

Private Law Remedies in Competition Law and Class Actions

The European Circuit's 2008 conference followed quickly on the heels of the Court of Appeal's decision in *Devonish*,¹ a case concerning a vitamins cartel, which addressed the issue of damages in competition law cases. The appellants said that the courts were required to give restitutionary relief, while the respondents said that the court was prohibited from giving such relief. Taking a middle course, the Court of Appeal said that it was neither necessary nor impossible to award restitutionary relief; simply that it was only to happen where there were exceptional circumstances, which was not the case where, as in the present case, compensatory damages were available.

In the context of *Devonish*, the Circuit hosted a multi-national panel who addressed the issue of private law remedies in competition law proceedings and the related issue of the paucity of such proceedings and whether class actions might provide a route for expanding the number of competition law actions.

Francis "Buddy" Menton Jr., Partner at Willkie, Farr & Gallagher in New York, offered an overview of his experience of securities class actions in the United States. Securities class actions typically involve stockholders alleging fraud against a company whose stock suffers a sudden and precipitous drop, usually defined as a price fall greater than the market overall. Companies are usually insured against the cost of settling these actions and it is very rare for the class actions to go to trial, the company and their insurer preferring to share the burden of settling the claim.

The process of bringing a class action was described by Buddy as being "lawyer driven". For example, "Investor Fraud Alert" websites offer, for a fee, to monitor your stocks and they will bring a class action on behalf of investors if the stock suffers a fall of such suddenness and magnitude so as to raise the possibility of fraud. Of the publicly-traded companies, approximately two per cent will be subject to such an action each year. Most actions which are commenced will survive an attempt by the company in question to have them dismissed (around seventy per cent survive). Of those which survive, none or one per year will go to trial (or, rarely, two in a year). Because most companies are insured against the cost of settling such an action, they will agree with their insurer to bear the cost of a settlement. Settlements are not trivial; the median cost of a settlement is \$5.5 million (although Buddy says he helps his clients to settle for much less!). However, it is very rare for individuals (who may be responsible in fact for any fraud) to appear as defendants to the action or to bear any of the cost of settling. The idea that these actions punish the wrongdoers is therefore incorrect.

The beneficiaries of the actions and any settlement are the claimant stockholders. These are often investors such as pension funds, who are themselves publicly traded companies. As a result, securities class actions tend simply to move money from one publicly traded company (the defendant company and/or their insurers) to another. This transfer takes place with what is, in effect, a large tax accruing to the plaintiff lawyers who drive the process. It is uncommon for the individual shareholders to bother recovering the sums to which they are entitled under any settlement; the range typically being 30-40 per cent.

¹ *Devenish Nutrition Limited v Sanofi-Aventis SA (France) and others* [2008] EWCA Civ 1086.

Buddy then turned to the question of whether society benefits as a result of the availability of such class actions. Broadly speaking, the diversified investor will have stakes in all of the parties to the action: the company against whom fraud is alleged, the insurance company which funds some of the settlement, and the pension funds who are the beneficiaries of any settlement. In other words, the result for the diversified investor is essentially neutral. The settlements do not distinguish between those stockholders who were persuaded to invest as a result of fraud and those who simply decided to invest at the same time, who are entitled to damages simply as a result of having invested during the period of the fraud. Transactions costs are high, being the costs of litigating and the administrative costs of tracking down people in order to pay them their share of the settlement.

Class actions are also available for antitrust cases, although they take place on a smaller scale than in respect of securities. The main example was brought by retailers against Visa and MasterCard in respect of a cartel which maintained abusively high card payment fees. The lead plaintiff was Wal-Mart and they recovered large sums; the individual victims are unlikely to recover much in the way of damages.

The conclusion from the American experience is that class actions require someone to have the incentive to bring together claimants and pursue the case. In the US, contingency fees reward the lawyers who drive the process for their time and expertise. It is not clear that such a system would be possible or desirable in Europe. Otherwise, it is difficult to see what drives the process, although government prosecutors could take such a role.

After Buddy's cautionary tale of America's experience of securities class actions, Marjorie Holmes, of Reed Smith in London, discussed the broader topic of why there are so few private action cases in Europe on competition law, and why even fewer are successful. Marjorie began by outlining a few of the recent, important cases.

The first principle which Marjorie identified as militating against the bringing of private law competition action was the effect on your relationship with suppliers, competitors and customers.

