Private Actions and Collective Redress for Antitrust Damages in the EU

The 18th Annual Antitrust Symposium
Perspectives on Global Competition Law
Thursday, February 19, 2015

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Agenda

- Private antitrust actions in the EU
  - Initiatives at the Member States level
  - The EU Directive for private actions for antitrust damages
- Collective redress for antitrust damages in the EU
  - Initiatives at the Member States level
  - The Commission Recommendation on collective redress
  - Will the Commission Recommendation enhance or impede collective redress for antitrust damages?

Private antitrust actions in the EU: A bit of history

- Until recently, there have been very few damages claims for competition law infringements in the EU. But private actions for damages have mushroomed in the past few years.
- Europe's journey towards encouraging and facilitating private antitrust claims essentially started with the CJEU ruling in the *Crehan* case (2001), which held that private antitrust litigation contributes to effective competition law enforcement, such that "victims" should have the right to seek compensation for harm suffered as a result of anti-competitive behavior.
- In the aftermath of *Crehan*, the European Commission decided to address the lack of a legal framework at the EU level for antitrust damages claims.
- The Commission issued a Green Paper in 2005 and a White Paper in 2008 devoted to private action for damages, but its first attempt to propose a directive on the subject, however, failed and the matter was temporarily left to the Member States.

Private antitrust actions in the EU: Member States taking the lead

Private antitrust actions in the following MS given the attractive features of their national laws.

- **United Kingdom**
  - UK courts developed of a broad application of the general EU rules on jurisdiction.
  - Availability of pre-trial and subsequent disclosure, generally unavailable in other MS.
  - Availability of third-party funding and possibility to use conditional fee arrangements (subject to certain requirements).
  - London is a major dispute settlements center.
- **Germany**
  - Courts developed a claimant-friendly approach to the calculation of damages.
  - German law allows so-called “claimant vehicles” to bring group claims, subject however to a recent judicial setback for CDC, a company bundling individual claims.
  - German law allows contingency fees, subject to certain conditions.
- **The Netherlands**
  - Dutch law allows claimant vehicles to aggregate individual claims and seek redress in their own name.
  - Dutch law enables binding collective settlement of claims. Availability of some third-party funding.

Private antitrust actions in the EU: EU Directive 2014/104

- *Disclosure*: Easier access to evidence for plaintiffs (within established limits)
- *Proof of infringement*: Final infringement decision of an NCA constitutes full proof before civil courts in the same MS that the infringement occurred (but only *prima facie* evidence of the infringement before civil courts of other MS).
- *Limitation period*: Parties have 5 years to bring damages claims from the moment they had the possibility to discover that they suffered harm from an infringement. They have at least 1 year to bring damages actions from final infringement decision.
- Clarification of the legal consequences of "*passing on*". Infringer can reduce compensation to direct customers by amount they passed on to indirect customers, subject to some caveats.
- Victims are entitled to *full compensation* for the harm suffered (including actual loss, loss of profit, plus payment of interest).
- *Rebuttable presumption* that cartels cause harm.
- *Joint and several liability* with the possibility of obtaining a contribution from other infringers for their share of responsibility.

Collective redress for antitrust damages: MS initiatives (1)

- **United Kingdom (current regime pending adoption of the Consumer Rights Bill)**
  - Regime for collective action introduced by the 2002 UK Enterprise Act which allows "specified bodies" to bring an action on behalf of consumers who have suffered losses.
  - Opt-in system (consumers have to give explicit consent to specified body to act on their behalf).
  - Regime was largely unsuccessful. Consumer association brought an action against JJB Sports following illegal price fixing cartel for retail of football kits. Led to a settlement, but action largely failed due to the difficulty of identifying affected consumers.
- **The Netherlands**
  - Collective Settlement of Mass Damages Act (2005) allows group settlements for antitrust claims. Agreement must be concluded between organizations that represent victims and the infringer(s). Once an agreement is achieved, parties can apply jointly to the Court of Appeals of Amsterdam to declare the agreement binding upon all persons who suffered damages as a result of the infringement.
- **France**
  - French Consumer Act (2014) allows group actions for follow-on damages.
  - Consumers can only file actions through consumer groups represented by government-approved associations. Opt-in system.

