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The International Comparative Legal Guide to:

Cartels & Leniency 2015

8th Edition

A practical cross-border insight into cartels and leniency

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The International Comparative Legal Guide to: Cartels & Leniency 2015

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EDITORIAL

Welcome to the eighth edition of *The International Comparative Legal Guide to: Cartels & Leniency*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of cartels and leniency.

It is divided into two main sections:

Three general chapters. These chapters are designed to provide readers with a comprehensive overview of key cartels and leniency issues, particularly from the perspective of a European transaction.

Country question and answer chapters. These provide a broad overview of common issues in cartels and leniency laws and regulations in 34 jurisdictions.

All chapters are written by leading competition lawyers and industry specialists and we are extremely grateful for their excellent contributions.

We are also pleased to once again include a Wall Chart, which contains a summary table of key features relating to cartels and leniency laws and regulations in each of the 34 jurisdictions.

Special thanks are reserved for the contributing editors Simon Holmes and Philipp Girardet of King & Wood Mallesons LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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Private Antitrust Litigation in the EU: A New Age of Advocacy

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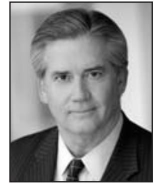

James Keyte

Paul Eckles

1. Introduction

As the European Union ("EU") and its Member States prepare to implement the EU Directive on antitrust damages actions ("Directive"),[i] including collective redress, it strikes those of us across the pond that antitrust litigators, competition authorities and national courts throughout the EU are on the verge of a new era of advocacy. No longer constrained by many of the procedural and substantive strictures that characterise administrative procedures (both in the EU and Member States), parties (including collective redress companies such as CDC) on both sides of cases are poised to litigate substantive, procedural and economic issues in ways and depths not seen before within the EU. While such vigorous litigation has been standard in the US courts for many decades, in the EU we have only seen hints of what is to come by observing what is taking place in those few jurisdictions (e.g., the UK, Netherlands, Germany and Italy) that have gotten a jump-start on the new private enforcement era. Indeed, the fact that Italy and France recently announced a programme to educate judges on antitrust legal and economic principles aptly highlights what clients, antitrust practitioners and courts are in store for in the coming years and decades.

This article briefly outlines some of the key areas that are likely to become the central battlegrounds of private antitrust enforcement in EU Member States, highlights the primary US issues in those areas and notes where we are already seeing antitrust advocacy in EU private litigation.

2. Who May Bring Actions?

One area that has been, and will continue to be, the subject of private litigation is who, or what types of entities, can bring private cases, including for "collective redress". This is a relatively nascent issue today in Member States. The Directive does not address the issue, but Member States continue to explore different methods for bringing claims. France has adopted a class action system for competition cases, but only allows a limited group of government-approved consumer associations to represent consumers.[ii] Other countries have experimented with assigning claims to third parties and claims vehicles. The German government signed over its claims against a cartel of pre-stressing steel producers to rail operator Deutsche Bahn, which then initiated legal proceedings on its assigned claims in the Netherlands where courts are more permissive towards claims assignment.[iii] Cartel Damage Claims ("CDC"), a private company that purchases antitrust damage claims and litigates them, has also gotten involved in the new age of antitrust advocacy in the EU. CDC acquired claims of paper companies and brought a follow-on damages action against chemical makers Kemira, AkzoNobel and Eka.[iv] It also brought a case against cement manufacturers in Germany but ran into a road-block when a national court determined the cement buyers' assignments of their claims to CDC were invalid under German law.[v] These issues will likely become more significant as other Member States adopt private enforcement procedures in line with the Directive.

