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Agenda

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Presuming too much? The UK consultation on private actions in competition law

The European Commission and various Member States would like to see more competition law cases in court. The UK government recently set out a number of proposals to improve on the current regime. Based on Oxera's response to the consultation, we discuss two aspects of the reforms: the plan to make the Competition Appeal Tribunal a major venue for competition actions, and the introduction of a rebuttable cartel overcharge presumption

Promoting the use of private competition law actions before national courts in EU Member States has long been a policy goal of the European Commission.[1] Private actions—in particular, follow-on damages actions—are now common in several Member States, yet the development of legal principles and procedural rules has been slow because, perhaps inevitably, the majority of cases are settled out of court. With limited relevant case law across Europe, national governments sometimes try to address this through specific legislative initiatives. The consultation on reforming private actions published by the UK government (through the Department for Business, Innovation and Skills, BIS) in April 2012 can be seen in this context.[2] Its stated aim is to promote private actions as a complement to the UK's existing public enforcement regime.

The consultation puts forward four main proposals:

- to make the Competition Appeal Tribunal (CAT) a 'major' venue for competition actions;
- to introduce a regime for opt-out collective actions for competition law, making it easier for consumers and businesses to bring cases collectively;
- to promote alternative dispute resolution (ADR) mechanisms to ensure that courts are the 'option of last resort';
- to ensure that private actions complement the public enforcement regime by protecting the incentives currently provided for companies to expose cartels.

Making the CAT a 'major' venue for competition actions

The CAT was created under the Enterprise Act 2002 as a specialist tribunal dealing with competition law matters. However, there is some consensus that the CAT has, as described by BIS (2012, para 4.14), a certain 'unfulfilled potential'. Although its main role has been to hear appeals against decisions made by the UK competition authorities and regulators under competition law and sector-specific regulations, the number of cases involving restrictive agreements or abuse of dominance (under the Competition Act 1998 or Articles 101 and 102 TFEU) has made up a relatively small proportion of its caseload. There are also restrictions on follow-on actions that the CAT can hear, in part due to some of its own rulings in the past. The government is now proposing to enhance the role of the CAT in three ways:

- by permitting the transfer of cases from the High Court to the CAT;
- by giving the CAT powers to hear cases directly (as opposed to dealing only with appeals or follow-on actions); and
- by allowing it to grant injunctions (ie, ordering anti-competitive behaviour to stop).

The main benefit of enhancing the role and powers of a specialist competition tribunal is likely to be that, over time, this will result in a body of clear and coherent case law developed by experienced expert judges. In the UK context, it appears that the generalist courts

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(the High Court of England and Wales and the Scottish Court of Session) have thus far been able to handle complex competition law cases. There have been many such actions in recent years—prominent examples include *BAGS v Amrac* (2008), a complex Article 101 case concerning the collective selling of horseracing broadcast rights, and *Purple Parking* (2011), an abuse of dominance case in which the High Court judge himself undertook the hypothetical monopolist test for market definition, in the absence of an economic expert.[3]

While the current prevalence of competition law cases before the generalist courts does not, in itself, diminish the case for expanding the specialist role of the CAT (and moving not only cases, but also judges, from the High Court to the CAT), it does put into perspective the cost–benefit analysis undertaken by BIS for this particular measure. BIS states that it has 'initial evidence' that cases before the CAT are less costly and resolved more quickly than cases before the High Court, and as part of the consultation it is looking for more expert opinions on this.[4] Oxera's experience of working on both High Court and CAT cases does not suggest any obvious differences in terms of the cost or length of the proceedings between the two forums.

Allowing the CAT to hear stand-alone cases on restrictive agreements and abuse of dominance directly, in addition to appeals, would give it a dual role: in direct (stand-alone) cases it would be the decision-maker in disputes between claimants and defendants; while in appeal cases, dealing with the same substantive matters, it would review the decisions made previously by the competition authority. Will the CAT, in practice, treat appeal cases in the same way as stand-alone cases, with the UK Office of Fair Trading (OFT) in effect being the claimant? Ultimately, this may again raise the question of whether the UK should have a prosecutorial system, where the competition authority must bring a case before the court rather than act as the decision-maker. Following BIS's consultation earlier this year on the institutional set-up of the UK competition regime, the government rejected the creation of a prosecutorial system, even though it saw many advantages to such a system and may reconsider it in future.[5]

