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THY KINGDOM COME: THE RISE OF PRIVATE DAMAGES ACTIONS IN THE UNITED KINGDOM

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INTRODUCTION

Whilst the United States' public policy has always used private enforcement actions as a key weapon in the fight against cartels and monopolies, the EU has largely relied on the heavy-handed axe of the public enforcement system, where the EU's Competition Commission ("Commission") acts as judge, jury and executioner.[2] In doing so, the Commission imposes fines which represent considerable financial punishment to infringers[3] but offers no compensation to their victims; whilst private enforcement has been encouraged, the EU has taken no practical steps to make private enforcement a reality.

With claimants crying out for a means of recourse, the emergence of a refreshing legal framework for private actions within the EU has seen several important cases brought through the courts. Within this framework, the UK – specifically England and Wales – is increasingly becoming an attractive forum to hear competition (antitrust) disputes, with the frontiers being pushed further in each case. This paper outlines the development of private damages actions in the UK and identifies the reasons why it has become such an attractive jurisdiction for claimants in competition matters.

PRIVATE ACTIONS BY CLAIMANTS

Breaches of UK or EU competition law, or both, give rise to claims for damages (or other types of relief) in the English courts.[4] Any party who has suffered a loss as a result of an infringement of the following provisions therefore has an actionable claim for damages in either the High Court (Chancery Division or Commercial Court) or the Competition Appeal Tribunal ("CAT").

1 Anthony Maton is a Partner & Simon Latham an Intern at Hausfeld & Co LLP.
2 In addition to the Commission, the UK also relies on the Office of Fair Trading, OFCOM (the regulator for the UK communications industries), OFGEM (the regulator for UK gas and electricity) and OFWAT (the regulator for UK water services) to tackle domestic infringements of competition law. These UK-specific regulatory authorities possess concurrent powers with the Commission in enforcing EU competition law.
3 On 21 February 2007, the Commission announced that it had imposed fines totalling €992 million on companies involved in the lift (elevator) and escalator cartel.
4 *See Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] AC 130, which establishes this principle.

> Articles 101 and 102 of the Treaty of the Functioning of the European Union ("TFEU")[5] form the backbone of competition law within the EU. Article 101(1) prohibits parties from entering into anti-competitive agreements (such as price-fixing arrangements) which have an appreciable effect on trade between member states. This applies to horizontal agreements (e.g. between retailers) and vertical agreements[6] (e.g. between retailers and suppliers). Article 102 prohibits parties from conduct which amounts to an abuse of a dominant position, and which has an appreciable effect on trade between member states.
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> The Chapter I and II prohibitions in the UK's Competition Act 1998 ("Competition Act") largely mirror the prohibitions contained in Articles 101 and 102 of TFEU, but apply where trade within England and Wales is affected, rather than trade between EU member states.

The European Court of Justice ("ECJ") held in *Manfredi v. Lloyd Adriatico Assicurazioni SpA*[7] that "*any individual"* (or business) who has been damaged by a breach of directly effective European competition law has a right to claim compensation where a causal link can be established between that damage and an agreement or practice prohibited under Article 101. The Commission considers that this principle clearly also applies to harm suffered as a result of a breach of Article 102. The Commission also considers that the reference to "any individual" includes indirect purchasers. This means, for example, that in cases where direct purchasers of cartelised products have passed on inflated prices charged by cartelists, the market participants or consumers further down the supply chain have the right to sue for compensation where they can show resulting damage.

This broad interpretation of "any individual" is not solely reserved for claims from UK claimants within the UK courts however.[8] Article 1 of the Brussels Regulation states that claims should ordinarily be heard in the jurisdiction in which the defendant is domiciled, regardless of its nationality.[9] In the case of legal persons or firms, domicile is determined by the country where they have their statutory seat, central administration or principal place of business. In certain circumstances, a defendant may, however, be sued in the courts of another EU country. For example, Article 5 of the Brussels Regulation stipulates that a claim in tort may also be brought in the EU member state where the harmful event occurred.

