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Towards the Directive on Private Enforcement of EC Competition Law: Is the Time Ripe?

Jesús Alfaro and Tim Reher
CMS Albiñana & Suárez de Lezo and CMS Hasche Sigle

From the intended great leap forward to a modest proposal

Several years ago, the European Commission launched an initiative to improve private enforcement of EU Competition Law. The initial aim was very ambitious as it intended a complete modernisation of Competition Law by making it widely applicable not only by public authorities but also by judges in the private realm.[1] In 2009, the Commission took a further step following the earlier Green Paper of 2005[2] and the White Paper of 2008, and drafted a 'Proposal for a Directive on rules governing damages actions for infringements of Article 81 and 82 of the Treaty' (the Draft Directive). Although this was not officially published, it leaked out in the typical EU style. The ambitious objective of the early years has been significantly narrowed in the process. The Draft Directive will in practice only have effects on damages actions in hard-core cartel cases following an infringement decision by a competent competition authority (follow-on actions).

In its Draft Directive, the Commission has eventually refrained from explaining the need for increased private enforcement through the deterrent effect of such actions. The Commission has thereby paid tribute to many critical submissions it has received on this point.[3] Indeed, in the Explanatory Memorandum the Commission now clarifies: 'The proposed Directive takes a compensatory approach: its aim is to allow those who have suffered damage caused by an infringement of the EC competition rules to recuperate that loss from the undertaking(s) which infringed the law.'[4] It now only 'welcomes' deterrence as a side effect of damages actions. Even though this is a step in the right direction, it would be preferable for the Commission to refrain from taking any initiative aimed at harmonising national procedural rules, leaving room instead for the member states to develop their laws individually.

Negative harmonisation is preferable

From a subsidiarity perspective, the intervention at the EU level in national procedural law of member states does not seem to be justified. Member states are certainly best placed and have more incentives to adequately adapt their national procedural rules in order to facilitate cartel claims.[5]

First, procedural law can enable competition between jurisdictions across Europe.[6] Regulation 44/2001,[7] as it is well known, allows the plaintiff to choose between the courts of the domicile of the defendant or the courts of the place of production of the damages (lex loci delicti article 5.3 in relation with 2.1). Also, article 6.1 allows all co-defendants to be sued before the courts of the domicile of one of them provided the actions to be exercised are all connected. Given that typical cartels prosecuted by the Commission are international cartels, plaintiffs will have a strong incentive to select the forum more convenient for the success of their claims.

Furthermore, some member states might have incentives to promote their jurisdictions as 'plaintiff friendly', particularly those interested in protecting their consumers, but also those interested in attracting to their jurisdictions important cases in terms of volume and relevance, benefiting the national bar and other related professionals such as consultants. This has already happened with insolvency cases but also as regards antitrust. The United Kingdom is increasingly seen as an 'attractive place in which to litigate antitrust disputes'.[8] Its appeal is explained by the broad approach of its national courts in affirming their own jurisdiction in cases with international elements, the UK courts' well-established reputation and celerity.[9] Similarly, Germany has established itself as a popular forum for damages claims due to recent changes in its law erasing obstacles to damages claims that previously existed and the high cost efficiency of its legal system.

Secondly, the legislative proposals from the Commission often propose very detailed and complex rules to solve identified obstacles to the effectiveness of private antitrust enforcement that could be more easily solved by the market on its own.

