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Agenda

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Latest developments in English cartel enforcement and litigation

Regulatory, procedural and substantive trends are creating opportunities and potential hazards for claimants seeking damages arising from antitrust infringements. Scott Campbell, Partner, and Tristan Feunteun, Solicitor, at Stewarts Law LLP discuss how these developments are opening up new areas and mechanisms for cartel damages claims before the English courts

At both the European and national level, the infrastructure, sectoral focus and procedures of regulatory enforcement are changing. Key developments include the creation of the Competition and Markets Authority (CMA) in the UK, the consultations being conducted by the European Commission and the UK Department for Business, Innovation and Skills (BIS), the Jackson Reforms and developments regarding litigation funding and after-the-event (ATE) insurance; increased regulatory investigation of financial services; and European Court judgments like *Pfleiderer* and *Menarini*. These are, for the most part, opening up new areas and mechanisms for follow-on claims for claimants before the English courts.

Several changes in enforcement have been top-down and appear—or are expected—to be largely positive for claimants. Changes to the regulatory landscape, in the form of the creation of the CMA, and to the litigation landscape, in the form of the Commission and BIS consultations on collective redress mechanisms, are examined in turn below.

Public enforcement

Fines and sectors of investigation: EU and UK

There does appear to have been something of a decline in the levels of fines (unadjusted for European Court judgments) imposed by the Commission in recent years. From €2.2 billion in 2008, €1.5 billion in 2009 and €2.8 billion in 2010, fines slipped to €614m in 2011, and were €400m for the year to the end of June 2012—but are currently at €2 billion for the year to date due to several recent fines, most notably the €1.47 billion imposed in early December on producers of TV and computer monitor tubes.[1]

However, there is increasing evidence that the Commission is maintaining the sectoral focus of its antitrust investigations. The consequence of this sectoral approach is that certain damages claimants, most likely to be large downstream original equipment manufacturers (OEM), will have multiple damages claims against a range of suppliers across a basket of cartels. One example is the cluster of cartels affecting the electronics industry, which has pending or completed investigations into dynamic random access memory (RAM) chips,[2] liquid crystal displays,[3] cathode ray tubes glass,[4] and optical disc drives.[5] Another example is the cluster affecting the automotive industry—cartels in car glass,[6] acrylic glass,[7] polyurethane foam,[8] safety systems,[9] auto electrical (also known as wire harnesses),[10] bearings,[11] and car battery recycling[12] are all likely to have hit the bottom line of car manufacturers.

In the UK, a clustered approach in investigations can also be discerned, with the Office of Fair Trading (OFT) investigating advertising (print and outdoor), financial services (such as MasterCard, loans to professional services firms, and commercial electronic platform services), fuel (bunker fuels and retail petrol), online booking sites (such as for hotel booking), and transport (including commercial vehicle manufacturers and passenger flights between London and Hong Kong).[13]

Challenges to the EU's cartel enforcement regime

Corporate defendants in recent years have attempted to claim that their fundamental rights under the European Convention on Human Rights (ECHR) have been breached by various aspects of the Commission's cartel enforcement regime. The most recent judgment

regarding the compatibility of the Commission's cartel procedures with the ECHR came from the European Court of Human Rights with its *Menarini* judgment.[14] Similar cases have raised issues like the standard of review,[15] procedural review, and the use of presumptions[16]—all relevant in the context of public and private enforcement of cartel infringements. While *Menarini* held that the procedures of the Italian competition authority were compliant, claimants can expect cartelists to bring many obfuscatory and delaying cases of this nature in the coming years, especially with the imminent accession of the European Union itself to the ECHR.

Changes to the UK's public enforcement infrastructure

The overarching infrastructure of those regulators that enforce competition laws in the UK is changing. In particular, the OFT and the Competition Commission are merging to form the CMA. The main driver of the creation of the CMA can be seen as the calls for regulators to take more decisions (on which potential damages claimants have come to rely), faster. The average OFT investigation takes around three years, with the dairy and tobacco cases taking around seven to eight years each. This can sometimes result in a ten-year wait for a settlement, if one includes the infringement period. However, is it too simplistic to judge the efficacy of a regulator by the number of its decisions? Do national competition authorities (NCA) actually raise their profile and help to dampen cartel and other infringement activity by undertaking fewer but more high-profile cases? Regardless, the new CMA will try to find an equilibrium between increased checks and balances, increased robustness of decisions (regarding research and analysis contained therein), and increased speed/efficiency of producing regulatory outcomes. When balancing this equation while trying to retain the talent of both organisations, it is likely that something will have to give way—and that this will have to be accommodated in the speed of decision timetables.

