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2 Travel v Cardiff Bus – Making Commitments in Dominance Cases Less Attractive?

Patrick Harrison (Sidley Austin LLP) · Sunday, August 26th, 2012

In early July this year, the UK's specialist competition court, the Competition Appeal Tribunal ("CAT"), adopted a judgment ("Judgment") in which it awarded a claimant (2 Travel) exemplary damages in relation to predatory pricing abuses engaged in by its dominant rival, Cardiff Bus.[1] Commentators have written extensively about the fact that the case marks the first occasion on which exemplary damages have been awarded in the UK in a competition case and, almost as extensively, about the prospects for a surge in competition law litigation in the UK courts. This blog, however, focuses on whether the CAT's judgment in *2 Travel* might make commitments a less attractive means of dealing with allegations of abuse of dominance.

The link between exemplary damages in UK "follow-on" cases and Commission commitments decisions might not be immediately obvious … but, on closer inspection, the link appears relatively strong. In short, where a party chooses not to offer commitments and ends up being fined by the Commission, it will be automatically immune from exemplary damages awards (in application of the principle of *ne bis in idem*). However, where a party chooses to offer (and eventually concludes) commitments, it might thereby expose itself to the risk of exemplary damages awards.

2 Travel's claim

In 2008, the UK's Office of Fair Trading ("OFT") issued a decision finding that Cardiff Bus had abused its dominant position in the market for the provision of no-frills and normal bus services in the Cardiff area by pricing its services at a predatory level with the aim of forcing a new entrant, 2 Travel, out of the market. However, since Cardiff Bus' revenues were relatively low, the OFT decided that it would classify Cardiff Bus' conduct as "*conduct of minor significance*" and that it would therefore not impose a fine.[2] 2 Travel brought a "follow-on" claim for damages before the CAT and asked for damages to be assessed, not only on the standard tortious "compensatory" basis, but also on the less common "exemplary" basis.

Exemplary damages in England and Wales

Whereas compensatory damages in England and Wales are intended to put a claimant in the position it would have been in absent the tort, exemplary damages (much like administrative fines) are intended to punish a defendant and deter future wrongdoing. The CAT explained that exemplary damages are a "*remedy of last resort*",[3] and that, in general, they are to be avoided. [4]

However, the CAT also set out the three categories of case in which exemplary damages may be awarded. The second such category (and the only category of relevance for current purposes) is where conduct is calculated to make a profit in excess of the compensation payable to the claimant.[5]

In the earlier case of *Devenish Nutrition Ltd v Sanofi-Aventis SA ("Devenish"),*[6] it had been held that the principle of *ne bis in idem* precluded an award of exemplary damages in a competition case where *"the defendants had been fined (or had fines imposed and then reduced or commuted) by the* [C]*ommission"*.[7] The application of the principle of *ne bis in idem* to preclude exemplary damages seems straightforward for defendants who have already received administrative fines intended to punish and deter. But its application to preclude exemplary damages for successful immunity applicants could perhaps be seen as slightly more controversial: certainly, the claimants in *Devenish* contended that defendants benefitting from immunity had not actually been sanctioned at all for their unlawful conduct. However, the Court concluded that it should not award exemplary damages against a defendant that had blown the whistle on a cartel as to do so would risk undermining the important policy objectives pursued by whistleblowing regimes.

Exemplary damages in *2 Travel*

Although the CAT noted in *2 Travel* that "*an award of exemplary damages should be made cautiously, where compensation is inadequate to punish the defendant for his outrageous conduct*",[8] it concluded that, "*there are no reasons of policy why exemplary damages may not be awarded in this case*".[9] It found Cardiff Bus' behaviour to be that of an organisation acting in "*cynical disregard*"[10] of another's rights and found the compensatory damages awarded to 2 Travel to be insufficient. The CAT awarded 2 Travel £33,819 in compensatory damages and £60,000 in exemplary damages.

Relevance to commitments

So how are *Devenish* and *2 Travel* relevant to commitments decisions?

