Private Competition Enforcement in the EU: How Utilities are Affected by Recent Developments

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Introduction

Utilities are more affected than most businesses by competition issues.

Natural monopolies exist in many cases and, even where they do not, industries often remain dominated by (former) state-owned incumbents. As such, dominance issues are always on the agenda. Often there is *ex ante* regulation to proactively address the risks of dominance, itself modelled on principles of competition law. In some cases there are special merger regimes.

Additionally, however, utilities are particularly likely to suffer heavy losses as the *victims* of infringements because they are typically such large scale purchasers of goods affected by cartels and because there have been a surprising number of cartels relating to items *only* purchased by utilities. Utilities may also tend to bear an unusually high proportion of the losses arising because of the limited scope to increase their own regulated prices.

It is for these reasons that utilities lawyers should know about private enforcement of competition law and recent developments that will facilitate it in Europe. It is to some extent a threat but certainly also a significant opportunity.

This article provides some historical context, an overview of recent developments and also practical suggestions on how utilities might respond.

Private vs public enforcement

As the name suggests, private enforcement describes a situation where private entities, rather than public authorities, seek to enforce competition laws, particularly, but not exclusively, through the medium of the courts. Enforcement may consist of seeking to stop the infringing behaviour, render void agreements relying on it or in seeking damages for losses caused.

Private enforcement has always been a complement to public enforcement in some legal systems. The famous or, depending on your perspective, infamous entitlement to treble damages for victims of competition infringements in the United States was put in place at the same time as the competition (or 'antitrust') prohibitions themselves way back in 1890[1] and has long incentivised victims to pursue private action, typically without even waiting for public enforcement to occur first.

In other jurisdictions, private actions have been more of a rarity.

One could argue, at a pinch, that England beat even the United States in the introduction of private enforcement, although it certainly did not do much with it thereafter. A reported case in 1599, when Elizabeth I was on the throne, mentions a ruling that a requirement on all the butchers in Canterbury to sell their tallow (animal fat) to a single nominated chandler (candle-maker) was unlawful '*because it did tend to a monopoly*'.[2] The plaintiff appears to have received damages, albeit not so much for the consequences of the monopoly[3] as for the injustice of having been thrown in gaol when he refused to go along with it.

Despite this early 'triumph' for competition, there does not appear to have been a single successful claim for cartel damages[4] and it was not until 2001, in the English case of *Courage v Crehan*,[5] that the European Court of Justice ruled that it had to be open to individuals to seek damages for harm caused by violations of competition law.

Private enforcement has, however, come on a long way in England and, indeed, throughout the EU since *Courage v Crehan*. There are now claims for damages in relation to almost every European Commission infringement decision (sometimes several in different jurisdictions). Law firms have appeared that focus solely, or mainly, on bringing competition claims and laws have been passed explicitly focused on making claims easier. These developments are all discussed in more detail below.

Cartels affecting utilities

Recent developments in EU private enforcement have been focused mainly, though not exclusively, on compensation for cartels, so these are addressed first.

European Commission cartel decisions suggest that it is rare for utilities themselves to engage in cartels. The only relatively recent example is of market-sharing in France and Germany between E.On and GDF Suez.[6]

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1 See §7 of the Sherman Act, 26 Stat. 209, 15 U.S.C. §7.

2 *Edward Darcy Esquire v Thomas Allin of London Haberdasher* (1599) Noy 173, 183; 74 ER 1131, 1140.

3 Or, perhaps more accurately, 'monopsony' since there was only one buyer rather than only one seller.

4 There was at least one unsuccessful claim, although, ironically, it was by a competitor for wrongful exclusion from a cartel (which cartel was considered perfectly legal at the time): *The Mogul Steamship Company, Limited v McGregor, Gow, & Co. & Ors* (1888) 21 QBD 544.

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

6 Commission Decision of 8 July 2009 in Case COMP/39.401 – E.ON/GDF.

By contrast, utilities are often victims of cartels. In some cases, they are the only direct victims. Examples in this regard include gas insulated switchgear,[7] power transformers,[8] power exchanges[9] and high-voltage power cables[10] where the direct victims were all utilities in the electricity sector. Telecoms companies have particularly suffered as a result of cartels in small-screen LCDs[11] and SIM card chips.[12] Water companies also appear to have been affected by a cartel specific to the sector. European Commission investigations remain ongoing into alleged cartels in plastic pipes and pipe fittings used in the sewage industry.[13] Although little information is available, it appears that the pipes in question may be those commonly used for sewage mains, in which case one would expect claims by sewage companies in due course.

