with

Hausfeld & Co LLP

GCR
GLOBAL COMPETITION REVIEW

Competition Law Claims – A Developing Story

Michael Hausfeld and Vincent Smith

Hausfeld & Co LLP

The European Commission's Green Paper on damages actions for breach of EC antitrust rules, published in late 2005, was followed in April 2008 by a White Paper setting out the Commission's more concrete views for consultation.

The Commission's approach to damages claims by victims of cartels appears still 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 fact finding 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.

The White Paper proposals attracted substantial interest, with well over 100 responses. As of mid-2009, the Commission has yet formally to present proposals taking the work forward in this area. The question of whether framework legislation is needed to further encourage claimants to come forward is still being considered, although a working draft of a proposed Directive has become informally available which takes up most of the proposals put forward in the White Paper.

Benefits of improving competition law claim procedure

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

- the primary aim of private actions 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 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 action promoted economic efficiency by redressing the imbalance in the functioning of the market caused by competitive behaviour. There is now a policy recognition that both aims need to be pursued in a balanced way – this is not happening at present;
- successful damages awards (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.

The reasons for the relatively low level of successful competition claims in Europe are numerous and almost certainly include a sociological reluctance in most European countries to resort to the court.¹ But the economic climate over the past year or so has changed the perception of the benefits from free markets – there

is a real risk that, in the wake of highly publicised financial market failures, the free market system will be largely abandoned in many areas of the economy in favour of significant regulation and even outright state ownership of key companies. This has been a common response in Europe to seismic economic events (for example in Britain and elsewhere in the immediate post-war years) to ensure a 'fair' system.

Clearly an effective means of collective redress for victims of market abuses, allowing them to take action themselves where large often well resourced market participants cause them harm, is a key tool in achieving 'fairness' and may eventually become an alternative to some of the more advanced regulatory options being discussed in various sectors at present. There is, it would seem, a close link between the availability of effective private redress for market misconduct and the extent of regulation – indeed (as detailed below) the Ministry of Justice in London recently made the link explicit in its response to a consultation on English class action procedure.²

Suggestions for improving access to collective justice for competition claimants 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.

A European response?

The European Commission position on whether to introduce the 'opt-out' class has been unclear. 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. As the Commission will be renewed from October 2009, it remains to be seen what the approach of the new Commission will be going forward.

The European Commission White Paper in 2008 proposed a number of steps that might be taken at European level to improve access to justice for the victims of anti-competitive behaviour. The proposals put forward were, in summary:

- A choice of two complementary mechanisms for collective redress in the competition field: representative actions by qualified bodies for groups of identified or identifiable victims of cartels and other anti-competitive behaviour or opt-in collective actions for groups of victims to pull their claims together in a single action.
- Minimum levels of court-controlled disclosure of evidence to the other parties in the case across the EU.
- Making national competition authority final decisions binding in EU courts – at least to the extent that courts would not be able to give judgments running counter to the decisions of the authority.
- Commission guidance on the calculation of damages. This project was tendered in early 2009 and a first draft of the guidance is expected toward the end of this year.
- Minimum harmonisation of limitation periods including a minimum two-year limitation period following a final decision of a competition authority.
- Protection from disclosure on a uniform basis across Europe for documents created for the purpose of applying for leniency to a national competition authority so as not to discourage leniency applications.

As noted above, the Commission received a large number of responses, many of them critical of parts or all of the proposals, and has yet to produce a formal proposal for legislation to follow up on this White Paper. It is now unlikely to do so before the end of this year given the change in Commission.

Clearly, in any event, most of the procedural issues that need to be addressed to encourage more private competition damages actions lie within the shared or exclusive 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 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 detail in the question of how best to implement any legislative change across Europe 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.

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 create a coherent system and to ensure that decisions of all 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 five years). Achieving the same degree of consensus as between national courts will be harder, but should be the ultimate goal.