Rebuttable presumptions

BIS acknowledges that 'it is intrinsically difficult to prove a breach of competition law due to the legal thresholds required, the complex economic factors that may underlie a case and the difficulties of obtaining the necessary information.'[6] This is the nature of competition law. As the CAT put it in 2005, 'competition law is not an area of law in which there is much scope for absolute concepts or sharp edges.'[7]

This has not stopped competition law from evolving over the decades, however, or competition authorities and courts from developing workable criteria to assess anti-competitive conduct and mergers; nor have courts been deterred by the complexity of quantifying damages. One US court stated that: 'The antitrust cases are legion which reiterate the proposition that, if the fact of damages is proven, the actual computation of damages may suffer from minor imperfections.'[8] As set out in the Oxera et al. (2009) report for the European Commission on quantifying damages, and reflected in the Commission's own draft guidance paper, a range of methods and models—from the simple to the more complex—can be used to estimate the harm arising from competition law infringements.[9] Courts across Europe are increasingly presented with such methods, and are familiarising themselves with them.

Where complexities arise in legal procedures, the use of rebuttable presumptions is a commonly accepted technique to make procedures more effective. These are presumptions that a court holds to be true, unless someone comes forward to contest them and prove otherwise. From a policy perspective, rebuttable presumptions can enhance justice and the efficiency of the legal system, although they might not be appropriate in all circumstances.

The cartel overcharge presumption

The BIS consultation considers making follow-on cartel damages claims easier by introducing a rebuttable presumption on cartel overcharges:

> This would be likely to take the form of a presumption that a cartel had affected prices by a fixed amount, such as 20%—a figure which would be indicative of the amount that the current economic literature suggests prices can be raised by cartels. If no economic evidence was presented by either side, the damages award would be based on this assumption. The presumption would be rebuttable by either the claimant or defendant; however, to do so they would have to present the necessary evidence to do so. (para 4.40)

In support of this presumption, BIS notes that it places prospective claimants in a better position to estimate the likely benefits of bringing an action, and that it avoids the need to assemble extensive economic evidence, which BIS observes is 'costly, time-consuming, if it is possible at all' (para 4.41). Another point made by BIS is that the presumption shifts the burden of proof to the defendant and thus reduces the informational disadvantage of prospective claimants.[10]

There are several economic and policy reasons why a rebuttable presumption on cartel overcharges, and the 20% presumption in particular, seem unwarranted.[11]

First, BIS envisages the proposed presumption to apply to any breach of Article 101 TFEU (or the equivalent provision in Chapter 1 of the UK Competition Act 1998).[12] However, there are clear distinctions between different types of restrictive agreement caught under Article 101. First and foremost is the distinction between horizontal and vertical agreements—in the latter case, an assumption of harm that is equivalent to a cartel overcharge does not make economic sense, because such agreements can be pro-competitive and efficiency-enhancing. Moreover, some types of horizontal agreement are also benign or even pro-competitive (where they yield efficiency benefits). A presumption that an agreement has resulted in an overcharge seems suitable only in cases of classic 'hardcore' cartels, where the competition authority has found factual evidence of secret meetings during which competitors systematically agree to fix prices or allocate customers. The European Commission has uncovered many such hardcore cartels in the past ten years, but not all Article 101 infringements are of this nature.

Second, even in the case of hardcore cartels, where it seems more likely than not that prices have been raised illegally, it is questionable whether a rebuttable presumption on overcharge is needed. If there is clear factual evidence of price-fixing or market-sharing, a court is likely to be sympathetic to a claim that prices must have increased. Courts in Germany and other jurisdictions have followed this logic. For example, in a vitamins cartel case, the Dortmund Regional Court applied the prima facie rule that a market price was generally lower than a cartel price:

> The damage of a price cartel consists of the difference between the cartel price and the hypothetical competitive price in the absence of the cartel. According to the experience of life [*Lebenserfahrung*], it can be assumed that a competitive price is lower than a cartel price. The defendant did not show that it would have been different in this case and why. The difference between the competitive price and the cartel price represents a financial damage in the sense of lost wealth.[13]

British judges might be expected to follow similar 'common sense' reasoning if the factual evidence is presented to them. A rebuttable presumption that a cartel has resulted in an overcharge greater than zero would not add anything.

