



## Vitamins Cartel – Actions for Damages

**Compensatory damages found to be the only remedy available under English law to claimants in a private damages action for a breach of competition law**

On 19 October 2007, the English High Court handed down an important judgment on the extent to which different types of remedies are available in private damages actions brought by parties that have suffered losses as a result of a breach of competition law<sup>1</sup>. This judgment confirms the principle that under English law of tort, damages for infringement of competition law are compensatory in nature. Alternative remedies are not available simply because it may be difficult to calculate compensatory damages.

### Background

The proceedings in this case are follow-on actions, relying on the European Commission's ("Commission") decision in 2001 that found a number of firms had infringed EU competition law by participating in a cartel in relation to the sale of vitamins used in the manufacture of chicken feed<sup>2</sup>. The claimants were all purchasers of vitamins, either directly or indirectly, from one or more of the cartelists and the defendants in this case.

The preliminary issue before the Court was whether the claimants could be entitled to any or all of the following remedies:

- (a) **compensatory damages:** damages which compensate the claimant for loss, whether financial or not, which the claimant has suffered as a result of wrongdoing;
- (b) **user damages:** damages assessed by reference to the fair price for what has been taken from the claimant;
- (c) **exemplary damages:** damages additional to an award which fully compensates the claimant for his loss, and which are intended to punish and deter;
- (d) **restitutionary damages:** an award of money assessed by reference to the wrongdoer's gain rather than by reference to the claimant's loss.

<sup>1</sup> *Devenish Nutrition Limited & Others v Sanofi-Aventis SA (France) & Others*, High Court of Justice, Chancery Division, 19 October 2007, [2007] EWHC 2394 (Ch).

<sup>2</sup> Commission Decision of 21 November 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 – Vitamins).

It was common ground during the trial that the claimants were entitled to compensatory damages. However, the claimants argued that given the difficulties involved in calculating compensatory damages due to problems in obtaining enough evidence, exemplary and restitutionary damages ought to be made available.

The EC courts have made it clear that, in the absence of specific Community rules, the conditions for the exercise of the right to claim damages must be determined by national rules. This case finally addresses the determination of the proper measure of damages in England and Wales.

### Why not exemplary damages?

The Court observed that whatever method of assessment for damages is followed, its object is the same, namely to return the victim to the position it would have been in if the wrong had not occurred. This is true of compensatory damages and user damages, but is different from remedies such as account of profits, whose object is to strip the wrongdoer of his personal gain.

Although the EC courts have held in principle that exemplary damages are not precluded by European law, within the European Union an award of exemplary damages is only known in the jurisdictions of England and Wales, Cyprus and Ireland. It is unknown in all other Member States and indeed in some Member States (e.g. Germany) an award of exemplary (or punitive) damages is regarded as contrary to public policy.

The Court noted that in a case where the discretionary remedy of exemplary damages is related to the enforcement of rights arising under the EC Treaty, it would be wary of granting a remedy which is potentially unavailable in most Member States. Furthermore, the Court was of the opinion that the usual means by which UK courts award damages in domestic cases are adequate to produce a fair result in cartel damages actions.

The Court applied the principle of double jeopardy (a person is not to be punished twice for the same wrong). It found that exemplary damages cannot be awarded in circumstances where a punitive fine has already been imposed by the Commission. Although the fines imposed by the Commission did not take account of damages that might be awarded in private civil actions, the Court was of the view that Commission fines did have the same function as exemplary damages. Furthermore, the Court accepted that an award of exemplary damages would “run counter” to a Commission decision fining the defendants. If the Court were to award exemplary damages it would be deciding that a fine levied by the Commission was insufficient. Article 16(1) of Regulation 1/2003/EC precludes national courts from taking decisions that run counter to a Commission decision.

The claimants argued that the fines imposed by the Commission did not punish and deter the defendants because the fines were reduced as a result of the application of the Leniency Notice. Although Sanofi-Aventis’s fines were zero as a result of its role as a whistle-blower and other companies had their fines partly reduced, the starting point for the application of the Leniency Notice was the finding of unlawful conduct coupled with the imposition, in principle, of a fine. The Court rejected the claimants’ argument. The Court was of the view that national courts should not undermine the public policy aim behind leniency programmes, which is to encourage whistle-blowers and to punish cartel participants, by awarding exemplary damages against the undertaking who has had his fine commuted as a result of an application for leniency.

