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UK RESPONSE

European Commission Green
Paper on Damages Actions
for Breach of Community
Antitrust Rules

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Commission Green Paper on Damages actions for breach of the EC antitrust rules

Introduction

1. The UK Government warmly welcomes the Green Paper and the accompanying Commission Staff Working Paper (SEC (2005) 1732) considering the main obstacles to the private enforcement of the EC competition rules.
2. The Green Paper suggests a number of options for consideration and possible action by Member States in respect of their legal systems as applied to competition disputes, and for possible action at the Community level. We would like to underline that we see this consultation as a very useful means of clarifying the issues, options and possible actions for in-depth consideration by the Member States.
3. The UK Government supports the wider aim of the paper, namely to encourage and facilitate private damages actions to those (consumers and businesses) who have suffered loss due to infringement of competition rules. In recent years, the UK has enacted legislation with exactly this aim in view. We are, therefore, in favour of effective private enforcement of the EC competition rules in all the 25 Member States, while recognising the need to avoid creating a litigation culture.
4. Public enforcement is currently the primary means of enforcing competition law. It is important not to compromise that, or divert resources from it. Private actions are however a very important complementary limb of an effective competition regime. Private actions allow those who have suffered loss to be compensated and, alongside other means, can in practice provide an important additional deterrent to those who may cause loss. Deterrence can also be achieved by other means such as fines or imprisonment and disqualification of company directors.
5. The possibility of private enforcement of competition law – injunctions to prevent or halt infringements, and actions to obtain compensation for breach of competition law - is an important element in the competition law scheme. It supplements the resources available to the Member States for enforcement of the law.

6. The UK has taken a number of measures¹ at national level aimed at encouraging and facilitating the bringing of claims, as have a number of other Member States. We shall be pleased to share our experiences and exchange ideas with the Commission and other Member States in considering possible steps which can help further to facilitate private actions.

7. Naturally, most of the options outlined in the Green Paper touch on matters of domestic civil law. The implementation of some of the options would therefore mean changes which would either affect the whole domestic civil law system or create special rules for competition issues only. There would need to be a very clear justification for making domestic rules applicable to competition law distinct from other areas of law.

8. In order to safeguard consistency with national laws and national competition law generally there are strong arguments for action being taken at Member State level rather than at Community level, particularly where these arguments relate to areas of substantive law such as damages and liability or to procedural law dealing with disclosure, costs and access to evidence. In each system, there are different sets of checks and balances in place, in order to retain a balance between claimants and defendants.

9. Any debate about how to facilitate private actions will have to consider carefully the interaction of provisions including access to evidence and burden of proof, the role of public enforcement and the availability of damages as well as how to treat leniency applicants. Therefore, there needs to be discussion among the Commission and Member States to increase understanding, disseminate and encourage best practice in this area, and consider what further action may appropriately be dealt with at the Member State level and at Commission level.

10. In considering the options put forward by the Commission, we are open to consider any possible improvements and ideas that may help to facilitate private actions in the UK and other Member States and we hope that all Member States will be encouraged to look at and discuss how the effectiveness of procedures for private actions could be improved.

11. This paper examines the options set out in the Green Paper and the extent to which they match, overlap with or differ from the current UK law position.

¹ These include the introduction of provisions on follow on actions (after public law enforcement) before the Competition Appeal Tribunal by the amendments to the Competition Act (CA) 1998 made by the Enterprise Act (EA) 2002; the ability of consumer bodies to bring claims pursuant to the amendments to the Competition Act 1998 made by the Enterprise Act 2002; and the binding effect of decisions (before the CAT and the ordinary courts) and section 16 of the Enterprise Act 2002 on provisions on transfer of proceedings between the High Court and the CAT.

Question A

Should there be special rules on disclosure of documentary evidence in civil proceedings for damages under Articles 81 and 82 EC?

If so, which form should such disclosure take? (Options 1 – 5)

Option 1:

Disclosure should be available once a party has set out in detail the relevant facts of the case and has presented reasonably available evidence in support of its allegations (fact pleading). Disclosure should be limited to relevant and reasonably identified individual documents and should be ordered by a court.

12. The purpose of Option 1, as described in paragraphs 34 and 89 to 90 of the Commission Staff Working Paper, is to allow the claimant access to evidence in the possession of someone else, be it the defendant or a third party. This is intended to address the problem that a claim for damages may be unsuccessful because the claimant is not able to provide sufficient evidence of the constituent elements of a damages claim. The Green Paper's proposal for a limited form of court-ordered disclosure of relevant and reasonably identified documents is designed to avoid excessively broad disclosure.

13. In the UK, competition cases may be heard in the ordinary civil courts or the Competition Appeal Tribunal ("CAT"), depending on the circumstances. The rules of disclosure, which are contained in the Civil Procedure Rules ("CPR") are, in practice, also applied by the CAT under the Competition Appeal Tribunal Rules 2003². There are extensive rules requiring the disclosure of documentary evidence in civil proceedings both by the parties, in the ordinary course, and when required by a court or tribunal.

14. In Scotland the court has a statutory power under section 1(1) of the Administration of Justice (Scotland) Act 1972 to order the production and recovery of documents which may be relevant to any proceedings before the court or which are likely to be brought before it. The Rules of the Court of Session in Scotland contain provisions regarding the production of documents founded on by a party in a case, and the recovery and preservation of documentary evidence during or in anticipation of litigation. These rules are broadly similar in effect to the rules for England and Wales set out here.

15. The normal procedure for disclosing documentary evidence is "standard disclosure" which is set out in the CPR. Each party is required to disclose documents on which it relies and which adversely affect or support either party's case, and as required by a relevant practice direction³. Disclosure

² SI. 2003/1372.

³ CPR Rule 31.6.

against third parties is also possible provided certain conditions are satisfied. Irrespective of whether disclosure is sought from a party to the proceedings or a third party, disclosure may be required pre-action.

16. The court has, in addition, a broad discretion to order additional disclosure since it may, at any time, on the request of a party or of its own initiative, give such directions as it thinks fit “to secure the just, expeditious and economical conduct of the proceedings”⁴.

17. Option 1 limits disclosure to “relevant and reasonably identified” individual documents. This formulation would appear to be narrower than that required by the standard disclosure rules.

Option 2:

Subject to fact pleading, mandatory disclosure of classes of documents between the parties, ordered by a court, should be possible.

18. The purpose of Option 2, as described in paragraph 91 of the Commission Staff Working Paper is to address the obstacle to claims posed by limited disclosure requirements and the limited powers of national courts in many Member States to order production of documents.

19. The rules governing disclosure in the UK are described above in response to Option 1. In the UK a party which is dissatisfied with the extent of his opponent’s disclosure can obtain a court order requiring the opponent to give further specific disclosure or conduct a further search⁵.

20. The UK experience has shown that the disclosure of documents by order of the court is a useful component of disclosure.

Option 3:

Subject to fact pleading, there should be an obligation on each party to provide the other parties to the litigation with a list of relevant documents in its possession, which are accessible to them.

21. The purpose of Option 3, as described in paragraph 92 of the Commission Staff Working Paper, is to facilitate the identification by the parties of relevant documents in the possession of another party.

22. In the UK, the standard disclosure procedure⁶ already requires the mandatory disclosure of a list of documents so that adoption of Option 3 does not appear to be necessary in the UK.

⁴ CPR Rule 19.

⁵ CAT Rule 19(2)(k) and in CPR Rule 31.12.

⁶ CPR Rules 31.5, 31.6, 31.8 and 31.10.

Option 4:

Introduction of sanctions for the destruction of evidence to allow the disclosure described in options 1 to 3.

23. The purpose of Options 4 and 5, as described in paragraphs 93 and 94 of the Commission Staff Working Paper, is to preserve evidence and ensure that it is not withheld from the proceedings.