Even where cartels are not specifically directed at utilities, the sheer volume of purchases made by utility companies – which are obviously often, though not exclusively, large enterprises – means that they will typically have suffered greater losses than other businesses. Thus, for example, one could imagine that utilities may be particularly badly affected by the alleged cartel(s) in cement even though their main business is not construction.[14]

Cartel damage claims

European cartel damages claims have mostly been brought in England, Germany and the Netherlands, although there have also been notable claims in a wide variety of other jurisdictions including Spain, Belgium, Italy, Austria and Finland. Claims have tended to be concentrated in a small number of jurisdictions, as claimants usually have a wide choice of where they can take action under EU jurisdictional rules[15] and gravitate towards those jurisdictions that are thought to be most favourable for various reasons.

England has proved to be particularly popular, regardless of the domicile of claimants, because of the following factors, amongst others: availability of documentary discovery; ability to recover costs; experienced and specialised lawyers and judges; and a favourable attitude to funding, including the availability of contingency fees and third-party funding. Points counting against England include a relatively high overall cost of proceedings, not least because of the documentary discovery, but this may be only a slight disincentive where the claimant or group of claimants has a large claim to pursue – as will typically be the case for utilities.

Although a pending decision of the Court of Justice of the European Union ('CJEU') may impose some limits on claimants' choice of jurisdiction in the future,[16] it should generally still be straightforward to find a basis for bringing claims in England. This is not least because of authority extending the scope to anchor claims in England based on the domicile of subsidiaries that have not even been named in any infringement decision.[17]

Notwithstanding the comments above about the popularity of the English courts, it is necessary to put these claims in context. One of the most commonly cited statistics in this area is the statement that, as of 31 August 2004, there had only been around 60 judgments throughout the whole of the EU in actions for damages based on competition law.[18] If that were true at the time, and if nothing had changed, it would rather beg the question of why the author is writing this article and why, indeed, there are whole journals and conferences exclusively devoted to the subject.

In fact, there have been far more judgments in the 11 years since – not least in Germany – but, in any event, judgments are only the tip of the iceberg. There has not been a single judgment awarding cartel damages in England (and only a handful awarding damages for other violations of competition law) but there have been an awful lot of multi-million pound settlements, some coming at a very late stage in proceedings but some also coming without proceedings ever having been issued and typically, therefore, without any public comment.

Rumour has it that one of the largest English settlements was of a claim by the UK transmission system operator National Grid in relation to gas insulated switchgear, which occurred just before trial in summer 2014. With legal costs alone said to be well in excess of £10 million, it would be reasonable to assume that the damages paid were considerably more.

Although cartel damages claims are now far more numerous, and substantial, than the 2004 statistics might suggest, it remains the case that they are not as prevalent as one might expect them to be given the scale of the loss reportedly caused by cartels. To some extent this is because it is probably never going to be economic to bring individual claims for small amounts, but there are other obstacles as well. It is this apparent under-development of cartel damages claims which has spurred a reform agenda over recent years both at European legislature level and within Member States. These efforts have come to fruition in 2015 and the resulting reforms are discussed further below.

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7 Commission Decision of 24 January 2007 in Case COMP/F/38.899 – Gas Insulated Switchgear.

8 Commission Decision of 7 October 2009 in Case COMP/39.129 – Power Transformers.

9 Commission Decision of 5 March 2014 in Case AT.39952 – Power Exchanges.

10 Commission Decision of 2 April 2014 in Case AT.39610 – Power Cables (only a summary decision is publicly available at the time of going to press).

11 The European Commission investigation remains ongoing but it has made a decision finding a cartel in large screen LCDs and the US Department of Justice has accepted guilty pleas which, in at least one case (Sharp), explicitly extended to the screens of a type of mobile handset sold in the EU as well as in the United States.

12 Commission Decision announced on 3 September 2014 in Case AT.39574 – Smart Card Chips (no public version available at time of going to press).

13 Commission press release of 11 July 2012 (MEMO/12/549).

14 See, for example, the Commission press release of 10 December 2010 (IP/10/1696).

15 Formerly the Brussels Regulation (Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) and now the Brussels Regulation (recast) (Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012).

16 The Opinion of Advocate General Jääskinen dated 11 December 2014 in Case C352/13 *Hydrogen Peroxide v Evonik* proposes that claimants should not be able to rely on Article 5(3) of the Brussels Regulation (Regulation 44/2001) in cartel damages cases.

17 *KME Yorkshire Ltd v Toshiba Carrier UK Ltd* [2012] EWCA Civ 1190.

