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GCR INSIGHT

PRIVATE LITIGATION GUIDE

Editors

Nicholas Heaton and Benjamin Holt

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For further information please contact Natalie.Clarke@lbresearch.com



Publisher

Clare Bolton

Business development manager

Natalie Hacker

Editorial coordinator

Hannah Higgins

Production editor

Katrina McKenzie

Subeditor

Rakesh Rajani

Editor-in-chief

David Samuels

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PART I

KEY ISSUES AND OVERVIEWS

Collective or Class Actions and Claims Aggregation in the EU: the Claimant's Perspective

Till Schreiber and Martin Seegers¹

Introduction

Private enforcement of competition law in Europe has in the past decade been driven in large part by the aggregation and enforcement of damages claims brought by multiple companies affected by the same competition law infringement in one single action. Follow-on damages actions based on forms of claims aggregation have been brought in various jurisdictions: for example, against the participants of Europe-wide cartels in *Air Cargo*, *Hydrogen Peroxide*, *Lifts and Escalator*, *Sodium Chlorate*, *Paraffin Wax* and *Trucks*. Aggregated or bundled claims have also been brought following decisions of national competition authorities, such as in *Cement* and *Sugar* in Germany. The cases led to landmark judgments by courts in several jurisdictions and to numerous out-of-court settlements resulting in significant compensation payments to corporate antitrust victims.

In parallel, some EU Member States have introduced forms of group or class actions, partially as a reaction to the Commission Recommendation on common principles for collective redress mechanisms in Europe.² The collective mechanisms adopted across the EU vary significantly: while in France, Italy and Germany victims may opt into a collective or representative action, the United Kingdom and Portugal provide opt-out mechanisms, and countries like Belgium have an alternative opt-in or opt-out model, where the competent court decides on the applicable mechanism depending on the circumstances of the case. With the exception of the

1 Dr Till Schreiber is managing director and Dr Martin Seegers is legal counsel of CDC Cartel Damage Claims Consulting SCRL.

2 Commission Recommendation 2013/396/EU 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 [2013] OJ L 201/60.

United Kingdom (e.g., in *Mastercard, Trucks and Forex*), these mechanisms have not yet played a role in the context of antitrust litigation. Nevertheless, they are practically indispensable in allowing the enforcement of mass claims at the end-consumer level.

The present chapter reflects on current developments, the need for effective collective approaches in cartel cases, the impact of the EU Directive 2014/104/EU (the Directive),³ the multi-jurisdictional framework for bringing such claims in Europe-wide cases and strategic considerations from a claimant perspective.

Directive and beyond: need for collective approaches

The Directive is a milestone for the private enforcement of competition law in the EU. It codifies case law of the European Court of Justice (CJEU) on the right to full compensation for competition law infringements and provides for a (minimum) common legal framework in the Member States. However, the Directive does not tackle many practical obstacles that claimants face when assessing or pursuing antitrust claims and does not provide for collective enforcement approaches.

Practical difficulties to full compensation

The enforcement of antitrust damage claims is complex, and time- and cost-intensive requiring a combination of specific economic, legal and IT expertise. Despite the Directive, consumers, small- and medium-sized enterprises and even large corporate victims continue to face many practical difficulties.

The main obstacles for claimants to enforce antitrust claims can be summarised as follows:

- the need to demonstrate and prove the damaging effects of market-wide competition law infringements, most notably cartels, on individual companies: any economic analysis and quantification, including causality aspects, typically requires detailed data and information covering the affected market ideally before, during, and after the infringement;
- information asymmetries and lack of evidence due to the secret nature of cartels;
- potential strains on ongoing commercial relationships associated with an individual exposure to (multiple) defendants;
- the risk of drawn-out litigation owing to the inherent legal and economic complexities;
- high costs for lawyers and economic experts, though the outcome of the process is uncertain;
- potentially high court fees and cost-risk asymmetries between claimants and (multiple) defendants, as cartels by definition have numerous participants; and
- in EU-wide cases, cartel members are seated and active in several jurisdictions and victims have suffered damages across Europe.

For these reasons, a majority of victims of anticompetitive practices still do not actively pursue their damage claims.

3 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 [2014] OJ L349/1.

Collective approaches as an effective solution

Many of these difficulties can be remedied or at least alleviated by collective approaches. From a structural perspective, collective approaches have significant advantages and increase the chances for an effective enforcement of claims for damages resulting from the infringement of competition law.

