CPI Antitrust Chronicle
February 2015 (2)

Collective Redress and the EU Directive on Actions for Antitrust Damages on Parallel Paths—Where Are We Now?

Ann Marie Galvin
3M Corporation

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2015© Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.

Collective Redress and the EU Directive on Actions for Antitrust Damages on Parallel Paths—Where Are We Now?

Ann Marie Galvin[1]

I. INTRODUCTION

Private enforcement has come a long distance since the European Commission ("the Commission") began its assessment of how to support and encourage damages actions over ten years ago. The question of whether European consumers have access to sufficient and appropriate mechanisms to claim damages for harm has been a focus for different Commission Directorates in separate parallel initiatives. The Competition Directorate has examined the need for collective redress for victims of antitrust infringements and the Directorate for Health and Consumer Affairs has looked more broadly at general consumer collective redress. Disagreement between stakeholders and concerns as to the lack of coherence in the Commission's approach resulted in further consultation and a separate approach to collective redress. This article provides a summary of the current position of collective redress in the context of antitrust damages actions at EU and national levels.

II. BACKGROUND

The entry into force of the EU Directive on actions for damages for infringements of national and EU competition/antitrust law on December 25, 2014 marks a significant step towards achieving more effective private enforcement intended to ensure that victims of competition law infringements can obtain full compensation for the harm suffered.

The background to this Directive is closely intertwined with the history and process that led to the publication in June 2013 by the Commission of its non-binding Recommendation on common principles for collective redress to ensure a "coherent horizontal approach to collective redress"[2] in the European Union without the need for express harmonization of different national judicial systems. Unlike the Damages Directive, this Recommendation applies more broadly to breaches of EU law and is not competition law specific. The issue of collective action was taken out of the scope of proposals for legislation on antitrust damages actions as this was considered contentious in the context of the 2008 White Paper on damages actions. In particular, there was significant concern expressed by many stakeholders as to requirements to reform national civil procedures.

III. RECOMMENDATION ON COMMON PRINCIPLES FOR COLLECTIVE REDRESS

The Recommendation sets out a number of common principles for Member States to apply in national collective redress systems. While intended to apply horizontally to all areas of

---

[1] General Counsel Benelux/Competition Law Counsel Europe, 3M Company, based in Brussels.

[2] *Available at*: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1398263020823&uri=OJ:JOL_2013_201_R_NS0013.

EU law, the accompanying Commission Communication identifies particular areas of application, including consumer protection and competition law. Member States are asked to implement these principles by July 26, 2015 and, within two further years, the Commission will assess if further measures are required to ensure the objectives of the Recommendation are met. Such review is likely to look again at the potential for binding rules on jurisdiction and choice of law in collective redress actions. This raised much debate during the earlier consultations with countries such as the United Kingdom and Sweden offering support only if limited to competition law cases.

The Recommendation seeks to improve access to justice for all citizens while avoiding a U.S.-style system of class actions and the risk of frivolous claims and abusive litigation. In particular, the Recommendation seeks to identify necessary procedural and structural safeguards that would allow effective redress for collective actions while guarding against such abuses and the forced settlement of unmeritorious claims. This range of safeguards includes recommending "opt-in" versus "opt-out" schemes of collective redress; that punitive damages should not be available; and includes clear restrictions on funding available via contingency fees and/or third-party funding.

The Recommendation states that all Member States should have national collective redress systems providing injunctive relief to stop illegal practices and also compensatory relief in relation to mass harm. Such systems should be fair, equitable, timely, and not prohibitively expensive. It is fair to say that such objectives are desired by all but the real challenge is, as ever, meeting these aims in a consistent manner across the European Union. But to this end, the Recommendation sets out common EU principles, including the following:

- **Standing to bring a representative action**: Designation of representative entities should be based on defined eligibility conditions that would include having a non-profit character and the existence of a direct relationship with, or interest in, the subject rights of the collective action.
- **Admissibility**: Verification process by national courts to ensure collective conditions are met and "manifestly unfounded" cases are not continued.
- **Costs**: Use of the loser pays principle
- **Funding**: Transparency as to source of funding at the outset of proceedings with clear restrictions on third-party funding.
- **Cross border cases**: Member States should ensure that claims can be brought by non-national claimant groups or representative entities. This recommendation could raise issues, for example, where the Dutch special purpose vehicle ("SPV"), recognized by Dutch Courts as having standing to bring a representative actions, seeks to bring an action in other jurisdictions that do not currently permit standing to such bodies, such as the United Kingdom.

The Recommendation also sets out criteria specific to each of injunctive and compensatory relief.

In relation to injunctive collective redress, Member States should ensure expedient procedures enabling prompt action and orders to prevent further harm together with appropriate sanctions to ensure compliance.

For compensatory collective redress, as noted above, the Recommendation advocates that collective redress procedures should be based on "opt-in" principles, with any exception to be justified by reasons of sound administration of justice. Contingency fees should not be permitted in order to remove incentives towards unnecessary litigation and similarly punitive damages should not be allowed to develop as deterrence should remain a matter for public enforcement. Collective alternative dispute resolution ("ADR") methods and settlements are to be encouraged and promoted both before and during litigation proceedings.

