The Public Competition Enforcement Review

Sixth Edition

Editor
Aidan Synnott

Law Business Research

The Public Competition Enforcement Review

Reproduced with permission from Law Business Research Ltd.

This article was first published in
The Public Competition Enforcement Review 6th edition
(published in April 2014 – editor Aidan Synnott).

For further information please email
nick.barette@lbresearch.com

The Public Competition Enforcement Review

Sixth Edition

Editor
Aidan Synnott

Law Business Research Ltd

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INTERNATIONAL INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

www.TheLawReviews.co.uk

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGERS
Adam Sargent, Nick Barette

ACCOUNT MANAGERS
Katherine Jablonowska, Thomas Lee, James Spearing, Felicity Bown

PUBLISHING ASSISTANT
Lucy Brewer

MARKETING ASSISTANT
Chloe Mclauchlan

EDITORIAL ASSISTANT
Shani Bans

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Anne Borthwick

SUBEDITOR
Janina Godowska

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2014 Law Business Research Ltd
www.TheLawReviews.co.uk
No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of April 2014, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-909830-01-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ANJIE LAW FIRM

BAYKANIDEA LAW OFFICES

BULBOACA & ASOCIATII SCA

BUSTAMANTE & BUSTAMANTE LAW FIRM

CLEARY GOTTLIEB STEEN & HAMILTON LLP

DLA PIPER

DRYLLERAKIS & ASSOCIATES

FRORIEP

HANNES SNELLMAN ATTORNEYS LTD

KHAITAN & CO

KING & WOOD MALLESONS

L PAPAPHILIPPOU & CO LLC

LEE AND LI, ATTORNEYS-AT-LAW

LLOREDA CAMACHO & CO

MARVAL, O'FARRELL & MAIRAL

NAGASHIMA OHNO & TSUNEMATSU

NORTON ROSE FULBRIGHT LLP

OSBORNE CLARKE

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

SIDLEY AUSTIN LLP

SQUIRE SANDERS

STIBBE

URÍA MENÉNDEZ – PROENÇA DE CARVALHO

VEIRANO ADVOGADOS

VON WOBESER Y SIERRA, SC

WEBB HENDERSON

WILHELM & ASSOCIÉS

CONTENTS

EDITOR'S PREFACE

The reports from around the globe collected in this volume will be of keen interest to practitioners of competition law everywhere. Increasingly we see that effects of public competition enforcement in individual jurisdictions are felt well beyond those jurisdictions as firms become globalised and cross-border trade increases. To be sure, many jurisdictions retain important local particularities in competition law and enforcement priorities. However, as we can see from the reports collected in this volume, increasing international cooperation among competition enforcers, the widespread reach of firms' conduct and the economic circumstances of certain industries have led to a notable convergence in the cases attracting the attention of enforcers.

With respect to cartel enforcement, the reports from the European Union, Switzerland and the United States all describe efforts in those jurisdictions concerning alleged fixing of the London Inter-Bank Offered Rate (LIBOR). Last year, in a related case, the European Commission levied its largest-ever aggregate fine. The past year also saw continued efforts by regulators to police *auto parts* price-fixing cartels. For example, the United States, the European Commission and Japan each have levied significant fines on auto parts companies around the globe, and Australia continued its proceedings against several firms in this industry. The alleged *liquid crystal display* cartel continues to attract attention from (and fines imposed by) authorities around the world.

Various alleged bid-rigging schemes have attracted the attention of authorities in many jurisdictions, including Brazil, Colombia, Germany, India, Romania, Switzerland and the United States. These investigations range from the provision of subway trains to railway tracks to rubber soles for boots to firearms to road construction. Competition authorities in the United States have continued their focus on bid rigging in municipal bond and real estate foreclosure auctions. The Italian authorities investigated a joint venture between Italian and French firms formed to bid on the provision of services to art museums and archeological sites, but found no infringement.

We also see a convergence in enforcement priorities in other areas. As detailed in the chapters that follow, several jurisdictions have acted against pay-for-delay agreements in the pharmaceutical industry. Last year, the United States Federal Trade Commission

won an important Supreme Court challenge to these agreements, and the European Commission and France levied several fines on parties to such agreements. Italy has also commenced an investigation into one such agreement. The reports from Australia, India and the United Kingdom describe further enforcement efforts in the pharmaceutical industry. Argentina and Italy, like the United States and Spain, continue to investigate various professional associations for possible anti-competitive agreements.

High technology industries – and in particular concerns surrounding the behaviour of firms holding standard-essential patents – continue to get significant attention from enforcers around the world. Chinese authorities have launched an investigation into a wireless research and development company over complaints that it has charged excessive fees for the licensing of certain of its patents for technology standards for mobile phones; the European Commission is undertaking an investigation of major industry players in connection with their ownership of standard-essential patents; and United States authorities continue to actively discuss policy in this area.

Additionally, both the United States and the European Commission have had success in their actions against e-Book publishers. Several jurisdictions – including Brazil, Germany, Switzerland and Finland – have brought actions concerning resale price maintenance schemes for various products. We also note that Brazil, Japan and Spain have moved against copyright management organisations for their actions with respect to royalties. Several of the chapters that follow note the efforts of various regulators concerning interchange fees associated with credit card transactions.

Enforcement activity related to mergers remains robust, and issues surrounding consolidation in the airline industry have occupied regulators across the globe. Both the European Commission and the United States Department of Justice confronted proposed airline mergers last year, leading to different results: the European Commission continued to oppose the proposed merger of Irish airlines Aer Lingus and Ryanair, while the merger of American Airlines and US Airways was ultimately cleared by the United States authorities. Brazilian authorities approved the merger of Azul and Trip Linhas Aéreas subject to conditions. Meanwhile, as detailed in the report from India, after an analysis that will be of interest to practitioners in and observers of airline competition issues, the Indian authorities approved various agreements between Etihad Airways and Jet Airways.

