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1.4.3 CARTEL DAMAGES ACTIONS IN GERMANY AND ENGLAND: THE CASE LAW EXPERIENCE TO DATE

I. Introduction

In the United States, private enforcement constitutes more than 90% of all antitrust litigation and has long been recognized as an important addition to the enforcement efforts of the US antitrust agencies. Famously, the Clayton Act permits plaintiffs in private actions to obtain treble damages if they have been harmed by a cartel. Discovery rights are very well developed, and class actions are frequent. Lawyers often work on a contingency basis, which reduces the upfront costs to be paid by potential plaintiffs and, with the level of damages that can be obtained, creates an incentive for lawyers to take on such cases.

In Europe, private damage claims for violations of national or EU competition rules are still rare. However, the EU Commission believes there should be more taking the view that they discourage anti-competitive behavior and can contribute significantly to the maintenance of effective competition in the Community. In 2003, it therefore launched a process of identifying the main obstacles to a more efficient system of damages claims and has set out a variety of options for removing those obstacles in relation to both for follow-on actions (*i.e.*, cases in which civil action is brought after a competition authority has found an infringement) and stand-alone actions.[3]

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3 See Waelbroeck, Slater and Even-Shoshan, Study on the conditions of claims for damages in cases of infringement of EC competition rules, August 31, 2004 (the "Ashurst Study"); Green Paper Damages actions for breach of the EC antitrust rules (presented by the Commission), December 19, 2005, COM(2005) 672 final; Commission Staff Working Paper Damages actions for breach of the EC

Issues identified by the Commission as potentially detrimental to private actions include the fault requirement in some states, indirect purchasers' standing, the ways in which damages are calculated, the passing-on defense, access to evidence (*i.e.* discovery), and the cost of actions. In response to the Commission's consultations, numerous comments were received[4] and the Commission has indicated that it is preparing a White Paper that will take account of these.

While the EU process of reviewing and (hopefully) removing obstacles is still ongoing, private damage actions have started developing in a number of Member States, prominent among which are Germany and the United Kingdom (UK). The German example is an interesting one, because German law was modified recently with the specific aim of facilitating competition law damage actions and because Germany is presently used as a "test jurisdiction" by a company that has purchased a large number of damage claims from small and medium sized companies that claim to have suffered damages in their position of customers for a product that was sold at artificially high prices because of a cartel. The UK is a historically popular venue for litigation, and its legal system offers a number of potential advantages to competition law litigants, including wide discovery rules (for Europe), no fault requirement, relatively swift decision making and, for some cases, the chance to litigate in a specialized competition court (the Competition Appeal Tribunal or CAT). In 2003, Enterprise Act 2002 (EA02) introduced rules to facilitate follow-on actions in the UK, and a form of opt-in class action for consumer claims. The UK Government has signaled an intention to go even further and the Office of Fair Trading (OFT) recently completed a lengthy consultation process by recommending a number of changes to UK law, including the possible introduction of a form of opt-out class action for consumers and businesses.[5] A Government consultation on the recommendations is expected very soon.

Below we explore the current situations in Germany and in the UK and attempt to draw some conclusions. To that end we will describe the legal basis for claims in each jurisdiction, highlighting certain issues identified by the Commission as key potential obstacles to damages actions and then survey recent case law developments.

Antitrust rules, December 19, 2005, SEC(2005) 1732.

4 http://ec.europa.eu/comm/competition/antitrust/actionsdamages/green_paper_comments.html.

5 Private actions in competition law: effective redress for consumers and businesses, OFT Recommendations, November 2007 (OFT 916resp) (the "OFT Recommendation").

II. The German and UK Experience

A. Germany

The law

Introduction

The German Federal Cartel Office (FCO) has long considered civil damages actions by private parties as an important complement to its own enforcement activities. It reports that between 2002 and 2005 it registered more than 900 judgments in civil cases involving questions of competition law.[6] In most of these cases, however, the goal was to obtain an injunction against the market behavior of dominant companies or a statement that certain (often vertical) agreements were unlawful and void.[7] Private damage actions against companies found to have been involved in cartels are a relatively recent phenomenon. Until 2005, the hurdles to obtaining damages for competition law infringements were set very high. So, for instance, some courts required the plaintiffs to demonstrate that the unlawful behavior targeted them specifically.[8]

As a result, and probably further motivated by the *Courage* judgment of the European Court of Justice (ECJ),[9] an amendment of the German Act against Restraints of Competition (ARC) facilitating private antitrust enforcement was considered necessary (7th Amendment to the ARC).

Legal basis and fault requirements

Under the new Section 33(3) ARC, whoever intentionally or negligently violates a provision of the ARC, Articles 81 or 82 of the EC Treaty or a decision taken by the cartel authority is liable for the damages arising therefrom.

If one of the conditions for obtaining damages is an intentional or negligent violation of the law, it is quite unlikely that in today's world a defendant would be successful in arguing that his participation in a cartel was not at least negligent. The award of damages also requires causation, *i.e.,* that the claimant has been harmed as a result of the illegal action committed by the defendant. The competition law infringement does not have to be the only cause of the damage incurred but it must at least have been essential for some of the damages.

6 Bundeskartellamt, Private Kartellrechtsdurchsetzung, Stand, Probleme, Perspektiven, Diskussionspapier für die Sitzung des Arbeitskreises Kartellrecht am 26. September 2005.

7 See e.g., Wissenbach, Schadensersatzklagen gegen Kartellmitglieder, Beiträge zum Transnationalen Wirtschaftsrecht, August 2006, p. 12.

8 See, *e.g.*, Landgericht Mainz, NRW-RR 2004, 478.

9 Case C-453/99 *Courage v Crehan* [2001] ECR I 6297 of 20 June 2001. In *Courage* the ECJ stated that the practical effect of the prohibition laid down in Article 85(1) (now Article 81(1) EC) would be put at risk if it were not open to any individual to claim damages for losses caused to him by a contract or conduct liable to restrict or distort competition.