Depending on their concrete form, collective approaches have notably the following advantages:

- the creation of synergies for the quantification of damages, since collective approaches can allow for the collection of data from a multitude of damaged persons and companies, thus enhancing the chances to prove harm caused by the infringement;
- the creation of synergies for the enforcement of claims in court and through out-of-court settlements (e.g., a stronger negotiation position);
- the enhancement of the claimants' cost-risk ratio through overall economies of scale; and
- procedural economy, since collective approaches result in a significant concentration of court procedures, which is advantageous for claimants, defendants and the courts.⁴

Collective enforcement mechanisms have, essentially for political reasons, been excluded from the Directive. Nevertheless, effective forms of collective approaches have developed in practice, pre-dating the Directive.

Trend of enforcing aggregated and collective claims

Claims aggregation

One effective solution that has evolved in the European Union is aggregation by bundling claims through a specialised company or entity, often referred to as a claims vehicle. The approach results in a de facto collective claims enforcement, without being a form of collective redress. The bundling model was developed more than 15 years ago by CDC Cartel Damage Claims to enforce corporate antitrust claims. Today, the model is widely used in different forms and by different parties across Europe.

The model typically has the following features:

- a multitude of persons or companies damaged by an infringement assign their claims via a claims purchase or assignment agreement that is negotiated at arm's length to a specialised company or entity that enforces the overall claim in its own name, at its own cost and at its own risk in and out of court;

4 The burden and cost consequences for defendants when exposed to individual claims and damage actions filed on a massive scale, in particular when brought before the courts Europe-wide, pose a substantial challenge. This is evident from the *Trucks* cartel litigation where thousands of actions were filed across Europe. Although in many jurisdictions claims had been effectively bundled on a larger scale and subsequently brought in one legal action before one court; for example, in the Netherlands and Germany, and although group and collective actions had been filed with the UK Competition Appeals Tribunal, Spanish claimants announced in February 2019 that they were filing over 7,300 individual legal actions 'as there is no class action mechanism in Spain'; see GCR News Briefing, 4 February 2019, 'Trucks claims worth over €700 million filed in Spain'. This shows that the aggregation or bundling of claims, and any form of concentration, is clearly in the interests of defendants and the courts.

- the claims vehicle ensures the collection and analyses of relevant data and documents, which significantly increases the chances of proving individual damages as well as the market-wide effects of the infringement;
- the specialised company or entity ensures the overall funding of the case; and
- for victims, the approach results in a full outsourcing of the complex, time- and cost-intensive process of both evidencing cartel damages and enforcing claims.

In practice, a critical mass of claims is required to optimise the economic analysis and claims enforcement. Ideally, the claims aggregator combines economic, legal and technical know-how, including specific IT solutions facilitating the collection and analysis of market and transaction data on a large scale. Aggregated data collected from a larger number of cartel victims and covering longer time periods allow for a more adequate damage assessment. Experienced claims aggregators with specialised know-how can eliminate information asymmetries, present a sound theory of harm in court and hold stronger positions in settlement negotiations.

The aggregation model is operated in different forms and not all parties offer the fully integrated approach as outlined above. For example, in the case of *Deutsche Bahn*, under a hybrid form, the bundling entity itself was damaged by the cartel and enforced its own claims together with damages claims of other companies. In the Netherlands, claims are often assigned to a foundation that enforces aggregated claims on a special statutory basis. Further, the bundling model is sometimes used to enforce claims assigned by consumers. However, cases brought by consumer associations (e.g., *Which?* in the United Kingdom, *Que Choisir?* in France, VKI in Austria) are rare and have not always been successful. Consumer associations often have difficulties in coping with the complexity of antitrust damages claims and time- and cost-intensive litigation.

Collective, group or class actions

A second trend to be observed is the introduction of collective redress mechanisms by some EU Member States. It still has to be seen to what extent the different collective or group actions, representative or class actions are truly effective. Whereas most adopt an opt-in model, some provide an opt-out as operated under the US class action. The opt-out is often seen to be in conflict with the principle that claims can only be adjudicated where the putative claimant expressly wants to be part of an action. That is why the scope of opt-out mechanisms is usually limited to the jurisdiction in question (e.g., the United Kingdom). Though, with the exception of the United Kingdom, these mechanisms have not yet played a prominent role in the field of antitrust litigation. But they are certainly necessary in allowing the enforcement of mass claims

at the end-consumer level. Problems that are typically associated with procedural collective mechanisms are, for example, disputes regarding class or representative claim certifications or collective proceedings orders, as currently in *Mastercard*⁵ and *Trucks*.⁶

From a claimant's perspective, the parallel availability of both claims aggregation or bundling models and effective collective claims procedures will help to overcome existing difficulties and disincentives on victims to pursue claims individually. Clearly, any choice is highly positive for individuals or companies damaged by competition law infringements.

