Competition litigation in the European Union: recent developments
Private enforcement of competition law in Europe is firmly on the radar of companies under investigation by antitrust authorities whether they are in the EU or elsewhere. The number of competition damages claims, especially those following-on from infringement decisions by the European Commission (the Commission) or national competition authorities (NCA), continues to increase. The global character of many cartel infringements means that one decision may lead to claims (or, at least, attempts to bring claims) in several jurisdictions.

This article focuses on key issues and recent developments in competition litigation in England, Germany and the Netherlands, because they have proved to be popular jurisdictions for claims in the EU, but some of the points discussed apply to all EU jurisdictions.

In 2012 there has been progress towards resolution of some of the legal and procedural uncertainties associated with competition damages actions in Europe. As we explain below, this includes further clarification on questions of jurisdiction and the ability of claimants to obtain leniency and other documents held on the files of EU antitrust authorities. Importantly, there have also been proposals for reform in all three jurisdictions aimed at facilitating effective private enforcement, of which perhaps the most eye-catching is the UK Government’s proposal to introduce ‘opt-out’ collective actions.

While the number of competition damages cases started continues to increase in all three jurisdictions, it is striking that final judgments remain rare. This is because many cases result in settlement (partially encouraged by procedural wrangling surrounding novel legal points) or are dealt with through arbitration or mediation. In England, it was not until July 2012 that damages were awarded in a private action for the first time. In Germany and the Netherlands, there have been only a handful of examples of damages awards in antitrust private actions.

**Jurisdiction**

The issue of which Member States’ courts have jurisdiction to hear a private damages claim is of critical importance to a potential claimant. The Brussels Regulation governs jurisdiction as between Member States and provides that the default position is that a defendant must be sued where they are domiciled. However, claimants have relied on exceptions provided by the Brussels Regulation which have allowed courts in one Member State to accept jurisdiction over defendants domiciled elsewhere in the EU.

Claimants have often sought to bring their claims in England even where there is a closer link to another country in the EU or elsewhere because of England’s claimant-friendly regime and, in particular, the broad disclosure rules. Claimants in the English courts have frequently relied on a mechanism under the Brussels Regulation whereby a defendant domiciled in England can be sued as an ‘anchor defendant’ entitling the claimant to assert that the English court then has jurisdiction over other cartel members domiciled elsewhere in the EU. The English courts have generally taken an expansive approach to questions of jurisdiction and a permissive approach to the use of ‘anchor defendants’. They have accepted jurisdiction over many defendants domiciled in other Member States and outside the EU relying on the ‘anchor defendant’ mechanism in the Brussels Regulation and a similar mechanism in the English court’s rules applicable to Non-EU defendants. The English courts have taken this approach even where the English ‘anchor defendant’ is not an addressee of the relevant infringement decision, but merely a subsidiary of a company which is.

One issue which has been the subject of debate in the English courts (but which remains unclear) is whether a subsidiary company can be liable for its parent’s infringement even if it “unknowingly” implemented the anti-competitive arrangements. This is relevant because, if a subsidiary company cannot be liable in these circumstances, then it

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1 Since the legal system in Scotland and Northern Ireland is distinct in some respects, this article focuses on the position in England and Wales.
2 For example, in Germany the Berlin Court of Appeals (Kammergericht, KG, 01.10.2009 - 2 U 10/03) recently granted damages in a follow-on damages suit. In the Netherlands, an example is the judgment of the Court of Alkmaar, 5 February 2003, WINO/FTP Vis B.V. v Cooperator Producemorgansrings Wieringen U.A c.s.
3 See, for example, Toshiba Carrier UK Ltd & ors v KME Yorkshire Ltd & ors [2011] EWHC 2665 (Ch) and [2012] EWCA Civ 1190.

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cannot be sued as an 'anchor defendant'. Although this point has been debated, it is perhaps unlikely in practice to have a significant impact on the use of the 'anchor' mechanism. This is because, recognising the usually secretive nature of anti-competitive behaviour, the English courts have permitted claimants to allege both knowing and unknowing implementation against 'anchor defendants' (and hence establish the English court’s jurisdiction) without requiring the claimant to put forward evidence of either state of knowledge. It therefore seems probable that, in any given case, the English court would already have accepted jurisdiction over the non-English defendants even if it later emerged that the 'anchor defendant' was not, in fact, liable to the claimant because it had not knowingly implemented the anti-competitive arrangements.

The 'anchor defendant' mechanism has been successfully relied on outside the antitrust context in the Netherlands and the Dutch courts have taken an expansive approach in this regard. Confirmation of its application to antitrust matters is expected soon since there are cases pending before the courts where claimants are attempting to rely on Dutch-domiciled 'anchors' to found jurisdiction of the Dutch courts. Further, in two recent judgments the Dutch courts accepted jurisdiction over groups of defendants (none of whom were domiciled in the Netherlands) relying on Article 4(1) of the Brussels Regulation. This permits the courts of the Member State where the events leading to the relevant damage took place to accept jurisdiction.

