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Half a Revolution?
Damages for Breaches of Competition Law in the European Union

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I. INTRODUCTION

On June 11, 2013, the European Commission (the "Commission") launched two initiatives relevant to competition damages. The first, which led to the adoption of the EU Damages Directive in November 2014,[2] has enjoyed significant coverage and publicity. It obliges Member States to allow disclosure of documents to be sought from parties to competition damages litigation, as well as third parties; introduces presumptions about passing-on; clarifies aspects of joint and several liability; and introduces a limitation period of at least five years.

Member States now have until the end of 2016 to implement the Directive' provisions, although it seems likely that their full impact will be felt only a number of years thereafter as lawyers and judges grapple with practices that have not formed part of their traditional dispute resolution processes. In particular, in many EU jurisdictions, the obligation to allow proportionate disclosure of relevant documents, and not simply documents held on a competition authority's file, may be transformative of competition litigation, particularly relating to passing-on.

What can be said unequivocally is that the Directive is likely to stimulate further claims and one side effect of that will be to further encourage innovative ways of grouping claims by those who consider they have been harmed by particular tortious conduct. Whatever the advances that have been made in competition damages litigation in the European Union over the last decade or so, those advances have not typically concerned redress to consumers or small- and medium-sized enterprises ("SMEs") harmed by anticompetitive conduct, but have overwhelmingly benefitted large and sophisticated legal persons.

The second of the two 2013 initiatives relevant to competition damages, and one which has enjoyed considerably less attention, sought to begin to redress this balance. Implementation of this "Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law" (the "Recommendation") is crucial if the objective of the Directive—to ensure that "anyone—be they an individual, including consumers and undertakings or a public authority—can claim compensation before national courts for the harm caused to them by an infringement" of Articles 101 and 102 TFEU—is to be made a practical reality.

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[2] Directive 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and other the European Union (the "Directive").

The remainder of this brief contribution first describes the approach being taken in the competition field to collective redress in the Netherlands, Germany, and the United Kingdom, which are typically regarded as the leading EU jurisdictions for competition damages. It then considers the main features of the Recommendation and whether experiences in these three jurisdictions suggest that more far-reaching EU initiatives are likely to be required if everyone harmed by breaches of competition law is truly to be able to recover their losses.

II. THE NETHERLANDS

In the Netherlands, there are a number of different ways in which it is possible to bring collective actions. First, as in other jurisdictions, actions can be brought by large numbers of individuals in their own names instructing a single firm of solicitors to represent them.

Second, it is possible for individuals to assign their claims to a special purpose vehicle ("SPV"), which brings the claim in its own name. This is the route that is being followed in relation to air cargo claims in the Netherlands (Equilib I, Equilib II, EWD, and SCC) and by CDC in relation to paraffin wax and sodium chlorate. The precise limitations, if any, on this method of proceeding are likely to be clarified in the near future.

Further, the Dutch civil code permits SPVs to bring collective claims by means of a representative action for a declaration (although reforms are afoot to permit such actions also to seek damages).

Finally, the Dutch Law on Collective Settlements permits the Amsterdam Court of Appeal to declare, at the request of the parties, a collective settlement binding on all persons that have suffered damage, unless they opt-out within a defined time period. Those collective settlements are, potentially, valid for all persons worldwide.

III. GERMANY

As in the Netherlands, Germany has also witnessed collective actions being brought on the basis of an assignment of legal rights to a legal entity, which then brings the claim in its own name. This is also the approach that has been taken in the German arm of the air cargo litigation.

It was reported that on February 18, 2015, the Dusseldorf Higher Regional Court had handed down a ruling that dismissed a claim brought in this way by CDC. At the time of writing, the text of the judgment is not available and so it is unclear to what extent the reasoning of the Dusseldorf Higher Regional Court will have implications for other claims brought in this way in Germany.

