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Le financement par les tiers du contentieux privé

THE CASE FOR BUNDLING ANTITRUST DAMAGE CLAIMS BY ASSIGNMENT

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1. The enforcement of damage claims resulting from infringements of EU competition law is a hotly debated topic, in particular since the European Commission published a proposal for a Directive on rules governing damage actions (the “Directive”)⁶⁹ and a Recommendation on common principles for collective redress mechanisms (the “Recommendation”).⁷⁰ More than ten years after the right to full compensation was established by the Court of Justice of the European Union (the “Court”),⁷¹ the EU legislator has taken action to provide a framework for the application of the fundamental right to compensation throughout the Union. Against this background, this article explores the practical difficulties which corporate victims still face when deciding to pursue antitrust damage claims and proposes as one effective solution the transfer of claims to a specialised service provider.

I. Practical difficulties to secure full compensation

2. The enforcement of antitrust damage claims is complex and requires an efficient and accurate combination of specific economic, legal and IT expertise. Despite the efforts of the EU legislator, end consumers, SMEs and even large corporate victims, who have suffered financial losses as a consequence of illegal cartel activities, continue to face many practical difficulties. The main obstacle for successful damage actions remains the challenge to substantiate individual effects by market-wide competition law infringements.⁷² As is evident

from the recently published Communication on quantifying harm in damage actions,⁷³ such economic quantification typically requires detailed data covering the period before, during and after the cartel infringement. Other practical obstacles include:

- drawn-out litigation due to the inherent legal and economic complexity;
- a potential strain on commercial relationships;
- information asymmetries and lack of evidence due to the secret nature of cartels;⁷⁴
- high costs for lawyers and economic experts;
- depending on the jurisdiction, potentially high court fees and adverse cost risks. Given that cartels always have numerous participants, there is a structural asymmetry in the cost risks of claimants and defendants.⁷⁵

II. Bundling of claims by specialised entities as effective solution

3. These disincentives inherent in the private enforcement of damage claims contributed to the emergence of specialised service providers offering options to corporate cartel victims to outsource effectively their litigation and adjust the level of risk they wish to bear. A main element of these solutions typically consists in the transfer and sale of damage claims by a multitude of companies harmed by one and the same

* The authors would like to thank Mr Vasil Savov for his assistance in preparing this article.

⁶⁹ The text of the Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union was adopted by the European Parliament on 17 April 2014 and was previously agreed between the European Parliament and the Council during the ordinary legislative procedure. The Directive has been sent to the EU Council of Ministers for final approval. The text can be accessed at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+AMD+A7-2014-0089+002-002+DOC+PDF+V0/EN>.

⁷⁰ The Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law can be accessed at http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1398263020823&uri=OJ:JOL_2013_201_R_NS0013.

⁷¹ In its judgments C-453/99, *Courage and Crehan*, and joined cases C-295/04 to C-298/04, *Manfredi and others*, the Court explicitly recognized the right of cartel victims for effective compensation. See also, more recently, C-536/11, *Donau Chemie*, §20-27.

⁷² The White Paper on Damages Actions for Breach of the EC antitrust rules (COM(2008) 165, 2.4.2008) itself admitted that “the success of antitrust damages actions and full compensation of victims rests not only upon the existence of an effective legal framework for compensation, but also on overcoming complex issues related to quantification of harm suffered by those victims.”

⁷³ Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, published on 11 June 2013, accessible at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:167:0019:0021:EN:PDF>.

⁷⁴ Against the background of joint and several liability of each cartel member for the entire damage caused, there is a requirement for striking a balance between protecting the attractiveness of leniency mechanisms and the disclosure information on cartels in order to allow potential victims to pursue their rights. In Art. 11(3), the Directive does this by limiting the joint and several liability of successful immunity applicants to damage claims relating to its direct and indirect purchasers or providers, see also Smith/Grigoriadou: Leniency, Pfeleiderer and the impossibility of balance, in *GCR* Vol. 16, Issue 1, pp. 21-23.

⁷⁵ Arguably, this structural asymmetry is contrary to the principle of access to justice and equality of arms as guaranteed by Art. 47(2) of the Charter of Fundamental Rights of the European Union. Echoing the principle of effectiveness, the Commission in its White Paper therefore rightly pointed out under §2.8 that court fees and cost allocation rules should also be applied in a manner as to not constitute a disincentive for antitrust damage claims, in particular if the claimants’ financial situation is significantly weaker than that of the defendant.

cartel to an entity which effectively bundles multiple claims.⁷⁶ This bundling at material law level helps to overcome existing economic disincentives and information asymmetries, and enables the realization of the true value of potentially valuable damage claims.