Competition law continues to evolve across the globe. Indeed, the report from the United Kingdom will be of particular interest. It describes the significant changes in the competition enforcement regime there, as authority for enforcement shifts from two separate authorities, the Office of Fair Trading and the Competition Commission, to a single Competition and Markets Authority. Mexico has a proposed new Antitrust Act, which is under discussion in the Mexican Congress. In China, Mofcom has published draft Provisions on Imposing Restrictive Conditions on Concentration of Undertakings which, we read, are expected to be adopted this year. We also note that in the coming year Australia will undertake a significant review of its competition laws. The report from Brazil details the first full year of that jurisdiction's new competition regime. The report from Germany describes important amendments to the German Act Against Restraints to Competition, particularly regarding the law's application to merger review; and the report from France details new guidelines there for merger control. Numerous

jurisdictions continue to implement and refine leniency programmes designed to encourage the reporting of cartel activity.

The reports that follow detail the efforts of public competition enforcers around the globe. Also of keen interest is the keynote piece challenging the European Commission's philosophy of encouraging private enforcement of competition laws. That chapter will surely provoke much thought on the efficacy and desirability of such enforcement.

Aidan Synnott
Partner
Paul, Weiss, Rifkind, Wharton & Garrison LLP
April 2014

Chapter 1

PUBLIC V. PRIVATE ENFORCEMENT: WHY EUROPE SHOULD CHANGE COURSE ON PRIVATE ENFORCEMENT

Ken Daly and Barney Connell[1]

Introduction

It has become a key tenet of the European Commission's enforcement philosophy that greater private enforcement of competition law will achieve the dual policy goals of deterring infringement and delivering redress and, in so doing, will complement public enforcement. To that end, successive commissioners at the Directorate General (DG) for Competition have sought to propose legislation designed to make it easier to commence litigation based on competition law. Unlike his predecessor, whose attempt is thought to have foundered due to political resistance to collective litigation, Vice-President Joaquín Almunia appears more likely to succeed in pushing through draft legislation that, at the time of writing, is going through the EU's legislative procedure. While this proposal does not itself tackle the controversial topic of collective litigation, it does form part of the same package as the Commission's recommendation of June 2013, which called on all Member States to introduce mechanisms for collective redress.

But is this confidence in private enforcement, and particularly collective redress, well-placed? We consider that there are a number of reasons to believe otherwise, some of which relate to the interaction of private enforcement with the existing framework for public enforcement. These reasons include:

a the threat that massive civil liability poses to leniency regimes;

b the difficulty of conducting follow-on cases efficiently in light of protracted appeals to the EU courts; and

c the potential ramifications for follow-on proceedings of long-established EU case law, according to which only those parties who successfully appeal an infringement decision can benefit from the decision being annulled.

1 Ken Daly is a partner and Barney Connell is an associate at Sidley Austin LLP.

Then there is the difficulty in designing a model of collective redress that can deliver compensation to those who deserve it without simultaneously creating incentives for abuse that result in excessive costs for business and the wider economy. Finally, there is the inconvenient fact that in jurisdictions such as the United States and Canada, private enforcement on top of administrative fines has not delivered a measurable deterrent effect.

These difficulties lead one to wonder whether, instead of following the gradual worldwide alignment with the US model of enforcement, Europe should be bold enough to buck the trend and seek out alternatives, for there do seem to be more efficient alternatives that deserve consideration. These might involve providing redress to people harmed by unlawful activity using funds seized by public authorities, for example using models with features similar to that used by the US Securities and Exchange Commission's 'Fair Funds' model. If there is reason to believe that such models are viable and are capable of delivering compensation in a timely manner without the process being co-opted by lawyers and other third parties such as litigation funders, then it would be a tremendous missed opportunity if Europe were to continue down the path to ever more private enforcement.

The slow evolution of private enforcement in Europe

Even 12 years on from the ruling of the Court of Justice of the European Union (CJEU) in *Courage Limited v. Bernard Crehan*, the following passage from the judgment retains a somewhat prophetic air:

> *The full effectiveness of Article [101] and, in particular, the practical effect of the prohibition laid down in Article [101(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to distort or restrict competition. Indeed, the existence of such a right strengthens the working of the [EU] competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the [EU].*[2]

Although the amount of litigation seeking damages based on competition law has steadily increased in recent years, it remains to be seen whether claims for damages do, or ever will, make a 'significant contribution' to the enforcement of competition law. This is not for lack of effort on the part of the Commission, which, for example, routinely encourages civil claims in its press releases reporting competition infringements.

The Commission has also sought to facilitate private enforcement through policy initiatives. In 2005, DG Competition published a Green Paper identifying obstacles to private actions and possible solutions.[3] That was followed, in 2008, by a White Paper

2 Case C-453/99 *Courage Limited v. Bernard Crehan* [2001] ECR I-6297, Paragraphs 25 and 26.

3 European Commission, Green Paper – Damages actions for breach of the EC Antitrust rules, 19 December 2005, COM (2005) 672 Final.

setting out specific proposals intended to address those obstacles.[4] In October 2009, a legislative proposal was drawn up addressing a variety of issues such as collective actions, disclosure, the status of decisions by national competition authorities and the passing on defence, but the proposal was not adopted by the Commission within the relevant term of office. The appointment of a new College of Commissioners in 2010 saw a new Commissioner take charge of DG Competition, but legislation on private enforcement remained on the agenda and the issue of collective redress was resurrected as the subject of a further public consultation conducted jointly by three Directorates-General: Justice, Health & Consumers, and Competition.[5]

It was not until June 2013, however, after reports that disagreement within the Commission was causing delay, that it adopted a proposal for a directive on private actions for damages (Draft Directive)[6] – which at the time of writing is going through the EU's legislative procedure – accompanied by a non-binding recommendation on collective redress (Recommendation).[7] These measures, which are discussed in greater detail below, are considered by the Commission to be a single package that reflects its approach to redress.[8] The Commission has also published non-binding guidance on the quantification of damages in private actions with the intention of assisting national courts that might otherwise have difficulty dealing with the econometrics used to estimate how markets would have behaved but for an alleged infringement of competition law.[9]

There are signs that private enforcement is steadily increasing, due to the Commission's efforts as well as adjustments at national level, but private enforcement continues to play only a peripheral role in comparison with public enforcement. The reasons for this likely include the time and costs associated with commencing litigation, procedural complexity, exposure to payment of defendants' costs if claims are unsuccessful, difficulty in obtaining evidence and the complexity (even in follow-on cases) of proving that a quantifiable loss was suffered as a result of an infringement of competition law.