Forum

Competence for any civil litigation based on infringements of competition law resides with the regional courts (*Landgerichte*).[10] Within these, panels for commercial matters (*Kammern für Handelssachen*) are competent to hear such cases. In most federal states, jurisdiction for claims based on competition law infringement has been concentrated in a small number of regional courts.[11] Similarly, in most federal states there is only one court of appeal (*Oberlandesgericht*) with a panel for cartel matters (*Kartellsenat*).[12]

Who can sue (including indirect purchaser issues)

In principle, claims can be brought by any "affected person," which according to Section 33(1) ARC includes "competitors or other market participants impaired by the infringement." In the beginning, there was some debate with respect to the question whether parties that had been indirectly affected by the illegal behavior also count as affected persons within the meaning of the law. The wording of the ARC does not exclude this and it would appear that only this interpretation is consistent with the judgments in *Courage* and in *Manfredi* which indicate that in principle "*everybody*" harmed by an infringement of Article 81 EC should be entitled to damage payments.[13] At the same time, there were voices in the literature arguing that the admission of indirectly affected persons would lead to a counterproductive multiplication of actions and would not fit into a system where the passing-on defense is (arguably) excluded.[14] The German Supreme Court has so far only confirmed that both competitors and market participants on the opposite side of the market, such as customers and suppliers, may be entitled to damages but that consumer associations are not.[15] This has not fully settled the debate in the literature, however.[16]

Class actions

While, as will be explained below in connection with the CDC case, German law appears to permit the bundling of multiple damage claims against a company having violated competition law, German law does not foresee US-style collective or class actions.

[10] Section 87 ARC.

[11] See Section 89 ARC and state implementing regulations.

[12] See Section 91 and 92 ARC and state implementing regulations.

[13] Case C-453/99 *Courage v Crehan*, [2001] ECR I 6314, 6323; Case C-295/04 *Vincenzo Manfredi v Lloyd Adriatico* ECR [2006] I 6619, at para 61.

[14] See *e.g.*, Bechtold in GBW, Kartellgesetz - Gesetz gegen Wettbewerbsbeschränkungen, 4th edition, Section 33, para. 10.

[15] BGH NJW 2006, 2627; WuW/E DE-R 1779 (781). Today, at least the hotly debated question whether competitors that had been part of a cartel can sue their co-conspirators is settled. For a summary of the debate see Emmerich in Immenga/Mestmäcker, Wettbewerbsrecht GWB, 4th edition; Section 33, para. 18.

[16] See *e.g.*, ,Alexander, Die zivilrechtlichen Ansprüche im Kartellrecht nach der 7GWB Novelle – Ein Überblick, JuS 2007, Vol 2, p. 109.

Who can be sued

The right *addressee* of the claim is whoever committed the infringement. In the case of a cartel, all co-conspirators are jointly and severally liable.

Calculating damages and the passing-on defense

The calculation of the amount of damages is based on the regular rules governing civil damage claims in the German Civil Code (Sections 249 et seq. BGB). In principle, this means that the damage is calculated by comparing the plaintiff's financial position in a situation where the competition law infringement occurred with the hypothetical financial position had it not occurred (*Differenzhypothese*). In practical terms, cartels will often lead to either a reduction of margins (if the defendant sells his products above the competitive price) or reduced sales (*e.g.*, if the plaintiff increases its own prices following the defendant's price increases). Once it is clear that the plaintiff has suffered damages it may be appropriate to take into account benefits that may also have resulted from the anticompetitive behavior (*Vorteilsausgleich*, "adjustment for benefits received").

A question widely discussed in the literature has been what this means for the passing-on defense under German law. Section 33(3) ARC reads: "If a good or service is purchased at an excessive price, a damage shall not be excluded on account of the resale of the good or service." This has been interpreted by some authors as an exclusion of the passing-on defense.[17] In reality, the situation is probably more complex and needs to be understood in the light of pre-7th Amendment jurisprudence. What happened before 2005 was that some of the courts considered that if there had been some form of passing-on there was no damages and thus no possible claim.[18] Section 33(3) ARC clarifies that this is not the correct approach – someone who has paid a price above what market price would have been in the absence of a cartel has incurred damages. Only in a second step it is appropriate to subtract whatever benefit may have arisen. Importantly, this construction means that the burden of proof for the amount of deductions is on the defendant rather than on the plaintiff.

When it comes to assessing the amount of the damage, §33(3)(3) ARC specifies that the assessment of the size of the damage pursuant to Section 287 of the Code of Civil Procedure (*Zivilprozessordnung*) may take into account, in particular, the "proportion of the profit which the undertaking has derived from the infringement." Once the amount of the effective loss incurred by the plaintiff has been determined,

[17] See *e.g.*, Bechtold in GBW, Kartellgesetz - Gesetz gegen Wettbewerbsbeschränkungen, 4th edition, Section 33, para. 26.

[18] OLG Karlsruhe, WuW/E DE-R p. 1229 (1231) – Vitaminpreise; LG Mannheim, GRUR 2004 p. 182 (184). This approach seems quite short-sighted: after all even the customer of a cartelized product who passes on every cent paid too much to cartel members may still be worse off financially because the higher price of his own product may lead to a loss in sales volume. For a summary of the debate see Emmerich in Immenga/Mestmäcker, Wettbewerbsrecht GWB, 4th edition; Section 33, para. 52 et seq.

the party in breach of competition law is obliged to pay interest (§33(3)(4) ARC).[19] Interests start to be calculated from the date on which the loss occurred.[20] German law does not provide for the attribution of punitive or exemplary damages.