4. In practice, the purchasing of a critical mass of antitrust claims required to merit an enforcement action leads to the creation of synergies which contribute significantly to the optimization of the economic analysis and the maximization of the chances of successful enforcement. Ideally, the service provider combines a broad range of economic, legal and technical know-how, combined with measure-made IT solutions which facilitate the gathering and analysis of relevant market data.⁷⁷ Indeed, combined data gathered from a large number of cartel victims allows for a comprehensive technical assessment of the cartel effects on the market as a whole.⁷⁸ In respect of potential passing-on arguments,⁷⁹ this is even more the case where the data stems from companies active at different levels of the supply chain.

5. Under these conditions, entities with specialised know-how hold strong positions in out-of-court negotiations or, in case of failure to reach settlements at fair conditions, are able to present a clear picture to the competent courts on the cartel effects in one single individual action for damages. In that regard, commentators emphasized that “*the information gathered and systematized by the market can be of help not only to the operators, but also the judge.*”⁸⁰ By contrast, a mere joinder on the (subsequent) procedural law level of several closely connected claims by several claimants would not reach similar results. The sale of antitrust damage claims to an entity whose business activity is focused precisely on the enforcement of such claims also perfectly fits with the business reality in particular of corporate cartel victims. It results in a stress-free outsourcing of potentially very burdensome litigation, a clearing of balance-sheets, while ensuring an effective pay-out in case of success.

III. Recognition across the EU

6. The model of bundling antitrust damage claims by assignment (often referred to as the “CDC model”) has been recognised across the EU. According to a study prepared for the European Parliament in 2012, the “*claims transfer to a third party may help to overcome the problem of lack of participation by injured parties.*”⁸¹ Courts in the Netherlands,⁸² Germany,⁸³ Austria,⁸⁴ and Finland⁸⁵ have specifically confirmed the standing of entities in respect of damage claims previously transferred by way of assignment. The Impact Study on the European Commission’s White Paper explicitly stated that such collective enforcement of bundled claims is possible in most EU jurisdictions.⁸⁶ In line with the national case law, the Directive has now explicitly confirmed the standing of entities purchasing damage claims in Art. 4(4): “*“action for damages’ means an action under national law by which a claim for damages is brought before a national court by an alleged injured party, by someone acting on behalf of one or more alleged injured parties, where Union or national law provides for this possibility, or by the natural or legal person that succeeded in his rights including the person that acquired his claim.”* A recent thesis on private enforcement, which was awarded the Thesis Award by *Concurrences*, highlighted another important aspect, namely that such specialised entities strengthen the overall effectiveness of competition law.⁸⁷

7. Although the overall effects of a “*market of liability claims*”⁸⁸ on competition have not been explored yet, it is safe to assume that entities such as CDC have been successful in and out of court where single cartel victims’ or collective redress actions would either not have been initiated or—in a worse case—would have failed. The assignment model thus contributes to the achievement of the main objective behind the EU case law and the EU legislator’s will in relation to the right of cartel victims to obtain full compensation: the effective application of the EU competition rules.

76 CDC Cartel Damage Claims (“CDC”) is one of these service providers focused on the private enforcement of antitrust damage claims throughout Europe. In addition to five actions initiated in its own name, that are currently pending in front of the courts in different Member States, CDC acts as a “back office” consultant to companies and their lawyers, where independent and comprehensive solutions with cartel members are sought, namely in cases of on-going business relationships; for details, see <http://www.carteldamageclaims.com/>. CDC has successfully concluded a multitude of complex out-of-court settlements totaling tens of millions of euros. While ensuring a fair compensation for the cartel victims, the settlements also result in a significant reduction of the risk exposure of the cartel member against the background of its joint and several liability. For example, an amicable settlement was recently reached between CDC and Kemira OYJ as regards the action for damages lodged before the District Court of Helsinki in relation to Kemira’s participation in the European hydrogen peroxide cartel, see press release at http://www.kemira.com/en/newsroom/whats-new/Pages/1786726_20140519073136.aspx.

77 For example, CDC has developed comprehensive databases for several large cartel cases and possesses economic and IT know-how regarding this key aspect of claims enforcement.

78 Also a single cartel victim is required to explain how the market was affected in order to substantiate its claim. In practice, this may constitute a significant and—in many cases—insurmountable burden.

79 See Articles 12 to 16 of the Directive.

80 A. Pinna, Financing Civil Litigation: The Case for the Assignment and Securitization of Liability Claims, in *New Trends in Financing Civil Litigation in Europe*, M. Tuil and L. Visscher (eds), Edward Elgar, 2010, p. 126.