Abuse of dominance cases

Although cartel damages claims have been a particular focus of private enforcement in Europe, abuse of dominance cases are also especially relevant for utilities and the latest reforms, for the most part, affect all types of private enforcement.

Private enforcement of abuse of dominance prohibitions has historically been considered difficult for claimants.

Unlike the position in relation to cartels, there is often little scope for claimants to bring claims as 'follow-on actions' relying on infringement findings made by competition authorities, because the competition authority investigations take a long time during which limitation periods are typically running. To await the completion of the investigation would risk finding any claim time-barred. Unlike in cartel cases, it is often hard to suspend time on the basis that the claimant lacked knowledge of the infringement.[19] The Competition Appeal Tribunal in the United Kingdom has a rule that starts time running for follow-on cases only when the infringement decision becomes final, after the resolution of all appeals, but this has proved to be of limited benefit because of the narrow definition given to 'follow on' claims, effectively excluding any claim that is not exclusively within the four corners of the decision made.[20] Another major obstacle to bringing 'follow on' claims is that there have historically been very few abuse of dominance decisions, particularly in the United Kingdom.

Where there is no option to bring a 'follow on' claim, the only other option for private enforcement is to bring a stand-alone claim, where the claimant must prove dominance, abuse and loss. This is naturally more difficult and expensive than a claim based on an existing competition authority finding that binds the civil court. It also carries a much greater risk of failure and the concomitant risk – in the United Kingdom at least – of paying the defendant's costs. These are typically all significant factors for potential claimants who tend to be less well-resourced than the companies they accuse.

Despite all these obstacles, there have still been some notable claims.

Perhaps the most notorious English case, in the utilities area at least, has been Albion Water's action against Dwr Cymru, the incumbent water company in Wales. Albion's legal action began as an appeal against the water regulator's decision finding that there had been no abuse of dominance, but a claim for damages was issued after Albion won the original appeal. Altogether, the proceedings took over nine years but Albion did eventually obtain damages of nearly £2 million.

In France, there have been a large number of damages actions against the telecoms incumbent Orange, based on alleged abuse of dominance.

There have also been a number of successful actions seeking urgent injunctions to stop allegedly infringing acts.[21] Overall, however, private enforcement in the area of abuse of dominance has remained relatively rare.

EU developments: the Damages Directive

A new European Directive[22] dealing with private enforcement of competition law was signed into law on 26 November 2014. It has taken nearly nine years to pass the law since the issue of a Green Paper suggesting that action ought to be taken to facilitate private enforcement.

Arguably some of the more significant, and double-edged, provisions are those relating to disclosure. On the one hand, the Directive requires increased disclosure, giving courts powers to require parties – and non-parties – to hand over documents so far as justified and proportionate.[23] Although probably not particularly significant in England, which already has broad disclosure requirements, this may prove to be very valuable in jurisdictions that have not hitherto required disclosure. On the other hand, the Directive offers increased protection against the disclosure of leniency statements and documents in the files of competition authorities,[24] effectively reversing the CJEU decision in *Pfleiderer*.[25] There has been much debate amongst practitioners over how far the increased protection is really necessary.

There are a number of provisions in the Directive which largely confirm the positions that most practitioners had believed to exist anyway. Thus, for example, punitive and multiple damages are not permitted,[26] joint and several liability of infringers is confirmed (at least as a default rule),[27] infringers are allowed to seek contribution from each other,[28] indirect purchasers are allowed to maintain claims and, consequently, infringers can argue that direct purchasers have passed on losses to indirect purchasers.[29] The value of these provisions is that they should remove any lingering uncertainty, which might discourage claims, especially in jurisdictions that have had few claims to date.

More novel provisions include the creation of certain presumptions in relation to loss[30] and passing-on.[31]

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18 Ashurst study for the European Commission on the conditions of claims for damages in case of infringement of EC competition rules: comparative report (Waelbroeck, Slater and Even-Shoshan, 31 August 2004), page 1.

19 On the basis of section 32 of the Limitation Act 1980 and equivalent provisions in other jurisdictions, it being common that time does not start to run until the claimant knew or ought to have known it had a cause of action.

20 *Enron Coal Services Ltd (in liquidation) v English Welsh & Scottish Railway Ltd* [2009] EWCA Civ 647.

21 See, for example, *Purple Parking Ltd v Heathrow Airport Ltd* [2011] EWHC 987 (Ch) and *Software Cellular Network Ltd v T-Mobile (UK) Ltd* [2007] EWHC 1790 (Ch).