Commission initiative on collective redress

In 2018, the Commission proposed new legislation to bolster consumers' rights, including a 'Directive on representative actions for the protection of the collective interests of consumers'.⁷ The legislation will allow 'qualified representative entities' (QRE) to bring collective actions, including claims for damages, on behalf of consumers harmed by infringements of EU law, including competition law. Only non-profit organisations; for example, public authorities and consumer associations, can be considered QREs and bring damages actions across the EU Member States. A negotiation position agreed by the European Parliament earlier in 2019 has been significantly amended by the EU Council.⁸ They concern, inter alia, the framework for bringing cross-border consumer actions and the prevention of non-meritorious claims.

The initiative complements the Commission's Recommendation 2013/396/EU on common principles for collective redress mechanisms.⁹ The Recommendation provides a framework for injunctive and compensatory collective redress in mass harm situations, the latter being defined as 'a situation where two or more natural or legal persons claim to have suffered harm causing damage resulting from the same illegal activity of one or more natural or legal persons'. It is clear that this is typically the situation in the case of cartels or other anticompetitive agreements with market-wide effects. Besides procedural aspects such as the standing of representative entities and the admissibility of collective actions, the Recommendation focuses on financial aspects such as the reimbursement of legal costs and the funding of collective actions. The Recommendation served as guidance for many EU Member States' legislation on collective actions adopted in the meantime.

5 The admissibility of the class action brought in the UK by Walter Hugh Merricks against Mastercard (i.e., a collective action on behalf of 46 million consumers), is pending before the UK Supreme Court (ref C3/2017/2778); see MLex, Insight of 25 July 2019, 'Mastercard wins bid to take fight over card-fee mass lawsuit to UK's top court'.

6 Collective actions brought before the Competition Appeals Tribunal by the special purpose vehicle UK Trucks Claims Limited (opt-out, with a fall-back option of opt-in, ref 1282/7/7/18) and Road Haulage Association Limited (opt-in, ref 1289/7/7/18) display similar inherent procedural complexities; see MLex, Insight of 6 June 2019, 'Truck cartelists seeking to stall mass damages claims'.

7 Commission, COM (2018) 184 final – 2018/089 (COD).

8 See MLex, In Brief of 17 July 2019, 'EU consumer-redress law looks unlikely to get governments' agreement this year,' and Insight of 29 July 2019, 'Consumer-redress law redrafted in bid for compromise between EU governments'.

9 Commission Recommendation of 11 June 2013 (footnote 2).

Main differences between and common features of claims aggregation and collective redress mechanisms

Under the aggregation or bundling model, the entity acquiring the damages claims is typically acting in its own right. It is not acting for or on behalf of the original claims' holders, but in its own name and account. As a result, there is only one claimant seeking compensation for all aggregated claims. This aggregation of claims does not require major changes of civil procedure rules and is in line with the legal cultures and principles in most EU Member States. Victims of anticompetitive practices that opt for a claims aggregation model should verify that the claims vehicle has the necessary know-how, experience and resources to bring the case to the end. The personal and financial involvement of the claims aggregator, combined with a careful *ex ante* assessment typically ensures that only meritorious claims are pursued.

Collective mechanisms on the other hand are typically initiated by a representative entity or a lead plaintiff. This results in special procedural requirements; for example, the certification process by which the representative organisation or plaintiff is designated. The exact conditions for the qualification of the entities or plaintiffs vary from jurisdiction to jurisdiction and are typically subject to specific legislation. If a jurisdiction provides for collective redress mechanisms in the field of competition law infringements, it seems particularly appropriate for the enforcement of low-level damages that are dispersed on a large scale; for example, at the level of end-consumers. In such cases collective actions on an opt-out basis will typically be more efficient compared to the bundling of individual claims. There are also synergies for the defendants and the courts, as one collective action replaces thousands or even millions of individual actions. One main challenge for any collective action is the allocation of the proceeds of successful recovery to the individual class member. Often, a substantive part of the compensation payment remains unclaimed and is distributed to public funds, such as the access to justice fund in the case of the class action mechanism in the UK. This problem does not arise in the case of the aggregation of individual claims, as the share of the individual assignor in the overall damage can be clearly identified; for example, on the basis of the individual purchase volume.

