

ENGLISH COURT PERMITS “FORUM SHOPPING” IN PRIVATE ANTITRUST SUITS

by
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The European Commission is currently digesting the (mostly unfavourable) responses to its Green Paper consultation on how more private enforcement of European Union competition law can be encouraged. The options canvassed in the Commission's proposals included the introduction of common law-style discovery rules, double damages and contingency fees for lawyers. If adopted, this would be a potent mix for the European environment and would revolutionise the framework for private enforcement of EU competition law. Realists, however, are concerned that such reforms could spill over into other parts of the justice system and could potentially usher in unwelcome litigation abuse.

But what relevance does the Commission's Green Paper have to forum shopping? The answer is that it highlights the attraction of common law procedures, notably those relating to discovery, for a private claimant relying on competition law. Similar discovery procedures are not found in continental civil law systems.

Which brings us on to the subject of vitamins. The Commission's prohibition of the vitamins cartel has promoted extensive forum shopping in common law jurisdictions. The U.S. Supreme Court found in *F. Hoffmann-La Roche v. Empagran*, 542 U.S. 155 (2004) that absent an adverse domestic effect in the U.S., the Foreign Trade Improvements Act precluded foreign purchasers from suing in U.S. courts under U.S. antitrust law. There needed to be a U.S. connection for U.S. law and U.S. courts to be available to a claimant.

The English High Court has proved accommodating for forum shopping in *Promivi Limited v. Roche Products Limited* [2003] EWHC 961 (Comm). As long as the Court had jurisdiction over one claim, it would allow similar claims by non-UK claimants to be rolled into the same action. This means that the UK courts can be expected to attract claims from other EU countries.

The issues relating to jurisdiction in *Provimi* were complex. The claims were based on overcharging for vitamins sold under a variety of supply contracts. These contracts had non-UK jurisdiction clauses. The defendant parties were different legal persons from those condemned by the Commission in its prohibition decision. The claimants argued that the UK subsidiary who implemented the cartel should be liable for the losses suffered by the purchasers elsewhere in the EU, including those of a German-based claimant. Ultimately, because some claimants and some defendants were locally based, that was sufficient for the English High Court to have jurisdiction over not only the locally-connected cases but also over a situation where both buyer and seller were German. Choice of jurisdiction clauses in the supply contracts were found

not to have been intended to encompass claims for breach of competition law, framed under English law as a tortious claim for breach of statutory duty.

A number of factors influenced the English High Court to arrive at this result. The Court was untroubled by the fact that the defendants to the proceedings and the addressees of the Commission's prohibition decision were different legal persons. The EC Treaty's prohibition on restrictive agreements applies to "agreements between undertakings." The concept of "undertaking" is elastic enough to cover economic groupings and is no respecter of legal form or legal personality. The defendants were part of the same "undertaking" as those condemned by the Commission.

Furthermore, the English High Court was applying EU competition law, a unitary system of law applicable to all EU Member States. Should it be so surprising for a national court to be prepared to rule on cases some of which were more connected with other parts of the same EU?

As the Commission focuses more of its enforcement effort on cartels, there are more cartel prohibition decisions. These spawn follow-on damages claims and the number of such claims is on the rise. A decision such as that in the English High Court in *Provimi*, coupled with the availability of common law discovery procedures will mean such cases are likely to be attracted to a UK jurisdiction. This could be a persistent trend since there is no certainty that some of the more far-reaching aspects of the Commission's Green Paper proposals on private enforcement will gain ground.

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