Burden of proof

Generally, the plaintiff needs to provide evidence that the defendant was a member of a cartel, that he incurred identifiable damages and that such damages were caused by the cartel. However, under the new law bringing a claim in connection with cartel damages is facilitated in the case of follow-on actions, *i.e.*, actions brought after a cartel decision by the EU Commission or a national authority. Section 33(4) ARC states that German courts are bound by a finding that an infringement has occurred to the extent that such a finding was made in a final decision by the cartel authority, the Commission of the European Community, or the competition authority – or court acting as such – in another Member State of the European Community. The same applies to findings in final judgments resulting from appeals against such decisions. Although the binding effect of prior decisions is limited to the finding of a competition law infringement (and thus does not help the plaintiff with respect to other elements of his action, such as those relating to causation or calculation of damages), the provision is still very significant for private plaintiffs who will generally find an infringement very difficult to prove.[21]

The standard of proof for plaintiffs has been lowered quite considerably also with respect to the amount of loss incurred by them. The court responsible for the case can estimate whether and if so how much loss the claimant has suffered so that the claimant merely needs to provide a reliable factual basis for such an estimate. As mentioned above, the court can base its estimate concerning the amount of loss incurred on the amount of profits gained by the defendants as a result of the cartel.

Discovery

While there are no discovery procedures as we know them from Anglo-Saxon jurisdictions, German law facilitates the access to information required to found a cartel damages claim. Thus, plaintiffs may access the records of the FCO in accordance with Section 406(e) of the German Code of Criminal Procedure.

Limitation issues

There is no special statute of limitation for cartel damages claims. As in the case of other damages claims, the period is three years and starts running at the point where the plaintiff knew or could have known without acting negligently about the circumstances underlying the claim. This will regularly be the case at the point

[19] See also Section 33(5) ARC read in conjunction with Sections 288 and 289 BGB.

[20] The obligation to pay interest is particularly important, of course, if the party harmed by a cartel waits for the competition authority to arrive at a decision before filing its own claim.

[21] For a detailed discussion see Emmerich in Immenga/Mestmäcker, Wettbewerbsrecht GWB, 4th edition; Section 33, para. 71 et seq.

where it becomes known that a competition authority has started an investigation and that the plaintiff is one of the companies that might have been damaged by the investigated infringement. The ARC determines that the statute of limitation for civil claims is suspended as soon as the FCO institutes proceedings based on an infringement of the ARC or of Articles 81 or 82 EC. The same applies if the EU Commission or the competition authority of another Member State initiated proceedings based on Articles 81 or 82 EC. The suspension expires six months after termination of those proceedings.[22]

Costs

One element of German law that may prevent particularly small and medium enterprises from bringing claims, are the cost rules. Plaintiffs have to pay in advance to cover the costs of the proceedings and ultimately the losing party has to bear the full costs (including the fees of defense counsel).

Case law developments

Experience before the 7th Amendment to the ARC

The first cases in which German courts closely examined complaints by companies claiming to have incurred losses as a result of excessive prices agreed upon in a cartel, were those filed in connection with the vitamin cartels.[23] The background of these cases is the following: Between 1989 and 1999, several companies selling Vitamins A, E, B1, B5 as well as a number of other products entered into agreements in violation of Article 81 EC. Under these agreements, quota and/or prices were set for certain products, and price increases were agreed upon. Following a worldwide investigation triggered by the information provided by a whistleblower, the EU Commission and the US authorities (among others) imposed fines in amounts unheard of until that time. After the EU decision, a number of direct customers filed damages claims in German courts.

One of the courts seized, the regional court in Mannheim,[24] rejected the complaint of a direct customer of the vitamin cartel. The court considered that the cartel had the purpose of raising prices for vitamins to all customers worldwide to supra-competitive levels and thus was not directed specifically against the plaintiff (which was considered to be a requirement under German law until the entry into force of the 7th Amendment to the ARC). In addition, the court indicated that it was not convinced that the plaintiff had incurred any damage as its margins had not changed before and during the cartel. The appeal launched by the plaintiff was rejected on procedural grounds. Nevertheless, the Karlsruhe court of appeal,[25] in

[22] In this connection it is not yet clear, however, what happens if several authorities initiate proceedings and particularly whether the suspension ends 6 months after the first or the last authority reaches a decision.

[23] See Commission decision of November 21, 2001, Case COMP/E-1/37.512 – *Vitamins*.

[24] See LG Mannheim, GRUR 2004, 182 et seq.

[25] See OLG Karlsruhe, GRUR 2004, 883 et seq.

an *obiter dictum*, confirmed the Mannheim court's finding that the plaintiff had not incurred any damages because it had likely been able to pass on the higher price to its own customers.

An action brought by another plaintiff in the Mainz regional court, was again rejected on grounds that the cartel was not directed specifically against the plaintiff. The Mainz court emphasized that the requirement of specific damage was not contrary to the ECJ's *Courage* judgment.

The only action in connection with the vitamin cartel that led to an award of damages was the one brought by Storck, a German producer of sweets before the regional court of Dortmund. The Dortmund court referred to the proposed 7th Amendment of the ARC (although it had not yet entered into force) and considered that this was sufficient for the plaintiff to have been affected by the cartel in order to be able to sue. With respect to damages, the court explained that it had to be calculated comparing a hypothetical market price (without the cartel) with the price paid in practice in presence of the cartel. Any potential reduction of damages as a result of Storck's passing on of the vitamin prices was to be taken into account only in a second step – and had to be demonstrated and proven by the defendant. The judgment of the regional court was confirmed by the Düsseldorf Court of Appeal on appeal by Swiss pharmaceutical company Roche whereby the court also explicitly explained why it disagreed with the Karlsruhe and Mannheim judgments. While, as a result of the discrepancy in views between the different courts, the case could have gone to the German Supreme Court, Roche finally settled out of court. There have been reports that at least five additional companies have obtained out-of-court settlements in connection with the vitamin cartel.

Experience after the 7th Amendment to the ARC

An interesting case, the outcome of which is likely to have a significant impact on the future of private actions in Germany, is one brought in connection with a German cement cartel. It is not yet certain, however, whether the case will be decided on the law as it is today or whether pre-7th Amendment law still applies.