One main challenge for claimants and defendants in the context of collective claims in the field of private enforcement will be the challenge to find out-of-court solutions for parallel proceedings that are pending in multiple jurisdictions in relation to one and the same competition law infringement. In this respect, collective settlement mechanisms will play a key role. The opt-out settlement mechanism in the Netherlands could, for example, provide a solution for settling parallel actions with aggregated claims as well as collective actions across European jurisdictions.

Recognition of and requirements for claims aggregation

The model of aggregating or bundling antitrust damages claims and enforcing them in one action has been widely recognised at both national level and EU level.

Recognition by the Directive

The significant role in the private enforcement context of the bundling model and the key role of proactive claims aggregators was recently confirmed by the Directive. Article 2(4) of the Directive explicitly confirms the standing of entities purchasing damage claims as follows:

“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, or 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 the right of the alleged injured party, including the person that acquired the claim.

Similarly, the possibility of an entity that acquired antitrust claims from damaged persons enforcing those claims is recognised in Article 7(3) Damages Directive. In its preparatory works, including the impact study, the European Commission stated that the collective approach of enforcing aggregated or bundled claims is known to most of European jurisdictions. Further, a study prepared for the European Parliament in 2012 acknowledged that the ‘claims transfer to a third party may help to overcome the problem of lack of participation by injured parties.’¹⁰

Advocate General Jääskinen in his opinion in *CDC Hydrogen Peroxide* (Case C-352/13) stated:

The emergence of players on the judicial scene, such as the applicant in the main proceedings, whose aim it is to combine assets based on claims for damages resulting from infringements of EU competition law, seems to me to show that, in the case of the more complex barriers to competition, it is not reasonable for the persons adversely affected themselves individually to sue those responsible for a barrier of that type.

The overall positive effects of claims aggregators on the private enforcement of competition law in the European Union have not been explored yet. However, it is safe to assume that such companies or entities have been successful in court and out-of-court where single damage actions would either not have been initiated or – in the worst case – would have failed. Some of the largest antitrust damages actions, both in the past and currently pending before national courts in the European Union, in particular the Netherlands, Germany and Austria, have been brought on the basis of the claims aggregation or bundling model.

Actions pursued by claims aggregators have also resulted in a multitude of ground-breaking judgments in various jurisdictions confirming key principles such as the joint and several liability of cartel members for the damage caused by a single and continuous infringement.¹¹ The claims aggregation or bundling model thus contributes to the achievement of the main objective of the CJEU and legislators regarding private enforcement: the effective compensation for infringements of EU competition rules.

10 EU Parliament, *Collective Redress in Antitrust*, 2012, p 37.

11 See e.g., District Court The Hague, C/09/414499 / HA ZA 12-293 – *CDC Project 14 SA v. Shell et al.*; District Court Helsinki, No. 6492, ref 11/16750 – *CDC Hydrogen Peroxide v. Kemira*.

Recognition at national level

At the national level, courts, in particular in the Netherlands, Germany, Austria and Finland, have expressly confirmed the standing of specialised entities that have bundled together a multitude of antitrust damage claims by way of assignment. Although the business model and the underlying agreements of claims aggregators have been heavily attacked by defendants, it is now common practice in many business sectors that claims are transferred to a third party.

For example, the District Court in Helsinki, by judgment of 4 July 2013 (No. 6492, ref 11/16750) in the follow-on action brought by CDC Hydrogen Peroxide, confirmed the validity of the assignments by several affected companies to the claimant. The court referred, inter alia, to 'CDC's better resources for gathering the information necessary for the matters under consideration' and the fact that the assignors did not succeed in settling their claims out-of-court, which was the reason they had decided to sell and assign their claims to CDC.