Private enforcement

BIS's proposed private enforcement reforms in the UK

In April 2012, BIS launched a consultation on reforming private actions relating to competition law infringements.[17] This contained several key proposals: transforming the Competition Appeal Tribunal (CAT) into a major venue for competition actions; introducing a rebuttable presumption regarding cartel overcharges; introducing an opt-out regime for collective actions; promoting alternative dispute resolution; and generally ensuring that private enforcement complements public enforcement. The first three factors are considered here.

A creation of the Enterprise Act 2002, the CAT is widely seen to have further capacity to develop its jurisdiction. In particular, BIS proposed transferring cases to the CAT from the High Court, and granting the CAT powers to hear direct stand-alone cases (rather than merely appeals or follow-on actions). BIS's justification for this is that it has 'initial evidence' that cases before the CAT are resolved faster and more cost-effectively than before the High Court. However, in practice there appears to be no difference and in fact the High Court has proven highly efficient at handling complex cartel litigation in recent years.

BIS's idea of a rebuttable presumption of 20% overcharge was intended to help prospective claimants, both by enabling them to estimate the likely benefits of seeking redress, and by shifting the burden of proof to the defendant. Such a rebuttable presumption has been introduced in Hungary for cartel claims, where an overcharge of 10% is presumed. However, doubts regarding the merits of a one-size-fits-all approach were voiced in response to the consultation,[18] and it is likely that the proposal for such a rebuttable presumption will be dropped.

BIS is considering an opt-out collective redress mechanism, which is most likely to be for individual consumers and specially designated representative bodies—but may also be applied to small and medium-sized enterprises (SME). (The Commission is also considering such mechanisms—including an opt-out formulation—but this is likely to be proposed later in 2013 after a draft law relating to damages actions, and in particular access to leniency documents.) At present there is concern over the dearth of UK mechanisms (that are proportionate, balanced and cost-effective) available for individual consumers and SMEs to seek redress for cartel infringements. It is likely that large corporates will not be subject to such an opt-out regime, and will be able to continue to pursue their own cartel damages actions in line with their own business strategies—as evidenced by the increasing number of such cases before the High Court.

Access to leniency documents

One of the more interesting developments at European level that ought to provide some encouragement to cartel damages claimants concerns access to leniency documents.

Pfleiderer AG, a victim of the German decor paper cartel, sought access to the leniency application made by a cartelist to the Bundeskartellamt in order to aid its pursuance of a cartel damages claim. The Administrative Court in Bonn referred the question to the European Court of Justice, which rejected a general prohibition on disclosure of leniency

applications.[19] Instead, the Court of Justice held that, given that Member States enact and apply such cartel leniency procedures, it is for the national courts to balance the public interest of uncovering and effectively prosecuting cartels with the need to facilitate a third party's interest in disclosure in order to exercise its right to compensation. The Court of Justice emphasised that: (i) the national court must have regard to equivalence/effectiveness; and (ii) before ordering disclosure (inspection) by the third party, the national court must ask if there are other sources of information that are equally effective. In its application of the Court of Justice's June 2011 Decision, in January 2012 the Bonn court denied Pfleiderer AG access to the file, citing that disclosure would have compromised the purpose of the investigation. *Pfleiderer* was considered by the English courts in April 2012 in *National Grid*,[20] where the High Court permitted limited disclosure of both the Commission's and NCA's files. *Pfleiderer* has been widely criticised and the Commission has sought to clarify the interaction of public and private enforcement at both EU and national level. Indeed, the Commission made written submissions to the High Court (since published), on Mr Justice Roth's invitation, during the *National Grid* proceedings.[21] In March 2013, the Commission is also expected to propose legislation that will clarify the post-*Pfleiderer* situation. A more encouraging judgment was given by the General Court of the European Union in *CDC Hydrogene Peroxide* in December 2011,[22] which annulled the Commission's refusal to grant a damages claimant access to the contents list of the Commission's file regarding the hydrogen peroxide cartel. Indeed, in that case the General Court noted that leniency programmes are not the sole way of ensuring compliance with EU competition law, and that private damages actions before the courts of Member States can make a significant contribution to ensuring such compliance.

Jurisdiction of the English courts: anchor defendants, limitation periods, hybrid claims, and damages

The English courts have shown a readiness to take a wide view in relation to accepting jurisdiction. In particular, there has been a string of cases regarding the circumstances in which an English-domiciled subsidiary of a Commission cartel infringement Decision can be used as an anchor defendant in English courts for the purposes of asserting jurisdiction over non-English-domiciled addressees of that infringement Decision. The most recent case is *KME Yorkshire v Toshiba Carrier* of September 2012,[23] concerning the copper tubes cartel, in which Lord Justice Etherton held that 'acts of implementation alone are capable of amounting to concerted practices when they are carried out pursuant to an anti-competitive agreement made between others and with knowledge of that agreement.'