---

4 European Commission, White Paper on damages actions for breach of the EC antitrust rules, 2 April 2008, COM (2008) 165.

5 European Commission, Public Consultation: Towards a Coherent European Approach to Collective Redress, 4 February 2011, SEC (2011) 173 Final.

6 Proposal for a directive 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, COM (2013) 404 final, June 2013.

7 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), L 201, 26 July 2013, p. 60.

8 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Towards a European Horizontal Framework for Collective Redress', COM (2013) 401 final, June 2013.

9 Commission Staff Working Document: Practical Guide: Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, SWD (2013) 205, June 2013.

Various steps are being taken at national level to alleviate some of these obstacles by adapting the national procedures applicable in competition law follow-on actions, the most extreme proposals being the introduction or expansion of collective procedures with a view to spreading the costs of litigation across large numbers of claims.[10] However, attempting to facilitate private actions overlooks some fundamental tensions between private enforcement and the prevailing regime for public enforcement.

Tensions between public and private enforcement

Whereas fines imposed on undertakings by the Commission and national competition authorities are intended to punish wrongdoers, private enforcement is intended primarily to deliver redress to victims.

Private enforcement takes on a punitive dimension where national courts award punitive damages, an example of which is the punitive (exemplary) award of £60,000 made by the UK Competition Appeal Tribunal in the case of *2 Travel Group plc (in liquidation) v. Cardiff City Transport Services Limited*.[11] However, such awards are rare, both in the UK and in European jurisdictions generally. Moreover, given that it has been accepted by both the European Court of Human Rights and the CJEU that EU competition law and the imposition of fines for breaches of EU competition law are criminal in nature,[12] it is unlikely that punitive damages would be available in follow-on proceedings where the defendant has already been fined, because to award such damages would be contrary to the principle of *non bis in idem*.[13]

In Europe, the absence of far-reaching discovery rules, which would permit claimants to conduct fishing expeditions in search of the information needed to establish the existence or otherwise of infringements, and the general difficulty of detecting collusion where it does exist, means that claimants will often have difficulty proving infringements on their own. For this reason, private enforcement is far more likely to

10 See, e.g., Schedule 8 to the UK's Consumer Rights Bill, which would implement the UK government's proposal to introduce an opt-out regime for private actions based on competition law.

11 [2012] CAT 19, judgment of 5 July 2012.

12 See, for example, statements made by the European Court of Human Rights in *Jussila v. Finland* (judgment of 23 November, 2006), and in *Menarini Diagnostics v. Italy* (judgment of 27 September, 2011), and the CJEU in C-272/09 *KME Germany and Others v. European Commission*. For a full discussion of the criminal nature of competition law see Nordlander and Harrison, 'Are Rights Finally Becoming Fundamental?', February 2012, *CPI Antitrust Chronicle*.

13 At least that is the position under English law following *Devenish Nutrition Ltd v. Sanofi-Aventis SA* [2007] EWHC 2394. It is presumed that the same reasoning would apply in other European jurisdictions. The *2 Travel* case was a follow-on case, but no fine had been imposed on the defendant because it benefited from immunity on account of its small economic size in accordance with Sections 40(3) and (4) of the Competition Act 1998, and the Office of Fair Trading had chosen not to exercise its discretion to withdraw that immunity.

remain an add-on to the established model of public enforcement in the form of follow-on actions.

To the extent that private enforcement builds upon public enforcement, it has two perceived benefits: first, it delivers (in meritorious cases) redress to victims of unlawful conduct; and second, it is thought to provide an additional deterrent against infringing the competition laws (although we question the extent of this effect below).

Rather than only considering the perceived benefits of private enforcement, though, it is also legitimate to ask 'What are the costs of the prevailing models of private enforcement?' and 'Could the same (or better) results be achieved more efficiently?' These questions are important, because there are a number of reasons for supposing that if court-based private enforcement under existing EU models were to take off on a significant scale it may create tension with the prevailing mode of public enforcement it is intended to complement.

Diminishing incentives to make leniency applications

It is difficult to overstate the importance of leniency programmes to the success of public enforcement against cartels in Europe. By way of illustration, 46 of the 52 cartels in relation to which the Commission issued a statement of objections from 2002 to 2008 were investigated as a result of leniency applications.[14] The rewards available to successful leniency applicants under the Commission's leniency programme are deliberately very attractive. Indeed, these rewards have to be significant to create a sufficient incentive for undertakings to report cartels, particularly since at the time of making the leniency application a cartelist will not be aware of whether other cartelists have already applied and provided sufficient information to secure the available rewards (a risk only partially alleviated by being able to make anonymous enquiries about the availability of leniency, as the sector at least must be identified).

Under the Commission's leniency programme, however, even if a leniency applicant successfully obtains immunity from fines, Member States are presently not required to provide any protection from damages actions brought in national courts by alleged victims of the cartel. This can be contrasted with the approach in the US where, provided the court in which the civil action is brought considers that a leniency applicant has provided satisfactory cooperation in the civil proceedings, the leniency applicant may (in addition to avoiding liability for multiple damages) have its liability limited to damages in respect of its own sales as opposed to those of other cartelists.[15] In the EU, leniency applicants are in fact the prime targets for follow-on litigation as, by definition, they will not deny their involvement, are less likely to be involved in appeal proceedings

14 Joint answer given by Ms Neelie Kroes (then European Commissioner for Competition) on behalf of the European Commission on 2 April 2009 in response to parliamentary questions E-0890/09, E-0891/09 and E-0892/09.