An illustration of the ability of the market to overcome the obstacles to effective private enforcement of competition law is found in developments regarding multiple claimants. In 2002, a business model evolved according to which companies could buy damages claims from numerous victims of a cartel, bundle these and sue for damages in their own name.[10] Only very recently the German Civil Supreme Court (BGH) approved of this business model by holding that CDC, the founder of the model, can sue for damages in the concrete case assigned to it by numerous cartel victims.[11] CDC has recently filed an action against six members of the hydrogen peroxide cartel before a German Court.[12] Prior to the filing, 32 large buyers of this raw material assigned to CDC their cartel-related damage claims resulting from hydrogen peroxide purchased from the members of the cartel.[13] Effectively, an opt-in class action system evolved under the current procedural laws rendering any legislative intervention from the EC redundant. Furthermore, it can be expected that the assignment model developed in practice better suits the interests of cartel victims than the complex rule in article 5 para 5 of the Draft Directive, which reads: 'Damages awarded in a representative action shall be distributed, to the largest-possible extent, to the injured parties represented. Member states may allow that a part of the damage awarded is used to cover expenses reasonable incurred by the qualified entity in connection with the representative action'. Even though highly complex, this rule gives little guidance in practice. According to the assignment model developed in practice, the parties agree in advance on a share of the damages the cartel victim receives in case of success and a small fee, if any, in case the claim fails.

It follows from the above that there are indications that the law will naturally evolve as regards private enforcement of EC competition law without the need for EU harmonising intervention.

No room for further harmonisation

The Draft Directive's main objective is to remove obstacles to the effectiveness of follow-on actions following the detection of a cartel by the competent competition authority. There is no need for further legislative intervention exceeding this approach to facilitate stand-alone actions or damages actions in other than hard-core car-

tel cases. While an increase in stand-alone actions would in theory improve the detection of cartels because those harmed by a cartel might have valuable information about the existence of a cartel that the competition authority has not yet become aware of, this effect will be very small in practice because private claimants will find it extremely difficult to prove the existence of the cartel before a court. Indeed follow-on actions will in practice serve the same objective in that they give an incentive to the victims of a cartel to inform the competent competition authority of the existence of the cartel. The competition authority can use its powers of investigation to prove the cartel and the victim may obtain full compensation in a second stage.

As regards non-cartel antitrust infringements detection is not generally the problem because unlike cartels, they are not secret practices. For these types of infringements it cannot be the case that there is insufficient private enforcement. In addition, the risk of 'false positives' – that is, practices that are actually not harmful for consumers – is much higher than in cartel cases, where the harm for consumers is almost certain. Therefore, it is highly doubtful that we can increase social welfare by promoting private litigation of these other infringements.[14]

The Draft Directive in detail

Looking at the details of the Draft Directive it is apparent that in some respects the proposed law lags behind what is already provided for in the law of most member states and in other respects unnecessarily interferes with coherent legal systems where practice is likely to be better placed to establish solutions suitable to the respective national law.

Calculation of damages

The Draft Directive is to be welcomed in that it follows the approach taken by the White Paper and clearly rejects claims for the introduction of multiple damages in cartel cases. The Draft Directive in article 1 relies on the principle of full compensation rather than deterrence, providing for compensation for the actual loss (damnum emergens), loss of profit (lucrum cessans) and payment of interest from the time the harm occurred until it has actually been compensated.

Many member states, however, provide in their procedural laws for more effective means to calculate the damages and allow for an estimation of the damages by the court. They often provide for the calculation of the damage on the basis of the illegal profits obtained by the infringer, thus releasing the claimant of the burden to prove and calculate the actual losses. The Directive will consequently be of little effect regarding the calculation of damages and there is no need for legislative action at Community level.

Passing-on defence

In relation to the passing-on defence the Draft Directive rightly distinguishes between two situations. In article 10 para 1 the Draft Directive provides for the passing-on defence in favour of the cartel member who may invoke as a defence that the claimant passed on the whole or part of the overcharge imposed upon him. In article 10 para 2, the Draft Directive provides for a rebuttable presumption in favour of the consumer that the overcharge resulting from an infringement of article 81 or 82 EC was passed on to the consumer. By providing for the passing-on defence and the presumption that the overcharge was passed on to the consumer the Commission strengthens the concept of full compensation recognised by the ECJ in *Courage*.[15]