22 Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

23 Article 5.

24 Articles 6 and 7.

25 Case C–360/09, *Pfleiderer AG v Bundeskartellamt* [2011] ECR I–5161. The decision in *Pfleiderer* effectively prohibited a national competition authority from imposing a blanket ban on disclosure of leniency materials to damages claimants.

26 Article 3(3).

27 Article 11. Note that there are limited, novel exceptions for some SMEs and immunity recipients.

28 Article 11(5).

29 Articles 12 to 16.

30 Article 17(2): a rebuttable presumption that cartels cause harm, which is far less radical than the previous suggestion that a particular figure for the extent of harm should be presumed.

31 Articles 13 and 14(2): the result is essentially that the infringer bears the burden of proving passing-on as against a direct purchaser and the burden of disproving passing-on as against an indirect purchaser.

Probably the most significant development, at least for English lawyers, is the extension of the limitation period for competition claims. The Directive requires that limitation should not expire for at least five years beyond both knowledge, or deemed knowledge, and the end of any infringement. Crucially, it also requires that the limitation period be suspended or interrupted until at least one year after the end of any competition authority investigation or proceedings.[32] This provision could have extraordinary consequences where a long-running cartel is only brought to an end through dawn raids and there are appeals against the competition authority's infringement decision (as commonly occurs). Limitation would not even start running until a year after the last appeal is finished, which means that a claim might still be in time more than ten years after the end of the cartel. In practice, it is questionable whether the necessary evidence to bring a claim would still exist after so long.

For utilities, the significance of the extension of the limitation period is that it will probably make 'follow-on' abuse of dominance claims more feasible.

Member States have until 27 December 2016 to transpose the provisions of the Directive into national law.

UK developments: the Consumer Rights Act

With frustration growing over the slow progress of the European legislation, UK legislators decided to take their own action to facilitate private enforcement of competition law. This has taken the form of Schedule 8 to the new Consumer Rights Act 2015, which finally received Royal Assent on 26 March 2015.

The single most noteworthy reform introduced through Schedule 8 is the creation of collective actions specifically only for claims based on infringements of UK or EU competition law.[33] For the first time ever in the United Kingdom, in relation to any area of law, the Competition Appeal Tribunal can allow such collective actions to proceed on an 'opt-out' basis in relation to claimants domiciled in the United Kingdom. Where claims are allowed to proceed on an opt-out basis, damages will be calculated on the basis of the loss suffered by all persons domiciled in the United Kingdom even if only some of them step forward to claim their compensation. The remainder will be payable to a charity, the Access to Justice Foundation.

It is notable that the United Kingdom's decision to proceed with an opt-out model was made despite an EU Recommendation which proposed opt-in collective action models instead.[34]

Utilities should also be aware that a new fast-track procedure for competition claims has been introduced.[35] The fast-track is particularly, but not exclusively, for the benefit of SMEs who seek urgent injunctive relief. Where it applies, the Tribunal can dispense with the need for an undertaking as to damages in relation to any injunction and can cap the adverse costs risk. It is to be anticipated that this may increase the volume of private actions alleging abuse of dominance, particularly where dominance itself is clear (as will often be the case with utilities).

Other more technical reforms in Schedule 8, and in draft revised Tribunal Rules that are the subject of consultation, are designed to make the Tribunal more effective as a venue for private enforcement of competition law. Thus, for example, the jurisdiction of the Tribunal is to be expanded to include all competition private actions and not just those which are considered to be 'follow-on' actions.[36] There are also changes to the limitation period for actions in the Tribunal, to align them with those that apply in the High Court, but these will soon be superseded by the new rules in the Directive.

There is also provision to allow the UK competition authority, the Competition and Markets Authority, to certify voluntary redress schemes offered by cartelists and offer a modest reduction in fines where one is offered. It is doubtful, though, whether there are sufficient incentives to encourage companies to do so.

The new provisions are intended to take effect in October 2015.

Practical implications

It would be surprising if the combined effect of recent developments was not to increase the amount of competition litigation. After all, it is almost the *raison d'être* of both the EU and UK reforms. The largest growth is likely to be in those EU Member States that have not previously seen much of this litigation as they will probably be the most affected by the EU reforms. The United Kingdom may also see considerable growth, though, if the collective and fast-track regimes prove popular.