In 2003, the FCO had imposed fines totaling EUR 660 million on numerous companies active in the cement industry because it considered that they had fixed cement prices in Germany between 1993 and 2002. Some of the defendants have appealed this decision but so far the appeals have not yet been decided on. In an action brought before the Regional Court of Düsseldorf, the plaintiff now claims that the cement cartel, in which the defendants participated, led to an elimination of all competition in the German cement market and raised prices for cement to a level that was significantly above market price. As a result, cement customers suffered significant damages.

What distinguishes it from previous cases, is that the claim was brought not by individual customers but by a Belgian company (CDC – Cartel Damage Claims) to whom the customers' claims had been assigned. CDC was founded to enforce the claims of commercial customers arising from violations of national and EU competition laws against third parties that have violated these laws. In practice, CDC purchases the claims of customers at a certain minimum price. It then bundles the different claims and, having assessed the economic and legal chances of success, brings them in its own name against the cartel participants. Generally, the purchase price of the claims contains a variable element, according to which the customers obtain a percentage (between 75-80%) of the amount of damages awarded.

In the cement cartel, CDC bundled the claims of 29 customers, claiming that they had incurred damages of approximately EUR 151 million (plus interest). The sum claimed from the six defendants as a minimum is approximately 75% of total damages that had allegedly been incurred. While the case is still pending and may be years from being decided, CDC has won some of the initial battles. The defendants had claimed that the Regional Court of Düsseldorf was not competent but by interim decision of February 21, 2007 the court rejected this because the plaintiffs had demonstrated that all defendants had participated in a cartel showing effects throughout Germany and therefore also in the region covered by the Düsseldorf court. The court also rejected the defendants' claim that CDC was not entitled to bring the claims of cement customers because this amounted to a "class action" inadmissible in Germany. This was rejected because CDC had been assigned all claims prior to bringing the action and had therefore acted on its own behalf. The court also considered that the assignment of the claims to CDC was *prima facie* lawful. Finally, the court did not appear to give credence to the defendants' claim that CDC's business model is in violation of German legal ethics given that German lawyers are not allowed to agree on contingency fees. After all, CDC is not a law firm. The defendants appealed this interim decision on admissibility of the claim of the Düsseldorf Regional Court, and the hearing of the Düsseldorf Court of Appeal, which is scheduled for April 22, 2008, is eagerly expected by all sides.[26]

If the case proceeds, the next stage will be one of fact-finding. While the Düsseldorf court would be bound by a final decision stating that an infringement has occurred,[27] the facts concerning the level of damages will still need to be established.

In the meantime, CDC has announced plans to prepare damages claims on behalf of victims of other cartels (e.g. bleaching chemicals). In order to increase the amount of evidence available, and, in particular, to facilitate an accurate assessment of the damage incurred, CDC is proposing to individual cartel participants to cooperate with it. These, in return, would benefit by not being sued in an action that could make them liable for the entire amount of damages jointly and severally with their former co-conspirators.[28] It is not yet certain, however, whether new damages claims will be filed in Germany. While the 2005 amendment of German law has greatly facilitated private actions in cartel cases, some important hurdles remain. In cases

[26] The appeal against another interim judgment of the Regional Court Düsseldorf has already been rejected: the courts did not consider that the action had to be stayed until the FCO's cartel decision has become binding.

[27] It is not yet certain when the appeals against the FCO's decision will be decided.

[28] This system reminds of the recent amendments to US law that permit a de-trebling and exclusion from joint and several liability for cartel participants that help the plaintiffs in private action.

where hundreds of millions of euros are at stake, court fees are very high, creating an initial barrier. Also, the above-mentioned cost rules create a further disincentive to engage an action that may bring a company in opposition to numerous defendants and that may stretch over many years.

B. The UK[29]

The Law

Introduction

The OFT regards private enforcement of competition law as an essential complement to public enforcement.[30] This reflects the view expressed by the UK Government in its 1999 White Paper "A World Class Competition Regime", where it recognized the significance of private competition law actions to ensure the optimum use of public and private resources.[31] However, prior to the changes to UK competition law introduced by EA02 facilitating follow-on actions (including sections 47A and 58A of the Competition Act 1998 (CA98)) and the seminal ECJ decision in *Courage v Crehan*, private enforcement in the UK was largely confined to defensive claims that agreements were void under Article 81(2), which were common, and a few cases seeking injunctions, which were not. Plaintiff's actions seeking damages for breach of competition law were scarce, in part because of a wealth of unresolved procedural issues.[32]

Legal basis and fault requirements

Following the changes introduced by EA02, two separate routes for seeking damages in relation to cartel activity exist under UK law. First, in the High Court (the ordinary civil court) claims may be brought under the common law rules of breach of statutory duty. Second, in the CAT, the specialist tribunal set-up to deal with certain competition law matters including appeals from decisions of the UK competition authorities, statutory claims for damages based on pre-existing infringement findings of the European Commission and the OFT may be brought under section 47A of CA98.

Both forms of action may be brought in relation to both breaches of Articles 81 and 82 of the EC Treaty and breaches of the Chapter I and II prohibitions under CA98 (the equivalent provisions under UK competition law).[33]

In a claim for breach of statutory duty in the High Court, the plaintiff must show (i) that there has been a breach of the relevant statute (*i.e.* an infringement of Article 81 or 82 or the Chapter I or II prohibitions) (ii) that he has suffered loss as a result.[34] There is no additional requirement to show that the breach was intentional or negligent. Claims may be either follow-on actions based on a pre-existing finding of infringement by the European Commission or OFT or stand-alone actions based on an allegation of infringement that must be proved as part of the case. In follow-on actions, the High Court is bound by the pre-existing finding of infringement, provided the deadline for an appeal has expired and/or any appeal has been completed.[35]

All statutory claims in the CAT must be based on a pre-existing finding of infringement by the Commission or OFT. All such actions are therefore follow-on actions. The CAT is bound by the finding of infringement, and the plaintiff need only show that he suffered loss as a result of the infringement in order to recover damages. Such actions may only be brought as of right once the deadline for appeal from the relevant decision has expired and/or any appeal has been completed.[36] They may however be brought earlier with the consent of the CAT.