IV. THE UNITED KINGDOM

The possibility of collective actions before the Competition Appeal Tribunal ("CAT") was introduced in the form of s47B of the Competition Act 1998. That possibility was used only once, by the consumer organization "Which?." The organization concluded from the experience that the collective active mechanism was inadequate for procuring effective redress on behalf of large numbers of individual consumers (in the case in question, purchasers of replica football kits).

In the absence of more effective rules for group claims, the leading current example in England in the competition law sphere is the litigation that has been brought by the Emerald claimants, of which there are presently 565,[3] in relation to the air cargo cartel.[4]

These proceedings clearly exhibit the difficulties caused to actions brought by large numbers of claimants by the current English law rules on proof of loss. At present, each individual claimant needs to demonstrate that it suffered loss. The defendant is then entitled to interrogate each claimant's documentary records in order to establish whether any overcharge resulting from the cartel was passed-on. This is a complex and time-consuming exercise in any competition damages case. It usually involves disclosure of all of each claimant's documentary records relating to the purchase of the air cargo services that are the subject of the claim, as well as documentary records and other evidence (for example, management accounts) relating to how any increases in costs were dealt with by each claimant (to address potential passing-on issues).

The complexity is multiplied exponentially in Emerald by the fact that the large number of claimants are active in very different economic sectors (for example, flower importing; manufacture of sportswear; and automotive, truck, and off-highway vehicle parts manufacture) and are located in differing jurisdictions around the world (for example, England, Germany, Kenya, India, China, America, and Brazil). As a consequence of the potentially different market conditions operating even on claimants within the same corporate group, these proceedings are likely to be challenging and very expensive to bring to trial.

Recognizing the obstacles that stand in the way of collective actions, the U.K. legislature intends to introduce both opt-in and opt-out collective actions for competition damages claims. Significantly, in this regard, it is proposed that the CAT "may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person."[5] This would appear to offer a useful solution to some of the difficulties posed to group claimants by the current rules. However, one effect of that proposal will inevitably be to place great emphasis on certification of the claims as eligible for inclusion in collective proceedings.

It is proposed that the CAT should be able to certify claims as eligible for inclusion in collective proceedings only if it considers that they "raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings." The current draft Competition Appeal Tribunal Rules provides that the CAT may certify claims as eligible for inclusion in collective proceedings where it is satisfied that the claims sought are brought on behalf of an identifiable class of persons, raise common issues, and are suitable to be brought in collective proceedings. Among the factors that will be considered in making this determination are: (i) whether it is possible to determine for any person whether he is or is not a member of the class, (ii) the size and nature of the class, and (iii) whether the claims are suitable for an aggregate award of damages. The draft rules also specifically envisage "sub-classes" within the class.

[3] Further proceedings have been brought by 66 claimants in the La Gaitana proceedings, 260 claimants in the Allstom proceedings, and approximately 65,000 in the Bao Xiang proceedings.

[4] *Available at* http://europa.eu/rapid/press-release_IP-10-1487_en.htm?locale=en.

[5] S 47C to be introduced into the Competition Act 1998 by Schedule 8 of the Consumer Rights Bill.

Faced in the future with an Emerald-type claim—in which the claims have been brought by suppliers who bought indirectly from the parties to a cartel—certification arguments will focus on whether there can be a single class of indirect purchasers. or whether separate classes (and separate claims) would be needed to cater for differences in the numbers of intermediaries separating the claimant from the parties to the cartel. Irrespective of the outcome of that argument, there are likely to be further arguments at the certification stage as to whether separate classes (or sub-classes) need to be created to reflect specific pass-on issues that may characterize some claimant product and/or geographic markets.

The likely consequence of these changes is that whereas, at present, arguments about pass-through tend to take place at a relatively late stage of proceedings, in the future, these arguments will take place earlier in proceedings. The question that then arises is whether limited disclosure relating to passing-on will have to be given in advance of those certification arguments or whether the arguments will take place based primarily on economic theory.

Despite the obstacles that will still stand in the way of consumers and SMEs recovering competition damages in the United Kingdom, the net effect of these reforms will be to greatly improve their ability to obtain effective redress.