24. A party dissatisfied with the extent of his opponent's disclosure can obtain a court order requiring the opponent to give further specific disclosure or conduct a further search⁷. If such an order is made, failure to comply can amount to contempt of court and may have serious consequences including the dismissal of a party's claim or judgment being entered against him.

Option 5:

Obligation to preserve relevant evidence. Under this rule, before a civil action actually begins, a court could order that evidence which is relevant for that subsequent action be preserved. The party asking for such an order should, however, present reasonably available evidence to support a prima facie infringement case.

25. In the UK the courts have the power to make an order for pre-action disclosure against the likely defendant⁸. An order is limited to such documents as the defendant ought to disclose by way of standard disclosure⁹. In addition, the Court has a similar power to order a third-party to produce documents before trial¹⁰.

Comments

26. The UK acknowledges that limited powers on the part of a claimant to demand the production of evidence may constitute an obstacle to successful claims.

27. As pointed out above, however, in the UK there is an extensive set of rules in place requiring the disclosure of documentary evidence in civil proceedings.

28. The proposals give rise to the general question whether it is appropriate to create specific rules applicable to competition cases only and, moreover, whether it is appropriate for EU law to amend the Member States' general

⁷ See above, CAT Rule 19(2)(k) and in CPR Rule 31.12.

⁸ Supreme Court Act 1981, section 33(2) and the County Court Act 1984, section 52(2).

⁹ CPR Rule 31.16(4) and (5).

¹⁰ Supreme Court Act 1981, section 4(2) and the County Court Act 1984, section 53.

rules of civil procedure (except in certain specific targeted areas). The Commission describes its rationale for such an amendment, in paragraphs 52 to 53 of the Commission Staff Working Paper, to be that civil litigation in the field of competition touches upon a particular public interest and offers a number of specific aspects that mean that the bringing of an action is unusually difficult.

29. We agree that the claimant in a competition case may face difficulties proving his claim. However, the UK believes that the Member States have the means to deal with this problem within their rules of evidence. This has to be done in a way that does not adversely affect the balance of the domestic legal system. Therefore, in order to maintain consistency with national laws, we consider that the rules of access to evidence are best dealt with at the Member State level.

30. Since UK law already addresses most of the issues raised in Question A in a comprehensive way, there seems to be no need for amendments to the current law.

Question B

Are special rules regarding access to documents held by a competition authority helpful for antitrust damages claims? How could such access be organised? (Options 6 – 7)

Option 6:

Obligation on any party to proceedings before a competition authority to turn over to a litigant in civil proceedings all documents which have been submitted to the authority, with the exception of leniency applications. Issues relating to disclosure of business secrets and other confidential information as well as rights of the defence would be addressed under the law of the forum (i.e. the law of the court having jurisdiction).

31. Question B appears to go wider than Options 6 and 7 suggest. The question (whether special rules regarding access to documents held by a competition authority may be helpful for antitrust damages claims) raises a number of difficult issues, including where the balance should be struck between (i) promotion of private enforcement and avoiding wholly speculative claims; (ii) promotion of private enforcement and protection of leniency applicants; and (iii) the burdens borne by the claimant and the competition authority respectively. These issues will need to be considered in detail.

32. The purpose of Option 6, as described in paragraphs 73 to 77 and 95 of the Commission Staff Working Paper, is to address the heavy evidential burden on the claimant and improve his access to evidence in cases often

involving a strong asymmetry of information without losing the protection of business secrets.

33. Option 6 has two aspects: (a) the requirement to disclose documents which have been made available to a competition authority and (b) the proposal that the law of the forum should apply to determine the disclosure of business secrets.

34. The first aspect of Option 6 appears to be a less appropriate solution than standard disclosure. The proposed test could lead to disclosure of a large number of documents which are not relevant to the proceedings or, equally, non-disclosure of documents which are relevant but which have not been submitted to a competition authority.

35. In the UK, documents held by a competition authority are not, as a general rule, available to claimants in a damages claim due to the restrictions on disclosure contained in Part 9 of the Enterprise Act 2002, in particular. Part 9 stipulates, inter alia, that information which relates to the affairs of an individual or any business of an undertaking must not be disclosed unless certain conditions are met. Information which has on an earlier occasion been disclosed to the public may be disclosed, provided that certain conditions are met. Information may be disclosed if the individual concerned or the person carrying out the business and the person who provided the information consents. However, a competition authority must comply with any court order requiring disclosure (see legislation outlined above).

36. When a case is before the CAT, parties wishing to claim confidential treatment of documents or parts of documents, including business secrets, may apply to the CAT to have those documents excluded from disclosure provided certain conditions are met. The request has to be made in writing within 14 days of sending the document to the Registrar and must indicate the relevant passages and the figures or passages for which confidentiality is claimed and must be supported in each case by specific reasons¹¹. Whether particular information is to be regarded as confidential is a matter for the Tribunal to decide in the individual case.

37. Confidentiality in the ordinary courts follows CPR Rule 5.4 (7). On the application of a party or any person identified in the claim form, the court can restrict the persons or classes of persons who may obtain a copy of the claim form, order that they may only obtain a copy if it is edited in accordance with the directions of the court or make such other order as it thinks fit.

Option 7:

Access for national courts to documents held by the Commission. In this context, the Commission would welcome feedback on (a) how national courts consider they are able to guarantee the confidentiality of

¹¹ See CAT Rule 53. It applies to claims for damages as well as to other proceedings before the CAT (see CAT Rules 3 and 30).

business secrets or other confidential information, and (b) on the situations in which national courts would ask the Commission for information that parties could also provide.

38. Option 7 suggests providing national courts with access to documents held by the Commission. The purpose of Option 7, as described in paragraphs 73 to 77 and 96 of the Commission Staff Working Paper, is to gather feedback on how national courts would themselves like to co-operate with the Commission.

39. We do not anticipate substantial difficulties in our national courts guaranteeing the confidentiality of business secrets or other confidential information. In the UK, there is a working system of rules and principles dealing with the treatment of confidential information in the courts¹². Although confidentiality is not a bar to disclosure, the court can conduct hearings in camera, impose reporting restrictions or limit access to court documents, for example¹³. Before the CAT, confidential matters are not disclosed unless they are essential for the decision. Furthermore, in the CAT a confidentiality ring can be defined, e.g. restricting disclosure to the legal representatives, who are subject to professional codes of conduct, while the parties themselves may be excluded. More generally, in the ordinary courts, the court can make various provisions on the treatment of confidential information, e.g. conduct hearings in camera, impose reporting restrictions or limit access to court documents,¹⁴.

Comments

40. In relation to Option 6 we do not feel that there is particular merit in an obligation being placed on any party to proceedings before a competition authority to turn over to a litigant in civil proceedings all documents which have been submitted to the authority, with the exception of leniency applications. As the second part of Option 6 suggests, however, issues relating to disclosure of business secrets and other confidential information as well as rights of the defence should be addressed under the law of the forum (i.e. the law of the court having jurisdiction).

41. We understand that the situation set out in Option 7, in which national courts would ask the Commission for information, is not expected to arise very often in practice in the UK because the courts would generally seek information from the parties rather than from competition authorities. It is, however, conceivable that a national court would ask the Commission for a copy of any statement of objections issued by the Commission in a case where the Commission has for some reason not proceeded to a decision.

¹² Paragraph 1(2) of Schedule 4 to the EA 2002 which applies to the CAT, CAT Rule 16(8), see also CPR Rule 5.4.

¹³ See CPR Rule 5.4.

¹⁴ See CPR Rule 5.4.

42. It is possible that the CAT might wish to obtain information from the Commission in the event of a follow on action for damages under section 47A CA 1998 but we should have thought that, in general, the CAT would seek the information from the parties.