Forum

As indicated, the CAT is a specialized competition tribunal. Cases before the CAT will typically be held before a panel of three Members that will normally include a legally qualified Chairman and at least one economist.

The High Court has also taken measures to improve its competition law expertise. All competition law matters are now allocated to the Chancery Division (the High Court consists of a number of Divisions, each with differing specializations). Chancery Division judges have been given specific competition law training, and have been authorized to act as chairmen in CAT proceedings. However, there remain clear indications that judges in the UK civil courts are uncomfortable in dealing with competition matters[37] and, where the option is available, those bringing competition

[29] Three separate legal jurisdictions exist in the UK (i) England and Wales (ii) Scotland and (iii) Northern Ireland. In general, UK competition law applies uniformly across all three jurisdictions. However, there are differences that may be significant in particular cases. For simplicity, the position set out in this article is that in England and Wales in cases of difference and reference to the UK should be understood accordingly. On the UK position generally see the UK section of the Ashurst Study at ec.europa.eu/comm/competition/antitrust/actionsdamages/national_reports/united_kingdom_en.pdf.

[30] OFT Discussion Paper, Private actions in competition law: effective redress for consumers and business, April 2007 (OFT, 916), at para 2.7.

[31] Cm 5233.

[32] One such issue was the application of the UK legal principle *in pari delicto porior est condition defendentis*, which provides that parties to an illegal agreement may not sue one another in damages. In *Gibbs Mew v Gemmell* [1998] EuLR 588, the Court of Appeal held that a beer supply agreement that infringed Article 81 EC was an illegal agreement for the purposes of this principle and, as a result, that the parties could not sue one another for breach of statutory duty. This was a major factor in the referral of the *Crehan* case, which related to a similar agreement, to the ECJ and the judgment of the ECJ requiring the *in pari delicto* principle to be set aside in some cases at least (*Courage v Crehan*, *supra*, para 36).

[33] There is no substantive difference between Articles 81 and 82 and the Chapter I and II provisions, other than the requirement for an effect on trade between Member States, which is replaced by a requirement for an effect on trade within the UK, and indeed there is a statutory requirement that the UK provisions should be interpreted consistently with Articles 81 and 82 (CA98, s 60).

[34] In principle, the plaintiff must also show that he is within the class of persons that the statute is intended to protect. However, it is now well established that all persons suffering loss as a result of breaches of competition law are within the protected class.

[35] CA98, s 58A.

[36] CA98, s 47A(5)(b).

[37] *Attheraces v British Horseracing Board* [2007] EWCA Civ 38, at para 7: "The nature of these difficult questions suggests that the problems of gaining access to essential facilities and of legal curbs on ex-

law damages claims may be well advised to do so before the CAT.

Who can sue (including indirect purchaser issues)

In principle, any person suffering loss as a result of a breach of UK or EU competition rules is entitled to sue for damages.[38] In a cartel case, that would appear to include both direct and indirect purchasers. Indeed, it is generally assumed that the reasoning of the ECJ in *Manfredi* means that indirect purchasers have a right to damages under EU law.[39] A number of claims have in fact been brought by indirect purchasers,[40] although none has yet given rise to a final judgment, and at least two cases involving indirect purchasers have been settled.[41]

Class actions

UK law does not currently provide for US-style "opt-out" class actions, in which a claim may be brought on behalf of all members of a specified class of plaintiffs who do not specifically ask to be withdrawn from (opt-out of) the class. The closest that UK law gets is the mechanism created by section 47B CA98 in relation to certain follow-on actions in the CAT. The section allows so-called "representative" actions to be brought by certain designated consumer bodies on behalf of named consumers that expressly agree to join the action (opt-in). Representative bodies must be designated in advance by administrative order and, to date, the consumer organization Which? is the only designated body. Only one representative action has been brought so far, with limited success (see below). There is currently no mechanism for bringing representative actions on behalf of businesses. The OFT has made a series of recommendations to Government in relation to extending representative actions, including that it should be possible to bring them (i) on behalf of businesses as well as consumers (ii) in stand-alone as well as follow-on cases and (iii) on behalf of businesses or consumers at large (*i.e.* a form of opt-out action).[42] The OFT also suggests that representative bodies are authorized by the courts rather than designated in advance.[43] If adopted, these recommendations would represent a major step towards an effective class action system in the UK.

cessive and discriminatory pricing might, when negotiations between the parties fail, be solved more satisfactorily by arbitration or by a specialist body equipped with appropriate expertise and flexible powers. The adversarial procedures of an ordinary private law action, the limited scope of expertise in the ordinary courts and the restricted scope of legal remedies available are not best suited to helping the parties out of a deadlocked negotiating position or to achieving a business-like result reflecting both their respective interests and the public interest. These are not, however, matters for decision by the court, which must do the best that it can with a complex piece of private law litigation."

38 *Garden Cottage Foods v Milk Marketing Board* [1984] AC 130, at page 141 C-E; and CA 98 s 47A.

39 Case C-295/04 *Vincenzo Manfredi v Lloyd Adriatico*, [2006] ECR I 6619, at para 61 "any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC".

40 CAT Cases number 1028/5/7/04 *BCL Old v Aventis*; and *Devenish Nutrition v Sanofi-Aventis* [2007] EWHC 2394.

41 Rodger, Private Enforcement of Competition Law, The Hidden Story, [2008] ECLR 96, at 114.

42 OFT Recommendations, paras 5.1 to 7.35. See in particular, paras 5.13, 6.8 and 7.13.

43 OFT Recommendations, para 5.2.

Representative actions are not available in the High Court, but there are a number of other mechanisms for dealing with multi-party claims that are available in both the High Court and the CAT. The most important of these is the "group litigation order" or "GLO", a procedure introduced only in May 2000. This allows courts to make an order bringing separate claims together in a single set of proceedings where they raise common or related issues of fact or law.[44] GLOs may be made at the request of one or more of the parties or at the initiative of the court.