Another helpful Court of Appeal case, at least from a claimant perspective, is *Deutsche Bahn v Morgan Crucible* of July 2012,[24] which related to the cartel in carbon and graphite products. There, the CAT had ruled in May 2011 that the claimant, Deutsche Bahn, had not brought its damages restriction within the two years it deemed to be the applicable limitation period.[25] Noting that its Decision in that case contradicted one of its earlier judgments, the CAT granted leave to Deutsche Bahn to appeal to the Court of Appeal. Ultimately, the Court of Appeal reversed the CAT's judgment, disagreeing with the CAT's narrow interpretation of 'Decision'—thus permitting the limitation period in which claimants like Deutsche Bahn can bring damages actions to be extended pending appeals against Commission Decisions before the European Courts—or, indeed, even where the Decision could still be appealed.

A further case to hearten claimants is November's High Court Decision in *Bord na Móna Horticulture Ltd v British Polythene Industries Plc and Ors*,[26] which concerned the industrial bags cartel. In that case, Mr Justice Flaux found that an injured party may bring a 'hybrid' claim (ie, neither a pure follow-on claim nor a pure stand-alone claim) that goes beyond what is provided for in a Commission Decision, provided that the case a claimant is trying to put forward is not contrary to the Commission Decision.

Regarding damages themselves, the first case relating to section 47A of the Competition Act 1998 was decided in July 2012 by the CAT, which awarded the claimant damages for loss of profits as well as exemplary damages. However, the Commission is considering providing advice to judges in 2013 on how to quantify damages in cartel cases, which is likely to have an impact on the quantum of damages claims in England and throughout the EU.

Costs reforms in the UK

A new civil costs regime was brought in with the Royal Assent of the Legal Aid, Sentencing and Punishment of Offenders Act on May 1st 2012—largely incorporating proposals suggested by Lord Justice Jackson. However, the Master of the Rolls confirmed recently that the Jackson reforms in this Act will not take effect until April 2013. Several key reforms will change the litigation landscape that those seeking redress for cartel infringements will face. These include changes to ATE insurance, conditional fee agreements (CFA) and the introduction of damages-based agreements (DBA, or contingency fees) and qualified one-way cost shifting.

To date, many cartel damages claimants, including well-financed multinational corporations as well as SMEs, have taken advantage of the existing litigation financing structures of CFAs (otherwise known as 'no

win, no fee' or 'no win, low fee' agreements—whereby a law firm will be paid at a discounted hourly rate as the case proceeds, but will forgo the balance of its base costs if the client loses, and will recover all of its base costs with or without a success fee if the client wins) coupled with ATE insurance products to manage fees and cover potential adverse costs. Of course, a number of claimants have also chosen traditional pay-as-you-go models of case financing. In the event of success, costs—such as base costs and success fees under a CFA plus ATE premia—are recoverable from the losing party. It is arguable that, without the ability to take competition damages claims 'off balance sheet' in this way, there may have been fewer claims in the English courts in recent years.

As of April 2013 under the Jackson reforms, CFA success fees and ATE premia are to be unrecoverable from the losing party under the principle that liability for the funding of claims should be shifted from unsuccessful defendants to successful claimants. However, DBAs are to be permitted. This will mean that law firms will be able to take a share of the claimant's damages up to a 50% cap according to the 'Ontario model' (in which costs shifting is effected on a conventional basis and, insofar as the contingency fee exceeds what would be chargeable under a normal fee agreement, this is borne by the successful litigant). It is also likely that hybrid discounted rate or partial DBAs, in a similar way to the current CFA arrangements, will generally be popular in commercial litigation. Within this context, it is likely that 'one-off' competition damages claimants will continue to seek to avail themselves of alternative fee structures to manage costs and to take the costs of the litigation off balance sheet, possibly in conjunction with third-party funders, or with law firms acting in conjunction with third-party funders to share risk.

Conclusion

The general thrust of these developments is that those affected by cartels are now in a better position to seek redress before the English courts. Regulatory reforms, such as the merger of UK competition regulators and efforts by the Commission and BIS to foster EU- and UK-wide collective redress mechanisms respectively, auger well for claimants. Increased sophistication of regulators and their focus on investigating key areas of the economy are helping to uncover cartels, and also providing claimants with the knowledge required to rectify cartelists' wrongs. Although grey areas remain—regarding access to leniency documents, for example—claimants are generally finding it easier than before to learn about, fund, obtain insurance for, and pursue their damages actions before the English courts. As the English courts themselves increase their appetite for complex cartel cases, this trend looks set to continue.

