YEARBOOK of ANTITRUST and REGULATORY STUDIES
www.yars.wz.uw.edu.pl

Peer-reviewed scientific periodical, focusing on legal and economic issues of antitrust and regulation.

CARS Centre for Antitrust and Regulatory Studies
Centrum Studiów Antymonopolowych i Regulacyjnych
Centre for Antitrust and Regulatory Studies, University of Warsaw, Faculty of Management
www.cars.wz.uw.edu.pl

Private Enforcement of Competition Law. Key Lessons from Recent International Developments. London, 5–6 March 2015

I. Introduction

The international seminar entitled 'Private Enforcement of Competition Law – Key Lessons from Recent International Developments', held in London on the 5th and 6th March 2015, was organised by the Competition Law Commission of the International Association of Lawyers (*Union Internationale des Avocats*, 'UIA') in cooperation with the UIA Litigation Commission and with the support of the Law Society of England and Wales, Berwin Leighton Paisner law firm (London, UK) and MLex as its media partner. The seminar brought together experts from many jurisdictions, including academics, a leading Judge, officials, private practice lawyers and in-house lawyers from global corporations.

On the first day of the seminar participants were invited to a welcome cocktail hosted by the Law Society of England and Wales. The cocktail provided the participants with the opportunity to get introduced to one another, exchange experiences and conduct informal talks.

The second day of the seminar included speeches and presentations which were held at the premises of Berwin Leighton Paisner. The seminar was opened by Harold Paisner (Senior Partner, Berwin Leighton Paisner), Stephen Sidkin (Partner, Fox Williams, UK and Co-Director of Communications of the UIA) and Aleksander Stawicki (Senior Partner, WKB Wierciński, Kwieciński, Baehr, Poland and President of the UIA Competition Law Commission). Mr Stawicki expressed his delight that the seminar was being held in London – the place where the heart of private enforcement beats.

The seminar was inaugurated with the speech by Sir Peter Roth, Justice of the High Court and President of the Competition Appeal Tribunal (UK) – one of the most eminent experts in the field of private enforcement. Sir Peter Roth introduced the conference agenda and noted a number of recent issues which would be discussed during the seminar. They included: the issue of a potential claimant and defendant; admissibility of assigning claims to a third entity (such as a specialised law firm); the competent court; exclusive jurisdiction clauses; liability of subsidiaries; and limitation period. He highlighted also several problems or difficulties that may arise in private

enforcement cases. These include inequality created between a potential claimant and defendant if the publication of a given infringement decision is delayed (while the potential defendant does have the text), or when the decision is published but contains redactions (especially with respect to information relating to leniency applications). Sir Roth expressed his concern that private actions for competition damages can be unattractive for small and medium-sized enterprises (hereafter, SMEs). He noted that a fast track procedure for SMEs, which will be introduced as a result of recent legislative works in the UK[1], might somewhat remedy this problem. Regarding the disclosure of evidence, Justice Roth pointed out that disclosure should be proportionate, yet the application of such general principles is not easy. The quantification of harm (where there is relatively little jurisprudence to provide guidance on this matter) was named as another difficulty here. Furthermore, Justice Roth voiced concerns about judges needing to assess economic evidence that is often very complex posing a challenge for competition lawyers in assisting the judiciary to properly understand the evidence.

II. Key issues in private enforcement

The first panel was dedicated to key issues in private enforcement. The panel was introduced and chaired by Adrian Magnus (Partner, Berwin Leighton Paisner). Daniel Beard (Barrister, Monckton Chambers, UK) first discussed recent trends in private antitrust enforcement in the UK as well as the legislative changes in this field introduced by the Consumer Rights Act 2015. Mr Beard noted that the claims are becoming more frequent and bigger, but that there is still a large scope for obstruction in private enforcement proceedings. He indicated that following the above legislative reform, a new form of actions for competition claims will be available in the UK for potential claimants – so-called opt-out actions[2]. The Competition Appeal Tribunal (hereafter, CAT) will determine whether a claim should be proceeded as opt-in or opt-out. The CAT's jurisdiction will also be extended so that it will be competent to hear stand-alone actions (and not only follow-on claims)[3] and grant injunctions.