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 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 areas where the current limited coordination of private law procedures does hold back legitimate private competition claims. 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. So what are the main areas where EC action now would be useful?

Beginning a claim

The Commission's main proposal in its White Paper were the Europe-wide creation or adoption of two forms of collective claims procedure for competition cases. The first is a proposed requirement that claimants who wished positively to group their claims together in a single court should have an effective means of doing so – so that they can opt-in to such litigation if they wish. The second is a requirement that recognised representative bodies should be able to bring collective claims both on behalf of identified persons (eg, their members, or some of them) but also on behalf of an identifiable group of persons. This last proposal provoked significant reaction as many commentators, in our view wrongly, equated it with the US opt-out class action which is said (again, in our view wrongly) to encourage a litigation culture. The Commission is currently considering these responses.

As the English Ministry of Justice highlighted in its recent response to recommendations made to it by the advisory body,

the Civil Justice Council,³ there is no sharp distinction between ‘traditional’ opt-in group litigation and the (US-style) opt-out class. At some point in the process the claimants each have to step forward to claim their compensation – the issue is when in the proceeding should that happen. The Ministry response identified four key cut-off points for the claimants individually to assert their claims:

- before the claim is issued: this would be a pure, and traditional, opt-in system where claims are joined;
- before common issues of liability are decided, this would run effectively as a test case with one or more claimants joining as test claimants. Given the usual follow-on nature of collective claims in the competition field;
- after the decision on liability but before quantification of damages: this corresponds to the two-step approach adopted by the claimants in the *Emerald v British Airways* litigation, where a representative declaration was applied for to show that the defendant is liable for the loss caused to the claimants. It would then be for other claimants who could show that they have the same interest in the claim to come forward and assert their right to compensation; and
- after quantification of damages awarded to the group on an aggregated basis: there would be a fund, probably administered by a trustee, to which other claimants could then apply for compensation on a standard basis. This comes closest to the class action – and clearly those who did not wish to be bound by the standard compensation award would need the facility to opt-out.

Clearly, some of these types of collective procedure will be more appropriate in some settings than others. Competition claims would tend to need to use the last two options given that in most cases there will be a regulatory finding against the cartel or dominant undertaking. But whatever method is chosen, the recognition that without an effective mechanism for collective claims to be brought by victims of cartels, the usual imbalance of resource evidence and expertise between claimants and defendants is very welcome.

Two further issues requiring a European level response 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. These two items have been taken up and developed in the White Paper and the pass through issue – or, properly, the defence will, it is expected, be addressed in Commission guidance in the next few months.

Pass through of overcharge

Should the customers of customers of cartelists be allowed to begin a claim: or are their claims always going to be too remote to justify clogging up the court system with those 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 well-known *Illinois Brick* case to hold that indirect purchasers should not have standing to sue in Federal Court.

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 directly effective EC law (including the competition rules) to claim compensation, it is highly unlikely that the ECJ would follow the

US Supreme Court and bar indirect purchaser claims.

Getting the evidence

The main area where action at the European level would seem appropriate regards access to evidence. While there is general agreement that disclosure by the parties to the claim (and not by 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 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’s proposal in this area is relatively high level: it has two main components – firstly court supervised disclosure of documents or categories of documents (presumably from both claimants and defendants) and – although not presented as an information disclosure measure – the proposed presumption that the full amount of the overcharge is passed through to the end user. Clearly this will alleviate the disclosure obligations on end users – but is likely to increase them for potential claimants further up the distribution chain who would be required to overcome the same presumption.

Making sure the claimants are paid

And the end of the competition damages process also 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.

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: it is to be hoped that the opportunity is taken.

Notes

- 1 The absence of effective redress also means that cartelists and other large defendants accused of corporate wrongdoing will normally take the line of *most* resistance when faced with even a well-founded claim against them, in the expectation that, unless the claimants force the claim, it will be abandoned fairly rapidly.
- 2 Ministry of Justice 'Improving Access to Justice through Collective Actions', July 2009.
- 3 Ministry of Justice op.cit at para 33.

