

## Large-Scale Damages Actions Tested In Europe

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*Thursday, Jul 03, 2008* --- The European Commission's ban on contingency fees and opt-out class actions has led many to question how large-scale private damages actions might function in Europe and has led claimants' representatives from the legal, advocacy and business arenas to test new approaches, with varying degrees of success.

It is widely believed that private antitrust action is on the rise in Europe, with the EC's backing. But the commission's intent to keep the litigation from running wild — which is how it perceives U.S. litigation — means that plaintiffs' representatives must work around tougher restrictions in order to build financially viable cases that can reach all the victims.

“Each class would have to have a funding mechanism,” said Julie Gabler, a partner in the Brussels, Belgium, office of Howrey LLP. “The funding issue more than anything, coupled with the opt-in, those are going to serve, especially in dispersed classes, as obstacles.”

Which?, a leading consumer advocacy group in the United Kingdom, put its government-granted power to represent consumers in damages actions to the test last year in a collective action against retailer JJB Sports.

While the company eventually agreed to reimburse plaintiffs in a settlement, Which? has since said the case illustrated how costly and ineffective private action under the current U.K. system can be.

“Certainly, for competition law, you need to think, 'Who's going to bring a redress action on behalf of consumers?,'” said Deborah Prince, head of the in-house legal department for Which?. “I don't actually know because we would think twice about doing it under an opt-in system.”

The group initiated its action after the U.K. Office of Fair Trading fined JJB and nine other companies a total of £18.6 million (\$36.8 million) in 2003 for fixing the price of replica soccer jerseys. The U.K. Competition Appeal Tribunal later affirmed the OFT's ruling but reduced the penalties awarded to JJB and two others.

Which? filed its private action in February 2007 after JJB exhausted its appeals. The company managed to collect about 600 consumers who had purchased close to 1,000 jerseys. They eventually settled with JJB in January, striking a deal in which collective action members will receive about £20 (\$39.60).

“Which? is incredibly well known in the U.K., so when we had our launch it was all over the news,” Prince said. “I don’t think anybody could have done a better job in actually publicizing the action, short of having the claimants’ names and writing to them directly.”

Still, the media campaign failed to draw in a majority of consumers who were harmed by JJB’s price-fixing, she said.

“Traditionally, in competition breaches, there are lots and lots of people who have been harmed, but probably not by that much money,” Prince said. “Litigation is time consuming and expensive, so unless you can be pretty sure you’re going to be successful, I don’t think you would want to do it.”

These perceived obstacles, however, did not stop one of the leading plaintiffs’ law firms in the U.S., Cohen Milstein Hausfeld & Toll PLLC, from setting up shop in London in January 2007.

Staffed with five solicitors, the firm’s European office has so far represented claimants from outside the U.S. in the U.S.-based class action against British Airways PLC and Virgin Atlantic Airways Ltd. Passengers accused the airlines of fixing fuel surcharges on international flights in that suit. BA and Virgin agreed to pay \$200 million in a settlement reached in February.

In addition, the firm says its London-based attorneys have negotiated several confidential settlements in relation to a number of global cartels with damages totaling in the billions and is representing two global oil firms in an international contractual dispute.

The EC’s ban on contingency fees does present difficulties for plaintiffs’ law firms, largely because antitrust cases typically involve marketwide offenses that affect large numbers of victims. But there are ways for the firm to work around the restriction, said Michael Hausfeld, head of Cohen Milstein’s antitrust and international practices.

“There are laws in place in Europe which clearly provide for victims of those cartels to reclaim that which was illegally taken by cartels,” Hausfeld said. “The absence of contingency fees makes it a bit more difficult, but that’s a challenge that we believe can be met.”

Cohen Milstein remains the only U.S. plaintiffs’ firm to have branched out to Europe so far, but others have begun to test new ways of representing victims in antitrust cases.

In one case that is being watched around Europe, a company called Cartel Damage Claims SA purchased the claims of companies involved in the cement, construction and concrete industries and kicked off an action in 2005 against the members of an alleged cement cartel in Germany.

CDC’s case is based on the German Federal Cartel Office’s decision in 2003

to fine 12 companies a total of €702 million (\$1.1 billion) for divvying up the German cement market and fixing prices.

CDC bought the claims of 29 companies affected by the cartel and filed a lawsuit against the six leading cartel members. Under the purchasing agreement, the claimants will be eligible for as much as 80% of the proceeds from the case.

“The advantages to victims of these cartels are obvious because if we buy their claims, we take on the risk,” said Till Schreiber, legal counsel at CDC.

So far, the German courts have allowed CDC to go forward with its case.

The defendants argued that the company did not have the right to bring an action under its own name, but the Regional Court of Dusseldorf confirmed that based on the contracts CDC signed with the claimants, the company had standing to pursue the claims.

As a result, what was initially considered to be a pilot case for this possible new way of bringing private damages claims is now looking more and more promising, Schreiber said. CDC is now preparing to launch claims against members of other cartels and believes it can bring these cases in most European jurisdictions.

“We see there is potential, we see there is an alternative to the proposal of the commission and of the current class action system in the U.K., for example,” he added. “We have received very positive feedback and interest with regard to potential other cases, and we think we have seen other companies that are trying to develop similar systems.”