In the case of a cartel, the relevant cause of action in English law is the tort of breach of statutory duty and the relevant harmful event is the implementation of the cartel arrangements i.e. selling the cartelised products. Furthermore, under Article 6, multi-jurisdictional claims may be consolidated and heard as a single claim before the courts of a particular member state where the claims are "*so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.*"[10] In a preliminary application by the Defendant to strike out the claim in *Provimi Limited v. Aventis Animal Nutrition*[11] ("*Provimi*"), the High Court indicated that it would interpret this provision broadly, finding in that case that it had jurisdiction to hear

5 Articles 101 and 102 of TFEU were formerly known as Article 81 and 82 of the EC Treaty.
6 *Consten & Grundig v. Commission* [1966] E.C.R. 299
7 *Manfredi v. Lloyd Adriatico Assicurazioni SpA* (C-295/04) [2001] Bus. L.R.188
8 The Brussels Regulation (Council Regulation (EC) No. 44/2001) and the Lugano Convention of 30 October 2007 set out the rules on jurisdiction for claims involving parties located in different European states
9 Article 3, Brussels Regulation
10 Article 6(1) Council Regulation (EC) No 44/2001
11 *Provimi Limited v. Aventis Animal Nutrition* [2003] EWHC 961 (Comm) (Provimi)

claims from European purchasers of cartel-affected goods against the English subsidiary of one of the cartelists in respect of all of the European losses, despite there being no direct contractual relationship between the purchasing company and the English subsidiary. Nonetheless, as articulated by the High Court in *SanDisk Corporation v. Koninklijke Philips Electronics NV*[12] ("SanDisk"), there has to be some connection to England and Wales before a court will assert such jurisdiction.[13]

Cooper Tire & Rubber Company ltd & ors v. Dow Deutschland & ors

On 23 July 2010 the Court of Appeal in London handed down its judgment in *Cooper Tire & Rubber Company Ltd & Ors v. Dow Deutschland Inc & Ors*[14] ("*Cooper Tire*"). The case involved a follow-on action on the back of a Commission decision fining five group companies €519 million for operating a price fixing cartel in the sale of synthetic rubber between 1996 and 2002. Two preliminary issues had arisen at an early stage and were the subject of the appeal.

The first of these questions presented to the court was whether a subsidiary company that was neither party to and/or not aware of, the anti-competitive practice adopted by another company in its group could nevertheless be liable to victims of such practices, on the basis that it had nevertheless implemented the infringing agreements by selling the goods at the prices set by its cartelist group company.

English domiciled claimants sought to pursue their claims in the English Courts against an English subsidiary of the cartelist group which was not an addressee of the Commission decision. The Court of Appeal held that it did have jurisdiction to hear the claims under Article 6(1)[15] of the Brussels regulation due to the close relationship between the claims against English domiciled defendants (who were not addressees of the Commission's cartel infringement decision) and the claims against non-English defendants. The Court did not, however, have to decide the issue of whether the English companies could be said to be liable for the competition law infringements, despite having no direct knowledge of and/or involvement in the cartels. The particulars of claim were broad enough to cover a claim based on general involvement and/or innocent implementation in the cartel arrangements such that the claims against the English defendants could not be struck out at a preliminary stage.[16]

The second important question to be answered by the Court of Appeal was whether it should uphold the Commercial Court's decision not to stay the damages action despite the fact that proceedings based on the same decision had also been brought in the Italian courts.

Article 27 of the Brussels Regulation provides that where proceedings involving the same cause of action and between the same parties are brought in the courts of different member states, any court other than the court first seized shall of its own motion

12 *SanDisk Corporation v. Koninklijke Philips Electronics NV* [2007] EWHC 332 (Ch).
13 In *SanDisk*, the court held that there was no connection to England and Wales. This was because there was neither evidence that the first steps of the alleged infringing conduct had occurred in the UK, nor that the immediate damage had been caused to San Disk in the UK as a result of that alleged conduct.
14 *Cooper Tire & Rubber Company Ltd & Ors v. Dow Deutschland Inc & Ors,* [2010] EWCA Civ 864 (23 July 2010).
15 Article 6(1) of the Brussels Regulation states that, where a person is one of a number of defendants to a claim he can be sued in the courts of the state where any one of them is domiciled as long as the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings.
16 Please see *Court of Appeal dismisses appeal against High Court ruling that refused to stay English proceedings in cartel damages action,* Practical Law Company, 23 July 2010, http://ld.practicallaw.com/5-502-8831?null

stay its proceedings until such time as the decision of the court first seized is established. Article 28 of the Brussels Regulation provides that any court other than the court first seized may stay proceedings before it where related actions are pending in the courts of different member states.