81 Study prepared for the European Parliament (ECON), p. 37.

82 Judgment of the Amsterdam Court of Appeal of 7 January 2014, Ref. 200.122.098/01 – *EWD v. KLM et al.*, recital 2.10.

83 Judgment of the Federal Supreme Court of 28 June 2011, Ref. KZR 75/10 – *ORWI*, recital 2.

84 Judgment of the Supreme Court of 14 February 2012, Ref. 5 Ob 35/11p.

85 Interlocutory judgement 6492 of the District Court Helsinki of 4 July 2013, Ref. 11/16750.

86 Impact Study on making antitrust damages actions more effective in the EU, welfare impact and potential scenarios, jointly prepared by the Centre for European Policy Studies (CEPS), the Erasmus University of Rotterdam (EUR) and Luiss Guido Carlo (LUISS) for the European Commission in 2008, p. 269.

87 R. Amaro, *Le contentieux privé des pratiques anticoncurrentielles*, Bruylant, 2014 (2013 *Concurrences* Thesis First Award). Original text in French “*Partant, la probabilité d’un recours civil conduit par un organisme coutumier de ce type de litiges sera nécessairement accentuée avec toutes les implications positives que l’on peut en attendre pour l’effectivité des règles de concurrence. Face à un professionnel compétent, titulaire d’un nombre significatif de demandes, le déséquilibre structurel inhérent aux relations de consommation ou de dépendance économique sera ainsi conjuré.*”

88 A. Pinna, p. 126.

IV. Assignment does not fall under the Recommendation on collective redress mechanisms

8. The bundling of damage claims by way of assignment is not a group or representative action falling under the Commission's Recommendation on collective redress mechanisms.⁸⁹ The entity acquiring the damage claims is, for reasons of legal succession, acting in its own right. To put it differently, the buyer is not acting for or on behalf of, but instead of the original claim holder⁹⁰ and is therefore the one and the only claimant seeking compensation for a multitude of acquired claims in its own name and on its own risk. The transfer of multiple claims is an independent legal alternative to group actions or representative collective actions and can best be compared with "opt-in" collective mechanisms. However, while the legal standing of an entity representing collective interests is framed by the relevant instruments for collective redress, the legal standing of an entity which became owner of the claims and now acts alone merely depends on the validity of the assignment agreement.⁹¹

V. Legal framework for the bundling of claims by assignment

9. It is general commercial practice that claims may be transferred for consideration⁹² to a third party. As set out above, the sale of antitrust damage claims to a specialised entity constitutes an attractive alternative for victims of illegal cartels to obtain compensation. Such *modus operandi* is typically formalized by a sale and transfer agreement between the cartel victim (the seller) and the specialised entity (the buyer). The provisions governing such sales and transfer agreement are subject to the general civil law of the applicable legal order. Terms and conditions are negotiated at arm's length between the seller and the buyer of the claim. In Germany, entities purchasing damage claims may be subject to the provisions of the German Legal Services

⁸⁹ The Recommendation explicitly emphasizes the difference between collective redress and individual actions. In recital 8 of the Recommendation, it is stated that "Individual actions (...) are the usual tools (...) to claim for compensation." Recital 9 of the Recommendation further substantiates that "[i]n addition to individual redress, different types of collective redress mechanisms have been introduced by all Member States."

⁹⁰ While the Recommendation focuses on mere procedural means where the legal ownership of the right to damages itself remains unaffected, in articles 4(4) and 7(3) of the Directive, the legislator itself deemed appropriate to specify the situation of a plaintiff who has acquired a claim from the original victim (e.g., by assignment). Indeed, no provision whatsoever precludes cartel victims or the person that acquired their claims from choosing the most appropriate and effective legal way to obtain compensation for harm resulting from violations of EU or national competition law.

⁹¹ See the comments of the German Federal Ministry of Economics and Technology, the Federal Ministry of Justice, the Federal Ministry of Food, Agriculture and Consumer Protection and the Bundeskartellamt on the EU Commission's White Paper on Damages actions for breach of the EC antitrust rules, p. 6 (available at: http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/bund_en.pdf), where it is stated that "a model to be taken into consideration and already practiced under the established legal framework is the transfer of individual claims for damages to a third party whose business is geared towards enforcing these claims."

⁹² The rights granted by the EU competition rules to harmed individuals become part of the legal assets of these individuals: see the Commission's communication on quantification of harm caused by infringements of the EU antitrust rules (n. 5 above), at recital 4, and more general, the judgment *Pressos compania naviera s.a. and others v. Belgium* of 20/11/1995 of the European Court of Human Rights. It is beyond any doubt that anyone can freely decide what to do with his assets.

Act (*Rechtsdienstleistungsgesetz*), which sets out detailed requirements that any service provider has to fulfil in relation to the personal ability and reliability, the financial situation and the theoretical and practical know-how.⁹³ Similar acts do, however, not exist in other EU Member States. In a recent judgment, the first instance court of Düsseldorf furthermore required that entities purchasing damage claims had to have the financial means to pay the adverse legal costs at the time of entering into the assignments.⁹⁴ This underlines the importance of being able to secure solid funding, also in relation to the potential adverse cost risk.

