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Civil Procedure Used for Enforcement of EC Competition Law by the English, French and German Civil Courts

George Cumming, Brad Spitz
and Ruth Janal

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Preface

The reform of European Competition Law resulting from the Regulation EC 1/2003 entered into force on 1 May 2004, placed undertakings as well as competition law practitioners, economists, arbitrators and judges, before unprecedented challenges. Decentralization of the application of the European competition law, primacy of this law when intra-community trade is affected, creation of a system of parallel competences; national courts now have, more or less, powers and obligations comparable to those of national competition authorities when they deal with damages claims on the grounds of Articles 81 and 82 EC.

However, the principle of procedural autonomy has not been put into question. Today as yesterday, Community competition law refers to the national laws the rules that apply to sanctions against anticompetitive practises taken on the basis of the European competition law.

Significant steps have been made towards harmonization of the procedural rules in Europe, which cover the allocation of the competent court (Reg. 44/2001), the cooperation between Member-States courts for the obtaining of evidence (Reg. 1206/2001), *res judicata* applying to judgments made by courts of Member States provided the parties and the object of the litigation are the same (Reg. 44/2001). And last but not least, the enactment of a common set of rules governing the fairness of the trial, the adversarial principle and the rights of the defence, provided for in the ECHR.

But diversity remains: this concerns the rules governing the bringing of the claim, those applicable to the principles which underlie the trial, to the function of the judge, to the collecting and use of evidence, as well as the assessment and compensation of prejudice.

Here lies the primary interest of the novel presentation proposed by George Cumming, Brad Spitz and Ruth Janal of procedural rules used by English, French and German civil and commercial courts in civil litigation involving articles EC 81 and 82.

This remarkable work offers an excellent tool for enlightening the procedural organization and the balance which has been sought between the different actors of the procedure in each of the systems they study. It also constitutes, for practitioners, a particularly useful guide by reason of its clear presentation, its exposes of doctrine and of national and European case-law as well as its bibliographical references.

In an era of increasing internationalization of economic disputes, no doubt this book will contribute to a better harmonization of the national rules of procedure in Europe, which is a factor of legal certainty for the economic actors and a guarantee for building a legal space which is truly European.

Jacqueline Riffault-Silk
President at the Court of Appeal of Paris

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Introduction

This study of the enforcement of EC Articles 81 and 82 by the English, French and German courts in terms of their respective rules of civil procedure will focus on the following: first, on certain of the areas of procedure as opposed to substantive law which the European Commission identified in two documents, the Green Paper[1] and the Commission Staff Working Paper,[2] as constituting impediments to the enforcement of the Community competition rules by means of actions for damages; and second, on certain aspects of the rules of the respective national procedures which although not identified in the aforementioned documents arguably operate to impede in varying degrees the effective enforcement of EC Articles 81 and/or 82. Further, it is submitted that both the specific areas of enforcement identified in the two aforementioned Commission documents as impeding the enforcement of the EC competition rules by means of damages actions as well as those procedural aspects which are not identified therein may well vary in form and nature according to each of the three national systems of procedure examined herein. Once the particular enforcement difficulty is identified within the national system of procedure in relation to the enforcement of EC Articles 81 and 82 the analysis will then proceed to the next stage: namely, the application of the doctrine of effectiveness and in some

1. Green Paper 'Damages Actions for Breach of the EC Anti -Trust Rules' COM (2005) 672 (19.12.2005) FINAL; *see generally* for a presentation of EU legislation and projects in procedural harmonization not pertaining to the enforcement of EC Art. 81 and 82 by the national courts M. Freudenthal, 'The Future of European Civil Procedure' *Electronic Journal of Comparative Law* (EJCL) Vol 7.5; <www.ejcl.org/ejcl/75/art75-6.html>; Communication form the Commission to the European Parliament and the Council: A More Coherent European Contract Law: An Action Plan: COM (2003) 68 FINAL; C. Cifro, 'First Steps Towards the Harmonisation of Civil Procedure: The Regulation Creating a European Enforcement Order for Uncontested Claims' (2005) 24 CJQ 200-25.
2. Commission Staff Working Paper: Annex to the Green Paper: 'Damages Actions for Breach of the EC Anti-Trust Rules SEC (2005) 1732 (19.12.2005).

cases the doctrine of non-discrimination in order to provide a possible procedural solution in terms of the national rules of procedure. However, the application of the doctrine of effectiveness will require consideration of the fundamental principles which underlie the respective English, French and Germans systems of civil procedure.

The next stage will consist of an analysis of certain aspects of the English French and German systems of civil procedure which constitute enforcement difficulties for EC competition damages actions. Subsequent to that analysis, it will then be necessary to consider whether the doctrine of effectiveness and or non-discrimination may intervene so as to require changes in the form of the national procedural rules. In the event that the doctrine of effectiveness does require certain modifications of the national procedure an attempt will then be made to propose the possible form that these modifications may take: it is submitted that the procedural modifications which will be proposed, in turn, may be justified according to the doctrine of effectiveness in terms of their being necessary in order to ensure adequately effective enforcement of EC Articles 81 and 82.

A. DOCTRINE OF EFFECTIVENESS

Before first analysing the procedural aspects identified by the Commission in the Green Paper and the Commission Staff Working Paper and second, those procedural aspects which are not considered therein, it is appropriate to consider the nature of the EC doctrine of effective enforcement.[3] Arguably, there are two basic principles which are involved in the enforcement by the national courts of EC law generally and in particular EC competition law in terms of the use of the national rules of procedure: the first principle is that of primacy or supremacy of EC law in relation to national law. This principle establishes that where a conflict exists between a provision of national law and EC law, the EC law provision must

3. *See generally* M. Struys, 'Le Droit communautaire et l'application des règles procédurales nationales' (2000) J.T.D.E 49; S. Prechal' Community Law in National Courts: the Lessons from van Schiyndel' (1998) C.M.L.R. 681; S. Perchal, *Directives in EC Law*, (2nd ed (Oxford University Press 2005) *see* ch 7 generally; P. Girerd, 'Les principes d'équivalence et d'effectivité: encadrement ou désencadrement de l'autonomie procédurale des Etats membres?' (2002) RTDE (38) 75–102; Himsworth, 'Things Fall Apart: The Harmonisation of Community Judicial Procedural Protection Revisited' (1997) ELRev 291; W. van Gerven 'Of Rights, Remedies and Procedures '(2000) C.M.L.R. 501, P. Oliver 'Le Règlement 1/2003 et les Principes d'Efficacité et d'Equivalence' (2005) CDE 352 at 354 describes the doctrine of effectiveness and equivalence as exceptions to the rule of procedural autonomy which in turn he relates to the principle of subsidarity: 'Il ne faut pas perdre de vue le fait que ces deux principes constituent des exceptions au principe que l'on pourrait appeler le principe de l'autonomie procédurale des ordres juridiques nationaux. L'ensemble de ces principes remontent aux arrâts Comet et Rewe et ont été confirmés à de nombreuses reprises depuis lors. Le principe de l' 'autonomie procédurale' qui relève du principe de subsidiarité veut qu'il appartienne aux Etat membres de prévoir leurs propres procédures et voies de droit pour la mise en œuvre du droit communautaire par leurs juridictions'.