This issue was also decided in the Claimants' favour with the Court of Appeal upholding the trial judge's decision not to stay the proceedings under Article 28 of the Brussels Regulation. The Commercial Court concluded that a stay was not justified on the basis that:

1. Proceedings were now more advanced in England, since the Italian proceedings had been dismissed and, even though "likely" to be restored by the Court of Appeal of Milan to a relevant extent, such restoration would be unlikely to occur before 2012;

2. While the proceedings were not particularly proximate to England and were more proximate to Italy, there was no court which could be said to be the centre of gravity in what was a Europe-wide conspiracy;[17] and

3. Furthermore the Court of Appeal did not regard the fact that a company (*Eni S.p.A)* that was an addressee of the Commission's decision had commenced proceedings in Italy operated as a "trump card" effectively barring claims in other jurisdictions. The Court of Appeal also held that the Commercial Court had not erred in noting that proceedings in Italy would take a long time. Rather than being a criticism of the Italian legal system it was merely a reality. The mandatory stay under Article 27 was not considered because the Italian proceedings involved different parties.

In their review of the first instance judgment handed down by the Commercial Court, Maton and Dhillon asserted that:

> *If the decision stands, it will be a step forward towards access to justice for victims of infringements of EC competition law*'[18]*... it will reiterate the willingness of the English courts to apply a pragmatic treatment to multi-jurisdictional disputes in the context of cartels, which is in harmony with the Commission's objective of ensuring all victims of cartels access to effective redress mechanisms so that they can be fully compensated for their loss*.[19]

The authors warned however, that:

> *The decision must be followed carefully. Insofar as it relates to an application for a stay, future litigants must have regard to the peculiar circumstances of the 'Italian Torpedo' case before the court and the varying types of relief sought by the defendants (acting as claimants in the Italian courts) and compare this to their own circumstances.*

17 Ibid.
18 Opinions, *Cooper Tire & Rubber Co v. Shell Chemicals UK Ltd [2009] EWHC 2609,* Anthony Maton and Rhea Dhillon. Global Competition Litigation Review, Volume 3 Issue 1/2010.
19 Ibid.

The Court of Appeal's decision was handed down with impressive speed. As the authors had hoped, the Court maintained its position on jurisdiction and demonstrated a willingness to offer a 'claimant friendly forum.' This judgment will increase the already popular status of the English Courts as a forum in which considerable pressure can be applied to defendants through the bundling of Europe-wide claims into one action.

BENEFITS OF BRINGING AN ACTION IN ENGLAND AND WALES

Disclosure:

One of the highlights of litigation in England and Wales is the extensive disclosure regime, particularly compared to other EU states.[20] In proceedings brought in the High Court, the Civil Procedure Rules require not only that parties make a reasonable search for and disclosure of document on which they intend to rely, but also the disclosure of documents that could assist the other side.[21] The ramifications of this, particularly in the context of damages actions pursuant to cartels is immense, given the likelihood that most of the material in relation to the cartel and its activities, such as pricing, will only rest with the defendants. Whilst the disclosure provisions in the CAT are less specific than in the High Court, defendants are generally required to disclose evidence that could help claimants.

The recent ECJ decision of *Pfleiderer AG v. Bundeskartellamt*[22] may go some way towards improving access to documents in cartel cases even further. *Pfleiderer* concerned an application from a purchaser to the German competition authority for the disclosure of leniency material. The ECJ ruled that Council Regulation (EC) No 1/2003 would not preclude the claimant from accessing leniency materials, but it would be up to national courts of Member States to determine the conditions under which materials were disclosed. The English courts are yet to rule on the full implications of the *Pfleiderer* decision, with an application before the English High Court (for disclosure of a confidential version of a Commission decision) in *National Grid Electricity Transmission Plc v. ABB*[23] currently adjourned. But it seems clear that the English rules on disclosure will allow claimants access to documents submitted to the Commission during an investigation other than for the purposes of leniency.

Costs:

While litigation in England is expensive, the general rule is that the losing side has to pay the other side's costs. This has been supplemented with conditional fee arrangements which allow lawyers who act in such cases to be paid either nothing (in the event that the claim is unsuccessful), or an uplift of up to 100% of their normal fees (if the claim is successful). In addition, insurance policies allow the risk of adverse costs to be covered with deferred and contingent premiums. Lastly, the existence & activity of funders in the London market mean that the costs of litigation can also be passed on to a funder. The result of all of these features is that it allows claimants to issue proceedings with relatively little or no cost or risk to themselves.