However, the strong focus on the ability to pass on the overcharge ignores the possibility that the direct customer of the infringer succeeded in passing on the overcharge in some cases but lost business in others so that the damage suffered does not correspond to the overcharge but to the decrease in business. The Draft Directive does not provide for compensation in these cases and thus conflicts with the principle of full compensation established in the *Courage* judgment. The passing-on defence as provided for by the Draft Directive also goes too far in that it does not require the defendant to prove a causal link between the price increase by the claimant and the overcharge imposed upon him by the cartelist. While such a causal link is likely to exist if the claimant simply sold on the product purchased at a cartel price, it may not exist if the claimant uses the product as input to the production of a new product. In this case, the cartel price paid for parts used in production is only one factor among others in the calculation of the end price for the new product, making it extremely difficult to establish whether the claimant succeeded in passing-on the overcharge.

Confidentiality of corporate statements

In article 8 of the Draft Directive, the Commission provides for an exemption from the disclosure rules laid down in article 7 for corporate statements and settlement submissions. Without mentioning leniency, the Commission clearly aims to safeguard the effectiveness of its leniency programme at the expense of full compensation for the victims of anticompetitive behaviour. By doing so, the Commission compromises the objective of the Directive, namely full compensation for the damages incurred by anti-competitive behaviour and stands in marked conflict with the jurisprudence of the European courts.

The general refusal to grant access to parts of the competition authority's file in order to give full effect to legal privileges granted in a leniency programme or a settlement decision violates the CFI's findings in the *Lombard Club* decision, where the court held that the Commission may not refuse access to its files on general terms.[16] It furthermore ranks deterrence as a primary objective higher than full compensation for the victims of an infringement of competition law.

Unfortunately, the Commission has followed its approach taken in the White Paper, where it had already rejected a proposal from the Green Paper that was to limit the liability of leniency applicants in private damages claims to the share of the damages relating to their market share. An approach restricting the joint and several liability of leniency applicants is clearly preferable to any solution restricting access to documents from the leniency application as it aligns the objective of leniency programmes to provide a bonus for the self incrimination of cartelists and the concept of full compensation as recognised by the ECJ.

Compromising the administrative fine imposed on leniency applicants is a legitimate means of providing incentives for cartelists which expose themselves to antitrust investigations, because the objective of a fining decision is deterrence. In the case of private actions for damages however, deterrence should not be taken into consideration and full compensation must be the only aim.

Class actions

The evolving practice of group actions for damages in cartel claims has made further legislative action obsolete. The Commission itself in No. 2.1 of the Explanatory Memorandum recognises that the public consultation resulted in almost unanimous approval of the choice not to suggest opt-out class actions. Considering this background, it is incomprehensible why the Commission effectively

provides for an opt-out class action in article 5 para 2 of the Draft Directive, by stating that the injured parties do not have to be identified.

As far as representative actions are concerned, the proposal is unsatisfactory and contradictory. According to article 1 para 2 of the Draft Directive, full compensation includes only compensation for actual loss and not hypothetical loss. It remains unclear how the actual loss incurred is to be calculated in proceedings in which the injured parties were not identified. The damages awarded cannot be distributed among the injured parties, as provided for by article 5 para 5, if they have not been identified beforehand. The proposal stands in marked conflict to fundamental rights of claimants in that it provides in article 5 para 4 that 'any decision by the court on the merits of the case shall be binding on all injured parties represented by the qualified entity', without there being a need to identify the injured parties in the representative action.

By providing only for an opt-out option for injured parties in article 5 para 4 of the Draft Directive, the Commission, without specifically stating this, falls back to its prior position that private enforcement fulfils a deterrent function. The concept of an opt-out class action conflicts with the principle of full compensation. The right of injured parties to obtain damages as identified in *Courage* includes the right not to pursue the damages claim. Even more compelling is the binding effect an unsuccessful representative action has for the injured parties in later individual actions. The injured parties will not be able to achieve full compensation in case a prior representative action on the same merits failed, for whatever reason. The injured parties thereby are denied the right to effectively pursue their claims.