That said, the US system may be of little guidance here. In general, the US and the EU diverge on how claimant parties should be formed in collective redress actions. In the US, collective action (called "class action") rules specify that all class members are bound by any judgment, whether favourable or unfavourable, unless they affirmatively request exclusion from – i.e., "opt-out" of – the certified class.[vi] The EU favours the opposite approach. Although the Directive does not speak to collective redress, the EC Recommendation on common principles for injunctive and compensatory collective redress mechanisms (which is not binding on Member States) advises that the claimant party should be formed based on the express consent of the persons claiming to be harmed. In other words, members must affirmatively "opt-in" to collective actions.[vii] Courts in some Member States (e.g., the Netherlands, UK, Spain and Portugal) have rejected this approach and adopted "opt-out" systems. Whatever approach ultimately prevails among Member States, policy considerations that underlie the US system – facilitating redress, but ensuring that collective claims are typical of any asserted "class" – may find their way into Member State procedures and, in turn, decisions.

3. How Will National Courts Weigh Decisions of National Competition Authorities?

While EC final infringement decisions remain binding on national courts, under the Directive final infringement decisions of other national competition authorities only constitute *prima facie* evidence that a party has violated the competition laws.[viii] The final Directive differed from the proposed Directive in this regard, as the proposed Directive sought to also make the final infringement decisions of national competition authorities binding.[ix] As a result, when parties bring a follow-on action arising from a decision of another Member State's competition authority, national courts will need to determine the weight that decision deserves.

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The US may provide a useful model on this issue. Judgments of US antitrust enforcement agencies are not binding evidence in follow-on private antitrust actions. Instead, agency judgments are admissible as *prima facie* evidence of matters actually and necessarily decided against a defendant in a government action. Further, the plaintiff is only entitled to the *prima facie* effect where the government judgment (i) was final, (ii) was entered in a civil or criminal proceeding brought on behalf of the United States, (iii) resulted from an action brought under the antitrust laws, and (iv) was not a consent judgment entered before any testimony was taken.[x] While national courts in the EU may adopt less demanding standards on the evidentiary value of national competition authorities' decisions, we will need to wait and see how the courts make this determination.

4. What is a Sufficient Claim on its Face?

We are also likely to see other types of antitrust cases beyond the now common context of follow-on private litigation from cartel liability findings of the EC or a national competition authority. Indeed, if the US is any guide, parties are likely to begin to bring actions for cartel-related conduct not covered by any decision or for plenary actions covering any number of potential antitrust violations (dominance, object or effect). In these cases, without the guidance of the EC or a national competition authority, Member States' national courts may need to address whether certain claims, on their face, actually raise antitrust issues.

This is an essential aspect of the US system, where class action cases can be rejected at the onset if what they allege factually – even if presumed true – would not amount to an antitrust violation. While many Member States have not needed to develop procedural mechanisms for such a review, we see no reason why national courts would not eventually explore such threshold requirements. As they do so, we can expect vigorous fights – well known in the US – over what may constitute antitrust misconduct.

5. How Will Courts Deal With Indirect Purchaser Issues?

The Directive codifies the position of several Member States on the standing of indirect purchasers and the availability of the "pass-on defence". Indirect purchasers may bring claims for damages depending on whether, or to what degree, an overcharge was passed to them, but the indirect purchaser also has the burden of providing the existence and scope of its damages.[xi] The Directive also permits defendants to invoke the pass-on defence – an affirmative defence that a claimant passed on the whole or part of the overcharge resulting from the infringement of competition law and as a result, the claimant is either not entitled to damages or is entitled to less damages than it is claiming.[xii] And of course, the Directive also notes that full compensation for claimants should not lead to overcompensation through multiple damages.[xiii] In its attempt to provide compensation to all harmed parties, the Directive has also left national courts with a complicated task. They must simultaneously consider whether a direct purchaser was harmed, whether that direct purchaser passed on any of the overcharge to consumers further down the supply chain and determine the amount of harm, if any, at each level.

In the US, the approach is much more streamlined. In the vast majority of cases, federal law precludes the pass-on defence. The victim of an overcharge is found to be harmed whether or not the overcharge was passed on down the supply chain.[xiv] Further, in most circumstances, indirect purchasers lack standing to bring claims for alleged overcharges.[xv] Through this approach, the US system promotes simplicity by not asking courts to apportion damages among purchasers along the distribution chain and helps avoid the possibility of multiple damages. The goal of this system is to avoid adding additional complexity to already complex antitrust litigation.