15 See the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (as amended), Pub L No. 108-237, Title 2, Sections 211-214, 118 Stat 661, 666-668, and the US Department for Justice's Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters.

against the infringement decision, and will possess or will have generated documents demonstrating their culpability. Moreover, where as a matter of national law cartelists share liability for the losses caused by a cartel, it is potentially open to any persons who believe they have been the victim of a cartel to seek to recover their entire losses only from the leniency applicants (if liability among cartelists is joint and several), or at the very least to include the leniency applicant as a co-defendant even if the claimant purchased from a different cartelist.

In these circumstances, the steady increase in private enforcement via follow-on actions must over time reduce the incentives for undertakings to make leniency applications. It is of course true that choosing not to make a leniency application will always involve a significant risk. However, there could come a point where the scale of liability associated with private actions will deter cooperation and leniency applications, particularly for those who may only be entitled to the lower orders of leniency (e.g., a 20 or 30 per cent fine reduction). This gradual and quietly growing disincentive is likely to reduce the effectiveness of public enforcement and, in turn, potentially reduce the number of decisions that could provide the basis for private enforcement via follow-on actions. Put another way, facilitating private enforcement in addition to public enforcement could lead to less enforcement, not more.

The Draft Directive, as originally proposed by the Commission, sought to address this issue by restricting the liability of successful leniency applicants to harm caused to the applicant's own direct or indirect purchasers (as under the US model) but, crucially, did not propose absolute protection. Instead, successful leniency applicants would be left with the lingering possibility that if claimants were unable to recover full compensation from the other members of the cartel, the applicant would then be exposed to liability for all damage caused by the cartel. While the risk of no other cartel member being in a position to pay compensation may in most cases be limited, the exception nonetheless leaves successful leniency applicants in a position where their liability might re-engage years or even decades after the matter – for them – has ended, as it might take this long for all legal avenues to be explored for claimants to determine whether full compensation is available from the members of the cartel other than the leniency applicant. There seems little practical benefit to leaving leniency applicants in this legally uncertain position.

Another risk to the efficacy of leniency programmes relates to the possibility that undertakings will be deterred from making leniency applications as a result of the risk that materials generated in the course of making such applications will be subject to disclosure in private actions.

It was expected that in response to the German court's request for a ruling in *Pfleiderer v. Bundeskartellamt*,[16] the CJEU would take the opportunity to rule definitively that EU law required leniency documents to be protected from disclosure in civil proceedings. However, in the event, it ruled that it is for national courts to decide on a case-by-case basis whether access should be granted. In doing so, national courts must weigh the rights of parties that have suffered loss as a result of infringements of competition law against the need to ensure the effective application of competition law.

16 Case C-360/09 *Pfleiderer AG v. Bundeskartellamt*, [2011] ECR 0.

In the view of Commissioner J Thomas Rosch of the US Federal Trade Commission, the weighing exercise to be conducted by national courts 'will be by no means an easy task for any court or tribunal, and [...] there is inevitably the palpable risk that a court or tribunal will get it wrong and make "bad law", especially if a large number of private damages actions are brought'.[17]

In observations made to the English High Court on how to carry out the weighing exercise in *Pfleiderer*, the Commission submitted that the Court should, *inter alia*, consider 'whether there are other available sources of evidence that are equally effective for that purpose, which therefore do not give rise to concerns about the consequences of disclosure for the effective functioning of a leniency programme'.[18] However, the Commission may be underestimating the difficulty of balancing these competing interests. From a claimant's perspective, it seems very unlikely that there will be sources of evidence that are equally as effective as a leniency document containing a detailed written confession. For this reason, the Commission proposed in the Draft Directive that certain categories of documents – including the leniency corporate statement – should benefit from absolute protection and should never be disclosed in litigation. At the time of writing, it remains to be seen whether this absolute protection will be included in the final legislation, as the Parliament has expressed strong reservations about whether any documents should benefit from absolute protection. There remains a risk, therefore, that the risk of disclosure of leniency statements and other documents will continue, which could prove to be an important deterrent to those considering submitting leniency applications.

Time taken for appeals to be concluded

The duration of appeals against Commission decisions before the EU courts may also render private enforcement an ineffective tool to realise the Commission's policy goals.

With respect to follow-on actions, in light of Regulation 1/2003[19] and the CJEU's judgment in *Masterfoods*,[20] it appears likely that national courts would in general stay follow-on actions until all appeals against the Commission's decision have been exhausted. For instance, although the English High Court has allowed a follow-on action to proceed until after the close of pleadings and the completion of disclosure, it also ruled that the trial would not take place until at least three months after the exhaustion of appeals against the Commission's decision before the EU courts.[21]

---

17 J Thomas Rosch, Commissioner, Federal Trade Commission, 'Does the EU need a system of private competition remedies to supplement Public Law Enforcement?', 2011 LIDC Congress, Oxford, UK, 23 September 2011, p. 33.

18 Observations of the European Commission pursuant to Article 15(3) of Regulation 1/2003 in *National Grid Electricity Transmission plc v. ABB Ltd and others*.

19 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty, OJ L1, 4 January 2003, p. 26.

20 *Masterfoods Ltd v. HB Icecream Limited* [2000] ECR 1-11369.