The rules of the High Court also allow for so-called "representative proceedings" (which are quite different from representative actions in the CAT (see above)).[45] Where a number of persons have the "same interest" in a claim, the court may order that the claim be pursued by only one of them in relation to that interest and that the result of that single set of proceedings bind all of those sharing the same interest. Representative proceedings are however rarely used as the "same interest" test is narrow.

Who can be sued

Any person guilty of breach of competition rules may be sued, and any corporate entity that participated in the infringement may be sued on behalf of the entire undertaking.[46] It is generally assumed that all members of a cartel are jointly and severally liable for damages caused by the cartel,[47] although as yet there is no clear authority on this point.

Calculation of damages and the passing-on defense

The standard measure of damages under UK law is compensatory, *i.e.* simple recovery of loss. In competition law cases, this includes lost profits.[48] Losses are to be assessed from the time when they occur, rather than the time of judgment, and interest will be awarded from that time.[49] Other measures of damages available in UK law include exemplary (*i.e.* punitive) damages and damages based on the profits of the defendant (so-called restitutionary damages). According to a recent decision of the High Court, neither restitutionary damages nor, at least in follow-on claims, punitive damages are available in competition cases.[50] In its Recommendations to Government, the OFT has suggested that restitutionary damages should be made available in representative actions.[51]

It is generally assumed that the passing-on defense is available in UK litigation – both because the measure of damages is compensatory and as a corollary of the

44 Civil Procedure Rules (CPR), r 19.10-15.

45 CPR, r 19.6(1).

46 *Roche and others v Provimi* [2003] EWHC 961, paras 32 to 36.

47 See, *e.g.*, Private actions in competition law: effective redress for consumers and business, OFT Discussion Paper, April 2007, para 7.17.

48 *Crehan v Inntrepreneur* [2003] EWHR 1510, paras 265 et seq.

49 *Crehan v Inntrepreneur* [2004] EWCA Civ 637, para 180.

50 *Devenish Nutrition v Sanofi-Aventis* [2007] EWHC 2394.

51 OFT Recommendations, para 7.35.

assumption that indirect purchasers may sue – and the plaintiff in at least one recent case conceded the point.[52] In principle, the burden of quantifying losses, including taking account of the possibility of passing-on, lies on the plaintiff.

Burden of proof

In stand-alone actions, the burden of proving the existence of a breach of competition law, and of proving the existence of losses caused by that breach, lies with the plaintiff. In follow-on actions, the plaintiff is relieved of the burden of proving the infringement and must only prove loss and causation.

The standard of proof that must be met by the plaintiff is the ordinary UK civil standard – *i.e.* the balance of probabilities. In principle this means that the plaintiff must show only that causation, loss and (in stand-alone cases) infringement are more likely than not to have occurred. There are however indications that this standard will be applied unusually strictly in competition law cases. In *Sherson Lehman Hutton v Watson*, the judge in the High Court took the view that he should require "a high degree of probability" as infringement of EU competition rules carry with them liability to penalties. Similarly, the CAT has indicated in appeals from decisions of the OFT that the OFT must establish its case on the basis of "strong and compelling evidence"[53], although it has also affirmed that the standard of proof remains the balance of probabilities[54].

Discovery

One aspect of litigation in England that makes the jurisdiction particularly attractive in relation to competition damages claims is the availability of discovery. Discovery can be particularly important in the context of competition claims given their factual complexity, in particular as regards calculation of loss.

In the High Court, the standard disclosure rules for civil cases apply.[55] These require all parties to disclose all documents that are or have been in their control (i) on which they rely (ii) which support the case of another party and/or (iii) which adversely affect either their own case or the case of another party.[56] Disclosure of specific additional documents that might not be covered by standard disclosure, including documents held by third parties, can also be ordered if the court believes it appropriate. Generally, standard disclosure takes place some time into proceedings after parties have completed their statements of case, and addition specific disclosure, if necessary, some time after that.[57] Pre-trial disclosure against potential defendants

[52] *Devenish Nutrition v Sanofi-Aventis* [2007] EWHC 2394, para 19.
[53] *Napp Pharmaceutical v DGFT*, [2002] CAT 5, para 109.
[54] *The Racecourse Association v OFT* [2006] CAT 1, para 131.
[55] CPR, r 31.
[56] CPR, r 31.6.
[57] Specific disclosure may however be ordered before standard disclosure, see *e.g.* the order of the CAT in *Emerson Electric* of 13.12.07 at http://www.catribunal.org.uk/documents/Order(2)1077Emerson131207.pdf

and, exceptionally, third parties can also be ordered in limited circumstances.[58] Documents subject to legal privilege are excluded from disclosure.

The High Court rules are not binding on the CAT, which has a wide discretion to handle disclosure as it believes appropriate. In general, the CAT has followed the approach of the High Court in relation to disclosure issues, while applying its discretion to limit the volume of documentation disclosed.

Limitation issues

The limitation period for actions for breach of statutory duty is the standard six year period for tortious claims under UK law.[59] The period starts to run from the date on which the damage was caused by the infringing act, subject to fraudulent concealment.[60] In cases of secret infringements such as cartels, it is not unlikely that fraudulent concealment principles would apply to extend the limitation period.

Claims in the CAT must generally be brought within two years of either (i) the expiry of the deadline for appealing the relevant OFT or Commission decision or (ii) the resolution of the appeal.[61] As described further below, difficult practical issues may arise in cases of multiparty infringements (*e.g.* cartels) where some parties appeal and others do not, or where some appeals are brought only against the quantum of the fine rather than the substantive finding of infringement.

Costs

The award of costs is at the court's discretion in both the High Court and the CAT. The general rule in the High Court is that the unsuccessful party must pay the costs of the successful party. The assessment is generally made issue by issue, so that a party losing a case may not have to pay all the costs of the other side if he has succeeded on at least some of his arguments. While recognizing the same general rule, the CAT appears to be more ready to depart from it than the High Court. In appeals from decisions of the OFT, the CAT has refused to award costs against the unsuccessful appellant in a number of cases[62] and, in others, has limited the costs payable by the OFT[63]. The amounts awarded in costs are subject to assessment by the court (although parties generally settle). Parties would not generally expect to recover much more than 70% to 75% of their costs on assessment or settlement.