Similarly, the Court of Appeal in Amsterdam held in its judgment of 7 January 2014 (ref 200.122.098/01) regarding the follow-on action brought by claims vehicle EWD against members of the European Air Cargo cartel:

In the present case KLM and Air France have extensively discussed the phenomenon of litigation funding and the qualification of EWD as a litigation vehicle or claim vehicle, taking into account that EWD attempts to find monetary compensation for damage claims of several injured companies on a commercial basis. What KLM and Air France have said on this, for now does not justify the conclusion that in the present case there is an abuse of civil procedure by EWD or conduct that is otherwise impermissible in the context of obtaining compensation for damages. This also does not give ground at present to place further requirements on EWD on the basis of due process or the protection of the interests of KLM et al and/or the companies of which the claim have been assigned to EWD.

In another follow-on action against the Air Cargo cartel, the District Court of Amsterdam by judgment of 13 September 2017 (ref C/13/486440/HA ZA 11-944) found that the assignment agreements between the shippers and the claims vehicle Equilib were not contrary to public morals or public order:

The Court states first and foremost that claims for damages can make an essential contribution to maintaining competition in the European Union (cf. EUCJ 5 June 2014, no. C-557/12, Kone). In cartel damages cases, it is often difficult for individual injured parties to realise their claims for damages. Combining such claims by means of assignment to a litigation vehicle is thus a legitimate means by which to achieve efficient settlement of cartel damage, as now also follows from Directive 2014/104/EU.

A special situation exists in Ireland and the United Kingdom, where the ancient common law doctrines of champerty and maintenance have not yet been abolished. There is still legal uncertainty regarding the possibility to transfer damage claims by assignment, although recent judgments confirm the validity of the bundling model also under common law. For example, the English High Court in its judgment of 22 May 2017 in *Casehub* confirmed that the assignment

by a consumer of his low value claims – which were not worth pursuing on its own – to a claims vehicle is not void under the champerty and maintenance doctrine. Rather, access to justice would in view of the High Court be ‘enhanced’. The court therefore did not find public policy grounds to determine the assignment as invalid: ‘On the contrary, there are in my judgment strong public policy grounds in favour of upholding the assignment.’¹² It would be nonetheless welcome if the legislators in Ireland and the United Kingdom would confirm the possibility of transferring claims to third parties to ensure a level playing field across the EU and allow its citizens to benefit from this effective enforcement mechanism, which has been explicitly recognised by the Directive.

Legal and practical requirements

Depending on the jurisdiction and the precise form of the claims aggregators enforcing anti-trust claims, specific regulatory provisions might be applicable. In Germany, for example, requirements under the German Legal Services Act might be applicable, setting out obligations for providers of legal services in relation to personal ability and reliability; know-how and financial means; as well as the obligation to register formally with the judiciary. Further, the Higher Regional Court of Düsseldorf by judgment of 18 February 2015 (ref Az VI U 3/14) required that entities purchasing damages claims need to have the documented financial means to pay the potential adverse legal costs for court proceedings at three instances, at the time of concluding the claims purchase and assignment agreements.

From a practical point of view, claims aggregators must substantiate as far as possible the claim for each individual assignor, at least on the basis of best estimates. This requires not only an individual damages analysis (which can of course be based on the larger and more robust data set provided by all assignors), but in particular technical know-how and an efficient logistical infrastructure. If claims aggregators do not fulfill these requirements, they risk losing their action. This is evident, for example, from the judgments by the District Court Midden-Nederland and the Court of Appeal Arnhem-Leeuwarden in the *Lifts and Escalator* cartel case.¹³ Even after multiple rounds of written and oral debate, the claimant neither provided the full assignment documentation (i.e., written evidence of the transfer of the damages claim to the litigation vehicle) nor the underlying documentation regarding the individual damage. The courts therefore dismissed the action as not sufficiently substantiated.

Sophisticated claims aggregators will also ensure that the contractual agreements they enter into with companies that have suffered damage comply with general legal and formal requirements such as the description of the transferred damages claims or the documentation of the signatory powers. Another aspect that should be foreseen in the contractual arrangement is the access to relevant data and documentation in order to substantiate the damage or to comply with potential court disclosure orders.

12 High Court, England and Wales, *Casehub Ltd v. Wolf Cola Ltd* [2017] EWHC 1169 (Ch).

13 District Court Midden-Nederland, judgment of 20 July 2016, ECLI:NL:RBMNE:2016:4284; Court of Appeal Arnhem-Leeuwarden, judgment of 5 February 2019, ECLI:NL:GHARL:2019:1060 (*EWD/Otis e.a.*).