21 See, *National Grid Electricity Transmission Plc v. ABB Ltd & Ors* [2009] EWHC 1326.

According to statistics produced by the EU courts, the average duration of competition cases completed in the General Court in 2012 was 48.4 months[22] (more than four years). The statistics for completed appeals to the CJEU in 2012 (across all types of case) suggest that an appeal would add on average a further 15.3 months.[23] Therefore, even after the Commission has published its infringement decision (which may itself take two to three years from the beginning of the Commission's investigation or a relevant leniency application), it will likely take over five years for all appeals before the EU courts to be exhausted. During this time it appears unlikely that a follow-on damages action would proceed to trial. In light of these potential delays, it is difficult to see how such private enforcement would lead to effective deterrence. For instance, how likely is it that a company representative (perhaps focused on a near-term sales target) would be deterred from engaging in anti-competitive conduct only by the risk of the company possibly facing liability for damages a decade later, potentially long after the individual has left the company? It is also questionable whether any damages actions would actually target those that benefited from the anti-competitive conduct, since during this time both the shareholders and management of the undertaking may have changed.

This delay also undermines the efficiency with which the other policy objective of private actions can be achieved; namely, redress. As a result of private actions being brought and then stayed, defendants face the uncertainty of potentially huge contingent liabilities over a number of years. Claimants, meanwhile, must incur significant costs preparing their cases, not knowing whether their claims will (depending on the extent they rely on infringement decisions) be undermined by successful appeals to the EU courts, in which case they may also face liability for the costs incurred by the defendants in the private action.

Effect on civil liability of successful appeals to the EU courts

Delaying the commencement or hearing of claims until all appeals against an infringement decision are resolved is a logical necessity in follow-on claim scenarios. However, this may also give rise to a conflict between EU law and national laws.

In *Deutsche Bahn AG and others v. Morgan Crucible plc and Others*, the English Court of Appeal held that the window of time for bringing follow-on claims in the Competition Appeal Tribunal did not commence until after all the defendants' appeals on liability against the infringement decision had been exhausted.[24] A leniency applicant had applied for the civil claims against it to be struck out on the basis that the claims were time-barred because the relevant limitation period under English law had started to run when the applicant could no longer have lodged its own appeal to the General

22 CJEU: Annual Report 2012: Synopsis of the work of the Court of Justice, the General Court and the Civil Service Tribunal (Luxembourg 2013), p. 189.

23 Ibid, p. 104.

24 See *Deutsche Bahn AG and Others v. Morgan Crucible Company plc and Others* [2012] EWCA Civ 1055. At the time of writing, a judgment is awaited from the Supreme Court in an appeal against the decision.

Court. The claimants, on the other hand, argued that the limitation period did not begin until all the defendants' appeals against the infringement decision had been determined. The outcome of the strike out application therefore turned on the nature of the 'decision' used to calculate the limitation period prescribed by the English legislation.

The leniency applicant relied in part on EU case law, according to which a Commission cartel decision 'although drafted and published in the form of a single decision, must be treated as a bundle of individual decisions making a finding or findings of infringement against each of the undertakings to which it is addressed and, where appropriate, imposing a fine'.[25] Based on this reasoning, the consistent position of the EU courts has been that appeals are individual – if one cartelist appeals and has a decision overturned, this has no effect whatsoever on the decision against other cartelists unless they too have successfully appealed.

However, the English Court of Appeal was not convinced that this case law assisted with the interpretation of a provision of domestic legislation relating to private law claims in civil proceedings for the recovery of damages for the infringement of a right rather than the imposition of penalties or fines to punish breaches of EU public law.[26]

Instead, the Court ruled that the limitation period was calculated by reference to 'a decision that there has been an infringement and that an infringement situation exists, not to a decision against, or as regards, a particular party or particular addressee of the Commission Decision'.[27] The Court went on to state:

> *The appeal by the undertakings against the infringement is an appeal against the basic decision that the relevant prohibition has been infringed. The result of a successful appeal might be that no infringement situation existed at all. It is not correct to describe an appeal against that infringement decision as an appeal against a decision addressed to a particular party. It is an appeal directed to the decision that an infringement situation exists because a relevant prohibition has been infringed. The appeal is not simply against the decision against a particular party or a particular addressee. The addressing of the decision on infringement to a particular undertaking is a secondary matter involving the allocation of responsibility consequential on a logically prior decision that the prohibition has been infringed and that an infringement situation exists.*[28]

This passage clearly contemplates that the position as regards liability following a successful appeal to the EU courts might be that no infringement of competition law ever took place. It also appears to contemplate, although less explicitly, that this could operate to the benefit of a non-appellant faced with follow-on damages claims based on the decision that was the subject of the appeal. However, that finding is starkly at odds with the EU courts' consistent rulings that an infringement decision addressed to

25 Case T-227/95 *AssiDomäKraft Products AB and Others v. Commission* [1997] ECR II-1185 at Paragraph 56. On appeal, this interpretation was also adopted by the CJEU (see Case C-310/97 *P Commission v. AssiDomäKraft Products AB and Others* [1999] ECR I-5363 at Paragraph 39).

26 *Deutsche Bahn* at Paragraph 101 and, more generally, at Paragraphs 99 to 102.

27 *Deutsche Bahn* at Paragraph 110.

28 *Deutsche Bahn* at Paragraph 12.

multiple parties is a 'bundle' of individual and independent decisions addressed to the relevant parties.

It is hard not to sympathise with the position taken by the English Court of Appeal. There must be cases where a non-appellant should be relieved of liability for damages as a result of successful appeals by others to the EU courts. Suppose, for example, that all but one of the undertakings implicated in a cartel decision successfully appealed to the General Court on the grounds that the Commission failed to prove to the requisite standard that they had infringed Article 101. The individual decision against the sole non-appellant would still stand as a matter of EU law, and national courts would be required to take account of it. It would be unconscionable, however, for that individual decision to give rise to liability to pay damages since the Commission cannot have proved to the requisite standard that there was an illegal agreement or concerted practice between two or more undertakings.

