Jumping The Train: The General Courts Sets a High Bar for Private Damages Claimants to Join Cartel Decision Appeals

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EU court rejects intervention of damages claimants in appeal before the European courts by taking a narrow and rather formalistic view of legal interest in the appeals. While it is true that damages actions are legally possible as stand-alone actions, the reality in Europe is that third parties' damages actions stand and fall with the decision that finds an infringement.

The General Court of the European Union (GC) has rejected a request by Schenker—the transportation and logistics arm of the Deutsche Bahn Group—to intervene in a series of appeals by airlines against a European Commission decision in the air cargo cartel case (cases T-28/11, T-38/11, T-40/11, T-46/11, T-62/11, and T-63/11).

Schenker is considering bringing damages actions against the airlines. In the European Union, most private damages actions are follow-on actions based on the identification of cartels by the European Commission or a national competition authority. The advantage for claimants in such actions is that the court is bound by the decision that found an infringement of competition rules; the claimant has only to substantiate and prove damages. Therefore, claimants seeking damages have a genuine commercial interest that the decision finding the infringement and on which they want to base their claims is upheld on appeal. In addition, claimants may want to gain access to information that may be useful for their damages actions.

According to European law, any person who can establish an interest in the outcome of a case is generally entitled to intervene in proceedings before the European courts. According to European court case law, companies may intervene in an appeal if they are, for example: legal entities that have been held jointly and severally liable alongside the appellant for an antitrust infringement; competitors of an appellant accused of abusing its dominant position; associations composed of competitors or customers that opposed anticompetitive agreements of the appellant; or parties that had actively participated or filed a complaint in the administrative procedure before the Commission, which led to the decision against the appellant.

Schenker claimed in essence to have a threefold legal and economic interest in the appeals:

- A legal interest in the final termination of the cartel as a company affected by the cartel.

- An economic interest resulting from the higher prices it was forced to pay as a customer of the airlines in the cartel.

- A direct and existing interest in having the contested decision upheld, as it formed the legal basis of possible damage claims before national courts.

The GC disagreed. First, it found that the aim of obtaining the final termination of the cartel and the prohibition of its reoccurrence was too general to be considered an interest in the meaning of the relevant statute. Also, the obligation to refrain from cartelist behaviour in the future is already prohibited under European antitrust law, notwithstanding any court decision.

Second, the GC found that the result of the case has no impact on Schenker's economic freedom of action. In particular, Schenker was free to conclude contracts with customers on the downstream market as well as contracts with the members of the cartel, independent of the outcome of the appeal. In addition, Schenker never complained to or participated in the administrative proceedings before the Commission. The GC held that the purpose of an intervention to support a decision to punish an alleged cartel was only to ensure a possible damage claim at a later stage before national courts, and that the intervention was thus not directed towards safeguarding the economic freedom of the intervener's commercial activity. Schenker, it stated, failed to distinguish itself from other consumers of air cargo services that may have also incurred economic losses.

Last, the GC concluded that the purpose of the appeal proceedings is not to make possible or facilitate private damages actions before national courts, but to review the legality of the contested Commission decision. In particular, it stated that damage claims could be brought independently of any prior Commission decision.

The GC seems to take a rather formalistic view of legal interest in the appeals. While it is true that damages actions are legally possible as stand-alone actions, the reality in Europe is that damages actions most often occur as follow-on actions. This has a variety of reasons, most importantly the absence or limited availability of discovery, the absence of class actions, and the absence of punitive damages. In reality, third parties' damages actions in Europe stand and fall with the decision that finds an infringement.

Damage claimants are now in a difficult position when they attempt to join proceedings at the appeal stage. Schenker has appealed the decision to the Court of Justice of the European

Union, claiming that the prior complaint/and or participation in the administrative procedure should not be a condition for intervention. In the meantime, prospective claimants should now do exactly that: actively participate in the administrative proceedings before the European Commission, to ensure its right of intervention in the appeals procedure.

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