Although the focus of the reforms has been mostly on cartels, it is likely that private enforcement of abuse of dominance will increase. This is particularly because of the extension of limitation periods and the new fast-track regime in the United Kingdom. One way to try to limit the impact of the reforms in this respect, and to keep claims confidential so as to avoid encouraging others, might be to include arbitration provisions in contracts with wholesale customers – particularly those who are also competitors downstream. There is doubt about whether the Directive applies at all to arbitration (although this may be cleared up in national implementing measures) and the United Kingdom's fast-track regime certainly would not. Arbitration can also limit the scope for claims to be brought collectively, although this is typically less of an issue outside the cartel scenario. Any such provision would need to extend explicitly to alleged competition infringements in order to stand a decent chance of being enforced.[37]

32 Article 10.

33 Section 47B of the Competition Act 1998, as substituted by paragraph 5 of Schedule 8 to the Consumer Rights Act 2015.

34 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU).

35 Paragraph 15A of Schedule 4 to the Enterprise Act 2002, as added by paragraph 31 of Schedule 8 to the Consumer Rights Act 2015.

36 Section 47A of the Competition Act 1998, as substituted by paragraph 4 of Schedule 8 to the Consumer Rights Act 2015.

37 The author has written an article for the *Global Competition Litigation Review* (publication pending) discussing how the use of arbitration clauses may be affected by the recent opinion of Advocate General Jääskinen in Case C352/13 *Hydrogen Peroxide v Evonik*. In short, however, the more explicit the wording, the better the prospects of it being enforced.

Arbitration clauses are less likely to be effective, or appropriate, in relation to consumers and/or cartel allegations. In practice, however, this may not be much of a concern for utilities given that utilities appear more often to be victims than perpetrators of cartels. In fact, utilities would be well-advised to consider inserting standard provisions in contracts with suppliers designed to facilitate recovery of compensation where suppliers engage in cartels. This is a practice followed by a number of large companies including, reportedly, Coca-Cola and Deutsche Bahn. One of the biggest challenges in seeking compensation for the effect of a cartel is quantification, not least because there is so much room for differences of opinion between experts, and this could be entirely avoided by the use of liquidated damages provisions. The reaction of suppliers to such proposed clauses may be enough in itself to identify possible cartels, but utilities might wish to seek audit rights to further aid identification of cartels and to assist in providing the disclosure necessary to bring claims.

Along similar lines, utilities ought to give very serious consideration to seeking compensation where cartels are identified whether or not there are the pre-existing contractual provisions suggested above to assist in bringing claims. There has been a tendency to date for management of many businesses to quickly discard the idea of bringing claims because they are seen as too expensive and/or uncertain. The latest reforms, however, reduce both the cost and uncertainty and are likely to make bringing claims the norm rather than the exception. Moreover, the development of the market is such that third-party funding is readily available, so there need not be any direct cost in bringing a claim anyway.[38] Management of utilities, more than other businesses, may find themselves subject to criticism if they do not pursue compensation. It has already been suggested by some commentators that the standards expected of directors, such as the business judgment rule in Germany, require at least very serious consideration of claims. For utilities, though, there is an additional public interest issue to be considered given that utilities are often publicly-owned and/or required to pursue public service objectives. One could just about imagine a situation where an available claim might be taken into account in the setting of price controls.

The advent of collective actions in the United Kingdom may be less significant for utilities than for consumers, SMEs and those found guilty of cartel infringements. UK-based utilities should bear in mind, however, that the procedure is not limited to cartels, so there is at least the theoretical possibility of consumers or SMEs using it against utilities in dominance claims. UK-based utilities should also ensure that they consider their position in relation to any opt-out actions that are certified. Experience in the United States indicates that businesses which opt out of actions tend to obtain more compensation – which may not be terribly surprising given differing interests and the incentives of class counsel. Even if UK-based utilities choose not to opt out, they should at least make sure that they claim any judgment or settlement sums that become available to the class as a whole. Failure to claim such 'free money' has been a source of criticism for businesses in the past, particularly investment managers in relation to US securities class actions.

Non-UK-based utilities should keep an eye on the certification of collective actions in the United Kingdom in order to decide whether or not to opt in. No benefits will accrue to claimants domiciled outside the United Kingdom unless they opt in at the beginning. Opting in to an established group action in the United Kingdom may be an efficient way of claiming smaller amounts of compensation where it would not be cost justified to bring an independent claim.

Conclusion

To summarise, whatever one thinks of the recent reforms in the United Kingdom and the EU, it is all but certain that they will add to the growth of private enforcement that has been seen over the past decade or so. This presents some challenges to utilities, who may be exposed by virtue of their dominance, but it also presents real opportunities given the exposure of utilities to the effects of cartels. There are a number of relatively simple steps that can be taken to maximise the benefits, and minimise the risks, from the new status quo.

38 There are, of course, some additional internal management costs. Further, if one uses third-party funding then one must sacrifice some of the compensation in return, in order to provide an investment return for the funder.