Courts in the UK have already encountered the complexity of pass-on defence cases. In the *Dow Chemicals* case, the defendant, Dow, raised the pass-on defence to counter claims that tyre makers suffered damages from a rubber price-fixing cartel that included Dow. Lawyers for the plaintiffs argued against the pass-on defence, saying that "public policy considerations … strongly favor the drawing of a line to crystallize the loss at the point of overcharge." They continued, "[o]nce you enter into this question of whether, ultimately, the claimant has gained or lost, and to what extent the business has suffered from the overcharge, you … enter an infinite regression." "It is possible to trace the economic consequences of the defendants' overcharge almost indefinitely through the market." Dow, for its part, argued that it should be able to invoke the pass-on defence to avoid paying out twice for the same damages.[xvi] Although the *Dow* case settled before the court resolved these issues,[xvii] the back-and-forth between the parties illustrates the challenging task for national courts. One possible outcome is increased consolidation of claims initiated by direct and indirect purchasers, but we anticipate significant litigation over these points until case law is more settled.

6. What Battles Can We Expect Over Disclosure?

The EU placed disclosure issues front-and-centre in the Directive. The Directive's disclosure provisions reflect an effort to walk a fine line between several important policy goals, several of which often conflict. The Directive balances disclosure rights of private claimants with protection of the EC's leniency programme. At the same time, the Directive strives to correct the "information asymmetry" between claimants and alleged infringers and third parties. It attempts to provide private claimants with enough access to relevant evidence to make their case but also to avoid the disclosure of confidential business information and to resist transformation to a full-blown US discovery system. While this balance protects important policies in the EU, it may also lead to protracted disclosure battles. In addition, parties have already litigated the limits of disclosure in a few follow-on cartel cases, and we can expect to see more of these disputes going forward.

The Directive itself confirms that disputes over access to files possessed by competition authorities will continue to be a focal point. Unlike in the US, where participation in leniency programmes affords little protection against discovery of non-privileged materials, the Directive prevents national courts from ordering disclosure of leniency statements and settlement submissions.[xviii] National courts can, however, order disclosure of all other files in the possession of a competition authority, provided that they evaluate whether a claimant's request is specifically formulated, whether the request is made in relation to an action for damages before a national court, and arguably most importantly, whether disclosure is consistent with the need to safeguard the effectiveness of the public enforcement of competition law.[xix] The Directive envisions a dialogue between competition authorities and national courts on when the need to

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safeguard public enforcement of competition law outweighs disclosure, as it permits competition authorities to submit observations about the proportionality of a disclosure request for files in the possession of the authority.[xx] As national courts continue to balance the needs of claimants against public enforcement needs, we can expect significant interaction between the parties, national courts and competition authorities.

National courts will also continue to balance providing private claimants with enough information to effectively assert their claims and protecting confidential business information, all while avoiding full-blown discovery. In a defending a series of cases, MasterCard resisted disclosure on confidentiality and relevance grounds. Further complicating the matter, the EC had possession of the documents in question, which it had gathered in an antitrust probe. To help resolve the complicated disclosure issues, the UK court sought guidance from the EC. The EC, in turn, advised the court that the requested documents could be disclosed, provided that adequate protection was given to business secrets. The EC suggested a confidentiality ring – a device that limits disclosure among a limited group of lawyers – as the means to provide that protection.[xxi] Courts can expect to continually confront these issues as the Directive requires Member States to ensure their courts have adequate measures in place to protect confidential information.[xxii] We also suspect that courts, much like in the US, are going to become increasingly flexible in granting targeted discovery requests. Although the EU strongly opposes the US system of discovery, the Directive's focus on informational asymmetry suggests at least a slight move away from the limited disclosure that has historically prevailed in many Member States.

