



Private Enforcement: The changing environment

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- **Picture of “total underdevelopment”**
- **Only 12 adjudicated cases found**
- **Range of obstacles identified**

Since then ...

- **Belgium**
 - elevators
- **France**
 - mobile phones
 - vitamins
- **Germany**
 - cement
 - vitamins
- **Italy**
 - insurance
- **Netherlands**
 - electrotechnical wholesalers
- **Sweden**
 - air cargo
- **UK**
 - vitamins (x4)
 - synthetic rubber
 - switchgear
 - private schools
 - carbon and graphite products
 - football shirts

What were the obstacles?

- **Complex issues and inexperience (uncertainty)**
- **High cost of litigation**
- **Absence of class action mechanisms**
- **Access to evidence (discovery)**
- **Fault requirements**
- **Limitation issues**
- **Quantification of loss and passing-on**

What changed?

- **Not a great deal**
- **Routes round obstacles are starting to be identified**

Rounding some obstacles

- **Limits complexity**
- **Mitigates judicial inexperience**

“The nature of these difficult questions suggests that the problems [may] be solved more satisfactorily by arbitration or by a specialist body equipped with appropriate expertise and flexible powers ... These are not however matters for decision by the court, which must do the best that it can”
(UK Court of Appeal, *Attheraces* (2007))

- **Claims of viable scale**
- **Can be grouped even without class action mechanism**
 - *Emerson Electric (UK)*
 - *CDC Cement Claim (Germany)*

- **No fault requirement**
- **Discovery available**
- **Expert tribunal (the CAT)**
- **Extended limitation period**
 - 3 or 6 yrs from knowledge of facts (High Ct)
 - 2 yrs from exhaustion of appeal rights (CAT)
- **Welcoming courts (*Provimi*)**
 - a UK sub that 'gave effect' to cartel sufficient to anchor all EU claims in UK (so far)

- **Avoids difficulty of quantifying loss**
- **Avoids discovery against plaintiff**
- **No cases resulting in final awards yet in UK ... but plenty of settlements**

Recent issues

- *Devenish (2007)*
 - no punitive damages in follow on cases
 - no restitutionary damages/account of profit
- **But**
 - “compensation is often accomplished by ‘sound imagination’ and a ‘broad axe’”
- **Court of Appeal confirms (2008)**

- ***Emerson Electric I and III (2007/8)***
 - follow on from 2003 EU carbon + graphite decision
 - no right to bring action against leniency recipient who had not appealed the decision, since other parties had
 - no right to bring action against parties that appealed fines only
- ***BCL Old v BASF (2008)***
 - follow on from 2001 EU vitamins decision
 - BASF argued claim time-barred because no party had appealed on substance (only fines)
 - CAT finds right of action only crystallizes once appeals (of whatever type) exhausted

- **Brussels Regulation, Art 27**
 - 2nd court seized will stay proceedings
- **Synthetic Rubber**
 - follow on claim by tyre producers launched in UK High Ct in Feb 2008 based on 2006 EU decision
 - UK jurisdiction contested on basis of action brought in Italian courts by defendant Eni seeking a declaration that there was either no cartel or no damages from it

- **Main proposals**
 - compensatory damages (inc loss of profit + interest)
 - no fault requirements
 - limited disclosure required
 - extended limitations periods
 - representative and opt-in actions
 - passing on subject to rebuttable presumptions
 - low court fees and ability to mitigate loser pays cost rules
 - guidance on quantification of damages
 - binding effect of NCA decisions
- **So limited change for the UK**

Consumer and SME actions

- **Recommended in the White Paper**
- **Implemented in the UK, Sweden, Norway and Denmark**
- **Without much success**
 - *Football Kits (UK)*
 - *Mobile Phones (France)*

- **DG Health and Consumers initiative**
- **Four options for discussion**
 - no action
 - mix of instruments (ADR, small claims, awareness raising)
 - opening up existing national collective redress mechanisms
 - EU measure extending representative or group action options in all MS

- **Existing mechanisms in Norway, Denmark and the Netherlands**
- **A possibility in the UK?**
 - OFT Recommendation (Nov 2007)
 - Civil Justice Council Recommendation (July 2008)
 - emergence of litigation insurance

- **Switchgear in Israel**
 - class action filed in December 2007 on behalf of Israeli electricity consumers
 - claim for EUR 575 million
 - based on 2007 EU decision
 - withdrawn December 2008

Access to Commission documents

- **Regulation 1049/2001**
 - right of access to documents
 - limited exceptions
- **3 cases before CFI on refusal of access**
 - *EnBW Energie* (access to Cmsn file)
 - *CDC Hydrogen Peroxide* (index of case file)
 - *Netherlands* (unredacted Cmsn decision)

Concluding remarks

- **Follow-on claims by direct purchasers appear to be a growth area in the EU**
- **Class action claims are an increasing risk, at least outside the EU**
- **Document access requests are an interesting development**