

REMEDIES FOR BREACH OF EU LAW REVISITED
DAMAGES FOR BREACHES OF COMPETITION LAW

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THE RIGHT TO CLAIM DAMAGES

Recognised in UK earlier than in the EU.

Garden Cottage Foods Ltd v. Milk Marketing Board, [1984] 1 AC 130

Confirmation by ECJ

Case C-453/99 *Courage Ltd. v. Crehan* [2001] ECR I-6297

Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619

ECJ deferential to national procedural autonomy

Case C-279/06, *EPSA Estaciones de Servicio* [2008] ECR I-0000

Confirmation that nullity of unlawful agreement limited to infringing provisions

ECJ cases confirm a right to damages, but have not yet confronted some of the more difficult questions, such as passing-on defences and the extent of liability within corporate groups and between defendants.

There is also considerable uncertainty over procedural rules, which ECJ leaves to national laws, subject only to some very general dicta about effectiveness.

It is generally accepted that legislative action is required.

OBSTACLES TO THE EFFECTIVE EXERCISE OF THE RIGHT TO CLAIM DAMAGES

Commission study of 2004, found situation in Member States to be in a state of "total underdevelopment".

Another study in 2007, the impact study, estimated damages foregone from the lack of private enforcement to be about €20m+ per annum.

The obstacles are mainly procedural.

Those identified as requiring legislative action in the White Paper are:

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- standing;
- access to evidence;
- binding nature of competition authorities' decisions;
- fault;
- definition of damages;
- availability of the passing-on defence;
- limitation periods;
- costs of damages actions;
- interaction between actions for damages and leniency programmes.

To this may be added jurisdictional issues under Regulation 44/2001, which although not obstacles as such, add to the complexity of bringing actions for damages.

POSSIBLE SOLUTIONS TO FACILITATE ACTIONS FOR DAMAGES

The 2005 Green Paper was followed by the 2008 White Paper, proposing action in these areas:

- Standing:

The need to facilitate action by indirect purchasers, usually consumers, through collective redress. Facilitating actions by indirect purchasers is seen as the corollary of allowing passing-on defences.

Should representative actions be brought only by designated entities?

cf. S.47A Competition Act 1998

- Access to evidence ;

Inter partes disclosure, under court control, to limit disclosure to that which is necessary

The availability of the Commission's investigative file is not discussed by the White Paper, but is the subject of several actions in the General Court, following refusals for access to documents under Regulation 1049/2001.

Case T-237/05 *Éditions Odile Jacob v. Commission* (9th June 2010)

Failure to undertake a concrete and individual examination of the documents, no consultation of the author of the documents to determine their commercial confidentiality.

Case T-399/07 *Basell Polyolefine v. Commission*

Case T-437/08 *CDC Hydrogene Peroxide v. Commission*

Case T-344/08 *EnBW Energie Baden-Württemberg v. Commission*

Decision of the European Ombudsman, Complaint 3699/2006/ELB

Draws attention to the possibilities afforded by Article 15 of Regulation 1/2003

- Binding nature of competition authorities' decisions;

Article 16(1) of Regulation 1/2003.

Narrow scope given to this in *Intrepneur v. Crehan* [2006] UKHL 38, but most cases can be expected to be follow-on actions, where the claim will be based directly on the infringement found.

Note however, an Article 9 Decision does not make a finding of infringement.

- Fault;

Not problematic in English law, the breach of statutory duty in infringing the Treaty's competition rules is sufficient to give rise to liability.

A more problematic issue is the extent of the range of parties that may be deemed to be at fault.

Should actions for damages lie only against the addressees of public law enforcement decisions, or more widely, or more narrowly?

Claims may be made against a wider range of defendants to secure jurisdiction in the forum of choice.

Provimi Limited v Roche Products Ltd. [2003] EWHC 961 (Comm)

Cooper Tire v. Shell Chemicals [2009] EWHC 2609 (Comm)

Allows liability to extend more widely than the addressees of the Commission decision, but probably not to the entire membership of the defendant corporate group.

There may be room for argument about fault in some jurisdictions in cases where liability under Article 101 or 102 arises from a presumption, such as parental liability

- Definition of “damages”;

EU law traditionally favours compensation, rather than, eg, US approach of treble damages, although *Manfredi* permits more generous measures of damages.

Devenish Nutrition v. Sanofi-Aventis [2008] EWCA Civ 1086, CA rejected claim for an account of profits, but indicated in any event that this would not preclude a passing-on defence.

- Availability of the passing-on defence;

Passing-on defences prevent unjust enrichment of claimants, but may result in less than the full measure of damages being paid if subsequent purchasers do not bring actions for damages.

Arguably contradictory rules about passing-on in the White Paper.

- Limitation periods;

Proposed new limitation period starting once an infringement decision has become final.

Comparable to position under Competition Act 1998.

Potential for delay whilst enforcement decisions are being contested may encourage challenges to such decisions and enlarge their scope.

Emerson Electric v. Morgan Crucible [2008] CAT 8; CAT noted that parties sought to be joined as defendants, although principally contesting before the ECJ the quantum of their fines, also sought the annulment of the Decision.

- Costs of damages actions;

ADR is to be encouraged. Some flexibility to the usual rules that costs follow the event is suggested.

Raises the question of to what extent the public purpose pursued by private enforcement should be reflected in a more favourable costs regime.

- Interaction between actions for damages and leniency programmes;

Proposal that leniency statements should be privileged from disclosure.

Can be supported by the argument that those who assist in public law enforcement of competition law should not be disadvantaged in relation to private law actions.

Can also be opposed on the ground that the leniency regime provides sufficient reward for such assistance, and that this blurs the line between public and private enforcement.

It might also be asked if, in a system with extensive disclosure requirements, protection of leniency statements would make a difference; the evidence could be elicited anyway.

Should leniency applicants enjoy limited liability for damages claims?

Possibility raised of limiting liability to direct and indirect purchasers of the immunity recipient.

Again, raises the question whether it is justifiable to alter usual rules of civil liability in pursuit of public policy objectives, and whether secondary legislation could provide a sufficient legal basis.

The Commission wants to see private enforcement move on from “total underdevelopment”, but recognises the dangers of going too far. Can EU measures to promote private enforcement avoid the ““devastating unfairness and anticompetitive consequences of much private antitrust litigation”¹ in the United States?

¹ Robert H. Bork, *The Antitrust Paradox: a policy at war with itself*. Free Press (1993)