Question C

Should the claimant's burden of proving the antitrust infringement in damages actions be alleviated and, if so, how? (Options 8 – 10)

Option 8:

Infringement decisions by competition authorities of the EU Member States to be made binding on civil courts or, alternatively, reversal of the burden of proof where such an infringement decision exists.

Option 9:

Shifting or lowering the burden of proof in cases of information asymmetry between the claimant and defendant with the aim of redressing that asymmetry. Such rules could, to a certain extent, make up for the non-existent or weak disclosure rules available to the claimant.

Option 10:

Unjustified refusal by a party to turn over evidence could have an influence on the burden of proof, varying between a rebuttable presumption or an irrebuttable presumption of proof and the mere possibility for the court to take that refusal into account when assessing whether the relevant fact has been proven.

43. The purpose of Options 8-10, as described in paragraphs 36, 78 to 87 and 98 to 100 of the Commission Staff Working Paper, is to alleviate the claimant's burden of proving the infringement of competition law, in view of the difficulties often faced by claimants arising from the unavailability of evidence.

44. **Option 8** has two alternatives. The first suggests that the civil courts should be bound by a decision of the competition authorities of other Member States. The second proposes a reversal of the burden of proof from the claimant to the defendant where such a decision exists. **Option 9** argues for a reversal or lowering of the burden of proof in cases of uneven access to information. **Option 10** considers a range of consequences for the defendant in case he refuses to turn over evidence without justification.

45. Under UK law the burden of proof of a breach of a statutory duty is on the claimant. The civil standard of proof (balance of probabilities) applies. OFT/EU Commission decisions are binding on the CAT, assuming that all relevant time-limits for appeal have expired or that any appeal has been completed¹⁵. OFT decisions as to infringement and CAT decisions (on appeal from OFT decisions) are binding in damages actions before the ordinary courts under broadly similar conditions¹⁶.

Comments

46. In the UK decisions of the OFT and the EU Commission are binding in follow-on cases before the courts and the CAT¹⁷. It follows from this that **Option 8** would mean a widening of the scope of Section 47A and Section 58 CA 1998 to decisions of competition authorities of other Member States.

47. German law¹⁸ already reflects the first alternative of Option 8 by making the findings of the German and EC competition authorities, as well as those of other Member States' competition authorities, binding on courts dealing with private law damages actions.

48. The UK is open to consider this aspect of Option 8. The binding effect of a decision of a competition authority appears to be an adequate recognition of the imbalance of power between claimant and defendant. If it can be shown that a rule similar to the German one has positive effects on the bringing of private actions, amendments of the domestic law could be considered. However, detailed requirements would be needed in relation to relevant time-limits for appeal. They should have expired or any appeal should have been completed before decisions of other Member States' competition authorities become binding on civil courts.

49. In relation to the alternative in the second part of Option 8, i.e. changing the burden of proof, there has to be a balance between the rights of the claimant and the rights of the defendant, which could be jeopardised in such a situation. Any changing of the burden of proof could raise issues under Article 6 of the European Convention on Human Rights (ECHR) relating to the right of the defendant to a fair trial.

50. Although we understand the problems **Option 9** aims to address, we foresee considerable practical problems with its implementation. The option does not define what degree of "asymmetry" would be required for triggering a reversal of the burden or lowering of the standard of proof. In order to be useful, a certain threshold of information asymmetry seems to be required but

¹⁵ Section 47A (6) and (7) of CA 1998 (inserted by Section 18 EA 2002).

¹⁶ Section 58A(2), (3) and (4) of CA 1998.

¹⁷ See above.

¹⁸ Section 33 (4) of the German Act against Restraints of Competition ("*Gesetz gegen Wettbewerbsbeschränkungen*", *GWB*).

the definition of this would appear to be difficult. Moreover, it is unclear how the standard of proof could be lowered further when the existing standard of proof is 'on the balance of probabilities'. Generally, effective disclosure rules such as those in the UK should obviate the need for any change in the burden of proof. Furthermore, any lowering of the standard of proof could increase the risk of gaming by claimants and unwarranted intervention.

51. We understand that under German law the claimant only has to adduce prima facie evidence of an abuse of dominance before this gives rise to a rebuttable presumption in his favour¹⁹. However, considering the strong domestic rules of disclosure, we do not see the need for any such provision in the UK.

52. **Option 10** raises questions of proportionality if a case can turn on the refusal to provide one piece of evidence. One would also have to put forward criteria for defining when a refusal to turn over evidence is "unjustified".

53. It is preferable for the domestic courts to have a discretion as to the management of a case. For example, in the UK, the refusal to hand over evidence may, at the court's discretion, have similar adverse consequences to the destruction of evidence e.g. failure to comply with an order of the court can amount to contempt of court and may have serious consequences including the dismissal of a party's claim or judgment being entered against him. The emphasis should therefore be on dealing with the failure to provide evidence by means, for example, of contempt proceedings which would be more effective than altering or reversing the burden of proof. Again any changing of the burden of proof could raise Article 6 ECHR issues. In practical terms, it would be necessary to prove that the evidence existed before any shift in the burden of proof would be appropriate, which could be very difficult.

Question D

Should there be a fault requirement for antitrust-related damages actions? (Options 11 – 13)

Option 11:

Proof of the infringement should be sufficient (analogous to strict liability).

Option 12:

Proof of the infringement should be sufficient only in relation to the most serious antitrust law infringements.

¹⁹ Section 20(5) Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, "GWB").

Option 13:

There should be a possibility for the defendant to show that he excusably erred in law or in fact. In those circumstances, the infringement would not lead to liability for damages (defence of excusable error).

54. The options suggest strict liability (Option 11), strict liability in the most serious cases only (Option 12) and strict liability but with a defence that the defendant excusably erred in law or fact (Option 13). The purpose of Options 11-13, as described in paragraphs 32 and 109 to 111 of the Commission Staff Working Paper, is to facilitate private damages actions by removing fault as a condition of liability for a breach of competition law or to consider that the infringement itself constitutes the fault.

55. Article 81 is partly effects based as an agreement is prohibited if it has as its "object or effect the prevention, restriction or distortion of competition within the common market". Article 82 requires "the abuse by one or more undertakings of a dominant position within the common market or a substantial part of it."

56. Under English case law, breach of Articles 81 and 82 EC constitutes a breach of the statutory duty created by section 2(1) of the European Communities Act 1972. The cause of action for breach of statutory duty is generally considered to impose strict liability, i.e. there is no requirement of fault.

57. UK law does not contain a provision equivalent to option 13, under which there would be no liability if the defendant excusably erred in law or fact.

Comments

58. UK domestic law reflects Option 11, in that it imposes strict liability for breach of Articles 81 and 82 EC. The UK therefore belongs to the large group of Member States where the fault requirement does not form an obstacle to private enforcement of competition law. Option 12 does not, therefore, reflect the position in the UK.

59. Since it appears that it is only a minority of Member States that do have a fault requirement²⁰, the UK feels that there might be a case for the relevant Member States to amend their rules rather than for action to be taken at a European level.

²⁰ See paragraph 102 of the Commission Staff Working Paper.

60. Both the content and context of any proposal along the lines of Option 13 would require careful consideration because it would import a concept of excusable error, which would be a new development in the UK.

Question E

How should damages be defined? (Options 14 –17)

Option 14:

Definition of damages to be awarded with reference to the loss suffered by the claimant as a result of the infringing behaviour of the defendant (compensatory damages).

Option 15:

Definition of damages to be awarded with reference to the illegal gain made by the infringer (recovery of illegal gain).

Option 16:

Double damages for horizontal cartels. Such awards could be automatic, conditional or at the discretion of the court.