Finally, there has been a great deal of litigation (and ambiguity) surrounding disclosure in follow-on cartel cases. Here again, the UK may have provided a preview of what is to come. In the *National Grid* case, the claimant, National Grid, requested information from each of the defendants, all of whom were already fined by the EC for their role in a cartel. The claimant wanted information on how the cartel worked in the UK.[xxiii] Defendants Siemens and Alstom both refused to reply to the requests and argued that National Grid's allegations covered matters outside the EC decision fining the defendants for their role in the cartel and therefore could not be disclosed. Judge Roth, the presiding judge, ordered disclosure but provided ambiguous guidance for future litigants. Roth acknowledged that a party's claim must fall within the scope of the EC decision to order disclosure of the requested materials. He stated that disclosure required, "looking at the decision [and] whether it encompasses the UK and in what way". Roth also noted that the EC decision set out a breach of the antitrust laws but did not provide the "whole detail of how the cartel actually operated".[xxiv] Future courts will need to further determine whether follow-on cartel allegations fall within the scope of an EC decision. While these issues may be clarified as Member States implement the Directive, there likely will be ongoing advocacy over the propriety and scope of disclosure, especially with the settled policy favouring leniency programmes.

7. How Will Causation and Antitrust Injury Inquiries Affect Private Litigation?

Based on what has developed over the last several decades in the US – as well as a few early illustrations in some Member States – one of the more active areas for private litigation in the EU could be on the subject of causation and so-called "causal antitrust injury" – i.e., ensuring that private plaintiffs do not obtain remedies unless their harm actually flows in fact from antitrust misconduct, and (as developed further in the US) only from "that which makes the conduct unlawful".[xxv] It is a mouthful, but has been critical in US cases for separating "antitrust injury" from harm that flows from other causes or harm that may flow from antitrust misconduct but not from that which made the misconduct unlawful under the antitrust laws (e.g., a merger may be illegal under antitrust principles, but plaintiffs still must prove that their harm flows from the reduction of competition that made the merger illegal rather than from the mere change in management or strategies resulting from the combination).[xxvi] Granted, this latter principle is complex even within US case law and may take some time to surface in EU private litigation. But, given the new age of advocacy and the moneys involved, it is likely to gain traction sooner than we may expect.

8. What Role Will Economic Experts Play in Private Antitrust Litigation?

Finally, there is no doubt in our minds that one of the most hotly contested areas for private litigation going forward will be surrounding economic experts – a virtual cottage industry in the US in large part because of private antitrust litigation. As in the US, these issues cover the gamut, ranging from the traditional merits (defining markets, market power, coordination *versus* unilateral conduct) to causation and "antitrust injury" (as noted, tracking whether the alleged harm "flows" from the alleged antitrust misconduct) to damages (both as to causation and calculation).

Economic experts will also confront several issues unique to the EU. As discussed above, the pass-on defence and indirect purchaser issues raise complicated issues of damage assessment and apportionment among parties. In addition, in *Kone AG and Others*, the European Court of Justice ("ECJ") held Member States cannot exclude civil liability for umbrella damages in cartel cases.[xxvii] The umbrella damages doctrine allows a court to hold a cartel's members liable for damages caused by price increases of non-cartel members that were able to free-ride on the cartel's price effects. In addition to exposing cartel members to even greater damages, umbrella damages require complex proof that will call for expert economic testimony.

Member states are beginning to prepare their courts for these complicated economic issues. Last spring Italy and France announced they will begin educating their generalist judges about competition economics and law.[xxviii] These are issues already being litigated in a few of the more active Member States, and there is likely to be an explosion in this area in the years to come.

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Endnotes

i. Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. Document A7-0089/2014, adopted 17 April 2014, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+AMD+A7-2014-0089+002-002+DOC+PDF+V0//EN.

ii. Melissa Lipmann, *New French Law OKs Antitrust, Consumer Class Actions*, Law 360, March 20, 2014, available at http://www.law360.com/articles/520536/new-french-law-oks-antitrust-consumer-class-actions.

iii. Lewis Crofts, Comment: Deutsche Bahn cartel claim may break new ground for Dutch Courts, MLEX, 8 May 2014.

iv. Christiaan Nelisse, *Kemira, AkzoNobel lose fight against damage claim in paper bleach cartel*, MLEX, 4 June 2014.