Funding aspects

The enforcement of damages claims resulting from competition law infringements by way of collective actions or claims aggregation is closely linked to the question of litigation funding. In general, any representative entity, lead plaintiff or claims aggregator operating in the field of competition law damages claims must be in a position to cope with the high costs and cost risks of potentially long-lasting litigation.

In practice, this results in a situation where collective actions as well as actions enforcing aggregated antitrust claims are often funded in cooperation with third-party litigation funders. For third-party litigation funders, the funding of such cases is attractive for several reasons:

- They typically arise in a 'follow-on' situation where an infringement has been established by a competition authority.
- The bundling of claims combined with an optimisation of the economic analysis does not only increase chances to successfully enforce claims, but also achieves the critical mass required to merit funding, as litigation funders typically require a minimum claims value of several million euros.
- The collective enforcement helps to turn complex claims into valuable assets, including statutory interest accruing as from the date when the damage was caused until the end of the proceedings.
- Owing to the 'loser pays rule', which is the norm across the EU, claims aggregators, representative organisations as well as third-party funders have an incentive to ensure a careful *ex ante* selection and management of cases. Typically, cases undergo an in-depth legal and economic due-diligence process. In combination with the follow-on situation, this minimises the risk of unmeritorious claims.
- Specialised claims aggregators with a proven track record will be able to obtain more advantageous funding terms, which is beneficial for all companies that entrust their claims to the entity.
- Collective claims and claims aggregation allow for access to justice in relation to damages claims that otherwise would be foregone.
- In Europe-wide cases, the aggregated claims can be enforced in the respective best-placed jurisdiction. Collective mechanisms that are available in one jurisdiction may provide for the possibility to opt-in for damaged companies or persons from other jurisdictions.

In view of the considerable costs inherent in competition damage actions and the requirement for specific legal and economic know-how, Member States should ensure that consumer organisations that are entrusted with the role of a qualified entity have access to sufficient public or private funding in order to be in a position to bring an action on an equal footing with the defendants.

Considerations on the choice of forum

Although there is a clear trend for actions for damages resulting from the infringement of EU competition law to be brought before the courts of virtually all EU jurisdictions (e.g., in the *Trucks* cartel case), claimants still seem to prefer – for the moment – certain jurisdictions; for example, the Netherlands, Germany and the United Kingdom. This holds true as well for enforcing aggregated or bundled claims.

This results from the fact that any claimant in a Europe-wide cartel case has to choose between jurisdictions where the courts according to the EU Regulation 1215/2012 (Brussels I) and Lugano Convention¹⁴ are equally competent. Hence, forum shopping is 'undoubtedly permitted'.¹⁵ However, the right choice is not straightforward, notably in cases where cartel members have their seat in multiple countries and damages have been caused to victims across Europe.

In their choice, claimants can rely on the following special heads of jurisdiction:

- In its judgment of 21 May 2015 in *CDC Hydrogen Peroxide*,¹⁶ the CJEU confirmed that pursuant to Article 8(1) Brussels I, several cartel members can be sued together at the courts of the place where one of them is seated. The court recently in *Skanska*¹⁷ also made clear that civil liability is attached to the 'undertaking', therefore not only to the addressees of a Commission decision, but also to other entities or persons of the economic unit. This has similarly been the opinion of the English High Court, which held that subsidiary companies of cartel members, without being addressees themselves but active in the same market, might be anchor defendants at whose seat all cartel members can be sued together.¹⁸
- Equally, the CJEU confirmed that pursuant to Article 7(2) Brussels I (*forum delicti*) claimants may sue cartel members in the courts at the place where the infringement was committed or where the damage occurred. Thus, they might choose between the courts of the place in which the overall cartel was concluded, in which one cartel agreement in particular was made that is identifiable as the sole causal event giving rise to a specific damage, or where the victim is seated.¹⁹ At least the first and latter allow claimants to enforce claims for the entire damage they have sustained as a consequence of the cartel.

The factors to be considered in the choice of jurisdiction by claimants are manifold. Existing procedural law differences between the EU Member States are significant in this respect, while the consequences of the choice of forum are far-reaching. At first glance, the answer looks simple, when a claimant is asked to 'exercise that option in a manner he considers most suitable and advantageous'.²⁰

However, the following factors are regularly decisive when enforcing aggregated claims:

- the availability of specialised courts or chambers with adequate personnel, technical and organisational resources to effectively deal with complex and voluminous antitrust cases;
- the overall duration of court procedures, taking into account potential possibilities for defendants to artificially delay procedures;
- the approach of judges in managing complex antitrust cases; for example, through proactive case management hearings (e.g., the Netherlands, the United Kingdom and Finland);

14 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1; Lugano Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339/3.