If, as a matter of national law, cartelists were jointly and severally liable for losses caused by a cartel, one or more non-appellants could potentially be liable for all of the damage caused by an infringement (including to parties not supplied by them) even after the courts had in real terms found that no infringement had occurred. Ironically, it is the leniency applicant that is the least likely to appeal, and could theoretically end up shouldering a disproportionate share of liability for an infringement that the EU courts have found was not adequately proven.

Lack of consensus on collective redress

Over a number of years, the Commission has made much of the argument that an effective civil enforcement system for competition law requires a system to collectivise smaller claims to make it economically viable to pursue them.[29]

However, despite sustained efforts by DG Competition, there remain parts of the Commission, the European Parliament, many Member States and a variety of interest groups that remain deeply sceptical about the need for, and ability to introduce, binding EU legislation on collective redress in competition cases. Hence the Draft Directive, in the form proposed by the Commission, contained no provisions on collective redress and the Commission's long-awaited response to its 2011 public consultation on collective redress was the (non-binding) Recommendation.

The concerns expressed over an EU framework for collective redress include the absence of a legal basis for such a system, the difficulty in creating such a system without profound changes to national legal systems, and the difficulty in creating a collective redress system without introducing incentives for excessive or opportunistic litigation. Although the Recommendation begins by asserting that '[a]ll Member States should have collective redress mechanisms at national level', it goes on to recognise implicitly the significance of these concerns by recommending that:

a representatives of claimants should be subject to eligibility criteria (including that they have a non-profit making character);

29 See, for instance, the Commission's Green and White Papers on Damages actions for breach of the EC Antitrust rules, and the 2011 public consultation on collective redress.

b the class of claimants should be formed on the basis of express consent (i.e., the opt-in model should generally apply, and any exceptional use of the opt-out model should be justified);

c the losing party should bear the winning party's costs (an important rule for deterring weak or spurious claims);

d there should be transparency about funding and prohibitions on third-party funders influencing the conduct of the proceedings;

e funders should not be permitted to base their remuneration on the amount of money recovered by the claimants unless the funding arrangement is regulated by a public authority; and

f lawyers should not be permitted to act on a contingency fee basis, and if, exceptionally, Member States do allow such fees, they should be regulated in collective redress cases.

The fact that the inclusion of all these safeguards in the Recommendation is necessary serves to illustrate the degree of risk that is associated with collective litigation, derived primarily from the lucrative opportunities that collective litigation presents for third parties such as lawyers and third-party investors. It is therefore unsurprising that, on a national level, no individual Member State has yet found the 'magic formula' that permits claims to be collectivised in an efficient and safeguarded way. Many different collective systems exist in the EU, but the majority of these are rarely used because they are too slow, too expensive, too complicated or too risky. The Netherlands has a much-admired collective system, but it has only been used six times and is not in fact litigation-based at all – it is a way of earning court approval for a voluntary settlement.[30]

One way sometimes considered for making redress available through collective actions is, contrary to the favoured policy of both the Commission and the European Parliament,[31] to adopt opt-out procedures of the kind applied in US class actions. This is the route that the UK government intends to follow with its proposal (currently before Parliament) to implement an opt-out collective action regime for competition cases.[32] This has led to business groups[33] expressing concerns that the UK has opened the door

30 The Dutch Act on Collective Settlements of Mass Claims.

31 European Parliament Resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)), Paragraph 20, second indent.

32 Strangely, at much the same time as the UK government originally announced its intention to introduce an opt-out regime for competition cases, it also announced that it was not in favour of collective redress in other areas because it was 'concerned about the scope for such mechanisms to create incentives for intermediaries, the economic cost of such intermediation and the very heavy burden which a proliferation of such cases may impose on businesses'. See Department for Business, Innovation & Skills, Civil Enforcement Remedies: Consultation on extending the range of remedies available to public enforcers of consumer law, November 2012, p. 19.

33 Including – in the interests of full disclosure – the US Chamber Institute for Legal Reform, which is represented by the authors.

to the sort of litigation culture that has dogged the US for so many years. It should be remembered that the US established its tort system with exactly the same access to justice intentions as the UK, but soon found that it had introduced a system with enormous potential rewards – and little risk – for intermediaries, with the consequence that speculative litigation has become commonplace. Indeed, the litigation industry has become so large and powerful that it has proved very difficult to contain it effectively, leaving the courts – and society as a whole – to bear the burden. The reality in the US is that, while redress may be available, the transaction cost (meaning the public cost, and the cost to defendants in particular) associated with redress is extremely high, and often the redress actually delivered is greatly diminished by contingency and other fees. Is this an efficient way of achieving the policy goal of consumer redress, and is it the system that Europe wants? At the very least, these concerns give cause for close examination of alternatives that carry less risk.

Limited evidence of additional deterrence

Aside from the tensions identified between public and private enforcement, it is legitimate to ask whether private enforcement actually provides an additional incentive to comply with competition laws. In *Crehan*, the CJEU noted that private enforcement of competition law 'discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition'.[34] In other words, the Court considered that private enforcement would act as an additional deterrent to undertakings from engaging in anti-competitive conduct. This view is not only held by the CJEU, but also by the Commission,[35] and by a number of EU Member States.[36]

This view is superficially attractive: the risk of additional liability should in theory deter undertakings from engaging in conduct that may give rise to such liability, since any additional profits may be more than outweighed by damages awards. However, there are countervailing factors that suggest an absence of actual deterrence in practice. In a 2007 study commissioned by the UK competition authority (then the Office of Fair Trading (OFT)),[37] Deloitte concluded that the most important sanctions that motivated compliance with competition laws were individual sanctions such as criminal penalties and disqualification of directors (i.e., not the imposition of additional pecuniary liability

34 Case C-453/99 [2001] ECR I-6297, at Paragraphs 26–27.

35 See the Commission's White Paper.

36 For instance, the UK government's proposals for the reform of the private enforcement of competition law, which at the time of writing were being debated in Parliament, will purportedly 'amongst other things, allow more high impact cases to be taken forward, increasing deterrence and benefiting new and innovative businesses and thus the consumer'. See Department for Business, Innovation & Skills, Private actions in competition law: a consultation on options for reform, April 2012, p. 9.