The application of the 'anchor defendant' mechanism to proceedings before the German courts remains unclear. There has been an attempt to use the device in a recent claim, but the question of whether the court will accept jurisdiction based upon the German domiciled 'anchor defendant' has not yet been determined and the German court may decide that a reference to the European Court of Justice (the ECJ) is needed to determine the point.

Access to documents

A key issue for claimants is how they will obtain access to the often hidden and protected documentary and other evidence which is necessary to prove their case (especially where the case against some or all defendants is a 'stand-alone' one, i.e. there is no decision from the Commission or an NCA to rely on).

One of the reasons that England has proved to be a popular jurisdiction with claimants is its extensive disclosure obligations which require parties to disclose documents that are both helpful and harmful to their cases. Germany and the Netherlands do not have equivalent disclosure regimes, although there are some, more limited, procedural mechanisms in both jurisdictions which give claimants the ability to seek to obtain certain of the defendants' documents. For example, in 'follow-on' actions in Germany a claimant seeking to prove its loss is entitled to disclosure of relevant documents from the defendant only if it can first establish that some loss has been suffered. This is often hard to prove, especially in non-hard core cartel cases. In the Netherlands, there are proposals to amend the rules governing disclosure which, if adopted, would increase claimants’ rights to obtain the defendants’ documents in proceedings before the courts.

In 'follow-on' actions, it is open to claimants in each of these jurisdictions to seek access to leniency documents and the confidential infringement decision from the Commission’s or NCA’s file to help build their case. The ECJ held in

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9 Judgment of the Court of Arbitration of 26 October 2011, TenneT c.s. v. ABB c.s. and Judgment of the Court of Arbitration of 26 October 2011, TenneT c.s. v. Alstom c.s.

7 High Court Dortmund, Case No. 13 O 23/09 (Kart) - Hydrogen Peroxide.

8 Member States’ national courts may make a reference to the ECJ if they need to determine EU law issue which arises in a case before them. The ECJ will generally give a judgment in which it will lay down the relevant EU law principles which can then be applied to the particular cases by the national courts. An ECJ judgment is binding on the national courts of all Member States.

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10 E.g. in the Tele 5 case, the High Court Munich I (1 HK 0 21138/09, 21.11.2011) dismissed a follow-on damages case based on anti-competitive rebates. Here, the claimant, a small competing broadcaster, sought access to defendant’s data which would allow him to calculate its damages. It was unable to show that it incurred any damage and, as a consequence, the High Court dismissed the case.

June 2011 that there is no blanket protection for these documents. The Court said that it is for Member States’ courts to balance, on a case-by-case basis, the interest in protecting the efficacy of leniency programmes against the rights of claimants to bring damages actions. The German Court which referred the question to the ECJ carried out this exercise and, in January 2012, ruled against disclosure of the relevant leniency documents. In April 2012, the English court applied the ECJ’s test and held that the claimant should be permitted access to certain parts of the leniency documents and sections of the Commission’s confidential decision.

The ECJ’s decision on this point has been the subject of much debate and further clarification from the Commission is expected. The UK government has indicated that, if the Commission does not take action, it is minded to take steps to protect leniency documents to ensure that NCA’s leniency programmes are not compromised. Whatever approach is taken, it will need to be reconciled with the approach that the General Court has taken on the question of rights of access to documents from the Commission’s file (including leniency documents) under the Access to Documents Regulation. In May 2012, the General Court upheld an appeal against the blanket refusal to allow access to such documents by the Commission which was primarily justified on the basis of an exception to the obligation to provide documents under the Regulation that is designed to protect the purpose of investigations. The General Court said that, unless there are exceptional circumstances, the Commission is required to carry out an individual examination of documents sought to consider whether they fall within the scope of an exception. Importantly, the General Court did not accept that fear that future leniency applications would be deterred meant that disclosure of documents should be denied in all circumstances. The Commission has appealed the decision to the ECJ.

**Applicable law**

Many of the claims brought in the English courts have little connection with England. One issue which is likely to assume greater prominence as cases progress further in the English courts (and, in damages claims with an international scope, in the German and Dutch courts) is the question of which law should apply in such cases. For claims based on events before 11 January 2009, it does not necessarily follow from an English perspective that English law should apply or that, where there are multiple parties to the proceedings, that one applicable law will apply to all of them. The question of which jurisdictions’ laws specifically governing the periods of time within which claims must be brought will apply is of particular importance in such cases, being an area of real uncertainty for claimants at the pre-claim stage.

For claims based on events after 11 January 2009, the interpretation is different because the UK, Germany and the Netherlands (along with other Member States) are transitioning to new conflict of law rules. The new rules provide that in anti-trust cases the applicable law is the law of the country where the market was or is likely to have been affected. The rules also provide for situations where there is more than one market affected and more than one defendant. How these provisions will work in practice remains to be seen, but it seems likely that the law of the jurisdiction where the claim is started could be applied to the whole of a claimant’s claim if the restriction of competition on which the claim against each defendant relies directly and substantially impacts the market in that jurisdiction.