In relation to collective follow-on actions, the Recommendation is very much in line with the Commission's broad support for follow-on actions. Where the claim for compensation relates to an area of law where a public authority is empowered to adopt a decision finding breaches of EU law, such as competition law, collective redress actions should generally only be brought once the regulatory proceeding is complete in order to avoid risk of conflicting decisions. National Courts should be able to stay compensation claims pending closure of regulatory proceedings and follow-on claims should not be prevented from seeking compensation due to application of limitation periods.

IV. LEADING NATIONAL FORUMS

As with any non-binding initiative, the real test will be what actions Member States will take to give effect to the common principles and objectives set out in the Recommendation, whether by amending current collective redress procedures or introducing new legislation. To date, the reactions of Member States and their respective judiciary could be described as slow and gradual.

Somewhat predictably the United Kingdom, Germany, and the Netherlands remain the leading forums for damages actions in Europe with the United Kingdom experiencing substantial legal reform in this context in recent years. In addition, Belgium has introduced new collective redress procedures that apply part of the principles advocated in the Recommendation and includes a flexible approach where the Court determines use of opt-in or opt-out. In France, progress towards the wide availability of collective redress is being made more slowly with legislation in draft but not finally approved. The main developments are discussed below in more detail.

A. The United Kingdom

Legal reform of the U.K. system for private damages actions in competition law, as part of a broader initiative to simplify and revise consumer rights legislation, is expected to strengthen the current regime and expand opportunities for businesses and consumers to obtain compensation for harm caused by breaches of competition law. The principal reform measures include the introduction of a new "opt-out" collective actions regimes that is subject to specific safeguards (including judicial certification to address concerns of frivolous and unmeritorious claims); reform of the Competition Appeal Tribunal ("CAT") including extension of its ability to hear stand-alone competition law cases; and promotion of ADR, including establishing a collective settlement regime and a new voluntary redress scheme managed by the national

competition authority, the Competition and Markets Authority ("CMA"). It should be noted that the proposed reforms embody many of the principles of the Recommendation but there are differences, in particular with regard to "opt-out" collective actions regimes.

It is interesting to note that while existing U.K. competition laws permitted both follow-on and collective damages actions, practical and procedural limitations have resulted in relatively low levels of competition law damages actions in the CAT (which was intended and designed to be the main forum for competition cases rather than the civil High Court). For example, collective actions could not be brought on behalf of businesses; and the CAT has had a limited role in only being able to hear follow-on actions.

Following extensive consultation in parallel to the above-mentioned EU consultations, draft U.K. consumer rights legislation has entered the final approval and review stages during 2014/15 with enactment expected to follow later in 2015/2016. This reform is expected to bring better consumer compensation and increased deterrent effect. Whether such effects will be the ultimate outcome will depend in part on the practical implementation and challenges in managing the procedural changes at the national level.

B. Belgium

As of September 1, 2014, collective redress actions will be available to consumers in Belgium who have suffered harm including as a result of competition law infringements. Such a step is quite unique under national law as this is the first time that a class or group action is possible in Belgium for the purposes of obtaining compensation for loss. A collective action is only available to consumers, i.e. individuals, and does not apply to business (similar to the U.K. pre-current reform).

This legislation does apply some of the principles of the Recommendation and adopts a flexible approach with Court determination as to opt-in or opt-out (with the exception that all cases involving moral or physical damage are subject automatically to an opt-in procedure). This legislation is still much in its infancy and its take up and successful outcomes remain to be seen.

C. The Netherlands

Private damages actions in the Netherland are relatively well established and this forum remains attractive due to low costs of litigation, relatively efficient processes, availability of disclosure, and the ability to bring collective actions and obtain collective settlements. It is fair to say that the Netherlands is solidifying its procedures for running private damages actions.

More recently there have been a number of follow-on actions before the Dutch courts, including in relation to the paraffin-wax cartel, the airfreight cartel, and the elevator cartel. A number of these actions are pursued by "professional claimants," such as Cartel Damages Claims ("CDC") and others, that employ a business model characterized by the bundling of claims and seeking high level of damages on the basis of infringement decisions by the European Commission and/or national competition authorities. CDC has been initially successful in its claim against member of the paraffin-wax cartel.

D. Germany

The German civil code provides the possibility to bundle together damages claims. This possibility has been tested most recently by CDC in a high profile case concerning a damages claim against six German cement manufacturers (cartels members investigated successfully by the Germany competition authority in 2002). CDC amassed up to EUR 176 million in damages claims from 36 companies. The claim by CDC was recognized as admissible but subsequently dismissed on grounds that the assignment of claims to CDC was invalid without assessment of merit or quantum. The case is currently being appealed by CDC.

V. CONCLUSION

The impact of the current Recommendation on collective redress alone is likely to be viewed as being limited. However, this should be considered in the context of the broader package of measures proposed by the Commission in 2013, namely, the Damages Directive, the Recommendation, and the Commission's Communication on quantifying harm in competition damages case.

There is a clear momentum at the EU level to promote and develop private enforcement as a complementary tool to public enforcement of competition law. It has been a long and gradual process with many turns, twists, and occasional roadblocks such as the removal of collective redress from the scope of the Damages Directive. But the Commission has shown patience and steely determination to drive forward in its aims of achieving more effective private enforcement intended to ensure that victims of competition law infringements can obtain full compensation for the harm suffered.

While it remains to be seen if further legislative proposals on collective action specific to competition law will follow, it would—and should—not be a surprise if the upcoming review of the impact of the Recommendation includes just such a suggestion.