v. Melissa Lipman, *German Court Nixes €176M Cement Cartel Suit*, Law 360, December 17, 2013, available at http://www.law360.com/articles/496512/german-court-nixes-176m-cement-cartel-suit.

vi. In the US, federal class actions are governed by Federal Rule of Civil Procedure Rule 23 and the vast majority of class actions are governed by Rule 23(b)(3). Rule 23(c)(2-3) provide rules on opting out of a certified class.

vii. Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, Article V, ¶ 21, available at http://eur-lex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:32013H0396&from=EN.

viii. Article 9(2) of the Directive.

ix. *See* Henry Vane, *Finish line in sight for EU cartel damages directive*, GCR, 19 March 2014 available at http://globalcompetitionreview.com/news/article/35534/finish-line-sight-eu-cartel-damages-directive/.

x. 15 USC §16(a).

xi. Article 14 of the Directive. *See also* Article 12 of the Directive.

xii. Article 13 of the Directive.

xiii. Preamble ¶12 of the Directive.

xiv. *See Hanover Shoe, Inc. v. United Machinery Corp.*, 392 US 481, 491-94 (1968).

xv. *See Illinois Brick Co. v. Illinois*, 431 US 720, 730-32 (1977).

xvi. Lewis Crofts, *Michelin, Pirelli, others seek to scotch "passing on" claims as Dow trial opens*, MLEX, 12 May 2014.

xvii. Lewis Crofts, *Dow settles UK lawsuit with tiremakers over rubber-cartel damages (update)*, MLEX, 28 May 2014.

xviii. Article 6(6) of the Directive.

xix. Article 6(4). Note that although national courts can order disclosure of any information besides leniency statements and settlement submissions, the Directive limits the time when national courts can order disclosure of certain materials. Only after the competition authority has closed its proceedings can national courts order disclosure of information prepared for competition authority proceedings, information the competition authority has drawn up and sent to the parties in the course of proceedings and withdrawn settlement submissions after. See Article 6(5).

xx. Article 6(11) of the Directive.

xxi. Lewis Crofts, *EU tells UK court it can disclose some MasterCard antitrust information*, MLEX, 27 June 2014.

xxii. Article 5(5) of the Directive.

xxiii. *National Grid Electricity Transmission Plc v ABB Ltd & Ors* [2013] EWHC 822 (Ch) (11 April 2013).

xxiv. Sille Ruubel, *National Grid, Siemens fight over UK cartel data in damages claim*, MLEX, 1 May 2014.

xxv. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 US 477 (1977).

xxvi. *See Alberta Gas Chems. v. E.I. DuPont de Nemours & Co.*, 826 F.2d 1235, 1240 (3d. Cir 1987).

xxvii. *See* Case C-557/12, *Kone AG and Others*, judgment of June 5, 2014. *See also* Irene Fraile, *EU High Court Opens The Door To Umbrella Liability*, Law 360, June 10, 2014, available at http://www.law360.com/articles/546044/eu-high-court-opens-the-door-to-umbrella-liability.

xxviii. Ron Knox, *Italian training project pushes for understanding in court*, Global Competition Review, 25 April 2014.

Acknowledgment

James Keyte and Paul Eckles are partners in the antitrust group of Skadden, Arps, Slate, Meagher & Flom LLP. They would like to thank Mike Folger, an associate in the group, for his invaluable assistance in preparing this chapter.

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Other notable representations include, among others, successfully defending: CEMEX in putative class actions alleging price-fixing of cement and concrete; HarperCollins Publishers in class actions and government investigations relating to e-books; DeBeers in antitrust actions alleging monopolisation and other anticompetitive conduct; Morgan Stanley in class actions alleging bid-rigging relating to municipal derivatives; Arclin in a Robinson-Patman case alleging price discrimination; Activision Publishing, Inc. in an antitrust action challenging the purported tying of products; NewYork-Presbyterian Hospital in a putative antitrust class action brought by resident physicians; and International Paper Company in an antitrust class action alleging price-fixing.

For a more detailed biography visit: www.skadden.com/professionals/paul-m-eckles.

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