The Court also considered the defendants’ argument that exemplary damages could not be awarded in this case because of the problem of multiple claimants. In this case, the claimants were not the only persons affected by the unlawful conduct. The cartel that the Commission found to exist affected the market in the whole of the European Union. This would have posed

the difficult question as to how a Court would calculate exemplary damages and on what basis they would be awarded.

Overall, given the problems associated with double-jeopardy, the serious problem of assessing the damages and the fact that the claimants are only part of the class affected by the wrongful conduct, the Court found that exemplary damages would not be available to the claimants.

#### **Why not restitutionary damages?**

The Court found that restitutionary damages would not be available in circumstances where compensatory damages are an adequate remedy. Restitutionary damages have historically been awarded by the English courts in circumstances where the claimant could not show that it had suffered any financial loss, not merely, as in this case, because of evidential difficulties when attempting to calculate the award of damages.

The Court found that a restitutionary award is not an available remedy in a competition case. Accordingly, until such time as a higher court rules on the availability of restitutionary damages in a competition case, the settled case law on restitution must be applied.

#### **Why not an account of profits?**

The Court held that the same arguments relative to an award of restitutionary relief could be applied to an award for an account for profits. The Court found that an account of profits would not be an appropriate remedy because the claimants are simply part of an EU-wide class of persons who have all been affected to a greater or lesser degree by the same breach of competition law. As members of a class, none of the claimants have a legitimate interest in preventing the defendants from making a profit from their breach of competition law. Unless all the relevant claimants were before the Court, it would be impossible for the Court to allocate profits made by the defendants amongst the claimants.

#### **Future implications**

This Judgment in favour of compensatory damages may discourage future claimants from bringing private damages claims in England.

The availability of punitive/exemplary damages is an issue under consideration by the Commission in its Green Paper on damages actions for breach of EC antitrust rules published for consultation in 2005<sup>3</sup>. The Commission considers that private damages actions have an important and complementary role to the public enforcement of EC competition law and has indicated that double-damages ought to be made available in cartel cases in order to create a sufficient incentive to bring damages actions. Such awards could be automatic, conditional or at the discretion of the court. The Commission also suggests that damages may include a reference to the illegal gain made by the infringer (recovery of illegal profits). The Office of Fair Trading's consultation on this issue ended on 31 August 2007.

In light of this Judgment and given the Commission's clear intention to promote damages claims in the EC, it will be interesting to see how the Commission will deal with these issues in its White Paper on private enforcement.

The White Paper is due to be published at the beginning of 2008.

Mayer Brown International LLP acted for the Sixth to Eighth Defendants from the BASF Group.

---

<sup>3</sup> European Commission, Green Paper – Damages actions for breach of EC antitrust rules, 19 December 2005, COM (2005) 672 final.

**Mayer Brown offices**

Berlin Brussels Charlotte Chicago Cologne Frankfurt

Hong Kong Houston London Los Angeles New York

Palo Alto Paris São Paulo Washington DC

11 Pilgrim Street  
London EC4V 6RW  
T +44 (0)20 7248 4282

31st Floor, 30 St Mary Axe  
London EC3A 8EP  
T +44 (0)20 7398 4600

mayerbrown.com  
E london@mayerbrown.com

**MAYER • BROWN**

Copyright © 2007 Mayer Brown International LLP . This Mayer Brown publication provides information and comments on legal issues and developments of interest to our clients and contacts. It is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice. Readers should seek specific legal advice before taking any action with respect to the matters discussed in this publication.

If you would prefer not to receive future publications or mailings from Mayer Brown International LLP , or if your details are incorrect, please contact us by post or by email to [businessdevelopment@mayerbrown.com](mailto:businessdevelopment@mayerbrown.com).

Mayer Brown is a combination of two limited liability partnerships: one named Mayer Brown International LLP, incorporated in England; and one named Mayer Brown LLP, established in Illinois, USA.