Private enforcement: a phenomenon on the rise

Private enforcement of competition law infringements is on the increase in Europe. There has been a rising number of cases in which damages claims have been lodged in civil courts either after (follow-on) or in parallel with investigations by European or national competition authorities (stand-alone). Findings of cartel and abuse of dominance/monopolisation are frequently followed by private (class) actions seeking compensation. There are various reasons for this:

– New EU rules help corporates and consumers claim damages if they have suffered harm caused by an infringement of competition law.

– This trend is strengthened by the appearance of specialised firms buying claims from alleged victims and subsequently initiating combined claims against the alleged cartelists.

– In addition, corporate culture in Europe is shifting, and cartel infringements are increasingly considered as unacceptable behaviour. This trend lowers both the commercial and psychological thresholds for lodging a claim against a business partner.

– Finally, consumer interest groups have also voiced interest in alleviating the burden of bringing damages claims against ‘cartelists’, and have been lobbying actively for legislation allowing for some kind of class actions. Belgium has adopted a collective redress act on 28 March 2014.

In light of these developments, the risk of this type of civil litigation being triggered in Europe can no longer be underestimated.

“The whole team is excellent and I appreciate the atmosphere - open, and always looking for opportunities to move forward”

Chambers 2014, Belgium, Competition & European Law
Private damages actions: key legal issues and factors in choosing a forum

Private actions between international companies increasingly take place in multiple jurisdictions at the same time. In such complex cases, an international strategy is required to enhance efficiency and consistency and also to reduce the costs involved. When identifying the courts and tribunals in which actions may be brought, the following factors need to be taken into account:

1. Collective redress
   - Which jurisdictions have a flexible system for joint actions or class actions?

2. Disclosure of evidence
   - What are the rules on access to evidence and disclosure?

3. Fault requirement
   - Does a breach of competition law automatically trigger civil liability?

4. Damages
   - How should damages be calculated?

5. Passing-on defence
   - Which legal system allows indirect purchaser standing and allows the passing-on defence?

6. Legal costs
   - Possibly an important obstacle in jurisdictions where eg the ‘loser pays it all’ principle applies, but not a hurdle at all in other jurisdictions
Why Allen & Overy?

Allen & Overy offers clients an integrated competition and litigation service, with few other firms being able to combine the quality of individuals, specialist knowledge and depth of resources and coverage. Our reputable litigation team is one of the largest contentious teams in Belgium, covering all aspects of dispute resolution, including civil liability rules and procedural aspects, while our competition practice has been involved in some of the most high profile antitrust cases in recent years.

Combining expertise and capabilities, we offer:

- **Advisors who have innovative expertise**: The strength and breadth of our Competition and Litigation practices provide an excellent platform to formulate innovative and cutting edge solutions to complex problems. The close cooperation of these two practices keeps our firm at the forefront of the latest trends.

- **Advisors who deliver forward-thinking insights**: With a pragmatic approach, we assess clients’ exposure to private damages claims. Our lawyers aim to resolve a dispute before it escalates, either by advising on prevention or by pursuing alternative dispute resolution methods. If a dispute is unavoidable, we help our clients seek the best strategy.

- **Advisors who understand multi-jurisdictional dynamics**: Allen & Overy’s Belgian practice is fully integrated in our extensive global network, and advises on multi-jurisdictional matters on a daily basis. This involves coordinating national and multi-jurisdictional litigation strategies and responses, often being called in at the pre-litigation stage. We pride ourselves on our ability to deal with complex cross-border procedures which involve a number of jurisdictions better than any other law firm.
Relevant private enforcement experience in key jurisdictions

BELGIUM

– A major commodity trader on a standalone private damages claim against another market player due to anticompetitive behaviour.

– A major producer of fast moving consumer goods in defending itself against a claim of a distributor.

– A company in a private enforcement action brought by a cooperative wholesale society.

FRANCE

– Direct Energie, an alternative electricity supplier, in several claims before the commercial courts against the French distribution system operator.

– Expedia in several private enforcement cases further to a decision of the competition authority.

– Janssen Cilag in a procedure for damages before a commercial court following an interim decision from the French Competition Authority relating to abuse of dominance.

– Several internet service providers against France Télécom for indemnisation for abuse of dominant position in relation to the unbundling of the local loop and the liberalisation of the telephony market.

– SFR in a joint claim with Canal+ against France Telecom and the Ligue de Football Professionnelle before the Commercial Court for abuse of dominance and anticompetitive agreements in relation to Premier League football matches.

– SFR in a dispute against France Telecom before the Paris Commercial Court to recover excess charges for access to the local loop following an ARCEP decision.

– A telecoms company in a dispute relating to the exclusive rights to the iPhone.

GERMANY

– Biomet v. Heräus – a successful damages action based on excessive pricing case now before German Constitutional Court. The plaintiff won on appeal. A further appeal to German Supreme Court was dismissed. Now the application by the defendant is for review by the constitutional court (pending) – this has been a landmark case in the area of excessive pricing by a market dominant supplier.

