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Agenda

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Cartel 'follow on' damages claims: a principled and practical approach

Damages actions against cartels that have been discovered by the European Commission and other competition authorities are on the rise in courts across Europe. Rob Murray, Partner at Crowell & Moring and head of its European Recovery practice, discusses why businesses should consider making such claims as a matter of principle (and possibly of fiduciary duty). He also sets out practical solutions to the perceived obstacles to making cartel damages claims

Key features of a cartel follow-on damages claim

A Decision of the European Commission that cartel members have infringed Article 101(1) of the EU Treaty binds all EU national courts, subject to the European Court appeals process, and can be relied upon to establish the civil liability of the cartelists for any loss caused. Decisions of national competition authorities, such as the Office of Fair Trading in the UK and other sectoral regulators such as Ofgem and Ofcom, can equally be relied upon in the English court. This article focuses on claims in the English High Court based on European Commission Decisions.

The issues of whether the cartel caused losses, of what amounts and in whose hands, remain to be proved before the court. It is rare for the Decision of a competition authority to contain significant evidence in relation to the level of the cartel overcharge—ie, the amount by which the prices charged by the cartelists was greater than those which would have been charged without the cartel. Decisions sometimes contain evidence of causation, for example that a bid tendered by a particular business was successfully rigged. But in general, the authority will find it sufficient to establish that the 'object' of the cartel was to fix prices, share markets/customers, etc, and not take the further step of showing in any great detail (or at all) the extent to which this was effectively implemented, thus causing identifiable losses. (Article 101(1) prohibits anti-competitive agreements and practices which have either the object *or* the effect of restricting competition.)

A business making a claim must therefore establish that:

- it purchased goods or services subject to the cartel, directly and/or indirectly;
- it was 'overcharged' for those purchases; and
- the total purchases multiplied by the estimated overcharge, plus interest, yield a material sum.

A purchase made directly from a cartelist is a direct purchase. An indirect purchase is where the cartel product is purchased via an intermediary. This usually occurs where the claimant purchases a product or service which incorporates a product or service subject to the cartel. So, a tyre manufacturer is a direct purchaser of synthetic rubber chemicals used to make tyres; a car manufacturer is an indirect purchaser when it purchases those tyres.

The court's assessment must consider whether some or all of the overcharge was 'passed on' down the distribution chain through higher prices. For a direct purchaser, pass-on relates to the next level down in the chain—ie, its prices to its customers. To the extent these increased, there may well still be losses suffered because the higher prices may cause lower volumes to be sold. For an indirect purchaser, pass-on also establishes the possibility of a loss; unless there was pass-on, the price paid by the indirect purchaser will not have increased. Which party bears which burden of proof in relation to pass-on issues has yet to be determined by the English court.

It is generally accepted that each cartelist is jointly and severally liable for the entire losses caused by the cartel, although it may be able to recover contributions from other cartelists for amounts exceeding its sole liability.

A central aspect of these cases is the question of the choice of national court in which a claim should be made. Most cartels in Europe affect the whole (or a very large part) of the European market and involve companies from a range of countries. Since the general

rule is that defendants should be sued in the court of their domicile, this means that in virtually all cases the claimant has a choice of forum. With each national court comes a different set of legal traditions and procedures. England and Ireland operate under common law, the remainder of the EU under variations of civil (codified) laws. There are many differences among the national civil procedures and professional rules of conduct that are potentially relevant to the choice of national court—in particular:

- the statutes of limitation, which vary widely;
- the extent of availability of disclosure of evidence (which is limited in civil law systems);
- the restrictions on types of risk transfer (lawyers' and others' fee agreements, insurances and litigation funding);
- the treatment of expert evidence;
- the standards and burdens of proof;
- specific rules relating to cartel claims (eg, the statutory rebuttable presumption of a 10% overcharge in Hungary, and the emerging approach of certain German courts to the treatment of pass-on as between direct and indirect purchasers);
- the remedies available (compensatory damages only, as in the English court?; restitution, based on the excess profits of the defendant?; or punitive damages?);
- the provisions covering payment of interest on losses (from what starting point and at which rate?);
- the speed of proceedings and judicial standards.

