Kluwer Competition Law Blog

Exemplary Damages in Competition Litigation

Stephen Dnes (Northeastern University) · Tuesday, December 10th, 2013

Much ink has been spilt following *2 Travel v. Cardiff Bus*[1] and *Albion Water v. D?r Cymru Cyfyngedig*[2] on the subject of competition litigation in Europe. An axiom with varying justification is that European competition litigation must not embrace exemplary damages. This sits oddly with the decisions of the Competition Appeal Tribunal (CAT) to award exemplary damages for the first time in *Cardiff Bus* and to follow similar analysis in *Albion Water*. Could it be that despite all objections exemplary damages are already available?

The decisions suggest an enhanced role for exemplary damages. In *Cardiff Bus*, the Office of Fair Trading (OFT) found an abuse of dominance in the launch by an incumbent public transport operator of a competing "no frills" service. 2 Travel subsequently brought an action in the CAT, a specialist body for competition law disputes.

As the action was follow-on, the CAT directed certain findings of fact, notably the relevant market, the abusive conduct, and duration.[3] Causation remained, which proved complex because it was unclear whether the violation alone caused the company to fail. Claims included consequential losses of £3,848,121 in foregone profits, a lost capital asset worth £6.8 million, £10 million from not purchasing real estate, and £152,635 in lost staff time. The CAT rejected all of these claims under a conventional "but for" test, except for £33,818.79, plus interest, in lost sales.

Unusually, the CAT upheld an exemplary damages award of £60,000 on the basis of the "cynical disregard" of 2 Travel's rights.[4]

The result is surprising because exemplary damages awards are rare in English law.[5] They were thought seldom available in the competition law context under *Devenish Nutrition v. Sanofi-Aventis* which, at least in principle, bars exemplary damages awards where the regulator imposes a fine.[6] The CAT distinguished *Devenish* because there was no fine in *Cardiff* under a de minimis exception.[7]

Cardiff might therefore be a mere curiosity, except that the CAT applied a similar mode of analysis in *Albion Water*. Albion alleged that D?r Cymru charged such high prices that Albion could not profitably operate downstream, a "margin squeeze". Although the CAT found D?r Cymru negligent, it did not award exemplary damages: D?r Cymru lacked the relevant "cynical disregard" found in *Cardiff*.

Where firms weigh the legal risks of infringements, that conclusion could differ and an exemplary award follow. At least where there was no fine, it could pay to bring exemplary damages claims, especially if the bar in *Devenish* proves less complete than thought, as where new damage comes to light beyond that accounted

for in the infringement decision.

If exemplary damages awards become more common, they will make important questions surrounding litigation more pressing. Among these could be issues with the optimal level of damages, the role of intent, standing rules, and collective settlement dynamics.

It is usually thought that cartel fining guidelines at least aim for an optimal level of damages. Exemplary awards overlap with the penal element in fines. If exemplary damages awards become more common, they are likely to affect whether fines achieve optimal deterrence.

Analysis of intent could become increasingly important because *Cardiff* notably emphasizes the mindset of defendants. There may be a risk of false positives as companies routinely look to eliminate competition. Too great a focus on intent at the expense of evidence of foreclosure could elevate duties of dominant companies to "something stricter than the morals of the market place."[8]

The focus on intent could have significant results in hardcore cartels cases, where the violation is well known to be illegal. Assessing intent might blur into finding constructive knowledge for civil litigation purposes. Claimed ignorance might come to be discounted as mere Nelsonian blindness, and exemplary damages could follow.

Nor is it clear that the infringement decision exhausts relevant contextual factors for each claimant. An antitrust standing rule might be needed to sift claims, and might even be implied by statements that competition law protects only "as efficient" competitors.

Collective settlement dynamics could also change. Significantly, current proposals bar exemplary damages in proposed collective redress mechanisms.[9] This may be a sensible safeguard, but it could deter large purchasers from collective settlements and undermine case funding. The same issue emerges with restrictions on funding collective claims, which may make individual claims, replete with potential exemplary damages, more attractive at the margin.

Cardiff Bus and *Albion Water* fit into a fast-changing litigation pattern that will present new issues for some time. The best strategy in competition law cases is likely to change, even if subtly at first. In time, the days when exemplary damages were uncommon may yet appear to be those before the flood.

References[+]

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