

Session 105 – Class Actions

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Opening remarks

Actions for damages in Europe – Observations:

- Europe is at a turn of an era
- The ‚rigor iuris‘ of the (roman) civil law damages concept is softened ...
- to the (expected) benefit of consumers, customers and competitors

Dr. Daniel Lucien Bühr, Schindler Management Ltd, Ebikon, Switzerland

Opening remarks

Actions for damages in Europe – Observations:

- EU legislation has eased competition tort litigation:
- EC Regulation 864/2007 (Rome II) on the law applicable to non-contractual obligations: in competition damages matters the claimant may choose among the laws of the countries affected
- EC Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters: competition damages claims can be heard by one court applying one single law, even where more than one defendant is involved and damages occurred in several Member States

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Class and collective actions in Europe

Slides will be handed out at the Conference

Ann Rose Stouthuysen, Sun Microsystems Inc., Brussels, Belgium

The Commission's white paper (02 April 2008): what lies behind it?

Current lack of an effective legal framework for private actions for compensation for the harm caused to citizens and businesses as a result of infringements of EC competition law.

While companies that breach competition law are punished through public enforcement by competition authorities, **compensation for victims can only be obtained via national courts, in accordance with national procedural rules.**

Jacques-Antoine Robert, Simmons & Simmons, Paris, France

The white paper: some of the key issues

- How to ensure effective collective redress mechanisms in the competition field and identify groups of claimants
- How victims can obtain evidence
- How to quantify and distribute the damages claimed
- How to avoid unmeritorious claims
- Costs

Jacques-Antoine Robert, Simmons & Simmons, Paris, France

The Commission's proposals ...

- **Collective redress mechanisms:**
 - representative action for damages brought by qualified entities for identified or identifiable members of a group
 - opt-in collective action
- **Access to evidence:**
 - minimum standard of disclosure based on fact pleading plus judicial control of relevance/proportionality
 - binding effect of NCA decisions
- **Definition and calculation of damages**
 - actual loss, loss of profit plus interest (ie single damages)
 - non binding guidelines on calculating damages

Jacques-Antoine Robert, Simmons & Simmons, Paris, France

The Commission's proposals ...

- **Mechanism for dealing with passing-on of overcharges**
 - differentiating between purchasers in the distribution chain
- **Costs: Member States to**
 - reflect upon costs rules
 - design procedural rules to foster settlements
 - enable courts to issue costs orders outside the normal rules
- **Interaction with leniency programmes**
 - protect leniency applications and corporate statements from disclosure (voluntary disclosure of corporate statement by applicant only after statement of objections issued)
 - new suggestion that an immunity recipient should be liable in damages only to its own direct and indirect purchasers

Jacques-Antoine Robert, Simmons & Simmons, Paris, France

European Parliament's response to the white paper (26 March 2009) ...

“EC competition rules and, in particular, their effective enforcement, require that victims of EC competition law infringements must be able to claim compensation for the damage suffered”.

•In favour of :

- settlement procedure for mass claims
- clearly delimited groups of claimants in collective claims
- avoiding abusive litigation
- recognising the passing on defence (if proved)
- victims obtaining access to Commission documents (though acknowledges the need for guidelines on leniency applications)

Jacques-Antoine Robert, Simmons & Simmons, Paris, France

European Parliament's response to the white paper (26 March 2009) ...

- **Against**
 - decisions of NCAs being automatically binding on the courts of other Member States
 - severing joint and several liability for cooperating witnesses
- **Continuing concern**
 - about the legal basis for any harmonising legislation
 - about consistency with other non contractual claims and with collective redress mechanisms in other fields (eg consumer law)
 - that harmonising measures must not lead to arbitrary or unnecessary fragmentation of procedural national laws

Jacques-Antoine Robert, Simmons & Simmons, Paris, France

Cartel damages litigation - The perfect laboratory for collective actions:

Introductory remarks:

- Corporations can be cartel damage defendants OR plaintiffs! Many companies are now in both roles ...
- In principle, class and collective actions for cartel damages do not exist in Europe, mainly due to its socioeconomic and judiciary history and culture
- But, ... in recent years plaintiff lawyers have found solutions to the difficulties claimants encounter

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Cartel damages litigation - The perfect laboratory for collective actions:

What does the ‚jungle‘ look like (today):

- Private (equity) firms have discovered cartel damages claims against wealthy corporations as a business: Cartel Damage Claims – CDC; Claims Funding International plc, Equilib SARL etc.
- Plaintiff lawyers use established procedural concepts such as joinder of proceedings or ...

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Cartel damages litigation - The perfect laboratory for collective actions:

What does the ‚jungle‘ look like (today) – cont:

- they set up SPVs that purchase claims and file suit on their behalf and account
- and (US) plaintiff law firms have entered Europe (excerpt from Hausfeld LLP’s webpage):

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Cartel damages litigation - The perfect laboratory for collective actions:

In addition to its work in the United States, Hausfeld LLP's London affiliate, Hausfeld & Co., has filed an action in the High Court in London, Emerald Supplies Ltd. et al. v. British Airways, seeking to recover damages incurred by shippers who shipped goods by air to, from, and within the European Union. This action is being pursued on a representative basis on behalf of all entities that elect to join the case.

(http://www.hausfeldllp.com/pages/current_investigations/141/air-cargo)

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Cartel damages litigation - The perfect laboratory for collective actions:

What's the conclusion:

- As corporate lawyers safeguarding the interests of our companies we may find ourselves acting as competition damage defendants and as competition damage plaintiffs at the same time
- As defendants, we must be aware of the mushrooming quasi class action type lawsuits ...
- that might, in a plaintiff role, well work in our companies' interests!

Dr. Daniel Lucien Bühr, Schindler Management Ltd, Ebikon, Switzerland

The Philip Morris experience with collective actions in Europe

A Case Study

Slides will be shown at the Conference

J. B. Simko, Philip Morris International Management S.A., Lausanne, Switzerland

Panel discussion and questions from the audience

Thank you for attending and participating at the session

Ann Rose, Daniel, J.B., Jacques-Antione