VI. The funding of bundled antitrust litigation

10. From a third-party litigation funder's perspective, antitrust damage claims, in particular if bundled by a specialised entity, are potentially valuable assets with a possibly attractive expected return on investment. This may especially be the case for "follow-on" actions where an infringement has been found by a competent competition authority. Statutory interest, accruing from the date the damage was caused,⁹⁵ boosts the value of the damage claim. This enables entities bundling antitrust damage claims to get, if required, access to funding and ensure that cases are solidly financed and can be pursued through to the end, taking into account the legal and financial requirements of such complex litigation.

11. The landscape of litigation funding has evolved to a great extent over the last five years. While it used to be difficult to find funders willing to finance large scale antitrust litigation, a variety of models are nowadays available to fund antitrust litigation in Europe. In England and Wales, there is a self-regulated Association of Litigation Funders,⁹⁶ whose members control in excess of \$1 billion, all available to finance litigation. The English law funding model is typically for the claimant to retain ownership and control of the claim. There is also a specialist insurance industry available to provide cover to claimants in the event the litigation is lost. Lastly, and by no means least, specialist English lawyers will also provide financing for antitrust claims by bringing the claim on a wholly contingent or conditional basis.

12. In continental Europe, the situation is slightly different. In general, there are fewer sources of third party capital available to finance these civil law claims. Depending on the jurisdiction, lawyers may be precluded from undertaking this work on a no-risk no-fee basis. Unlike England and Wales,

⁹³ The provisions of the German Legal Services Act are available (in German) at <http://www.gesetze-im-internet.de/rdg>.

⁹⁴ Judgment of the Regional Court of Düsseldorf of 17 December 2013, Ref 37 O 200/09 (Kart) U. CDC has appealed this judgment to the Higher Regional Court for a number of legal and factual reasons, *inter alia* because the Regional Court did not take into account the offer to provide security for cost regarding the potential adverse cost risk of the defendants.

⁹⁵ See recital 12 of the Directive. For long running cartels, interest accounts for a significant part of the overall claim and continues to safeguard the claim against devaluation through time.

⁹⁶ The website of the association can be accessed at <http://associationoflitigationfunders.com>.

the adverse cost risk is often fixed by tariff so there is more certainty regarding the maximum adverse cost risk. But from the view of a third-party funder, the biggest difference is that in continental European jurisdictions, the claims can be assigned to an entity which takes full control of the claim and becomes the claimant of record. This opens interesting opportunities for cooperation as the bundling by assignment ensures that the size of the claim justifies the risk of bringing an action.

13. When it comes to pricing, from the perspective of the litigation funder, things are more homogenous across the EU. Regarding the cost risk, a good rule of thumb is that the expected cost risk of the claim should not exceed 10% of the “realistic” claim value. Thus, if the claim was for €20m and the expected cost risk €2m, this would be a sound basis for a funder to provide financing. In this example, if the claim is successful, and the claimant receives €20m plus €2m of costs, the funder might receive €2m return of costs plus 20% of the €20m i.e. €4m. In summary, the funder puts in €2m and receives €6m back. This would be a typical return target for a third-party funder of antitrust litigation: to make three times its investment when a claim is successful. Newcomers to litigation funding may consider this “3x” return to be high but it equates to an IRR of approximately 20% over a 5-year period, once the funder allows for other losing cases in its portfolio and its own operating costs. In this correct light, large corporate claimants understand litigation funding to be no more expensive than their own internal cost of capital and it becomes a rational choice to use an external specialist for a non-core project like antitrust litigation.

14. A main feature of the approach outlined in this article is that the careful *ex-ante* case selection and management, often combined with an in-depth legal and economic due-diligence, ensures that only meritorious claims are pursued. Every entity willing to invest significant amounts of capital and resources has an incentive to limit the risks that flow from unmeritorious claims, in particular the cost risks implied by the “loser pays rule” applicable throughout the EU. The described approach of bundling claims by assignment, possibly combined with third-party litigation funding, ensures access to justice in relation to justified claims which otherwise would be foregone, thus avoiding the perpetuation of the unjust enrichment by the cartelists. In view of Art. 47 of the Charter of Fundamental Rights of the EU and the effectiveness principle firmly established by the CJEU in the context of private enforcement,⁹⁷ it seems justified that the funding costs for justified damage actions should be awarded as reimbursable costs in case of prevailing in court, as such costs were regularly required in order to bring an appropriate action. ■

⁹⁷ See the judgments in Case C-453/99 – *Courage and Crehan*, §29; Cases C-295/04 to C-298/04 – *Manfredi and others*, §62; Case C-536/11 – *Donau Chemie*, §27.

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