Option 17:

Prejudgment interest from the date of the infringement or date of the injury.

61. Options 14- 17 suggest compensatory damages, recovery of illegal gain, double damages for horizontal cartels and prejudgment interest respectively. The purpose of Options 14 -17, as described in paragraphs 112 to 124 and 147 to 151 of the Commission Staff Working Paper, is to consider the effects of the definition of damages on incentives for claimants to bring a case before a court.

62. UK courts apply general principles of foreseeability and quantum where loss of profits is claimed to restore the claimant to the position he or she would have been in but for the unlawful conduct (see *Crehan*²¹ and *Arkin*²² cases).

²¹ *Crehan v Inntrepreneur Pub Company* [2003] EWHC 1510 (Chancery Division); [2003] ALL ER (D) 354 (Jun); CA, [2004] EWCA Civ 637, 21 May 2004.

²² *Arkin v Borchard Lines Ltd* [2001] Eu LR 232, QB (preliminary issues); judgment [2003] EWHC 687 (Comm), [2003] ALL ER (D) 173.

63. Civil damages in the UK are primarily focused on providing compensation for the actual loss suffered by the claimant, and not on deterring or punishing the defendant. In addition to purely compensatory damages, the courts also have the power in certain circumstances to award aggravated damages (which compensate the victim of a wrong for mental distress or injury to feelings) or restitutionary damages (which aim to strip away some or all of the gains by a defendant arising from a civil wrong), or, in very limited circumstances, exemplary damages.

64. Damages must be assessed at the date of the loss²³.

65. In cartel cases, a party claiming to have been affected in the market by the existence of the cartel will generally claim the “overcharge”, i.e. the amount by which the price of the goods or services in question have been inflated over and above the price that would have been charged had there been no cartel.

66. Pre-judgment interest is already available at the discretion of the court. This can potentially extend to interest from the date of the infringement. Interest may additionally be awarded on the judgment debt at the rate for the time being specified under section 17 of the Judgments Act 1838 (currently 8%).

Comments

67. The UK’s overarching position is that the availability, nature and calculation of damages are matters of substantive law which should be left to Member States. We do not believe that there is a need for a special regime to be established at Community level or for competition law cases to be treated differently from other damages cases.

68. In relation to the specific options on which views are sought, Option 14 is generally available and Option 15 is possible under the law in England and Wales but would go against the general principles of damages in Scottish law.

69. However, we feel that the recovery of illegal gain proposed in Option 15 may, in practice, give rise to difficulties of proof, not least because the information is with the defendant rather than the claimant, and could give rise to further difficulties of how to divide the illegal gain among claimants from different levels of the supply chain.

70. Option 16 proposes double damages for horizontal cartels. While there is some scope in the UK for punitive damages, they are only available in very limited circumstances and there is no decided competition case where punitive damages have been considered. The Government’s current policy is

²³ Crehan v Inntrepreneur Pub Company, [2004] EWCA Civ 637 (CA) at paragraphs 172 et seq.

that there should be no further lessening through statute of the restrictions on the availability of punitive damages in civil proceedings. This reflects the view that the primary purpose of civil law on damages is to provide for loss, and not to punish.

71. Option 16 could also raise practical difficulties, for example, additional arguments might arise between the parties as to whether a particular fact situation constitutes a cartel and, therefore, gave rise to double damages. This could add to the cost and length of proceedings.

72. Deterrence for the formation of cartels may also be achieved by fines, imprisonment and disqualification of company directors²⁴. It is important to consider how best to achieve effective deterrence.

Question F

**Which method should be used for calculating the quantum of damages?
(Options 18 – 20)**

Option 18:

What is the added value for damages actions of use of complex economic models for the quantification of damages over simpler methods? Should the court have the power to assess quantum on the basis of an equitable approach?

Option 19:

Should the Commission publish guidelines on the quantification of damages?

Option 20:

Introduction of split proceedings - between the liability of the infringer and the quantum of damages to be awarded - to simplify litigation.

73. Options 18-20 ask three questions. Their purpose, as described in paragraphs 125 to 146 and 152 to 155 of the Commission Staff Working Paper, is to demonstrate the variety of techniques available for quantifying damages and to collect views as to the suitability of the described methods in damages quantification before civil courts.

²⁴ Section 36 et seq CA1998 (penalties); section 188 et seq EA2002 (cartel offence); Company Directors Disqualification Act 1986

Comments

74. The UK's overarching view is that the quantification of damages is a matter of substantive law which should be left to the courts of Member States to determine on the basis of the evidence provided to them. We do not believe that it would be appropriate or helpful to adopt uniform levels of damages or to require the use of complex economic models to determine quantum.

75. In relation to Option 18, we are keen for the courts to continue to calculate damages by reference to the loss suffered by the claimant. The compulsory use of complex economic models would be cumbersome and impractical, as over time the efficacy of any particular model may be called into question and different considerations may apply in different cases. In addition, we are wary of imposing an extra layer of complexity and expense as a result of the need to employ economists to prepare the complex economic models.

76. It is unclear what is envisaged by the "equitable approach", suggested at the end of Option 18. In the UK the courts will determine what is fair compensation in an individual case on the basis of all the evidence and the loss that the claimant has suffered. It is our view that a court should be able to apply the Member State's rules for assessing damages so that decisions have the merit of consistency and fairness between cases and between claimants and defendants and may, if necessary, be readily reviewed by a superior court.

77. In relation to Option 19, we have doubts that the publication of Commission guidelines on the quantification of damages would be helpful. It is unclear exactly what kind of guidelines are envisaged or what status they would have. The damages that are appropriate in an individual case will depend on the loss that the claimant has suffered, and any prescriptive models as to how these should be quantified or tariffs would risk either over- or under-compensating the claimant.

78. In relation to Option 20, we do not feel that split proceedings should, as a general rule, be compulsory. It is already possible for the courts in England and Wales to determine liability prior to deciding quantum if that appears appropriate in an individual case. However, it would not be desirable to introduce prescriptive provisions requiring this to occur in every case or to attempt to define the circumstances in which it will be appropriate.

Question G

Should there be rules on admissibility and operation of the passing-on defence? If so, which form should such rules take? Should the indirect purchaser have standing? (Options 21 – 24)

Option 21:

The passing-on defence is allowed and both direct and indirect purchasers can sue the infringer. This option would entail the risk that the direct purchaser will be unsuccessful in claiming damages as the infringer will be able to use the passing-on defence and that indirect purchasers will not be successful either because they will be unable to show if and to what extent the damages are passed on along the supply chain. Special consideration should be given in this respect to the burden of proof.

Option 22:

The passing-on defence is excluded and only direct purchasers can sue the infringer. Under this option direct purchasers will be in a better position as the difficulties associated with the passing-on defence will not burden the proceedings.

Option 23:

The passing-on defence is excluded and both direct and indirect purchasers can sue the infringer. While the exclusion of the passing-on defence renders these actions less burdensome for the claimants, this option entails the possibility of the defendant being ordered to pay multiple damages as both the indirect and direct purchasers can claim.

Option 24:

A two-step procedure, in which the passing-on defence is excluded, the infringer can be sued by any victim and, in a second step, the overcharge is distributed between all the parties who have suffered a loss. This option is technically difficult but has the advantage of providing fair compensation for all victims.

79. Options 21 to 24 set out different possibilities of allowing or disallowing the passing-on defence and giving or denying standing to indirect purchasers. The purpose of Options 21-24, as described in paragraphs 38, 39, 156 to 180 and 181 to 187 of the Commission Staff Working Paper, is to examine the possible benefits and disadvantages the passing-on defence and indirect purchaser standing could have for private enforcement of competition law.