– CTS Eventim AG, a provider of ticketing services, in successful defence against a petition for a preliminary injunction in three district courts (LG Bremen, LG Hamburg, LG Munich). The plaintiff TKS, a producer of stage musicals, alleged that our client was dominant and therefore violated its supply obligation when it no longer offered ticketing services. The first court to decide was LG Bremen. It dismissed the case on several grounds. The plaintiffs then withdrew their petitions in the other two district courts.

– DIS as plaintiff in a breach of contract and damages arbitration case against the market leading producer of onboard car navigation systems.

– FC St. Pauli, a German sports club based in the St. Pauli quarter of Hamburg, and St. Pauli Vermarktungs KG in a legal dispute against Upsolut Merchandising GmbH & Co. KG, an international sports rights marketing agency, based on an exclusive marketing and merchandising agreement which FC St. Pauli considered to be illegal and unenforceable (as well as financially damaging). The district court (LG Hamburg) did not accept FC St. Pauli’s argument and the matter went to appeal (OLG Hamburg). The appeal court reversed the decision and held that the exclusivity in the agreement was partly void.

– Tchibo in a follow-on damages action launched by Deutsche Bahn. The case is pending at the Hamburg district court (LG Hamburg). Deutsche Bahn argues it has suffered damage from the “coffee service” cartel in which Tchibo participated.

– WAS in obtaining a preliminary injunction against Daimler Benz AG. Daimler refused to supply chassis to WAS, a supplier of ambulances and related vehicles. The case concerned the abuse of a dominant position and arose in a compliance context as Daimler was subject to a monitoring arrangement under the DOJ settlement in the U.S. FCPA case.
ITALY

– A leading chemical company in a standalone antitrust damages claim for an abuse of economic dependence brought by one of our clients before the Monza Civil Court and in the subsequent appeal before the Court of Appeal. This case involved the appointment of an economic expert in order to evaluate the damages.

– A prominent oil company in a standalone antitrust damages claim for an abuse of economic dependence brought by a distributor before the Court of Rome.

– British American Tobacco in two follow-on antitrust damages claims stemming from the IAA investigation on a price fixing cartel in the Italian cigarettes market, brought before two different Justices of the Peace.

– Royal Dutch Shell on an antitrust damages litigation before the Court of Milan stemming from a EC decision which fined several companies operating in the synthetic rubber industry (including companies belonging to the Shell group) for participating in a cartel involving price fixing and market sharing. In particular, we assisted our client in a proceeding for a “negative declaratory action” started by a co-cartelist (ENI) which claimed not to have been part of the cartel (Italian Torpedo).

– Shell Italia and Shell Italia Aviazione, as defendants, in significant damages claims filed before the Court of Milan and the Court of Rome by the bankruptcy administrator of Alitalia as a follow-on damages action from the Italian jet fuel cartel investigation before the IAA.

– Telsystem, the Italian telecommunications start-up, in its successful multiple litigation before the ordinary courts against Telecom Italia S.p.A. This case is viewed by antitrust scholars and jurisprudence as the leading case for antitrust private damage claims in Italy and as the case through which our client opened up the Italian market for voice telephony services.

LUXEMBOURG

– Alternet, a Luxembourg internet service provider, on a contentious competition matter against the Luxembourg incumbent operator, P&T.

NETHERLANDS

– A client on the follow-on damages relating to the Bitumen cartel.

– Heineken on damages claims of Koninklijke Horeca Nederland following the decision of the European Commission on the Dutch beer case.

SPAIN

– Telefónica (as co-counsel) in its appeal before the GC against the European Commission decision (AT.39839 – Telefónica/Portugal Telecom) which levied a EUR66.8m fine on Telefónica for an alleged non-compete covenant with Portugal Telecom.

– Advising a company sanctioned by the Spanish Competition Authority in connection with a potential follow-up damages claim to be lodged by one of its clients.

UK

– A major corporation as claimant in its English High Court follow-on action against three manufacturers involved in the car glass cartel.

– A major commodity trader in a standalone private damages claim against another market player on the basis of the latter’s anticompetitive behaviour.

– A major processor of credit card transactions on its potential liability as a shareholder in a company sued for damages relating to the EC’s investigation of interchange fees.

– Corporations involved in the zips and DRAM cartels about threatened follow-on damages actions in England.

– Hitachi in relation to three very substantial damages actions brought before the English High Court relating to alleged cartel conduct concerning sales of LCD & CRT and following findings by the EC. This work has also involved making representations to a Special Master of the California Court in a closed hearing relating to the crucial policy considerations of which documents collected by the competition authorities during a cartel investigation should be disclosed to a third party claimant.
“Focused and solution-oriented. The team advised on more than the technical aspects — the initial strategic advice was excellent”

Chambers 2014, Belgium, Dispute Resolution
GLOBAL PRESENCE

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