Dr Florian Neumayr (Partner, Hügel Rechtsanwälte, Austria) proceeded to speak of umbrella claims. There may be damages to be collected (also) because of a non-

[1] On 26 March 2015, the Consumer Rights Act 2015 was enacted. The new law entered into force on 1 October 2015. For more information see: https://www.gov.uk/government/policies/providing-better-information-and-protection-for-consumers/supporting-pages/consumer-bill-of-rights. The text of the Act is available at: http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted (last accessed on 25 August 2015).

[2] In an opt-out action, the claim is brought by a representative on behalf of a defined class without the need to identify each individual class members. Those class members can be consumers or businesses. All those falling within the opt-out class will be bound by the judgement in the case unless they opt-out. Source: http://eu-competitionlaw.com/uk-consumer-rights-bill-proposes-opt-out-class-action-for-uk-competition-claims/ (last accessed on 25 August 2015).

[3] So far only the High Court was competent to hear stand-alone claims.

cartelist that had raised its own prices for products or services in the wake of a cartel. Dr Neumayr presented recent Austrian and EU case law relating to the issue of umbrella pricing, which in principle has allowed for bringing umbrella claims. He concluded that currently it is possible to bring an umbrella claim against a cartelist, even if a potential claimant had not been a party to any agreement with the cartelist, on condition that the claimant is able to prove that the effects of the cartel could have affected the pricing of services or products that the claimant has obtained from a third party.

Christopher Rother (Head of Deutsche Bahn Group Regulatory, Competition and Antitrust, Germany) continued the presentations by speaking of Deutsche Bahn's policy and strategy in enforcing claims for competition damages against DB's contractors. He briefly described cases where DB sought or is seeking damages, including the air cargo cartel, the rail tracks cartel and the carbon and graphite products cartel.

The last presentation in this panel was made by Laurie Webb Daniel (Partner, Holland & Knight, USA) who discussed the US private enforcement model and cited recent US Supreme Court case law.

III. Recent policy and legislative developments – what are their likely impacts?

The second session, chaired by Aleksander Stawicki, was devoted to recent policy and legislative developments and their likely impacts. Filip Kubik (European Commission – DG Competition, Private Enforcement Unit, Belgium) characterised the guiding principles of the EU Damages Directive. He highlighted that the Directive pursues two main goals: more compensation for victims and stronger enforcement overall (both public and private). He indicated that the Directive guarantees a right to full compensation, easier access to evidence, or the possibility to rely on a final decision of a national competition authority (hereafter, NCA) finding an infringement. The Directive allows also for a certain level of 'forum shopping' which is considered by DG Competition to be a good trend. According to the Commission representative, it will also be easier to settle damages out of court. Mr Kubik stated that DG Competition is very closely following the implementation of the Directive.

Paolo Palmigiano (Chairman, European Association of In-house Competition Lawyers & General Counsel and Chief Compliance Officer Sumitomo Electric Group, UK) explained why the UK is considered a forum of choice for private enforcement of competition law. He listed a number of factors: access to documents through wide-ranging discovery; easiness in establishing jurisdiction; experience of courts in awarding damages; high quality of judges, most with competition law expertise; speed of the process; possibility for English or foreign claimants to seek to recover the entire loss in English courts, irrespective of where the loss was actually suffered, provided there is an English subsidiary that implemented the cartel. However, proceedings in the UK can also be expensive, complex and time consuming for jurisdiction disputes. In his concluding remarks, Mr Palmigiano noted also the possible downsides of the

UK's recent legislative changes stating that they may lead to the increase of the cost of doing business in the UK. He also wondered whether there will be enough safeguards for opt-out actions.