20 By way of comparison, German civil procedure is governed by the principle of 'party control' where each party is responsible for presenting the relevant facts and evidence on which they rely. Claimants in Germany are therefore unable to request relevant documents from the defendant.
21 Civil Procedure Rules 31.6(a) and 31.6(b) respectively.
22 *Pfleiderer AG v. Budeskartellamt* (C360/09) [2011] ECR0 (Pfleiderer).
23 *National Grid Electricity Transmission plc v. ABB* [2011] EWHC 1717 (Ch) (National Grid).

Specialist Judges and Tribunals:

The CAT came into effect in June 2003 as a product of the Enterprise Act 2002, which supplemented the existing Competition Act 1998. It has jurisdiction to hear follow on damages cases. The purpose behind the Tribunal was so that there would be within the UK Court system, a specialist tribunal capable of handling the specialist nature of competition litigation. The CAT has its own set of rules of procedure separate to the Civil Procedure Rules and is flexible in how it proceeds with litigation, for example its limitation periods (see below). However, there are problems with this and while the CAT has jurisdiction for follow on actions, the High Court also has jurisdiction to hear such matters. Furthermore, the High Court, and the experienced Judges who sit in the Court, has shown itself very pro-active in its approach to follow on damages claims in the National Grid & Rubber decisions.

Limitation:

The courts of England and Wales offer some of the most favourable limitation periods in the EU for claimants. For cases brought in the High Court, claimants have six years in which to bring their claim, with time running from the date of notice of the infringement. The German courts, by contrast, offer a much smaller three year limitation period. On its face the CAT offers even more favourable limitation periods than the High Court however. Under Rule 31 of the CAT's Rules, claims must be brought within the later of: (i) two years from the date on which the right to bring an appeal against the relevant decision expires; or (ii) the date on which such an appeal is determined or the date on which a cause of action accrued. The position was, until recently, that limitation did not begin to run until *all* appeals against the original infringement decision had been completed, as set out in *Emerson Electric v. Morgan Crucible*[24] ("*Emerson 1*"). In *Deutsche Bahn v. Morgan Crucible*[25] however, the CAT reversed its decision in *Emerson 1*. The CAT has since acknowledged that such conflicting decisions require clarification in the Court of Appeal,[26] who should hopefully provide guidance on this point within the next twelve months.

Collective Actions:

Although England and Wales does not have an opt-out class action system as conceived of in the United States,[27] groups of claimants can pursue claims either through a "representative action" where claims are substantially similar[28] and brought by lead claimants, or by way of a "group litigation order" (GLO) where individual claims are filed and then brought together by the courts.[29] Group actions are often chosen because they allow the sharing and defraying of costs. This gives a greater concentration of leveraging power and economies of scale. The experience to date suggests that this model is likely to trigger settlements earlier in the litigation process, if indeed proceedings are required to be commenced at all.

Choosing Judicial Forum:

There are several factors which might influence a claimant's decision when choosing between the High Court and the CAT. These include: whether a claimant seeks to

24 *Emerson Electric Co v. Morgan Crucible Company plc* [2007] CAT 28.
25 *Deutsche Bahn AG v. Morgan Crucible Company plc* [2011] CAT 16 ("*Deutsche Bahn*").
26 *Deutsche Bahn AG v. Morgan Crucible Company plc* [2011] CAT 22 [8].
27 The Civil Justice Council proposed the introduction of an opt-out mechanism in their paper "Reform of Collective Redress in England and Wales: A Perspective of Need." Momentum behind this proposal has since diminished however.
28 Pursuant to CPR 19.6.
29 Pursuant to CPR 19.11.

bring the case on a "stand-alone" or "follow-on" basis;[30] the type of relief sought; the level of expertise required of the court; and the timing of the action.

Stand-Alone v. Follow-On:

Where there has been a prior infringement decision by a regulatory authority, a claimant may bring a follow-on claim for damages in either the High Court or before the CAT. If, however, a claimant elects to bring a private action on a stand-alone basis, the action will need to be brought before the High Court. Bringing an action on a follow-on basis offers several advantages.