Third, the point made by BIS about the informational disadvantage of claimants is overstated. Claimants will often possess the relevant information on the purchases they made from the cartel, and on how any cartel overcharges may have been passed on to downstream prices. Moreover, the UK court rules provide for ample disclosure of information to parties on the other side of the dispute. Even if such information is not made available until later stages of the proceedings, the understanding that it will eventually have to be made available influences the dynamics of the litigation process. Furthermore, as noted in the Oxera et al. report for the Commission, several simple techniques can be used to approximate the order of magnitude of the likely cartel harm, even where relatively limited information is available.

The 20% rule

BIS seeks support for the 20% presumption by making references (in paras 4.40 and 4.43) to the economic literature, to the Oxera et al. study and to the European Commission's draft guidance paper. According to BIS, 'the figure of 20% represents the lower end of the range that the current economic literature suggests prices can be raised by' (para 4.40). This is not correct, as shown below.

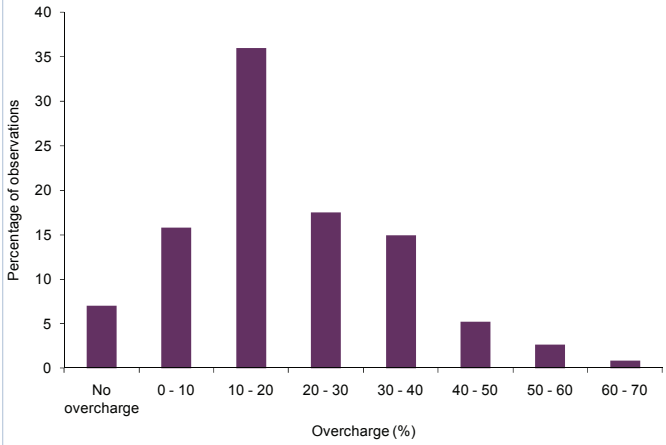
Economists have carried out many empirical studies on overcharges in past cartels, but some care is required when interpreting this empirical data. Not all studies on cartel overcharges would qualify as sufficiently robust. Empirical studies may also tend to focus on cartels that are most likely to have had an impact on the market, in which case many cartels with no effect will not have been captured in these studies (although, as shown below, a small but significant proportion of the cartels studied resulted in no overcharge). A study by Connor and Lande (2008) uses the most comprehensive dataset on cartel overcharges currently available, and is also the most widely cited study on this topic.[14] It contains 674 observations of average overcharges from 200 social science studies of cartels from the 18th century onwards—for example, it covers a British coal cartel that started in the 1770s and a Canadian petroleum lamp oil cartel in the 1870s. The authors find that the median cartel overcharge for all types of cartel was 20% of the cartel price.

As part of its study for the European Commission, Oxera examined the dataset underlying the 2008 Connor and Lande study, as well as an additional 350 observations provided by Connor and Lande (thus amounting to more than 1,000 observations). Oxera tested the sensitivity of the overcharge median and other results by limiting the sample to cartels that

started after 1960 and to overcharge estimates obtained from peer-reviewed academic articles and chapters in published books (this reduced the sample size to 114). Figure 1 below illustrates the distribution of cartel overcharges across this new dataset. The range with the greatest number of observations is 10–20%. It was found that, in this dataset, the median overcharge is 18% of the cartel price—not far from the 20% found by Connor and Lande. The mean overcharge is around 20%, compared with 23% in Connor and Lande. However, since the variation in observed overcharges is large, it is informative to consider the distribution of overcharges as well as the median or mean overcharge. This shows that 20% is not at the 'lower end of the range', as BIS states.

Finally, when discussing cartel overcharges, it is important to be clear about what the percentage refers to. The current convention is to express the overcharge as a percentage of the cartel price—this is the convention that has been followed in Figure 1 and in the European Commission's draft guidance paper. However, some academic studies express the overcharge as a percentage of the non-cartel price. BIS refers to the Oxera et al. and Commission documents, but also mentions prices being raised by 20%, which would imply the overcharge being 20% above the non-cartel price. To illustrate the difference, a cartel price of £120 represents a 20% increase above a non-cartel price of £100, but only a 17% overcharge based on the cartel price.

Figure 1 Distribution of cartel overcharges in empirical studies of past cartels



Source: Oxera et al. (2009), op. cit., based on underlying Connor and Lande data described above and selection criteria applied by Oxera.

Should all cartels be treated the same?