Assuming that the Court in *Devenish* was right that *ne bis in idem* precludes there being both administrative fines and exemplary damages, attention turns to cases in which there are no fines. There are three main types of case in which a competition authority might consider that an infringement has been committed and yet decide against imposing a fine: (i) where an infringing company makes a successful application for immunity; (ii) where there is another legal basis for not imposing fines (such as the UK's "*conduct of minor significance*" exemption, or cases which raise such novel issues that the imposition of a fine would be inappropriate); and (iii) where the competition authority accepts an offer of commitments.

Devenish says there can be no exemplary damages in relation to successful immunity applicants but *2 Travel* says there can be exemplary damages in cases deemed to involve *"conduct of minor significance"*. So what would the situation be in relation to parties having settled cases by way of commitments?

On the one hand, on the basis of the terms of the CAT's judgment in *2 Travel*, if the defendant is proven to have acted in *"cynical disregard"* of the claimant's rights, and if compensatory damages

would be insufficient, there seems no reason to believe that exemplary damages would not be available.

On the other hand, the final sentence of Recital 13 of Regulation 1/2003 states that: *"Commitment decisions are not appropriate in cases where the Commission intends to impose a fine."* As such, it might be argued that commitments cases would be unlikely to involve conduct so egregious as to engage exposure to exemplary damages awards. However, it is far from obvious that the Commission has abided, in its decision-making practice, by the clear terms of the final sentence of Recital 13. Indeed, there appear to be several examples of cases that are disposed of by means of commitments decisions not because the imposition of fines was thought impossible but rather because continuation of the case would have been too burdensome (or time-consuming) for the Commission.

It might also be argued that imposing sanctions aimed at punishing conduct or deterring future infringement should be the preserve of competition authorities rather than the ordinary courts. But that exact argument was considered – and rejected – by the CAT in *2 Travel*. [11] Equally, it might be argued that awarding exemplary damages in commitments cases might undermine the policy objectives behind the commitments procedure. But similar arguments in relation to the UK's "*conduct of minor significance*" exemption were considered – and rejected – by the CAT in *2 Travel.*

In sum, therefore, there seems good reason to believe that, if exemplary damages are available in an action based on a "*conduct of minor significance*" case, so they may also be available in an action based on a commitments decision. If that is correct, it may significantly reduce the incentives to settle cases by way of commitments.

Two key points should be made at this juncture about the nature of commitments decisions.

First, although commitments decisions contain no admission of liability (and although parties agreeing commitments with the Commission often vehemently deny having committed any offence), it is worth recalling the legal basis for the offer and acceptance of commitments, as set out in Article 9 of Regulation 1/2003: *"Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings."* Thus, the basis for accepting commitments is that the Commission *"intends to adopt a decision"* finding an infringement. Indeed, in the court of public opinion, the very offer of commitments is often viewed as amounting to an admission that there has been an infringement.

Second, although the absence of an actual finding of infringement may mean that "follow-on" damages actions are not available, Recital 13 of Regulation 1/2003 is clear that "stand-alone" actions must still be available: *"Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make* […] *a finding* [of infringement] *and decide upon the case."*

Thus, commitments cases involve a quasi-admission of an infringement, which can form a strong basis for a "stand-alone" damages action. That being the case, what are the incentives for parties to offer commitments and how might the availability of exemplary damages impact those incentives?

In most cases, the principal advantages of settling a case by means of commitments are: (i) that the Commission will not impose administrative fines; and (ii) that it will be more difficult for potential claimants to bring "stand-alone" damages actions (where the elements of the infringement must be proved) than it would be for potential claimants to bring "follow-on" damages actions (where the elements of the infringement are presumed).

However, the availability of exemplary damages, which, in *2 Travel*, amounted to almost twice the measure of compensatory damages, might seriously affect the incentives to offer commitments for three related reasons.

First, exemplary damages awards effectively replace administrative fines, meaning that, even in the absence of fines, there is still a punishment and deterrence element to overall liability.

Second, although "stand-alone" damages actions in commitments cases might remain less likely to be brought (or to succeed) than "follow-on" actions in infringement decision cases, the availability of exemplary damages in commitments cases means that damages awards in such cases might be significantly higher than damages awards in "follow-on" cases based on infringements decisions imposing fines.

Finally, "stand-alone" damages actions must be much more likely to be brought post-*2 Travel* than pre-*2 Travel*, as the potential upside for claimants is so much higher.

References[+]

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