VI. COMPLETING THE REVOLUTION

The purpose of the Recommendation is to "enable injured parties to obtain compensation in mass harm situations caused by violations of rights granted under Union law" and it obliges Member States to put in place collective redress mechanisms at national level. Collective redress is defined to include mechanisms that enable injunctions and/or compensation to be sought "collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation or by an entity entitled to bring a representative action." A mass harm situation is "a situation where two or more natural or legal persons claim to have suffered harm causing damage resulting from the same illegal activity of one or more natural or legal persons." A representative action is one "brought by a representative entity, an ad hoc certified entity or a public authority on behalf and in the name of two or more natural or legal persons" that are not parties to the proceedings.

The Recommendation lays down minimum requirements that must be satisfied by representative entities:

a) have a non-profit making character;

b) there should be a direct relationship between the main objectives of the entity and the rights granted under EU law that it is claimed have been violated; and

c) have sufficient financial and human resources capacity as well as legal expertise.

Such representative entities should be designated in advance or certified on an *ad hoc* basis for a particular action. Law firms, it is clear, need not apply.

Crucially, the Recommendation's focus is on opt-in collective actions with opt-out actions being permissible only exceptionally and where "duly justified by reasons of sound administration of justice." This caution on the part of the Commission is undoubtedly prompted

by what are perceived to be the excesses of the U.S. opt-out regime and which the Commission and the Member States are anxious not to import into litigation in the European Union.

However, serious questions are raised as to the likely efficacy of an opt-in collective redress regime in providing redress to consumers and SMEs for breaches of competition law. The systems in both the Netherlands and Germany by which claims are assigned have been used by corporate groups, rather than by individuals, at least in the context of competition law claims. Similarly, no one would claim that the U.K.'s s47B experiment was a success in providing collective redress to individuals.

Any opt-in regime will inevitably be inferior to an opt-out regime in terms of facilitating individual redress. And unless and until the European Union promotes such an opt-out regime, consumers obtaining redress for breaches of competition law are likely to remain very much in the minority, and the objective of enabling all those harmed by breaches of competition law to obtain redress will remain unrealized.

Another area that the European Union needs to address if collective redress for consumers/SMEs harmed by breaches of competition law is to be made effective is the question of proving loss. Requiring that each claimant prove what level of overcharge reached his level of the supply chain, and enabling defendants to investigate how much—if any—of that amount was passed on by that claimant further downstream is simply inconsistent with an opt-out regime (albeit that some mechanism will have to be established to verify entitlement to payment from any damages fund that is formed).

Indeed it could be said, although with less force, that the same requirement is unnecessarily restrictive even in an opt-in regime. Provision should be made, as has been done in England, for the court to dispense with the need to establish the damages suffered by each claimant and/or for the award of aggregated damages—at least if the European Union is serious about facilitating redress for consumers/SMEs.

Finally, comes the question of funding. The "loser pays" principle, a bedrock of European legal orders and a perceived bulwark against frivolous litigation, makes embarking upon competition damages litigation, usually against well-resourced corporate defendants, a risky undertaking for all but the most confident. It is not immediately obvious how the kinds of representative non-profit making entities that the Recommendation envisages will be authorized by Member States to bring collective actions will be able to make provision for adverse costs awards.

The Recommendation refers to third-party funding and gives grudging recognition that contingency fees may be necessary in some competition damages cases, but this is subject to appropriate regulation and "taking into account in particular the right to full compensation of the members of the claimant party." Perhaps if the Commission really wishes to encourage collective redress for consumers/SMEs harmed by breaches of competition law, it could set aside a proportion of competition fines it receives to fund actions for collective redress in the competition sphere that cannot obtain commercial funding for their claims.

In short, the two June 2013 initiatives have significantly facilitated competition damages claims in the European Union. However, if the goal of enabling all those harmed by breaches of

competition law to obtain effective redress is to be achieved, additional far-reaching reforms will be required.