80. The Commission Staff Working Paper draws attention to the need to weigh the problems of proof posed by tracing an overcharge through the

hands of a potentially long chain of purchasers against the desirability of having an effective recovery mechanism available to all affected purchasers.

81. Neither the 'passing-on' defence nor 'indirect purchaser' standing is the subject of settled case law in the UK. The broad language of the ECJ in the *Crehan* case²⁵ suggests that indirect purchasers may have standing when the Court says that "all" individuals harmed by infringement of Article 81 EC can sue for loss. However, they will have to prove loss and causation, among other things, as in any other claim.

82. Different models can be discerned from a comparative law perspective that may help to illustrate some of the arguments.

83. The recent 7th Amendment of the German Act against Restraints of Competition²⁶ stipulates, in section 33(3) GWB, that damages are not excluded simply because the goods or services have been sold on. Although theoretically it is possible to invoke passing-on as a defence, practically this can only be done within the very narrow framework of the German civil law concept of "*Vorteilsausgleichung*", i.e. mitigation of damages by benefits received. Thus, in principle, German law has not ruled out the passing-on defence, but it has effectively made it very difficult to use.

84. Under Federal US law the passing-on defence is not available to a cartel. A majority of the US Supreme Court ruled against the passing-on defence in *Hanover Shoe Inc. v. United Shoe Machinery Group*²⁷. The court held that measuring the impact of passing-on and having to calculate the total overcharge was too complex and, to go beyond this and apportion overcharge along the chain of purchasers would increase the complexity and cost of competition enforcement. Possibly, the passing-on defence could lead to an enrichment of the cartel. It would not have to fear claims by indirect purchasers from further down the chain because they would not be interested in suing considering the small loss they might have suffered. In *Illinois Brick*²⁸ a majority of the US Supreme Court stressed that allowing the passing-on defence would cause massive efforts to apportion the overcharge along the supply chain. This again would increase the complexity of damages suits, thus seriously undermining their effectiveness.

85. In *Illinois Brick*, the majority of the Supreme Court also restricted the class of potential claimants, so that only those who are direct purchasers from the cartels may sue. We understand, however that around 30 states have reversed the effect of the Supreme Court's judgment as far as actions in their state courts are concerned²⁹.

²⁵ Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I – 6297.

²⁶ *Gesetz gegen Wettbewerbsbeschränkungen* ("GWB").

²⁷ 392 US 481, 88 S.Ct. 2224, 20, L.Ed. 2d 1231 (1968).

²⁸ *Illinois Brick Co. v. Illinois*, 431 U.S. 270 (1977).

²⁹ See Davis, Ronald W., *Indirect Purchaser Litigation: ARC America's Chickens Come Home to Roost on the Illinois Brick Wall*, 65 *Antitrust L.J.* 375 (1997) for further background.

86. The restriction on indirect purchasers suing in US Federal law was justified as a necessary adjunct to disallowing the passing-on defence so as to prevent multiple liability being imposed on the cartelists. It was also considered more likely to facilitate successful private enforcement of competition law if the damage could not be laid off to a more dispersed (and proportionally less affected) class of claimants who will have less incentive to bring the necessary claims to hold cartelists to account. Another argument put forward was that cartelists should not benefit from the potential difficulties of proof for an indirect claimant in tracing overcharge.

87. To permit indirect purchasers to sue could also lead to over-recovery from the infringer. (Consolidation of claims might, however, be used to reduce or eliminate the risk of this.) Advocates of indirect purchaser standing³⁰ have argued that allowing indirect purchasers to sue might promote a strong form of deterrence against the infringer.

Comments

88. There might be cases where the loss of an indirect purchaser can be quantified and is sufficient to justify a case, such that confirming the standing of indirect purchasers could result in action. This could be especially useful if a direct purchaser is reluctant to sue an infringer because it might jeopardise their relationship with suppliers, particularly when the supplier has a dominant position in the market.

89. The argument of the US Supreme Court that double recovery should be avoided requires careful consideration, together with an examination of what may be done to reduce that risk. However, the requirement of a direct casual link between the Article 81 infringement and the damage caused, among other things, already provides a limitation on the class of persons who can claim. In addition, the claimant still has to show an overcharge and the amount of it, that he has suffered loss caused by the breach, that it is not too remote, etc. We believe that consumers and other end-users should have the right to sue as they bear the brunt of infringements and, therefore, a marked disadvantage of Option 22 is that it would appear to preclude claims by consumers and other end-users.

90. We feel that more work needs to be done to quantify the risk together with the complexities involved, especially concerning proof and costs. The difficulties involved in recognizing passing-on and indirect purchasers' standing needs to be balanced against improving the effectiveness of private enforcement of competition law.

³⁰ *Landes, Posner*, University of Chicago Law Review 46 (1979), p. 602 – 635.

Question H

Should special procedures be available for bringing collective actions and protecting consumer interests? If so, how could such procedures be framed? (Options 25 –26)

Option 25:

A cause of action for consumer associations without depriving individual consumers of bringing an action. Consideration should be given to issues such as standing (a possible registration or authorisation system), the distribution of damages (whether damages go to the association itself or to its members), and the quantification of damages (damages awarded to the association could be calculated on the basis of the illegal gain of the defendant, whereas damages awarded to the members are calculated on the basis of the individual damage suffered).

Option 26:

A special provision for collective action by groups of purchasers other than final consumers.

91. Option 25 sets out three aspects that require consideration in the context of collective actions. These are standing, distribution and quantification of damages. Option 26 suggests considering some form of group action for groups of litigants other than final consumers. The purpose of Options 25 and 26, as described in paragraphs 31, 198 to 200 and 201 of the Commission Staff Working Paper, is to indicate the scope to introduce additional means of collective consumer redress in those Member States that do not have specific legislation on the issue.

92. The UK agrees with the Commission that there may in principle be merit in encouraging claims by final consumers, because these contribute directly to the overarching aim of compensating those who have suffered loss and, moreover, that it will be very unlikely for practical reasons that consumers and purchasers with small claims will bring an action for damages for breach of competition law under present conditions.

93. As the Commission acknowledges in paragraph 197 of the Commission Staff Working Paper the UK has already introduced the possibility for bodies specified by the Secretary of State for Trade and Industry to bring actions for damages on behalf of two or more individual consumers before the CAT³¹. So far the only body to be designated to do this is *Which?* (formerly the Consumers' Association), who were awarded these powers as from 1 October 2005.

³¹ Section 19 EA 2002 amending the CA 1998 by inserting new sections 47B and 47A.

94. In order to be specified to bring claims on behalf of consumers, bodies must meet the following criteria:

- The body is so constituted, managed and controlled as to be expected to act independently, impartially and with complete integrity;
- The body is able to demonstrate that it represents and/or protects the interests of consumers. This may be the interests of consumers generally or specific groups of consumers; and
- The body has the capability to take forward a claim on behalf of consumers.

95. Additionally, some consumer bodies also operate trading arms. The criteria for designation note that the fact that a body has a trading arm will not disqualify it from being able to bring consumer group claims, provided that the trading arm does not control the body, and any profits of the trading arm are only used to further the stated objectives of the body.

96. Any claims can only be brought as follow on actions, i.e. on the back of an infringement decision made by either the OFT or the EU Commission: Section 47A(5) and (6) CA 1998.

97. Section 47B(6) CA 1998 stipulates that the damages awarded in respect of a consumer claim must be awarded to the individual concerned, but the Tribunal may with the consent of the specified body (consumer organisation) and the individual order that the sum awarded be paid to the specified body.

98. There are several requirements to be met for a specified body to bring a claim³². As with other claimants, formal requirements include the submission of a claim form containing the name and address of the claimant, the defendant and the specified body etc. In addition, the claim form has to contain a concise statement of the relevant facts and identify the relevant findings in the decision of the competition authority on the basis of which the claim for damages is being made.