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[1] European Commission (2012), 'Antitrust: Commission fines Producers of TV and Computer Monitor Tubes €1.47 billion for two Decade-long Cartels', press release, IP/12/1317, December 5th.
[2] European Commission (2011), 'Summary of Commission Decision of 19 May 2010 relating to a Proceeding under Article 101 of TFEU and Article 53 of the EEA Agreement (Case COMP/38.511 – DRAMs) (notified under document C(2010) 3152 final)', *OJ* C 180, June 21st.
[3] European Commission (2010), 'Commission Decision of 8.12.2010 relating to a Proceeding under Article 101 Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area (COMP/39.309 – LCD – Liquid Crystal Displays)', C4 (2010) 8761 final, December 8th.
[4] European Commission (2011), 'Commission Decision of 19.10.2011 relating to Proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (COMP/39605 CRT Glass)', C(2011) 7436 final, October 19th.
[5] European Commission (2012), 'Antitrust: Commission sends Statement of Objections to suspected Participants in a Cartel for the Supply of Computer CD and DVD Drives', press release, IP/12/830, July 24th.
[6] European Commission (2008), 'Commission Decision of 12 November 2008 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/39.125 – Carglass', provisional non-confidential version, November 12th.
[7] European Commission (2006), 'Commission Decision of relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/F/38.645 – Methacrylates), C(2006) 2098 final, May 31st.
[8] European Commission (2010), 'Antitrust: Commission confirms Unannounced Inspections in Polyurethane Foam Sector', Memo 10/359, August 3rd.
[9] European Commission (2011), 'Antitrust: Commission confirms Investigation into Suspected Cartel in the Sector of Seatbelts, Airbags and Steering Wheels', Memo 11/395, June 9th.
[10] European Commission (2010), 'Antitrust: Commission confirms Investigation into Suspected Cartel in the Sector of Automotive Electrical and Electronic Components Suppliers', Memo 10/49, February 25th.
[11] European Commission (2011), 'Antitrust: Commission confirms Unannounced Inspections in the Sector of Bearings for Automotive and Industrial Use', Memo 11/766, November 8th.
[12] European Commission (2012), 'Antitrust: Commission confirms Inspections in Lead Recycling Sector', Memo 12/722, September 28th.
[13] See 'OFT current cases', available at: http://www.oft.gov.uk/OFTwork/oft-current-cases/.
[14] European Court of Human Rights, *A. Menarini Diagnostics S.R.L. c. Italie* (Requête no. 43509/08), judgment of September 27th 2011.
[15] Case C-457/10P, *AstraZeneca AB and AstraZeneca plc v European Commission*, judgment of May 15th 2012; Case C441/07P, *European Commission v Alrosa Company Limited*, judgment of June 29th 2010; and Case C-12/03P, *European Commission v Tetra Laval*, judgment of February 15th 2005 (although these cases concerned cartel infringements per se).
[16] Case C-8/08 - *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, judgment of June 4th 2009.
[17] Department for Business, Innovation and Skills (2012), 'Private Actions in Competition Law: a Consultation on Options for Reform'.
[18] Oxera (2012), 'Presuming Too Much? The UK Consultation on Private Actions in Competition Law', *Agenda*, August.
[19] Case C-360/09 *Pfleiderer AG v Bundeskartellamt*, judgment of June 14th 2011.
[20] *National Grid Electricity Transmission Plc v ABB Ltd and Others* [2012] EWHC 869 (Ch).
[21] European Commission (2011), 'Claim no. HC08C03243 between National Grid Electricity Transmission Plc and ABB Ltd & Others: Observations of the European Commission pursuant to Article 15(3) of Regulation 1/2003'.
[22] Case C-457/10P – *AstraZeneca AB and AstraZeneca plc v European Commission*, Opinion of Advocate General Mazak of May 15th 2012.
[23] [2012] EWCA Civ 1190.
[24] [2012] EWCA Civ 1055.
[25] Deutsche Bahn AG & Others v Morgan Crucible Company Plc & Others [2011] CAT 16.
[26] [2012] EWHC 3346 (Comm).

If you have any questions regarding the issues raised in this article, please contact the editor, Dr Leonardo Mautino: tel +44 (0) 1865 253 000 or email l_mautino@oxera.com

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