The English court is currently perceived as being a jurisdiction of choice for claimants in many cases, for a number of reasons—in particular:

- its expansive approach towards its jurisdiction to hear cases;
- the availability of extensive disclosure of evidence;
- the possibility of sophisticated risk transfers from claimants to lawyers, insurers and funders;
- its attractive rules in relation to interest on losses;
- the sophistication and experience of the judiciary;
- the relative speed of proceedings.

It should be noted, however, that defendants can also seek to determine in which national court a case is heard. In a recent case,[1] one of the Italian defendants sought to fire a pre-emptive 'Italian torpedo': it lodged applications in an Italian court for declarations broadly to the effect that it had not been involved in the cartel (despite being named in a Commission Decision) and/or that it had not caused any loss. The aim was to take advantage of rules which are designed to allocate exclusive jurisdiction to the national court which is first 'seized' of the matter. The claimant businesses have recently successfully persuaded the English court that, in these particular circumstances, it has jurisdiction to hear the claims,[2] thus obtaining the perceived benefits of the English court and avoiding the perceived disadvantages of the Italian court (principally, lack of disclosure and protracted proceedings).

The scale of the claims opportunities

The statute of limitations in the English court is six years from the date when the claimant became aware that it had suffered loss. A generally accepted view is that, due to the secret nature of cartels, this is likely to be no earlier than the date of the publication of the Commission press release concerning an infringement Decision. In the period 2005 to July 2010 the European Commission decided 38 cartel cases involving approximately 250 different businesses or groups, and imposed almost €11.5 billion in fines.[3]

Cartels vary considerably in their scope—geographical, products or services affected—duration and scale. Some sectors contain more repeat offenders than others. What is not in dispute is that thousands of businesses (and millions of consumers) have suffered losses as a result of cartel activities, often over periods of many years. Oxera's report for the European Commission, 'Quantifying antitrust damages: towards non-binding guidance for courts', contains an interesting reworking of the Connor and Lande (2008) empirical data on cartel overcharges.[4] This shows a median overcharge of 18% of the cartel price and a mean of 20%. This makes the 10% rule of thumb that has often been used (and which is a rebuttable presumption under Hungarian law) look conservative. The Connor and Lande data also suggests that international cartels, which are increasingly the major target of regulators, tend to have higher overcharges than national cartels: 26% as against 16%.

The English court is currently considering follow-on cartel damages claims in relation to air cargo services, certain synthetic rubber chemicals, car glass, gas insulated switchgear, certain vitamins, liquid crystal display panels and marine hoses.

Should businesses consider making claims as a matter of principle? Is there a fiduciary duty to do so?

Cartel follow-on claims are a relatively novel proposition and it is important to look at the broader interests of a business that has been a victim of a victim. First, the directors may owe a fiduciary duty to shareholders to at least consider whether to claim for material losses suffered. Some large companies, including Coca-Cola, already appear to consider

themselves subject to such a duty. Of particular relevance to this issue is the extent to which the risks—financial and commercial—of claiming can be transferred from the claimant to its legal and other advisers, insurers and/or litigation funders (see the 'Practical solutions' section below). Second, there is the possibility of a private deterrence effect through the development of a reputation for pursuing claims (formally or informally) as a matter of course. This should not only reduce the likelihood of becoming a victim but also generate competitive advantage. Third, there is a 'public good' argument: deterring cartels or limiting their operation should yield greater overall economic efficiencies and fairness, as a result of reducing the excess profits of cartelists and thus the reallocation of resources through the normal competitive process.

Moving from principles to pragmatism, there is also the interesting prospect of the internal legal function of a business operating as a profit rather than a cost centre. This approach has been pursued with considerable success by a number of companies such as DuPont, Michelin and Coca-Cola.

Significant perceived obstacles to making claims

Comments such as the following are often heard.

- 'We need to continue working with these guys—they still supply us, and switching would be tough.'
- 'Litigation only benefits the lawyers—they get paid regardless.'
- 'What if we lose—don't we have to pick up their legal and experts' fees as well as our own?'

Practical solutions

There are a number of practical solutions to these perceived obstacles, as set out below.