99. As a matter of general law, there is a possibility of Group Litigation Orders (GLOs) under Part 19 of the CPR³³. These Orders are subject to strict supervision by the court and may only be made with the consent of a senior judge. They are likely to be made when more than one party has the “same interest” in a claim and there are common issues of law or related fact. In relation to Scotland, there is no direct equivalent to this in the Rules of the Court of Session, although it is possible to arrange administratively for cases to be dealt with together, provided parties agree.

³² See CAT Rules 30 to 33.

³³ CPR Rule 19.11, Civil Procedure (Amendment) Rules 2000, Statutory Instrument 2000 No. 221 (L.1).

Comments

100. The UK needs to observe the functioning of its rather recent legislation before any evaluation or conclusions can be drawn. So far there have not been any cases brought by *Which?* under section 47B CA 1998. However, these are still early days and there appear to be no reasons why *Which?* will not bring an action in due course. Additionally, recent reforms in respect of conditional fees have, to some extent, addressed any potential issues of funding and may provide a suitable mechanism for designated bodies wishing to bring claims.

101. We shall be happy to share the UK experience with the Commission and other Member States that are interested in passing similar legislation. We feel, however, that it would be premature for action at Community level at the moment that would instigate change to the UK systems which have just been put into operation.

102. Actions being brought by authorised organisations have the potential advantage of saving time and money for the parties. We believe that a number of elements are important in any such system. For example, claims should be brought only by authorised bodies, to ensure that the organisation bringing a claim is reputable, suitable and capable of bringing the action. Also, the court's permission should be sought before a claim is brought to avoid spurious or tactical claims being brought against businesses.

103. The cost and complexity of competition cases and the need for proportionality would support a de minimis rule, e.g. where the effective loss to the individual is minimal.

104. There is a view that collective actions brought other than by a consumer organisation are complex, costly and time consuming without bringing particular benefits. These criticisms would have to be taken into account in the design of any possible rules on such collective actions.

Question I

Should special rules be introduced to reduce the cost risk for the claimant? If so, what kind of rules? (Option 27)

Option 27:

Establish a rule that unsuccessful claimants will have to pay costs only if they acted in a manifestly unreasonable manner by bringing the case. Consideration could also be given to giving the court the discretionary power to order at the beginning of a trial that the claimant not be exposed to any cost recovery even if the action were to be unsuccessful.

105. Option 27 suggests considering special cost rules for competition-related damages claims, including giving special discretionary powers to the court to order – under certain conditions - that the claimant need not pay costs even if he loses the case. The purpose of Option 27, as described in paragraphs 43, 214 to 220 of the Commission Staff Working Paper, is to prevent the disincentive effect of the “loser pays” principle, especially in those competition-related damages claims in which the outcome cannot be clearly assessed at the outset of the action or in cases in which very small amounts of damages are being claimed. This option seeks to confine the application of the loser pays principle in relation to claimants to cases where it was manifestly unreasonable to bring an action.

106. The central principle that applies to costs in the UK is that the unsuccessful party will normally be expected to pay the costs of the successful party, but the court has discretion to order otherwise. In determining what costs order is appropriate the courts have a wide discretion to consider all the circumstances of the case, including the behaviour of the parties and the way that they have conducted the case (for example whether it was reasonable for a claimant or a defendant to have made or defended a particular allegation or issue in the proceedings). In most cases, the parties will agree between them the amount of costs which should be recoverable. If agreement cannot be reached, it is open to either party to apply to the court for it formally to assess the amount of the costs. In the case of the CAT, the Tribunal has discretion in relation to costs³⁴. The CAT has exercised this discretion so as not to award costs against an unsuccessful claimant in a number of cases, with the policy intention of not discouraging appeals against decisions of the UK competition authorities.

107. Generally speaking, contingency fees as understood in the USA are not available in England and Wales. Contingency fees usually work on the basis that the lawyer charges a percentage of the compensation awarded. Contingency fees are currently illegal for contentious business (proceedings before a court) but can be used in non-contentious business (probate, tribunals and claims up to issue of proceedings) where settlement is the ultimate objective. Solicitors’ practice rules allow the use of contingency fees in non-contentious business but barristers cannot use them at all.

108. Conditional Fee Agreements (“CFAs”), introduced by the Courts and Legal Services Act 1990, are the primary form of agreement between clients and solicitors. The Act made provision for agreements in which it was explicit that part or all of the solicitor’s fees were payable only in the event of success. CFAs can be used in all civil proceedings other than family. CFAs are not permitted in criminal proceedings.

109. CFAs allow a solicitor to take a case on the understanding that, if the case is lost, he will not charge his client for the work he has done (or he will

³⁴ CAT Rule 55.

charge at a lower rate). However, if the case is successful, the solicitor can charge a success fee on top of his normal fee, to compensate him for the risk of not being paid. That success fee is calculated as a percentage of his normal fee and the level at which the success fee is set reflects the risk involved (the success fee can be up to 100% of the agreed or taxed expenses paid by the losing side). The success fee is recoverable from the losing side. In Scotland, conditional fees and success fees are also now permitted, but the success fee is paid by the client, not the other side. It is open to a party to take out insurance against the possibility of being ordered to pay the other party's costs.

Comments

110. The UK recognises that the high cost risks involved in competition actions may operate as a disincentive to bringing private actions. CFAs go some way to reducing this disincentive.

111. The UK also holds the view that it is particularly difficult to assess the prospects of a case before trial. However, we believe that, as a matter of domestic law, cost rules in private damages claims following competition law infringements should not be treated any differently from other civil cases, in order to keep the domestic cost rules consistent and fair to all concerned.

112. It is important that the courts have the discretion to reach a decision on costs in individual cases that is fair to both parties in all the circumstances of the case, and we would not support any prescriptive provision which would restrict that discretion. It is also important to recognise the interests of the defendant - for example, Option 27 suggests that even a successful defendant should have to pay costs if the claimant has not acted "in a manifestly unreasonable manner" in bringing the case. This may be unfair to a defendant who has successfully resisted a claim.

113. The first part of Option 27 entails other potential disadvantages. For example, it is a very high burden and possibly unfair for the defendant to have to prove that the claimant "acted in a manifestly unreasonable manner" and the need to prove this might well result in further costs and legal argument while this is being resolved; also, even if the defendant succeeds in the main action and in proving the "manifestly unreasonable manner" the claimant may prove not to have sufficient financial resources.

114. In competition cases, the courts and the CAT have discretion to decide on the costs that should be awarded, although they do not do this at the beginning of the trial. Hence, the suggestions made in the second part of option 27 are (at least partly) realised in the UK. However, it may be unreasonable in private law proceedings for the court to decide at the beginning that the claimant does not have to pay any costs at all.

115. There are certain other risks involved in amending the costs rules, for example, that a reduced cost risk could increase the number of ill-founded actions being brought. A proliferation of ill-founded actions could result in a significant increase in the costs to business.

116. We would not, therefore, support any prescriptive provision in this area. Rather than overriding the general principles of cost recovery in each Member State, other proposals in the Green Paper may be more effective, such as providing for a body like *Which?* To bring actions for damages on behalf of consumers, as discussed in our response to Question H.

Question J

How can optimum coordination of private and public enforcement be achieved? (Options 28-30)

Option 28:

Exclusion of discoverability of the leniency application, thus protecting the confidentiality of submissions made to the competition authority as part of leniency applications.

Option 29:

Conditional rebate on any damages claim against the leniency applicant; the claims against other infringers – who are jointly and severally liable for the entire damage - remain unchanged

Option 30:

Removal of joint liability from the leniency applicant, thus limiting the applicant's exposure to damages. One possible solution would be to limit the liability of the leniency applicant to the share of the damages corresponding to the applicant's share in the cartelised market.