UK courts currently have powers to protect parties from costs by ordering, at an early stage in litigation, caps on the amount of costs that may be recovered from them in the event they are unsuccessful. Such cost-capping orders are rarely made in practice. One suggestion in the OFT Recommendations to Government is that there

[58] Supreme Court Act 1981, ss 33(2) and 34(2) and Civil Court Act 1984, s 52(2) and 53.
[59] Limitation Act 1980, s 2.
[60] Limitation Act 1980, s 32.
[61] CAT Rules (SI 2003 No. 1372), r 31(1).
[62] See, e.g. *The Institute of Independent Insurance Brokers v The Director General of Fair Trading*, judgment of 29 January 2002 at http://www.catribunal.org.uk/documents/JdgIIB290102.pdf.
[63] *The Racecourse Association v OFT* [2006] CAT 1.

may be scope for a structured use of such orders in competition law actions.[64]

Case law developments

To date, none of the stand-alone damages claims brought in the High Court has concerned cartels, and none has so far ended in a successful claim for damages. Given the secret nature of cartels, the absence of stand-alone cases is perhaps not surprising.

There have, in contrast been a number of follow-on damages claims – both in the High Court and in the CAT – in relation to pre-existing cartel findings. Although as yet, there has not been a final award for damages in these cases, the reason appears to be that defendants are settling and, on that measure, the cases appear broadly successful.[65]

As in Germany, many of the initial follow-on cases have arisen from the European Commission's 2001 *Vitamins* cartel decision. In May 2002, two actions were brought, one by the UK company Provimi and the other by UK and German subsidiaries within the Trouw group against various companies within the Roche and Aventis groups, each of which had participated in the cartel. The two cases were joined and led to the *Provimi* judgment in May 2003.[66]

Provimi concerned an attempt by the Roche and Aventis groups to have the action struck out on a number of grounds relating to jurisdiction. Among these, were (i) that the Roche and Aventis subsidiaries against which the actions had been brought were not the entities named in the Commission Decision (ii) that the claims brought by the German subsidiary of the Trouw group did not have a sufficient jurisdictional connection with the UK and (iii) that various jurisdictional clauses in the contracts under which Provimi and Trouw had acquired vitamins excluded the jurisdiction of the UK courts.

As regards the identity of the defendants, the High Court took the view that the breach of statutory duty, like the infringement of Article 81, had been committed by the Roche and Aventis undertakings. Although the subsidiaries named as defendants were not the corporate entities named as addressees of the Commission Decision, they nonetheless formed part of the same undertakings and were therefore proper defendants.

As regards jurisdictional nexus, the defendants argument hinged on the fact that Trouw's German subsidiary had not purchased vitamins from any of the UK subsidiaries of Roche and Aventis. All its purchases had been from Roche and Aventis subsidiaries in Germany. The High Court nonetheless refused to strike out the claim struck brought by the Trouw Germany. It found that Trouw Germany's claims

[64] OFT Recommendations, para 8.11 et seq.

[65] E.g. Nicholas Green, Recent Experiences in the High Court, Paper for The LSEG Annual Conference 2007.

[66] *Roche and others v Provimi* [2003] EWHC 961. For a complete review of the UK case law to 2004 see Rodger: Competition Law Litigation in the UK Courts – Parts I to III, [2006] ECLR 241, 279 and 341.

against the German subsidiaries of Roche and Aventis were very closely connected with the claims of Trouw UK against the UK subsidiaries of Roche and Aventis. It also found that there was a risk of irreconcilable judgments if the two claims were heard in different jurisdictions. As a result, it found that the plaintiffs had at least a good arguable case that the jurisdictional rules under Article 6(1) of the Brussels Regulation[67] were met.

Finally, the High Court also rejected the arguments based on the jurisdictional clauses in the contracts for the purchase of vitamins, on the basis that these clauses were not wide enough to cover claims relating to competition law infringements.

The High Court's decision was appealed to the Court of Appeal, but settled a month before the Court of Appeal hearing. Although the High Court's ruling is not definitive, it is generally agreed that *Provimi* indicates that UK courts are likely to take a broad view of their jurisdiction in cartel damages actions.

In February 2004, two further follow-on damages claims arising from the *Vitamins* decision were launched in the CAT under section 47A CA98. *BCL Old v Aventis* and *Dean Foods v Roche* were the first follow-on damages cases to be brought in the CAT.[68] One potentially interesting issue was that BCL was an indirect purchaser. However, the point was never fully argued. The claims led to a small number of interim judgments on minor procedural issues (costs etc.) but were ultimately closed by consent order on 24 November 2005, indicating that a settlement was reached between the parties.

A third set of cases arising from the *Vitamins* decision, this time once again in the High Court, resulted in an important judgment on the quantification of damages in November 2007. *Devenish Nutrition* concerns the basis on which damages should be calculated, which was taken as a preliminary issue.[69]The plaintiffs in the case had sought damages over and above compensation their losses on three alternative bases (i) exemplary damages (ii) restitutionary damages and (iii) account of profits.

The first basis, exemplary damages, are punitive damages awarded above and beyond the loss suffered by the claimant and are intended to act as a deterrent to wrongful conduct. Exemplary damages may be awarded where, among others, the defendant has calculated that the profits he expects to make will exceed any compensation he may have to pay if sued.[70] (Although this would arguably apply in a wide range of commercial circumstances, including cartel behavior, awards of exemplary damages have in practice been extremely rare.) The High Court held that exemplary damages were not available, at least in follow-on cases. The reasons included that, in a case where punitive action in the form of fines had already been taken by the Commission, an award of exemplary damages would amount to double punishment and would offend the *ne bis in idem* principle. The High Court also took the view that exemplary damages would be inappropriate because (i) all the parties that had suffered loss as a result of the cartel were not before the court and

[67] Regulation 44/2001, OJ L 158, 14.6.2001, p. 57.