Collective redress for antitrust damages: MS initiatives (2)

- **Germany**
  - Attempts have been made to bundle individual claims following a 2002 Decision of the German antitrust authority uncovering a cartel in the cement sector.
  - A company named "CDC" was incorporated specifically so as to bundle the damages claims against the cement producers.
  - In 2013, the Düsseldorf District Court dismissed CDC's lawsuit inter alia on the ground that the assignments of damage claims to CDC breached public policy as CDC would have been unable to pay the winning's side legal costs if CDC had lost the action.
- **Sweden**
  - Group Proceedings Act (2002) makes private group actions available in all areas of civil law. But effectiveness of the system is limited by mandatory opt-in procedure, no pre-trial discovery, and loser party pays principle.
- **Belgium**
  - Belgian Collective Redress Act (2014) provides a system whereby collective actions can be initiated by a consumer associations meeting certain criteria.
  - No punitive damages, no contingency fee, and before filing an action parties have to go through a mandatory dispute settlement process.
  - Judge decides whether actions can be based on opt-in or opt-out

Commission Recommendation on collective redress mechanisms (2013)

- MS should have a system of collective redress that allows private individuals and entities to seek both “injunctive” and “compensatory” relief in a situation where a large number of persons are harmed by the same illegal practice.
- Collective redress systems should, as a general rule, be based on the "opt-in" principle. “Opt out” permitted subject to proper justification.
- MS should not permit “contingency fees”.
- Entities which are representing claimants have to be of non-profit character.
- No punitive damages. Instead, full compensation should reach individuals once the court confirms that they are right in their claims.
- Member States should ensure that the party that loses a collective redress action reimburses necessary legal costs borne by the winning party (“loser pays principle”).
- The central role in the collective litigation should be given to the judge, who should effectively manage the case and be vigilant against any possible abuses.
- The Commission does not rule out third-party financing for European collective redress, but proposes conditions, in particular related to transparency, to ensure there is no conflict of interests.

Will the restrictive approach of the Commission Recommendation kill collective redress in the EU?

- The Commission and the MS are terrified by what they perceive as the excesses of the US class action system.
- While the US system may have led to excesses, the various safeguards contained in the Recommendation will likely reduce the effectiveness of collective redress actions:
  - Opt-in: Will considerably reduce the number of claimants and thus the "profitability" of collective actions.
  - No punitive damages: Reduces the size of the award and thus the "profitability" of collective actions.
  - No contingency fees: Will make the funding of collective actions more problematic, although the Recommendation does not exclude third-party funding.
  - Loser pays principle: Makes collective action riskier.
- Recommendation goes for the lowest common denominator and will impede rather than enhance collective redress for antitrust damages.

Collective redress: Will some Member States be more ambitious?

- The Recommendation is not binding on the MS and some of them may wish to adopt more ambitious collective redress schemes.
- UK Consumer Rights Bill (soon to be adopted)
  - Goals of the Bill are to establish the Competition Appeals Tribunal (CAT) as a major venue for private enforcement in the UK, and to make it easier for claimants to bring claims and to convert their legal rights into effective redress.
  - The Bill foresees collective settlements for both opt-in and opt-out claims, but the Bill introduces a series of safeguard, including:
    - judicial certification to filter out non-meritorious cases;
    - no treble or exemplary damages;
    - no contingency fees; and
    - the “loser pays” principle as the default position on costs.
  - This Bill is therefore not revolutionary and does not introduce a US class-action system in the UK, but the fact that it provides for an opt-out regime is a significant step forward compared to the regimes in place in other MS.

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