117. Options 28-30 set out a variety of possible ways of dealing with leniency applicants. Option 28 would exclude discoverability of a leniency application. Option 29 contemplates a conditional rebate on any damages against the applicant. Option 30 considers ways of limiting the applicant's exposure to damages. The purpose of Options 28-30, as described in paragraphs 221 to 236 of the Commission Staff Working Paper, is to ensure optimal coordination between leniency programmes and the rules on damages claims.

118. In common with other Member States³⁵, the UK regime displays a number of features which are aimed at optimising the coordination of public

³⁵ Article 15 of Regulation 1/2003

and private enforcement when matters are before the courts. The OFT has the power to act as *amicus curiae* in private competition law actions and submit observations to a national court on issues relating to the application of Article 81 or 82 EC Treaty³⁶. The OFT may, acting on its own initiative, submit written observations to a national court on issues relating to the application of Article 81 or 82 of the EC Treaty. With the permission of the court in question, it may also submit oral observations. For the purpose of the preparation of the OFT's investigations, the OFT may request the court to transmit or ensure the transmission to it of any documents necessary for the assessment of the case.

Comments

119. Leniency is an essential tool in the investigation of cartels. The UK believes that in making it easier to bring private actions, undertakings must not be discouraged from applying for leniency

120. As regards Option 28, the Commission Staff Working Paper states that '[i]t might ... be necessary to exclude not only the actual corporate statement but also to disallow that a claimant seeks through disclosure the documents in the form submitted by the leniency applicant to a competition authority.' The UK is open to consider a variant of Option 28, subject to the need to accommodate any exclusion within the existing rules.

121. The UK believes that any exclusion could cover not only the national equivalents of the 'corporate statement', but all material created to support an undertaking's leniency application also. In the UK, such material could include transcripts of interviews and witness statements. An exclusion of this type would ensure that leniency applicants do not place themselves in a position worse than that of the other members of the cartel.

122. However, in our view, there should be no blanket exclusion of discoverability of pre-existing documents, as this would confer advantages in litigation which would not have been obtained but for the leniency application – third party rights should, so far as possible, not be affected. That said, it may be that a request in the form of a request for all documents submitted to a competition authority should be rejected.

123. Adoption of Option 29 or 30 would create an additional incentive for an undertaking to apply for leniency but these options could bring some disadvantages. For example, adoption could also mean that a claimant is not fully compensated for his loss and thereby reduce his incentives to bring an action. Also, if the other infringers are insolvent, say, the ability of the claimant to recover damages in full from the leniency applicant would be essential. As

³⁶ Practice Direction – Competition Law – Claims relating to the Application of Articles 81 and 82 of the EC Treaty and Chapters I and II of the Competition Act 1998.

regards Option 30, claimants are likely to be discouraged from bringing an action if they have to define the relevant market. If market definition is to play a role, it must be for the cartelists, rather than the claimant, to convince the court at their own cost of the correct market definition.

124. As mentioned above, the UK's view is that policy options should not confer advantages in litigation which would not have been obtained but for the leniency application - third party rights should, so far as possible, not be affected (and certainly not in contravention of the ECHR). A compromise may be to allow third parties to sue and obtain judgment against the leniency applicant under normal principles of joint and several liability, but allow the leniency applicant, in turn, to seek contributions of up to 100% from the other cartelists if they have sufficient financial resources.

125. Various types of leniency are available in the UK in respect of both horizontal cartels and vertical price fixing. The OFT has the power to grant full immunity or a lesser reduction in the level of fines, depending on (i) whether an administrative or criminal investigation is already under way and (ii) whether undertakings have already come forward. The various types of leniency available in the Member States would need to be taken into account in any implementation of Options 29 and 30 and we feel that this whole area merits further detailed consideration.

Question K

Which substantive law should be applicable to antitrust damages claims? (Option 31- 34)

Option 31:

The applicable law should be determined by the general rule in Article 5 of the proposed Rome II Regulation, that is to say with reference to the place where the damage occurs

Option 32:

There should be a specific rule for damages claims based on an infringement of antitrust law. This rule should clarify that for this type of claims, the general rule of Article 5 shall mean that the laws of the states on whose market the victim is affected by the anti-competitive practice could govern the claim.

Option 33:

The specific rule could be that the applicable law is always the law of the forum.

Option 34:

In cases in which the territory of more than one state is affected by the anti-competitive behaviour on which the claim is based and where the court has jurisdiction to rule on the entirety of the loss suffered by the claimant, it could be considered whether the claimant should be given the choice to determine the law applicable to the dispute. This choice could be limited to choose one single applicable law from those laws designated by the application of the principle of affected market. The choice could also be widened so as to allow for the choice of one single law, or of the law applicable to each loss separately or of the law of the forum.

126. The purpose of Options 31-34, as described in paragraphs 241 to 254 of the Commission Staff Working Paper is to address the specific difficulties that may arise in damages claims following cross-border infringements of competition law. The Commission fears that in subsequent civil action, the laws of several states could be applicable to the claim. We agree with the Commission that this would make litigation extremely complicated and should therefore be avoided.

127. As to handling, Question K is already being debated at the EU level in the context of the negotiations on the proposed Rome II Regulation. We understand that it is likely that political agreement on that Regulation within the Council will be made during the course of the next few months so that we question whether it is necessary for there to be further discussion of Question K in the context of the Green Paper, until the final form of the Regulation is clear.

128. On the assumption that breaches of competition law are to be characterised as being tortious in nature, the applicable UK law in such cases is governed by the Private International Law (Miscellaneous Provisions) Act 1995³⁷. Under that Act, as a general rule, the applicable law in tort claims is "the law of the country in which the events constituting the tort in question occur". Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being "the law of the country in which the most significant elements of those events occurred".

129. However, the general rule can be displaced if it appears from a comparison of the significance of the factors which connect a tort with the country whose law would be applicable under the general rule and the significance of any factors connecting the tort with another country "that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of that other country".

³⁷ The applicable jurisdiction is determined by EC Council Regulation 44/2001.

130. It is likely that in cases for breaches of competition law, the acts alleged to give rise to the tort and the corresponding injury or damage to competitors, downstream purchasers and ultimately consumers may occur in more than one country. Applying the legislation above, the applicable law would then be determined by reference to where the “most significant elements of the events” constituting the tort occur. This would necessitate looking at the facts of each particular case and consideration of in which countries the conduct causing the harm took place and where the relevant damage occurs. It would then be necessary to assess the significance of those elements.

131. The current UK law has created a system that allows for flexibility in dealing with different circumstances.

Comments

Option 33

132. This is the option favoured by the UK. Stakeholders in the UK have also commented that this approach appears the most workable and likely to lead to greater certainty - those wishing to pursue a damages claim will know that once jurisdiction has been decided under the Brussels I Convention/ Regulation 44/2001, the law of the Member State in which the proceedings are being heard will apply. If there is one applicable law, rather than several, the costs of bringing an action will be reduced and may encourage private enforcement of competition rules. The "law of the forum" would always be a Member State - thus avoiding the situation described in Option 31 above where jurisdiction might be in an EU Country, but the applicable law may be that of a non-EU country.

Options 31 and 32

133. These options propose that the applicable law should be determined by reference to Article 5 of the proposed Rome II Regulation. The UK has previously expressed concerns about Article 5 of the Rome II proposal. These arise because we think that the proposal may result in more than one applicable law. We consider this an unduly complex result that will not help to encourage claims, or reduce legal costs. In addition, commercial stakeholders in the UK have expressed their concern that the proposal is unworkable.