First, regulatory authorities are in a far stronger position than individual claimants to obtain the evidence needed to establish a breach of competition law. For example, competition authorities will be able to collate market information and commission reports into particular markets and will have statutory powers to obtain information from companies under investigation. In the UK, under sections 26 to 28 of the Competition Act, competition authorities have specific powers to obtain information from parties that are the subject of a complaint in order to make an assessment of that claim. One such power is that provided by section 27 of the Competition Act, which allows the Office of Fair Trading ("OFT") to search and enter into company premises without a warrant in order to investigate an allegation of infringing behaviour.

Second, national courts in the UK are bound by OFT and Commission decisions.[31] Thus, where a breach of competition law has been determined, a claimant will only need to prove causation and the quantum of loss suffered in a follow-on claim for damages. This significantly reduces the time and cost involved in litigation, compared to the position where a claimant had to bring a stand-alone action before the courts.

The House of Lords made clear in *Crehan v. Inntrepreneur Pub Company*[32] that decisions of competition authorities will only be binding in relation to the same agreement between the same parties that were the subject of the regulatory authority's decision. Where a court is faced with a dispute involving different parties, the Commission's decision will not be binding (even if the conduct concerned relates to the same product or market, or both) and the action will need to be pursued as a stand-alone action. The Commission's decision may nevertheless still be persuasive in the related action, and therefore, may still be beneficial to a claimant pursuing a claim before the courts.

Despite the attractions of a follow-on action, there are circumstances in which a claimant may wish to commence an action on a stand-alone basis. In certain cases, for example, it may be strategically important to issue a claim at an early stage if there is a threat of a rival claim being filed in an EU jurisdiction outside England and Wales. In this way the claimant would ensure that the English Courts are seized with jurisdiction to hear

30 A stand-alone action is where there has been no prior infringement decision by a regulatory authority in the matter, or where the relief sought extends beyond a claim for damages. A follow-on action for damages follows on from the decision of a regulatory authority as to whether there has been an infringement of English or EU competition law, or both.

31 Pursuant to article 16 of Regulation 1/2003, national courts will be bound by decisions taken by the European Commission in respect of allegations of breach of European Competitions Law (insofar as the decision in question relates to addresses of the Commission's decision). Sections 58 and 58A of the Competition Act contain analogous provisions to article 16 within the domestic regime, stipulating that national courts are bound by decisions made by the OFT with respect to a breach of competition law (provided that that decision is no longer appealable).

32 *Crehan v. Inntrepreneur Pub Company* [2006] UKHL 38.

the claim rather than running the risk of being "Italian Torpedoed"[33] by one of the defendant companies. According to barrister Daniel Beard of Monkton Chambers:

> *The need to progress without delay has resulted in a reduction in the number of complaints being lodged at the UK's Competition Appeals Tribunal (CAT), as permission is required to file a case. This increases the risk of other claimants filing elsewhere, or for 'torpedo' actions. Consequently, all recent private litigation has been filed at the English High Court*

The "Italian torpedo" tactic came to the fore in relation to the *Cooper Tire* case which has been discussed in more detail above. It will be recalled that, in that case the Italian defendants sought negative declarations before the Italian courts in an attempt to prevent claims for damages being brought in England or elsewhere. As a result, commentators such as Oliver and McCann assert that potential claimants in cross-jurisdictional litigation should commence proceedings in the court most favourable for their claim without delay to ensure that it is the first seized of the dispute.[34] Having done this the claimants can then seek to agree to stay proceedings for settlement discussions and information exchange prior to the litigation being pursued.

The Passing-On Defence:

One of the key difficulties in assessing the damage caused by cartels is establishing who suffered a loss as a result of any increase in price in the cartel product. Direct purchasers paying inflated prices due to a cartel on the manufacturer level, may be able to pass all or part of their additional costs on to indirect buyers, such as distributors and/or the end consumer. Being sued for damages by direct buyers, the defendant may invoke this fact as the so called "passing-on" defence, i.e. that damages to be paid to the claimant should be reduced by the amount of the loss passed on down the supply chain.