Besides the criticism of the Draft Directives operating as an opt-out model there is no need for representative actions in cartel damages actions at all. Increasing enforcement by means of damages actions should not be a goal in itself. The social resources consumed by increased enforcement through representative actions can clearly outweigh the social benefits of such actions, as the extreme costs of class actions for the US economy show. The assignment model established in practice and mentioned above avoids this risk and at the same time guarantees cartel victims the cost advantages of collective redress, because it ensures that claims will only be brought if they correspond with the interest of the injured parties who need to take action and assign their claims.

Fault requirement

As far as the Draft Directive lowers the fault requirement in damages actions, it again interferes with well-established principles of national law without sound justification. Indeed, most of the problems identified by the White Paper do not arise in actions grounded on infringements other than complex cartel cases. These competition law infringements themselves involve some element of intent or negligence so that the fault requirement in damages claims provided for in some member states does not constitute any hurdle to the principle of full compensation. The Draft Directive, however, is to be welcomed in that it allows for the defence of an excusable error and has dismissed the idea of strict liability as proposed in the Green Paper.

Next steps

The Draft Directive is to be welcomed in that it rejects many of the far-reaching proposals of earlier preparatory works but rightly meets criticism that any legislative action is inappropriate at the time given. The Commission is well advised to await the practical results of changes in the relevant laws some member states have recently adopted instead of entering into the political debate on its draft at a time when fierce criticism is sure to be encountered and any resulting legislation would be little more than a weak compromise. Recent years have shown that many member states, both through legislative action and case law, have adapted their national laws in order to overcome the obstacles to private enforcement of competition law that were identified in the Commission's Green Paper. The remaining obstacles do not at present justify legislative action at the Community level which would inevitably cause damage to the established national laws which each have found a different answer to the complex questions resulting from the interplay of procedural and substantive law. Whereas negative harmonisation takes more time, it ensures that the common objectives identified at the Community level are, in their implementation, adequately

CMS

CMS Albiñana & Suárez de Lezo
Calle Génova, 27
28004 Madrid
Spain
Tel: +34 91 451 93 12
Fax: +34 91 399 06 32

Jesús Alfaro Águila-Real
jalfaro@cms-asl.com

CMS Hasche Sigle
Stadthausbrücke 1 - 3
D-20355 Hamburg
Germany
Tel.: +49 40 37630 363
Fax: + 49 40 3763040 534

Tim Reher
tim.reher@cms-hs.com

www.cmslegal.com

aligned with the legal traditions and history of the member states' laws. It remains to be seen whether the Commission will react to the criticism and reconsider the necessity of further legislative action at the EU level or whether it will take the next steps and officially publish the Draft Directive. It must then of course state the legal basis of its competence.[17]

Notes

1 V, D WOODS, A SINCLAIR, D ASHTON, Private enforcement of Community competition law: modernisation and the road ahead, Competition Policy Newsletter, 2004, pp31-32.

2 Working papers can be found http://ec.europa.eu/competition/antitrust/actionsdamages/index.html.

3 See, for example: T REHER, "The Commission White Paper on Damages Actions for EC Antitrust Rules, The European Antitrust Review 2009, pp38 et seq.

4 Point 1.2 of the draft Explanatory Memorandum.

5 In line with this reasoning, but from a more economic perspective, see F Marcos/A Sanchez Graells: 'Towards a European Tort Law'. 'Damages Actions for Breach of Antitrust rules: Harmonising Tort Law through the Back Door?' *European Review of Private Law* 3-2008 [469-488]; T Reher, 'The Commission White Paper on Damages Actions for EC Antitrust Rules', *The European Antitrust Review* 2009, pp38 et seq.

6 Similarly to what is currently happening in corporate law thanks to Centros, Überseering and Inspire Art rulings. V, Jesús Alfaro Aguila-Real, 'La unificación del Derecho privado en la Unión Europea: planteamiento', *Boletín europeo de la Universidad de La Rioja*, No. 5, 1999, pp6-16.