**Damages available**

The damages which can be awarded in each of England, Germany and the Netherlands are generally compensatory and there is no potential to

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12 Pfleiderer AG v Bundeskartellamt C-369/09.
16 Member States court will apply Regulation 864/2007 (Rome II) to determine the law of most non-contractual obligations where the events that give rise to the damage occur on or after 11 January 2009 (before that point the previous conflicts of laws rules applicable in that Member State will continue to apply).
17 Article 6(3)(a) of Rome II.
18 Article 6(3)(b) of Rome II.
recover treble damages. There is no right to recover punitive or exemplary damages in the Netherlands or Germany. In England, exemplary damages were awarded to a claimant in an anti-trust case for the first time in July 2012, but it is clear from the judgment that the circumstances in which they are available will be very limited.19

Funding of claims and costs

How to fund a claim, and whether it will be possible to recover the costs of bringing a claim from a defendant, are often key drivers of a claimant’s decision to bring proceedings in a particular jurisdiction. In England (and to a very limited extent in Germany), conditional fee arrangements are permitted which usually involve lawyers acting on a reduced fee basis, but with an entitlement to a ‘success fee’ (ie their basic fee plus an uplift). Such arrangements have permitted claimants to bring actions in England on a relatively low risk basis. There is also scope for claimants in all three jurisdictions to seek insurance or third party funding to cover legal costs.

Factors such as the extensive discovery process and the focus on oral advocacy can make litigating in England relatively expensive. The comparatively lower costs in Germany and the Netherlands can make them attractive jurisdictions for claimants. All three jurisdictions employ the concept of ‘costs shifting’ in which the loser will pay some proportion of the winner’s costs.20 In England, it is generally possible to recover a relatively substantial proportion of the costs which are actually spent, but in the Netherlands and Germany the amount of costs which can be recovered is usually small compared to the amount spent because the amount of compensation available for lawyers’ fees is standardised.

A further option for claimants, which has been used in both Germany and the Netherlands in the private damages context, is to assign the claim to a claims management vehicle which will bundle claims from a number of claimants and enforce all the claims together in one claim in the courts. One such vehicle is currently pursuing a damages claim arising out of the Commission’s infringement decision in the hydrogen peroxide cartel in Germany.21 If the claim is successful, the companies which have assigned their claims can expect to receive a portion of the damages recovered.

Collective actions

In all three jurisdictions there are formal procedures which allow for forms of collective action in antitrust cases. To date none of these procedures have proved to be particularly effective.

In England, there are a number of procedures which claimants have sought to rely on with little success. A specific ‘opt-in’ follow on damages procedure which was introduced about ten years ago has been used only once.22 However, reform in this area is very much on the agenda. The UK government has decided to implement reforms to introduce ‘opt-out’ collective actions and collective settlements in both ‘follow-on’ and ‘stand-alone’ antitrust cases.

The collective actions procedures available in Germany, which allow for claims to be brought by trade associations that are active on the same market where the antitrust violation occurred on behalf of their members have also proved ineffective. This is not least because any awards compensating for the anti-competitive gain are paid to the state and not to the trade associations or their members. There are some limited proposals for reform which are expected in 2013, but these are not expected to make the mechanism more effective because, although the number of potential claimants will increase (ie consumer associations will be able to bring claims), the procedure will remain the same (ie awards are only to be to the state). What has been more effective in the German context and has resulted in a collective action procedure of sorts, is the ability for claimants to assign claims to third parties.

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20 This is the case in the general courts, but there is somewhat more discretion in the CAT.
21 High Court Dortmund, Case No. 13 O 23/09 (Kart) - Hydrogen Peroxide.
22 The Consumers’ Association v JJB sports Plc (a case concerning cartel pricing over replicas of football kits worn by leading UK teams, as sold by the defendant).
In the Netherlands, the present procedures for bringing group actions which are available in a competition context do not allow for damages claims to be brought (only claims for injunctions and declaratory relief). However, if judgment is made in the group claimants favour, that judgment is likely to be very persuasive in any future damages claim brought by any individual in that group. Further, as in Germany, the fact that claims can be assigned to third parties has, already allowed for collective damages actions of sorts. There is also a procedure under the Dutch Collective Settlement Act which allows for a settlement to be declared binding by the court, with an 'opt-out' mechanism which has been used successfully in some areas. The procedure has not yet been used in an antitrust case, but there is no reason why it could not be. Moreover, the Dutch Government has put forward a legislative proposal which would see amendments to the Dutch Collective Settlement Act to allow group actions for damages.

Commission initiatives

An important contributor to the ability of claimants to bring competition damages actions across the EU is the extent to which the Commission takes action. The Commission is also focussing on private enforcement, with a legislative proposal expected which should clarify the extent to which claimants can obtain leniency documents held on the Commission’s file for use in a civil action. No collective action mechanism currently exists at an EU level, but the Commission has consulted in this area and may make proposals for reform during 2013.

23 Particularly noteworthy are the Shell case (Court of Amsterdam 29 May 2009, LJN: BI5744) and the Converium case (Court of Amsterdam 12 November 2010, LJN: BO3908).