[68] Cases number 1028/5/7/04 and 1029/5/7/04.

[69] *Devenish Nutrition v Sanofi-Aventis* [2007] EWHC 2394.

[70] *Rookes v Barnard*, [1964] 1 AC 1129.

would not therefore benefit from an award of exemplary damages and (ii) equivalent punitive damages are not available in most Member States. These later grounds, if correct, suggest that exemplary damages may also be unavailable in at least some stand-alone cases.

The two other measures of damages claimed – restitutionary damages and account of profits – are both based on the profits made by the defendant (rather than the plaintiff's loss). The High Court found that neither measure was available in competition damages claims. Further, it found that even if they had been available in principle, it would not have been appropriate to award them on the grounds that, since it was possible to calculate the losses suffered by the plaintiffs, compensatory damages were a sufficient remedy.

In March 2007, the consumer group Which? brought the UK's first representative action.[71] The action was brought against the sports goods retailer JJB. In 2003, the OFT had found that JJB and a number of other retailers and sports good manufacturers had been involved in a cartel to fix the retail prices of England and Manchester United football shirts. Which? was only designated to bring representative actions in August 2005, by which time action against most members of the cartel had become time barred. However, JJB had appealed the OFT decision and its final appeal was rejected only in February 2007. As a result, Which? was able to bring the action. Since representative actions are an opt-in procedure, Which? launched a campaign asking consumers to join the action by registering on the Which? website. Although the campaign attracted significant publicity, only a very small number of consumers ultimately registered (around 600), probably because their individual losses were small (around £15 to £20 per shirt). In February 2008, JJB settled the case, offering to pay consumers that had joined the case £20 per shirt and those that had not £5 to £10 per shirt. Despite the settlement, the failure to attract significant numbers of consumers to join the action illustrates the limitations of the representative actions system as it currently stands.

The most recent decision in a cartel damages case is that in *Emerson Electric* in the CAT.[72] The defendant in the case, Morgan Crucible, was found by the Commission to have participated in a cartel for graphite products in its *Electrical and mechanical carbon and graphite products* decision of December 2003.[73] Morgan Crucible was the leniency applicant and as such had its fine reduced to zero. Perhaps unsurprisingly, it did not appeal the Commission's decision and, as a result, it was in principle vulnerable to a statutory claim for damages in the CAT. Indeed the limitation period for bringing such proceedings appeared to be running.

However, several other members of the cartel had launched appeals in relation to the Commission decision so that CAT proceedings against them could not be started without the CAT's consent. The question before the CAT was therefore were

[71] www.which.co.uk/reports_and_campaigns/consumer_rights/campaigns/Football%20shirts/Our%20campaign%20explained/football_shirts_campaign_559_108349.jsp.

[72] *Emerson Electric v Morgan Crucible* [2007] CAT 30.

[73] Case C38.359, unofficial text only: http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38359/en.pdf

the claimants entitled to proceed against Morgan Crucible while the decision upon which the claim rested was under appeal, albeit by other parties. The CAT held that, in the circumstances, the plaintiffs required the consent of the CAT in order to bring the action, and granted such permission, in part because Morgan Crucible had been reluctant to give an undertaking in relation to the preservation of documents and had previously been found to have destroyed documents relevant to the case.

In February of this year, further hearings were held in the case on the issue of whether permission should be given to commence proceedings against other members of the cartel (SGL Carbon, Carbone Lorraine and Schunk) and on certain jurisdictional issues.[74] One of the issues at stake is that certain of the appeals from the Commission's Decision appear to be limited to the calculation of fines and do not therefore challenge the finding of infringement. The outcome of those hearings is still pending.

III. Conclusions

It is still early in the development of cartel damages litigation in both the UK and Germany. Key changes to the laws of both states enabling follow-on claims to be brought were introduced only in 2003 and 2005 respectively. This is reflected in the case law experience in both jurisdictions, which is sill struggling with basic issues such as who may sue,[75] how damages should be quantified[76] and even when claims may be brought.[77]

However, even now there are clear trends. Procedural issues, including those that might have prevented cases being brought successfully, are being resolved, generally in favor of those seeking damages. In Germany, courts are now beginning to award damages rather than reject cases and other cases are settled under the threat of damage awards. In the UK, the absence of awards appears to be the consequence of a thriving practice of settlement rather than the failure of claims. Further assistance to plaintiffs is likely. Some of the problems with representative actions in the UK may be dealt with in the wake of the forthcoming Government consultation and, across the EU, the Commission's anticipated White Paper seems likely to call for action on issues like shifting the burden to defendants in relation to passing on (a positive change in the UK) and access to documents in discovery-like procedures (a positive change in Germany).

Overall, the future looks bright for follow-on cartel damages claims in both jurisdictions. However, both jurisdictions – and, in fact, Europe overall – remains a long way away from the position in the US, where opt-out class actions and treble damages have led to damages claims becoming a routine part of the cartel enforce-

[74] Hearing on *20 to 21 Feb 2008*, transcript at http://www.catribunal.org.uk/documents/Tran1077Emerson200208.pdf and http://www.catribunal.org.uk/documents/Tran1077Emerson210208.pdf.

[75] LG Mannheim, GRUR 2004, 182 et seq, and CDC litigation (above); *Roche and others v Provimi* [2003] EWHC 961.

[76] *Devenish Nutrition v Sanofi-Aventis* [2007] EWHC 2394.

[77] *Emerson Electric v Morgan Crucible* [2007] CAT 30.

ment process.

The picture may not be so bright in relation to stand-alone actions. There are few examples in cartel cases and the examples that exist elsewhere, at least in the UK, suggest that prospects of success are not great. Perhaps legislators in Member States and at the EU level need to focus greater efforts here, particularly if private enforcement is to become a truly effective complement to public enforcement.