A significant deterrent to bringing competition actions was the costs rule that the loser pays. In *Arkin v Borchard*,² the claimant averred that the defendant had abused their dominant position through price fixing. After fifty days in court, the claimant lost and faced costs of approximately £6m. The case failed on causation; however, the claimant had spent £1.5m on experts' reports going to the issue of damages, an issue which the judge never had to address owing to his finding that the case failed for causation. The claimant had been claiming \$160m, half of which was exemplary. He refused to accept offers to settle of several million dollars. Chasing his sunk costs, he refused reasonable offers to settle and incurred costs in respect of issues which were not decisive to the outcome of the case.

In relation to causation specifically, Marjorie explained that few cases establish causation because a trader will often pass on his loss to a third party, i.e. his

² *Arkin v Borchard Lines Ltd & Ors* [2005] EWCA Civ 655.

customers. A claimant is therefore less likely to recover more than nominal damages and they are unlikely to commence proceedings in the first place.

If the possibility of exemplary damages were ever to encourage claimants to bring private law competition action, Marjorie suggested that the *Devonshire* vitamins cartel case had rendered that much less likely. It was already the case that exemplary damages were only available in the UK and Ireland, and it is now even less likely in the UK.

Marjorie also assessed two possible solutions to the lack of claims brought: class actions and “super complainants”. Class actions are suggested as a way of increasing the number of competition cases, although in the UK they are “opt-in” as opposed to the US system of opting-out, meaning fewer claimants are likely to join a class action. A related system is for one judge to hear one out of many similar cases, with the judgment in one allowing for the expedited disposal of the others. There is also a role for so-called “super complainants”, being interest groups who bring cases on behalf of their members. The prominent UK example is of Which?, who brought the UK football shirts price-fixing case which resulted in purchasers being entitled to compensation in respect of specific football shirt sales.

The Commission has taken steps to encourage the bringing of actions and has taken to advertising infringement decisions on its website. The recent “Commission White Paper on Damages Actions for Breach of the EC antitrust rules” has not proposed major changes but is encouraging more disclosure and access to evidence in competition cases. It also proposes that national authorities’ findings of fact should be binding in other jurisdictions, allowing claimants in other territories more easily to seek damages in respect of breaches already established elsewhere. It further proposes that the limitation period, which presently varies across Europe, should be standardised and should not run until the infringement ends.

Marjorie’s closing remarks ended with a suggestion, which indicated the degree of boldness which may be required effectively to increase the number of private law competition claims, namely the abolition of costs against Claimants.

The final speaker in this discussion was Frederic Puel, Partner at Fidal, Brussels. Faced with an audience whose minds had turned to the promise of a break for coffee immediately following his talk, he gave a quick-fire analysis of the potential problems in the Commission White Paper that Marjorie had discussed.

Frederic compared the principle in *Courage v Crehan* that it should be “open to **any individual** to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition”³ with three proposals from the White Paper.

First, Frederic discussed the proposal that decisions of national authorities should be binding across Member States. This is in fact a somewhat limited proposal, applying only to decisions that are final and which find an infringement. However, Frederic suggested that it presented a political hurdle, in which courts may be reluctant to

³ Case C-453/99 *Courage v Crehan* [2001] ECR I-6297, para 26.

recognise as binding the decisions of national authorities, not least ones from other Member States.

Secondly, Frederic assessed the measures designed to facilitate parties' access to evidence. He suggested that these may be at odds with the Commission's leniency procedure in respect of cartels, under which the first member of a cartel to expose the anticompetitive behaviour can expect 100% immunity from fines. Under that leniency procedure, the "whistleblower" may be certain that the commercial secrets which they impart will be totally confidential, whether or not they are successful in applying for leniency. The proposals will have to guard against the risk of discouraging undertakings from seeking leniency; a programme which has dramatically increased anti-cartel enforcement in the Community.

Finally, Frederic suggested that the principle of full compensation for any individual would have to be reconciled with the immunity for whistleblowers under the leniency programme. There may have to be a limitation on the right of the individual to recover damages since it would be undesirable if this deterred companies from applying for leniency and exposing a cartel.

With that, the discussion came to an end and the delegates enjoyed the opportunity to discuss what they had heard over coffee and, of course, Belgian chocolates. Clearly there remain obstacles to enforcing the Community laws on competition, not least the reluctance of parties to commence private actions. It is not clear, from the American experience, that class actions either are desirable or effective at promoting consumer welfare and the Commission's White Paper shows that any proposals will have to be carefully screened for compatibility with other, equally desirable, antitrust programmes. The Circuit will no doubt return to this theme in due course and assess the extent to which some of the difficulties have been overcome.

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