15 AG Mengozzi, Opinion in Case C-98/06 *Freeport* ECLI:EU:C:2007:302, para 38; see also Amsterdam Court of Appeal, *CDC v. Kemira* [2015] ECLI:NL:RBAMS:2014:3190.

16 Case C-352/13 *CDC Hydrogen Peroxide* ECLI:EU:C:2015:335.

17 Case C-724/17 *Skanska Industrial* ECLI:EU:C:2019:204.

18 *Provimi Ltd v. Roche Products Ltd & Ors* [2003] EWHC 961.

19 Case C-352/13 *CDC Hydrogen Peroxide* ECLI:EU:C:2015:335, para 56.

20 AG Jääskinen, Opinion in Case C-352/13 *CDC Hydrogen Peroxide* ECLI:EU:C:2015:335, para 89.

- the existence of relevant precedents and case law in a given jurisdiction;
- the appropriateness of the rules on evidence and disclosure regarding antitrust damage claims;
- the possibility to submit electronic data and documents in foreign languages; and
- the costs and cost risks associated with antitrust litigation, taking into account the applicable cost rules and costs of potential third-party interveners.

Two observations can be made in this respect. Firstly, there still remains a great deal of work to be done in many EU Member States to allow for truly effective enforcement of antitrust claims. Secondly, there are considerable differences between the Member States. Some of them have seized the opportunity of attracting international antitrust cases to their courts and have gone beyond the minimum standards of the Damages Directive. This also applies to the possibility of the aggregation of claims, be it by way of assignment or claims transfer at material level or at procedural level by way of collective actions.

Appendix 1

About the Authors

Till Schreiber

CDC Cartel Damage Claims Consulting SCRL

Dr Till Schreiber is managing director of CDC. He manages operations and is responsible for the strategy in some of the largest antitrust damages actions in Europe. Since joining CDC in 2007, Till has steered the claims acquisition process across the EU and has negotiated settlements in CDC's damage actions in Germany, the Netherlands and the Nordic countries. Prior to joining CDC, Till practised as a competition lawyer for six years in a leading international law firm in Brussels, Cologne and Madrid. In this role, Till represented companies from various industry sectors in pan-European antitrust and cartel investigations. Till studied law at the universities of Bonn, Cologne, Barcelona and London and published a doctoral thesis on international competition law.

Martin Seegers

CDC Cartel Damage Claims Consulting SCRL

Dr Martin Seegers is legal counsel with CDC. He is in charge of the analysis, preparation and coordination of some of the largest antitrust damages actions in Europe. This involves assessing cases, leading the acquisition process regarding corporate antitrust claims across Europe and coordinating with external counsel in court proceedings. Prior to joining CDC in 2007, he worked for an international law firm and the Competition Directorate of the European Commission, Brussels. Martin studied law in Cologne, Paris and Washington, DC. He has widely published on antitrust claims, litigation and settlements, including a doctoral thesis on European and international claims.

CDC Cartel Damage Claims Consulting SCRL

475, Avenue Louise

1050 Brussels

Belgium

Tel: +32 2 213 49 20

Fax: +32 2 213 49 21

mail@carteldamageclaims.com

www.carteldamageclaims.com



Private competition litigation has spread across the globe, raising specific, complex questions in each jurisdiction. The implementation of the EU Damages Directive in the Member States has furthered the ability of victims of anticompetitive conduct to seek compensation, even as US courts tighten the standards for forming a class action.

The *Private Litigation Guide* – published by Global Competition Review – includes a section exploring in depth the key themes such as territoriality, causation and proof of damages, that are common to competition litigation around the world. Part 2 contains invaluable summaries of how competition litigation operates in individual jurisdictions, in an accessible question-and-answer manner. Beyond the established sites such as the US, Canada, Germany, the Netherlands and the UK, experts lay out the scene for competition litigation in countries such as China, Mexico and Israel.

As the editors of this publication note, ‘litigating antitrust or competition claims has become a global matter, requiring coordination among jurisdictions, and requiring counsel and clients to understand the rules and procedures in many different countries and how the approaches of courts differ as to key issues.’

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