Commercial risks

The commercial risks of taking action against an important supplier can be significantly mitigated in a number of ways. First, alternative (non-litigious) ways of resolving the dispute can be explored. To be effective, these may need significant legal and economic support, if only in relation to the quantum of the damages. Second, resolution can go beyond cash compensation for past losses—it can also include future preferential commercial terms, which may even result in closer cooperation and a win–win; for example, greater quantities could be purchased, albeit at lower prices (but not necessarily lower margins). Third, if the main concern is fear of acting alone and of being vulnerable to retaliation, it often makes sense to explore acting together with a number of similarly placed victims in a manageable group with clear common interests and objectives. Risks can be shared, and settlement becomes a more likely prospect if the claimant group can deliver something approaching 'closure' or 'peace' to the cartelists. For example, a handful of claimants may represent a significant proportion of a cartelist's sales. Importantly, such groups can be formed using existing court procedures—there is no need for a 'class action' mechanism.

Financial risks

The financial risks and uncertainties of litigation are rightly perceived as an important consideration. What is less well understood is that these risks can, to a considerable degree, be transferred by the claimant business to others. Here is how it can work in the English court.

- **Claimant's own legal fees**: solicitors in England can work on the basis of a success fee (a 'Conditional Fee Agreement'). They can take all or part of the risk that the case is lost in return for an uplift on their fees up to a maximum of 100% of their hourly rates. If the case is won, their fees, including any uplift, are recovered from the losing party to the extent that they are reasonable. If the case is lost, no, or only partial, fees are paid. Fees are subject to assessment by the court in the normal way. In England, solicitors are not permitted to charge a contingency fee whereby the fee is calculated in relation to the damages recovered.
- **Claimant's other professional fees** (eg, for economists, barristers, etc): barristers can, and increasingly do, enter into success-fee agreements, as may other professionals (except expert witnesses). Some or all of these fees may be insured and/or funded by third parties (see below).
- **Defendant's legal and other costs**: the risk of liability under 'loser pays' can be transferred to specialist after-the-event insurers. In principle, cartel follow-on damages claims are attractive to certain insurers because there is already a binding liability finding. These insurers typically offer insurance on the basis that the payment of the premium is deferred until judgment or settlement, and is conditional upon success. The result is that, if the case is lost, the insurer pays to the limits of the indemnity. If the case is won, the premium is recovered by the claimant from the losing defendant, to the extent that it is reasonable.
- **Working capital**: insurance cover for estimated own costs does not provide cash for their payment. Often, a client (or group of clients) will jointly fund all or part of such own costs, or their law firm will fund them. A relatively new development is the growing market for

third-party litigation funding, whereby a variety of businesses fund litigation, in whole or in part, in exchange for a significant return. Such funders can, and often do, charge a percentage of damages recovered and/or a multiple of their investment, rising over time. This provides an alternative source of both risk transfer and cash flow. However, it is best used, as far as possible, in conjunction with insurance since, unlike insurance, the litigation funding costs are not recoverable from a losing defendant and therefore reduce the claimant's recovery.

The overall result is that, for strong cases of sufficient scale, the combination of risk-taking by the claimant's solicitor and possibly other professionals, after-the-event insurers and/or third-party litigation funders can transfer the vast majority of the financial risks of litigation. Furthermore, each of these professionals has to be extremely careful in selecting the cases into which they put so much investment: the claimant therefore has the reassurance that its lawyers and insurers or funders have put their money where their mouths are, and that the interests of all are arguably fundamentally much more aligned than in the case of a normal retainer under which the professionals are paid regardless of the result achieved. The risk–reward ratio is therefore significantly enhanced.

Conclusion

Businesses which suffer material losses as a result of cartel activities should consider seriously how best to recover them, in the knowledge that there are practical solutions to many of the perceived risks and obstacles of taking action—should it be necessary—in the English High Court.

Rob Murray

[1] *Cooper Tire & Rubber Company and others v Shell Chemicals UK Limited and others*, [2009] EWHC 2609 (Comm); *Cooper Tire & Rubber Company Europe Limited and others v Shell Chemicals UK Limited and others, and Dunlop Oil and Marine Limited and others v Dow Chemical Company Limited*, [2009] EWHC 1529 (Comm).
[2] *Cooper Tire & Rubber Company Europe Limited and others v Dow Deutschland Inc and others*, [2010] EWCA Civ 864.
[3] European Commission document 'Cartel Statistics', available at: http://ec.europa.eu/competition/cartels/statistics/statistics.pdf.
[4] Oxera and a multi-jurisdictional team of lawyers led by Dr A. Komninos (2010), 'Quantifying antitrust damages: Towards non-binding guidance for courts', prepared for the European Commission Directorate General for Competition, January. 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.