37 With effect from 31 March 2014, the competition law work and responsibilities of the OFT pass to the newly created Competition and Markets Authority.

on companies).[38] Further, in a 2011 report, the OFT noted that 'compared to the predictions of the literature […] private damages are ranked relatively low by respondents in terms of being an effective deterrent'.[39] This is consistent with the experience in the United States and Canada, where the existence of significant private enforcement on top of administrative sanctions has led to massive payouts, but it is hard to conclude that this had an impact on the number of infringements being discovered (let alone committed).

There is, of course, some empirical evidence that supports the view that private enforcement of competition laws increases deterrence.[40] However, such empirical evidence appears to be limited, inconclusive and circumstantial. For instance, Lande and Davis (two strong proponents of private enforcement) acknowledge that they can only conclude that 'there is evidence that private enforcement probably deters'.[41] When set against the countervailing body of literature that considers that private enforcement[42] (or, more generally, increasing pecuniary penalties[43]) does not increase deterrence, it is difficult to defend the proposition that private enforcement provides a significant additional deterrent against infringing competition laws.

It may be rational for policymakers to conclude that even if follow-on actions deliver redress with only a minimal or theoretical deterrent effect in addition, such actions should nonetheless be encouraged. This argument has a certain pragmatic appeal, but has no place in a discussion about which system would provide the most effective redress system and deliver on the policy goal of deterring future infringements. Instead, the search for a redress system that actually deters – or positively encourages compliance – should continue.

Alternative models for delivering redress

Taken together, the above concerns lead us to wonder whether there are better ways to achieve both greater compliance and redress.

Other areas of public law enforcement have embraced alternative models, and in some cases they have been remarkably successful. However, competition regulators

38 OFT, The Deterrent Effect of Competition Enforcement by the OFT, November 2007, Ref: OFT 962, available at: www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft962.pdf.

39 OFT, The impact of competition interventions on compliance and deterrence, Final Report, December 2011, Ref: OFT 1391, at Paragraph 6.10, available at: www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft1391.pdf.

40 For instance, see Lande and Davis, Comparative Deterrence from Private Enforcement and Criminal Enforcement of US Antitrust Laws, 2011 BYUL Rev 315 (2011).

41 Lande and Davis, The Extraordinary Deterrence of Private Antitrust Enforcement: A Reply to Werden, Hammond, and Barnett, University of San Francisco Law Research Paper No. 2012-24.

42 For instance, see Werden, Hammond, and Barnett, Deterrence and Detection of Cartels: Using All The Tools and Sanctions, 56 *Antitrust Bulletin* 207, 227-33 (2011).

43 For instance, see Wils, 'Recidivism in EU Antitrust Enforcement', *World Competition*, Vol. 35, No.1 (2012), in which, at p. 23, he notes that 'if the current enforcement level is insufficient to deter, it is not obvious that the best solution would be further to increase the level of fines'.

the world over appear stuck in the same groove, and – through initiatives such as the International Competition Network and other cooperation mechanisms – are in fact becoming ever more wedded to the same enforcement model (largely based on the US model), to the point where any regulator trying something different might find itself regarded as an outlier.

However, our hypothesis is that competition regulators, and particularly the Commission, must stop looking to other competition regulators for examples of how to construct a system that delivers on both redress and deterrence.

Instead, greater openness should be shown towards adopting the best elements of systems that appear to be working in other fields. A comprehensive overview of these is beyond the scope of this chapter, although the following are features that we find very interesting and that could be considered if the EU were prepared to have a bold rethink about how it will achieve redress and deterrence.

The architecture of competition enforcement in the EU is based heavily on entire undertakings (and indeed their parent undertakings) paying the price for failing to prevent infringements, and ratcheting up the fines on and civil exposure to entire undertakings is how greater deterrence is pursued. However, infringements are often personal, taken in pursuit of an individual's goals of reward or advancement and contrary to the express instructions of the undertaking. Where individuals are prepared to break the law and defy all internal policies for their own gain, no amount of additional exposure to the parent companies will increase deterrence. Only the threat of serious personal consequences will deter them. Under Section 7 of the UK Bribery Act 2010, a company may commit an offence by failing to prevent an associated person such as an employee from engaging in bribery, but it is a defence for such a company to prove that it had adequate procedures in place designed to prevent its associated persons engaging in bribery. However, a company successfully relying on that defence does not prevent penalties being imposed on its associated persons if it is proved they have committed bribery offences. This approach is enlightened in the sense that it avoids punishing a company where reasonable steps were taken to prevent illegitimate practices and there is, therefore, no need to subject it to a fine for the purpose of punishment or deterrence. Of course, that is not to say that undertakings should be allowed to profit from the illegal acts of employees acting in contravention of the company's procedures. Undertakings in this position should surely be required to redistribute ill-gotten gains to victims, but the focus of regulators in this scenario should be on how to measure and redistribute improperly earned profit and not on punitive measures that swell the public purse but do nothing at all for the victims.

To avoid many of the sequencing and conflict of laws problems identified above, an enforcement system that both encourages and recognises compensation due to victims seems essential. Within such a system, follow-on litigation might be avoided altogether. The Commission has already taken account in some infringement decisions of efforts to compensate victims, although on an *ad hoc* and limited basis.[44] While formalising

44 See, for example, the case of *Nintendo* (Cases COMP/35.587, COMP/35.706, COMP/36.321, [2003] OJ L 255, p. 33) and others cited in Kaarli Harry Eichhorn, 'EU Sanctions Policy and

such systems might slow enforcement, taken against the combined length of public enforcement and a follow-on action, this delay would be worth the wait, as victims might get compensation many years earlier than through court-based mechanisms.