7 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

8 L Farrell, S Ince, 'Private enforcement in the UK', November 2008, available at: www.mondaq.com/article.asp?articleid=67882.

9 Idem, ibidem.

10 Examples of this model are: Cartel Damages Claims (CDC): www.carteldamageclaims.com; Association for Cartel Damage Actions (ACDA): www.kartellschadensersatz.de; Talionis: www.talionis.de.

11 Order of 07/04/2009 – KZR 42/08, available at: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2009&Sort=3&Seite=2&nr=47699&linked=bes&Blank=1&file=dokument.pdf.

12 The claim is based on the Decision of the European Commission COMP/F/39.620 – Hydrogen Peroxide and Perborate of 3.5.2006

13 www.carteldamageclaims.com/presse/20090423_CDC_PressRelease.pdf.

14 R H LANDE, J; P DAVIS, 'Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases', *U San Francisco Law Review* 82(2008), p898, available at: http://ssrn.com/abstract=1090661.

15 ECJ Judgment of 20/9/2001, C-453/99, *Courage*, confirmed in Judgment of 13.7.2006, C-295/04, C-296/06, C-297/04, C-298/04, Manfredi.

16 Judgment of the European Court of First Instance of 13.04.2005, T-2/03, Lombard Club.

17 The Draft Directive in No. 3.1 of the Explanatory Memorandum simply acknowledges that the legal basis 'will be complemented during the interservice consultation'.

Jesús Alfaro Águila-Real

CMS Albiñana & Suárez de Lezo

Jesús Alfaro Águila-Real is a partner at the Madrid office of CMS Albiñana & Suárez de Lezo and a member of the CMS competition practice area group, as well as full professor at the Universidad Autónoma de Madrid (UAM) in the area of commercial law. He joined the firm in 1996 as a consultant and became a partner in January 2006. He has extensive experience in corporate and commercial, antitrust and unfair competition law practices.

Among the most relevant cases in which he has collaborated, Jesús has acted for the Iberdrola Corporation in many regulatory, antitrust and commercial law issues. He has also acted for ONO (a Spanish telecommunications operator), Heineken and Antena 3 TV.

Jesús attended the Institut für Gesellschafts-und Wirtschaftsrecht at the University of Heidelberg (1989) and the Law School of the University of Chicago (1993) as a post-doctoral visiting researcher.

He has been a member of the Spanish Bar association of Madrid since 1996. He was also a member of the commission asked by the CNMV (Spanish National Stock Market Commission) to develop the proposal to reform the Spanish Corporations Act in 1998.

Jesús Alfaro is listed in the competition section of the 2003, 2004, 2006 and 2007 editions of *Chambers Global*, *Chambers 2008*, *Chambers Europe* 2007 and 2009 and *Legal 500*.

Tim Reher

CMS Hasche Sigle

Tim Reher is a partner of CMS Hasche Sigle and a member of its competition law practice group, based in Hamburg, Germany. Tim advises clients on the full range of competition and merger law issues, both in European and German law. His work includes merger notification and review, compliance, vertical and horizontal cooperations, damages claims and monetary fine proceedings. Tim was the first lawyer to bring a successful damages follow on action against a member of a horizontal cartel ('Vitamincartel') and has extensive experience in this field, both for claimant and defendants. Tim has particular industry knowledge for pharmaceutical and medicinal products, food and drink, oil and gas, sports and media. He received a doctorate in 1997 and holds a master's degree from Oxford University. Tim is listed as recommended lawyer by *JUVE*, *Chambers Global* and *GCR 100*. He publishes regularly on various items related to competition law and is visiting professor at Bucerius Law School, Hamburg. Tim is admitted to the Hamburg Bar and is a member of the Association of Antitrust Law and the Association of Intellectual Property and Copyright law.