Private actions face several obstacles, many of which are legal or procedural. Initiatives such as those proposed by BIS can contribute to removing such obstacles. If one country takes such steps, others may well follow, either because they consider the UK initiatives to be good practice or because there is some rivalry to become the jurisdiction of choice for international follow-on actions.

The economic literature on past cartels provides some interesting background information on the orders of magnitude of overcharges. However, the literature provides no sound basis for a rebuttable presumption, because there is a wide variation in overcharges and there are certain types of horizontal and, more often, vertical agreements that will not lead to higher prices. In hardcore cartel cases where the competition authority has found factual evidence of price-fixing or the allocation of customers, courts are likely to be more sympathetic to overcharge claims, even without a rebuttable presumption. The amount of the overcharge in any particular damages case ultimately needs to be determined according to the facts of the case.

[1] See European Commission (2005), 'Green Paper: Damages Actions for the Breach of EC Antitrust Rules', COM(2005) 672 final, December; European Commission (2008), 'White Paper on Damages Actions for Breach of the EC Antitrust Rules', COM(2008) 165, April; European Commission (2011), 'Staff Working Document: Towards a Coherent European Approach to Collective Redress', February; and European Commission (2011), 'Quantifying Harm in Actions for Damages based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union', draft guidance paper, June.
[2] Department for Business, Innovation and Skills (2012), 'Private Actions in Competition Law: a Consultation on Options for Reform'. See also Mansfield, I. (2012), 'Growth and Fairness: Private Sector-led Challenges to Anti-competitive Behaviour', *Agenda*, July, which sets out the potential economic impact of the proposals on private actions.
[3] *Bookmakers Afternoon Greyhound Services Ltd & Ors v Amalgamated Racing Ltd & Ors* [2008] EWHC 1978 (Ch) (8 August 2008); *Purple Parking Limited and Meteor Parking Limited v Heathrow Airport Limited* [2011] EWHC 987 (Ch) (15 April 2011). An example of a Scottish Court of Session ruling on an Article 101 case involving vertical restraints is *Calor Gas v Express Fuels and D Jamieson*, Court of Session [2008] CSOH 13.
[4] Department for Business, Innovation and Skills (2012), 'Impact Assessment—Private Actions in Competition Law: A Consultation on Options for Reform', April, pp. 18–9.
[5] Department for Business, Innovation and Skills (2012), 'Growth, Competition and the Competition Regime: Government Response to the Consultation', March, p. 9.
[6] Department for Business, Innovation and Skills (2012), 'Private Actions in Competition Law: A Consultation on Options for Reform', April, para 4.8.
[7] Competition Appeal Tribunal, Judgment in Cases 1035/1/1/04 and 1041/2/1/04, *Racecourse Association and British Horseracing Board v OFT* [2005] CAT 29, August 2nd 2005, para 167.
[8] *South-East Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767, 794 (6th Cir.1970).
[9] Oxera and a multi-jurisdictional team of lawyers led by Dr Assimakis Komninos (2009), 'Quantifying Antitrust Damages: Towards Non-binding Guidance for Courts', study prepared for the European Commission Directorate General for Competition, December; and European Commission (2011), 'Quantifying Harm in Actions for Damages based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union', draft guidance paper, June.
[10] One jurisdiction with an explicit rebuttable presumption of this nature is Hungary. The Hungarian Competition Act provides that injured parties bringing claims against members of price-fixing cartels can rely on the rebuttable presumption that 'it shall be deemed that the infringement affected the price by 10% unless the contrary is evidenced.' Competition Act (as amended, 2008), Hungary, Section 88/C; applicable to damages arising after September 2008.
[11] For a more detailed discussion of the incentive effects of the rebuttable presumption used in Hungarian courts, see Noble, R. and Pilsbury, S. (2008), 'Is 10 per cent the Answer? The Role of Legal Presumptions in Private Competition Litigation', *Global Competition Litigation Review*, **3**, pp. 124–32.
[12] Department for Business, Innovation and Skills (2012), 'Private Actions in Competition Law: A Consultation on Options for Reform', footnote 38.
[13] LG Dortmund 0 55/ 02 Kart Vitaminkartell III, Decision, April 1st 2004. The quote is a translation by Oxera.
[14] Connor, J.M. and Lande, R.H. (2008), 'Cartel Overcharges and Optimal Cartel Fines', chapter 88, pp. 2203–18, in S.W. Waller (ed), *Issues in Competition Law and Policy*, volume 3, ABA Section of Antitrust Law.

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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