The focus on wielding the public stick to deter, and encouraging court-based follow-on litigation to compensate, is fundamentally inconsistent with the Commission's own recent focus on the speed, fairness and efficiency afforded by alternative dispute resolution mechanisms[45] and the efficiency gains offered by the Commission's own settlement processes. There seems little reason why an agreed compensation mechanism could not be combined and run concurrently with public enforcement, particularly for infringers who are prepared to admit their participation in an infringement.

While it has its own imperfections, some of the elements worth exploring further may be seen in the US Securities and Exchange Commission's 'Fair Funds' model. Under the US Sarbanes-Oxley Act of 2002, the Securities and Exchange Commission establishes 'fair funds' to distribute both returns of wrongful profits and penalties to defrauded investors. Prior to this Act, disgorgement remedies were possible, but penalties were paid to the public purse.

The consumer redress powers available to the UK's Financial Conduct Authority (FCA)[46] provide another interesting example of how a regulatory body can – and arguably should – participate in and guide processes to compensate victims of wrongdoing. Under Section 404F(7) of the Financial Services and Markets Act 2000, the FCA may in certain circumstances require a firm to set up a consumer redress scheme. This process may be started voluntarily by the firm in question or at the FCA's own initiative. The UK Consumer Rights Bill, which is currently before Parliament, would give the UK's Competition and Markets Authority a similar power to certify redress schemes where companies volunteer to put them in place, but not to impose them.[47]

An example from the regulation of financial services that demonstrates how a more flexible approach to enforcement could operate (although not one that involved use of the specific power under Section 404F(7)) is the response of the FCA's predecessor, the Financial Services Authority (FSA), to the mis-selling of payment protection insurance

---

the Encouragement of Private Enforcement in Article 102 TFEU Cases, Antitrust Between EU and National Law' (EA Raffaelli ed., 2011).

45 See, for example, legislation originally proposed by the Commission on alternative dispute resolution and online dispute resolution for consumer disputes, which has been adopted by the Parliament and Council during the past year: Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive of consumer ADR), OJ L 165, 18.6.2013; and Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR).

46 The FCA, together with the Prudential Regulation Authority, took over the functions of the Financial Services Authority with effect from 1 April 2013.

47 See the consultation response referred to in footnote 7.

(PPI). In addition to imposing fines totalling £12.6 million, the FSA published guidance on assessing complaints and providing redress.[48] The amount paid out in relation to mis-selling PPI between January 2011 and November 2013 was £13.3 billion.[49] The relevant question for comparative purposes is this: would the position of consumers have been better, and the overall level of deterrence higher, if greater fines had been recovered for the public purse and the 2.5 million complainants had been left to take their chances in follow-on litigation?

Conclusion

Our view is that the Commission and other competition authorities have over-relied on the precedents set by competition enforcers, notably those in the United States. This over-reliance is leading the EU towards a follow-on litigation system, which is riddled with problems. The goals of victim compensation and deterrence are achievable, although to succeed it may be necessary first to re-examine some fundamentals, including in particular the role of the Commission as an enforcer, which currently also acts as a cheerleader for private actions instead of taking on some of the responsibility for redress itself. Both deterrence and compensation would potentially improve if the Commission adapted its fines and settlement procedures to accommodate a far greater focus on redress to victims as part of a single conclusive set of measures, which, in the right cases, could entirely remove the need for follow-on litigation.

48 See FSA, 'The assessment and redress of Payment Protection Insurance complaints': www.fsa.gov.uk/pubs/policy/ps10_12.pdf.

49 See FCA, 'Monthly PPI refunds and compensation' published 22 January 2014 and accessed on 25 February 2014, at www.fca.org.uk/consumers/financial-services-products/insurance/payment-protection-insurance/ppi-compensation-refunds.

Appendix 1

ABOUT THE AUTHORS

KEN DALY

Sidley Austin LLP

Ken Daly is a partner in Sidley's Brussels office, where he practises EU law, with a particular focus on EU competition and regulatory matters.

He has significant competition law experience, including advising on European Commission investigations in cartel and abuse of dominance cases, advisory work in relation to selling practices and market behaviour and all aspects of competition litigation before national and EU courts. He has advised clients on high-profile cases before the European Commission and national competition authorities, and has represented clients in litigation before the EU courts, national courts of EU Member States, US courts, and in a variety of international arbitrations and mediations.

In addition, a significant part of his practice relates to advising companies on how to understand and navigate the EU's law-making processes and regulatory regimes, including how to participate in the development of EU policy and decision-making processes.

Mr Daly has written extensively on EU law and policy topics, including distribution, competition law criminalisation, cartel enforcement and sports law, and is a regular speaker and contributor to conferences. He features prominently in the competition rankings of the leading bar publications.

BARNEY CONNELL

Sidley Austin LLP

Barney Connell is an associate in the dispute resolution group in London. His practice focuses on all areas of dispute resolution, often with an international element. He has experience of litigation in the High Court and the Court of Appeal, and of acting as an agent in proceedings before the Judicial Committee of the Privy Council. He has also been involved in arbitration proceedings.

Working closely with members of Sidley's antitrust practice in London and Brussels, he advises on litigation issues arising from alleged antitrust infringements.

During time spent working in Sidley's Brussels office, he was involved in a variety of EU law matters including litigation before the General Court of the European Union concerning public access to documents. In the field of EU competition law, he assisted with the representation of a multinational company under investigation by the European Commission for suspected cartel behaviour.

Mr Connell has also advised on a range of regulatory issues, including compliance with sanctions legislation and anti-bribery laws. This has involved drafting procedures and training materials designed to promote compliance with the UK Bribery Act 2010.

SIDLEY AUSTIN LLP
Rue Montoyer 51
1000 Brussels
Belgium
Tel: +32 2 504 6400
Fax: +32 2 504 6401
sidleybrussels@sidley.com
www.sidley.com