It has yet to be conclusively determined whether the passing-on defence is applicable under English law. If applicable, it would preclude claimants from recovering damages on losses passed on to customers by way of higher prices, on the grounds that compensation should only be recoverable in respect of losses actually suffered. The applicability of the defence under English law was raised in an interlocutory application for security of costs in *BCL Old Co Ltd v. Aventis SA*.[35] In that application, the third and fourth defendants argued (in support of their application for security of costs) that the claimant had not in fact suffered any loss, having passed on all of its loss to other purchasers by way of higher prices and should therefore provide security for costs. The court held that the applicability of the passing-on defence under English law raised "*novel and important issues"* in that case and for future cases, and "*would be an important consideration to potential claimants when considering whether to issue proceedings in the future.*" However, the court deemed it premature to consider fully the issue at that stage

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33 The term 'Italian Torpedo' was coined to describe the pre-emptive strike launched by Eni, the Italian tire manufacturer, prior to the *Cooper Tire & Rubber Company Ltd & Ors v. Dow Deutschland Inc & Ors* (*"Cooper Tire")* proceedings in the UK. Eni sought a number of declarations from the Italian court, including a declaration that the cartel had had no effect on prices charged to rubber customers. That, of course, was precisely the question that would have been before the English court in the claims being threatened by the tyre manufacturers.

Placing that question before the Italian courts, and joining all the tyre manufacturers as defendants to that claim for declaratory relief, meant that the English courts were prevented from hearing a claim between the same parties relating to that subject matter under the doctrine of *lis pendens.*

34 *Commercial & Chancery Special Report: Brussels clout:* Keith Oliver and Steve McCann, 16 March 2009. www.thelawyer.com/commercial-and-chancery-special-report-brussels-clout/137158.article

35 *BCL Old Co Ltd v. Aventis SA* [2005] CAT 2, [33], [38].

in proceedings, arguing that it should only be assessed when all the relevant facts had been established.[36]

There is no direct ruling on this point at the EU level either. But, given the case law of the ECJ giving the right to anyone who has been damaged by a breach of directly effective EC law to claim compensation, it seems highly unlikely that the ECJ would follow the practice of the US Supreme Court and bar claims by indirect purchasers who could establish a loss.

REMEDIES

Compensatory damages

Compensatory damages are the most common type of remedy awarded by English courts for breach of competition law. Such damages compensate claimants for losses suffered as a result of a defendant's wrongdoing. As articulated by the High Court in *Devenish Nutrition Ltd v. Sanofi-Aventis SA* ("*Devenish*"),[37] English courts will generally use the "but-for" test to calculate the loss to be compensated to claimants, attempting to return the claimant to the financial position that it would have been in "but-for" the infringement. In order to do this, a court will generally ask what the difference is between the claimant's actual position and the position that it would have been in "but-for" the illegal conduct.[38] The damages figure payable to claimants will usually be accompanied by a sum for interest and costs.

The ECJ has confirmed that "*a claim in compensation includes a claim for loss of profits in the event that a claimant can show that the operation of the cartel had, for example, a dampening effect on demand due to the higher prices being charged, this is likely to be difficult to prove.*"[39]

The method used to calculate the amount of loss will largely depend on the facts. If a cartel was shown to have made agreements to increase prices by a certain percentage, then it would make sense for the courts to also use percentages to estimate overcharge in order to calculate damages. The courts have stated in *Tullis Russell Papermakers Limited v. Inveresk Limited*[40] that: "*It is accepted economic practice to use more than one benchmark, in order to reflect more of the underlying data and to reduce the effect of biases in individual approaches.*" It would therefore seem logical that in situations where several methods could be reasonably used to estimate overcharge, the English courts will consider them all.

Exemplary damages

While exemplary damages (awarded so as to punish or deter grossly unlawful behaviour) may theoretically be awarded in England and Wales, it seems clear from *Devenish* that they are not likely to be available in the context of follow-on actions for breaches of competition law. In that case, the court held that the principle of "*ne bis in idem*" – which dictates that a person should not be sanctioned more than once for the same

36 *BCL Old Co Ltd v. Aventis SA* [2005] CAT 2, [33], [38].
37 *Devenish Nutrition Ltd v. Sanofi-Aventis SA* [2007] EWHC 2394 (Ch) (*Devenish*).
38 *Devenish Nutrition Ltd v. Sanofi-Aventis SA* [2007] EWHC 2394 (Ch) [21], citing paragraphs 126 and 127 of the Commission Staff Working Paper annexed to the Commission's Green Paper on Damages Actions for Breach of the EC Anti-Trust Rules.
39 *Cartel Damages Claims*, Patrick Boylan and Tony Woodgate: http://uk.practicallaw.com/0-501-6802?q=cartel+damages+claims&qp=&qo=&qe=
40 *Tullis Russell Papermakers Limited* [2010] CSOH 148 [183].