Dr Aniko Keller (Szecskay Attorneys at Law, Hungary) focused her presentation on the current situation in Hungary and changes to be introduced because of the implementation of the Damages Directive. The speaker indicated that the main reasons for few damages actions in Hungary are costs of litigation matters, lack of effective collective redress, limitation period, and access to documents. She expressed also her conviction that the implementation of the Damages Directive would significantly change the current practice by, for instance, raising the awareness and knowledge of competition law in Hungary.

Professor Renato Nazzini (King's College London, UK) gave the last presentation of this session devoted to the issue of seeking competition damages in arbitration proceedings. Professor Nazzini listed several legal problems connected with the fact that arbitration tribunals are not 'courts of a member state' according to EU case law. For this reason, procedural rules such as Articles 15 and 16 of Regulation 1/2003 or the rules on evidence and on the effect of national infringement decisions in the Damages Directive do not apply before arbitrators. This means, among other things, that arbitrators are not bound by strict rules on the disclosure and admissibility of evidence, even if the seat of the arbitration is in the EU.

IV. Claimant considerations

David E. Vann (Partner, Simpson Thacher, UK) opened the third session dedicated to the issue of a claimant. Andrew Hockley (Partner, Berwin Leighton Paisner) provided guidance on how the strategy of a potential case should be prepared and, in particular, how to assess the loss suffered in case of purchases directly from a cartelist. Dr Till Schreiber (CDC Cartel Damage Claims, Belgium) followed-up with legal and practical issues connected with proving damages. Mick Smith (Partner, Calunius Capital, UK) closed the panel with a presentation of the factors which make a case fundable. According to him, these include: quantum (realistic value of a claim), merits (probability of positive outcome), recoverability (can the opponent pay?), time (likely investment period), costs and variability (likelihood of changing factors).

V. Defence considerations

The fourth panel, chaired by Dr Florian Neumayr, focused on defence considerations. Fernando de le Mata (Partner, Baker & McKenzie, Spain) provided some remarks on the issue of legal standing in order to verify if a claimant is really entitled to sue. He indicated the following points to be considered: due assignment – different laws will need to be taken into account (at least, *lex contractus* and *lex fori*); compliance with

organisational laws; the claimant's business model; the passing-on argument; and, in case of umbrella damages, whether they fall within the scope of assignment.

Martin André Dittmer (Partner, Gorrissen Federspiel, Denmark) presented the possible defence tactics that a defendant can use in case of a follow-on claim. He advised that the best way to pre-empt follow-on litigation is to ensure that there is no infringement decision for claimants to follow on. A potential defendant should explore as early as possible whether the public enforcement investigation (be it before the EU Commission or NCAs) can be closed by way of a settlement procedure, or even better, by way of informal undertakings, thus resulting in no decision at all. If a decision finding an infringement has been issued, a defendant should in general look for any and all indications in the decision that infringing undertakings enjoyed limited market power. It may be helpful to look in detail at the scope of the infringement in order to obtain information on whether the claimant's business falls in some way outside the scope of the infringement/decision.

Stephen Wisking (Partner, Herbert Smith Freehills, UK) discussed the consensual methods of enforcing claims indicating potential problems which may arise.

VI. Discussion of claimant and defence tactics on hypothetical case study

The last panel, chaired by Beckett McGrath (Partner, Cooley, UK), included a case study of a hypothetical scenario where a decision finding a cartel has been issued. Participants conducted a vivid discussion on possible tactics and steps to be taken, and exchanged a great deal of practical remarks on the basis of their experience in private enforcement cases.

VII. Concluding remarks

The programme of the seminar was very rich and speakers had a lot of experiences to share in this context. Time allowing, panels were followed by questions or comments from the audience. These included some remarks from economists in areas such as, for example, the quantification of harm.

The seminar was closed by Aleksander Stawicki who briefly summarised the proceedings, thanked all seminar speakers as well as its other participants, and expressed his sadness that Poland is not yet among those EU countries where private enforcement of competition law actually takes place.

Emilia Wardęga
LL.M. (College of Europe, Bruges), trainee advocate, associate
WKB Wierciński, Kwieciński, Baehr Sp.k., Warsaw, Poland
emilia.wardega@wkb.com.pl