134. Furthermore, we would be concerned if the law of a non-EU-state were able to determine conditions of competition within the single market. This could occur when an event within the EU caused damage both within and outside the EU. Although an EU country might have jurisdiction the applicable law may be that of a non-EU country. Whether the law of such a country would recognise breaches of competition law in the same way as the EU does is outside our field of expertise.

Option 34

135. The purpose of Option 34 as set out in paragraph 250 of the Commission Staff Working Paper is to avoid the specific difficulties which may arise under Options 31 to 33 and which could render litigation very complex. This would particularly be the case where the court has the power to rule on the entirety of the loss suffered and in cases in which the markets affected are situated in more than one state.

136. We feel that there are some advantages in providing the parties to an action with the freedom to choose the relevant applicable law. It would be “consumer friendly” to provide a claimant who might have a special preference for a particular jurisdiction with a choice. We question, however, whether the ability to choose needs to be confined to claimants – defendants might also have a preference. That said, the ability merely to choose one single applicable law from the laws designated (by the application of the principle of affected market) would facilitate claims for the claimant and the handling of a case for the court dealing with it. We understand, however, that in the context of the Rome II Regulation there is little support among the other Member States for a choice of law to be available in competition cases.

Question L

**Should an expert, whenever needed, be appointed by the court?
(Option 35)**

Option 35:

Require the parties to agree on an expert to be appointed by the court rather than by themselves.

137. Option 35 suggests that the parties would have to agree upon an expert, who would then be appointed by the court. The purpose of Option 35, as described in paragraphs 259 to 260 of the Commission Staff Working Paper, is to increase the expertise available in court especially where Member States do not provide for specialist courts. While external experts may increase the expertise available in court they may also boost the costs of litigation. It is on this basis that the Green Paper argues that a provision requiring the parties to agree on an expert to be appointed by the court may serve to both increase the expertise and save costs.

138. In the UK, parties may usually appoint one or more experts to provide evidence before the court on technical issues, provided that the court gives

permission³⁸. Written questions may be put by the parties on the opponent's expert report for clarification purposes. The court may direct experts to narrow down issues in proceedings. Single joint meetings are rare. It follows that experts are party-led, not court appointed. The CPR provide that no party may use an expert without the court's permission, and the court may direct that evidence is to be given by a single joint expert. Joint court appointed experts are not known before the CAT, although the CAT has the power to make such directions³⁹.

Comments

139. The UK notes that the Commission has taken up the question of how to increase the available expertise in court. As the Commission Staff Working Paper itself stresses in paragraph 259, this option is particularly aimed at Member States that do not provide for specialist courts or panels. In the UK, competition cases are heard both by the general courts and by the CAT, which was created by the Enterprise Act 2002.

140. For the purpose of ensuring consistency of decision-making by national courts experience of applying Articles 81 and 82 of the EC Treaty will be concentrated in a small number of judges in the Chancery or Queens Bench Divisions of the High Court. The judges in the Chancery Division have been appointed to the panel of chairmen of the CAT.

141. There is, however, a marked reluctance in the UK among the parties to use joint experts and we feel that any requirement for a single, court appointed expert is likely to prove unpopular.

Question M

**Should limitation periods be suspended? If so, from when onwards?
(Option 36)**

Option 36:

Suspension of the limitation period for damages claims from the date proceedings are instituted by the Commission or any of the national competition authorities. Alternatively, the limitation period could start running after a court of last instance has decided on the issue of infringement.

³⁸ CPR Rule 35.4.

³⁹ CAT Rule 19 (h).

142. Option 36 looks at extending the time-limit for bringing claims by suspending limitation periods from the moment a competition authority (Commission or national competition authority) institutes proceedings. The alternative links the commencement of the limitation period to the time of a judgment of a court of last instance. The purpose of Option 36, as described in paragraphs 271 to 272 of the Commission Staff Working Paper, would appear to be to keep the claimant's right to claim open until administrative proceedings have run their course.

143. In England and Wales, the time limit in which to institute proceedings is six years⁴⁰. The time limit starts on the date the wrongful act caused the damage in issue, subject to fraudulent concealment⁴¹. The equivalent time limit in Scotland is determined by the prescriptive period of five years as laid down by section 6 of the Prescription and Limitation (Scotland) Act 1973. The time limit runs from when the loss occurs, but any delay in raising an action that is caused by fraud or the inducement of error, or the legal disability of the claimant, will not count towards this period (section 6(4) of the 1973 Act).

144. Damages claims to the CAT must be brought within two years of the OFT/EU Commission decision relied upon under section 47A CA 1998 (see CAT Rules of Procedure).

Comments

145. We appreciate that suspension of the limitation period may be appropriate in certain cases. However, the UK's view is that any suspension of the limitation period should only be available in certain narrowly defined cases and there is a need to avoid open-ended liability which could create uncertainty and unfairness. We believe limitation periods are best dealt with at Member State level.

Question N

Is clarification of the legal requirement of causation necessary to facilitate damages actions?

146. The purpose of Question N, as described in paragraphs 273 to 276 of the Commission Staff Working Paper, is to consider a possible clarification of the legal requirement of causation in order further to facilitate damages actions. The Commission Staff Working Paper refers to the diverse approaches different legal systems of the Member States adopt, such as

⁴⁰ Section 2 Limitation Act 1980 (LA 80) (dealing with tort damages).

⁴¹ Section 32 LA 80.

“foreseeability”, “direct cause” and “adequate cause” but concedes that, arguably, these will not lead to diverging results.

147. The principle of causation requires a causal link between the tort and the injury or loss suffered and that the injury or loss is not too remote because it is not reasonably foreseeable. In order to prove causation, in the UK the claimant must show that it is more likely than not that the damage would not have occurred “but for” the breach of duty. In other words, if the damage would have occurred irrespective of the infringement, the “but for” test would not be satisfied.

Comments

148. The requirement of causation is a core element of any domestic law of damages. The legal principles governing causation are very well-established and form a central part of the common law in the UK. It is a fundamental principle that the loss suffered by the claimant must have been caused by the act or omission of the defendant.

149. Any modification in one particular area of the civil law would have implications for the civil law generally. As this is an area of substantive law, it should be a matter for the courts of each Member State, and provisions at Community level would be inappropriate.

150. The potential obstacles to private actions stem from the problem of obtaining evidence to show that in a given case the requirement of causation is fulfilled, rather than from each Member State’s formulation of principles of causation. Given that the principles of causation are already clear in UK law and that very wide rules of disclosure of information address the problems of evidence,⁴² we do not feel the need for any further action in this area.

Question O

Are there any further issues on which stakeholders might wish to comment ?

151. There are no further issues on which the UK would wish to comment.

⁴² For details please refer to the discussion of Question A.

Conclusion

152. The UK has taken a number of measures to strengthen the means of private enforcement of competition law in recent years. The Competition Act 1998 and especially the Enterprise Act 2002 in particular have introduced new mechanisms for bringing private actions on an individual and a collective basis.

153. We believe that where Member States (including the UK) are facilitating private actions it must remain open to those Member States to take full stock of the experience gained. Before further changes are made, therefore, the Member States must have the opportunity to evaluate their relatively new systems.

154. We are aware that there is a significant amount of variation among the 25 Member States as regards the shape of a system for damages claims for infringements of competition rules. The questions raised in the Green Paper correctly identify the issues which will have to be considered in any debate about private damages actions for breach of EC competition law.

155. Any such debate will have to consider carefully the individual civil law systems of the Member States and how issues such as access to evidence and the burden of proof, the role of public enforcement, the availability of damages and how to treat leniency applicants interact. We support the general aim of facilitating and strengthening private enforcement of competition law by way of private actions for damages throughout the whole of the European Union.

156. We feel that the next steps should be detailed discussion of the key issues in order to increase understanding, to disseminate and encourage best practice and to consider what further action might be taken by the Member States and by the Commission.

End