Hausfeld & Co LLP

1700 K Street, NW Suite 650
Washington, DC 20006
United States
Tel: +1 202 540 7200
Fax: +1 202 540 7201

Michael Hausfeld

mhausfeld@hausfeldllp.com

25 Southampton Buildings
London, WC2A 1AL
United Kingdom
Tel: +44 20 3170 7725
Fax: 44 20 3170 7729

Vincent Smith

vsmith@hausfeldllp.com

www.hausfeldllp.com

Hausfeld LLP is a global claimants' firm dedicated to handling large and complex litigation matters on behalf of individuals, corporations and organisations in the areas of antitrust/competition law, human and civil rights, mass torts, environmental threats, securities fraud, and consumer protection.

Hausfeld LLP lawyers have, throughout their careers, applied forward-thinking ideas and creative solutions to clients' most vexing global legal challenges. As a result, the firm's litigators have developed numerous innovative legal theories that have led to successful and in many cases precedent-setting legal decisions.

In addition to the firm's Washington, DC, headquarters, multiple US offices and London office, Hausfeld LLP offers clients access to justice in every corner of the world and across every industry through a broad and deep network of joint ventures and affiliate relationships spanning Europe, Asia, South Africa, South America and Canada.

Hausfeld LLP was founded by Chairperson Michael D Hausfeld, acknowledged as one of the country's top civil litigators and a leading expert in the field of private enforcement of competition and antitrust laws and international human rights.



Michael Hausfeld

Hausfeld & Co LLP

Mr Hausfeld's career as one of the nation's leading civil litigators has included some of the largest and most successful class actions in the fields of human rights, discrimination and antitrust law. He is or has been co-lead counsel in antitrust cases against manufacturers of genetically engineered foods, bulk vitamin manufacturers, technology companies and industrial cartels.

Throughout his career, Hausfeld has been driven by the belief that global wrongs must be accountable to global rights. To execute this vision, Hausfeld in November 2008 launched Hausfeld LLP, a global claimants firm dedicated to handling large and complex litigation matters in order to ensure that global citizens and corporations are afforded the same access to justice available to claimants in the United States.

Hausfeld has most recently been recognised as 'a titan of the antitrust bar,' and for his pioneering role in extending the US class action model to Europe. Hausfeld helped to achieve a first-of-its-kind US\$200 million transatlantic settlement for victims of price fixing of fuel surcharges imposed by BA and Virgin Atlantic; and was the only private lawyer permitted to attend and represent consumer interests in the 2003 EU Commission closed hearings in the *Microsoft* case.

Hausfeld was among the first lawyers in the US to assert that sexual harassment was a form of discrimination prohibited by Title VII; and represented Native Alaskans impacted by the 1989 Exxon Valdez oil spill. In *Friedman v Union Bank of Switzerland*, Hausfeld represented a class of victims of the Holocaust whose assets were wrongfully retained and laundered by private Swiss banks during and after World War II.



Vincent Smith

Hausfeld & Co LLP

Vincent Smith is a partner with Hausfeld & Co LLP in London, focusing on UK and European claimant and complainant competition matters, including the current air cargo litigation in the English High Court and claims against cartelists in marine hose and paraffin wax. He joined from the Office of Fair Trading where he was senior director for competition and director of its competition enforcement division from 2003. He led the OFT's 180-strong competition function, having overall responsibility for the OFT's work in combating cartels and other anti-competitive practices and for the OFT's merger control duties as well as oversight of its developing enforcement policy – for example on case prioritisation. From 2002 to 2003 he was the OFT's director of competition policy coordination and deputy director of the division with prime responsibility for the OFT's input to the EC 'modernisation' of competition enforcement.

Before joining public service he was a solicitor in private practice in the City of London and in Brussels specialising in competition and EC law since qualifying in 1990.