illegal conduct – precluded the award of exemplary damages in cases in which defendants had already been fined by the Commission.[41] Furthermore, the court held that Article 16 of Regulation 1/2003, which dictates that Commission decisions will be binding on national courts, precluded the court from making a decision counter to the one already adopted by the Commission in respect of the same facts.[42] Thus, even before it needed to assess the relevant principles under domestic law, the court held that European Community law precluded the award of exemplary damages on the facts of the case.

Nonetheless, it remains to be seen whether courts will in the future deem it appropriate to award exemplary damages in stand-alone actions, where no penalty has been imposed by a regulatory authority, such as where a cartelist has been exempt from fines where it was the first amnesty applicant notifying the Commission of the cartel arrangement.

Restitutionary damages

Restitutionary damages are aimed at stripping unjust profits from the wrongdoer, rather than measuring the loss to the victim. In the Court of Appeal's decision in *Devenish*, it held that restitutionary damages would only be available in exceptional circumstances, such as where compensatory damages would not be an adequate remedy for the claimant.[43]

Future developments

On 17 June 2011, the European Commission launched a public consultation on a Draft Guidance Paper on quantifying harm in actions for damages based on breaches of the EU antitrust rules. It is stated that the aim of the Guidance Paper is to offer assistance to national courts of EU Member States and parties involved in actions for damages by making more widely available information relevant for quantifying the harm caused by competition law infringements. The paper sets out insights into the harm caused by anti-competitive practices and provides an overview and illustration of the main methods and techniques available to quantify such harm in practice.

Assignment of a cause of action in tort

The ability to transfer a party's right to claim damages to another can be a tactical advantage in anti-trust litigation, improving both the strength of a claim and the efficiency of litigation, subject to public policy considerations. English law historically prohibited the assignment of bare causes of action including claims in tort on the basis of the principle of champerty or maintenance. That principle prohibits the participation in litigation by a person who has no legitimate concern in the litigation and without just cause or excuse.[44]

However, since the decision in *Trendtex Trading Corp v. Credit Suisse*,[45] a more relaxed and commercial approach has been taken by the courts to such questions, placing greater emphasis on whether the assignee has a "*genuine commercial interest in the enforcement of the claim of another.*" For example, in *Trendtex* itself, Lord Roskill said at 703:

> *If the assignment is of a property right or interest and the cause of action is ancillary to that right or interest, or if the assignee had a genuine commercial*

41 *Devenish Nutrition Ltd v. Sanofi-Aventis SA* [2007] EWHC 2394 (Ch) [52].
42 *Devenish Nutrition Ltd v. Sanofi-Aventis SA* [2007] EWHC 2394 (Ch) [53].
43 *Devenish Nutrition Ltd v. Sanofi-Aventis SA (France)* [2009] 3 All ER 27, [130].
44 See *Factortame* (No 8) [2002] EWCA Civ 932 at paragraph 32.
45 *Trendtex Trading Corp v. Credit Suisse* [1982] AC 679.

> *interest in taking the assignment and in enforcing it for his own benefit I see no reason why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance*.

In the subrogation context, it has been stated that an assignment to enhance or support an existing interest is valid, albeit that the assignor may thereby recover in respect of more than the loss he himself has suffered – *see Compagnia de Seguros v. Pacific Steam Navigation Co* [1965] QB 101 Roskill J at 121, discussed by Lord Roskill in *Trendtex* at 703). This principle may be applicable to those claims which have simply been enlarged by claims relating to an earlier period.

CONCLUSION

The myriad of strategic advantages to private enforcement in England and Wales has resulted in continual growth in this sector, with at least 10 EU Cartel findings being litigated before the Courts. These actions have inevitably thrown up many issues that have yet to be conclusively settled and others which the Courts are yet to resolve (e.g. the issue in *Deutsche Bahn* regarding limitation in the CAT). Nonetheless, the parameters of English competition litigation – on disclosure, limitation, jurisdiction, and damages – are steadily being established so that a clear route map is emerging which will allow claimants to bring litigation in confidence in England in the future.