INTERNATIONAL COMPETITION DAMAGES LITIGATION IN THE UK

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Agenda

- State of play in EU and UK:
  - Cases afoot EU wide
  - Recent UK trials/settlements

- Benefits/drawbacks of UK civil litigation system

- Jurisdiction

- Collective actions in the UK

- Access to evidence

- Proving damages in practice
  - Proving damages
  - Directs & indirect purchasers
  - Umbrella damages

- Settlement
Overview – Extent of Art. 101 cartel damages claims in Europe (1 Jan. 2009)

Based on publicly available information

Hausfeld & Co LLP October 2014
Overview – Extent of Art. 101 cartel damages claims in Europe (1 Sep. 2014)

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Overview
Extensive Art. 101 cartel damages claims in Europe (1 Sep. 2014)

- Air Cargo
- Car Glass
- Carbon Graphite
- Copper Tubes
- Copper Fittings
- CRTs
- Feed Phosphates
- GIS
- Interchange Fees – MasterCard
- Interchange Fees – Visa
- LCDs
- Marine Hose
- Paraffin Wax
- Pharma – Pay for Delay
- Synthetic Rubber
- Vitamins

- elevator
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- Car Glass
- Beer
- Bitumen
- Paraffin Wax
- Construction
- Elevators & Escalators
- GIS
- Shrimps
- Pre-Stressing Steel
- Sodium Chlorate

- Asphalt
- Auto Spare Parts
- Hydrogen Peroxide

- Air Cargo
- Car Glass
- Cement
- Coffee
- Elevators
- Hydrogen Peroxide
- Paper
- Railway Track
- Refrigeration Compressors

- Fruit Packaging
- Synthetic Rubber
- Pharma – Pay for Delay

- Sugar

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State of play – UK cases

- Most major EU cartel decisions lead to one or more follow-on claims in UK
  - Air Cargo, LCD, Autoparts, Air Passenger Fuel Duty, Cooper Tubes, Paraffin Wax etc
- Claims so far overwhelmingly B2B, not B2C (Replica Football Shirts)
- Tendency of cases to settle on doorsteps of Court (or during trial) due to multiple uncertainties on legal position:
  - Cooper Tire
  - National Grid
  - Deutsche Bahn
- Settlements confidential but known to be hundreds of millions of £ cumulatively
- Cartel follow-on cases only small part of antitrust litigation – multiple standalone cases and arbitrations in UK
Benefits/drawbacks of UK forum

• Pro:
  • Access to documents almost on par with US discovery
  • Generous approach to jurisdiction (more later...)
  • Judges high quality & many with competition experience
  • London tried and tested forum for international disputes
  • Not an Italian torpedo

• Con:
  • Very expensive (although novel funding models emerging)
  • Complex & time-consuming for jurisdiction disputes
  • Cooper Tire: A company that does not appeal the Commission decision, or does so unsuccessfully, is bound in follow-on litigation to find that another, unrelated company was party to the cartel with them, even if that other company has since overturned the finding against them.
  • Court dress...
Jurisdiction

- UK subject to usual Judgments Regulation private international law rules:
  - Sue D in domicile (Article 2)
  - D enters an appearance (Article 24)
  - Jurisdiction agreement (does it cover competition law claims)? (Article 23)
  - Tort claims: sue either in the place where the damage occurred or in the place of the event giving rise to that damage (Article 5(3)) – see Cooper Tire (“I have, I confess, a sense of unease, in concluding, in the context of a Europe-wide cartel orchestrated at meetings in several countries, that the place where the harmful event occurred is England because that is where the first meeting took place. That seems to me to be unrealistic. In truth the harmful events occurred in several countries.”)
  - Closely connected claims (Article 6(1))

- Main novelty in UK is that English or foreign claimant seeking damages for loss suffered as a result of a cartel can seek to recover the entire loss in the English courts, irrespective of where the loss was suffered so long as there is an English subsidiary that implemented the offending anti-competitive conduct (Provimi)
Collective actions in the UK (1)

• Historically limited in scope in cartel cases: *Emerald v BA*

• Scope for using
  • test cases (*Courage v Crehan*)
  • joined claimants (*Devenish v Aventis*)
  • consolidation (*Teva v Reckitt Benckiser*)
  • Group Litigation Orders (*Prentice v Daimler Chrysler*)
  • Section 47B of the Competition Act 1998

• But limited impact in practice
Collective actions in the UK (2)

- New Consumers Rights Bill:
  - Will apply to follow-on/stand-alone
  - Will apply to consumers/businesses
  - Claims must be “eligible for inclusion” in collective proceedings (similar to US certification process)
  - Collective proceedings can be opt-in or opt-out
  - Collective proceedings can only be brought by an approved representative
  - Various safeguards designed to avoid US excesses
Access to evidence (1)

• Current position:
  • Governed by civil procedure rules in 28 Member States, subject to equivalence etc
  • *Donau Chemie & Pfleidder* encourage some access to leniency materials but leave issue to national courts

• Variation in approach:
  • *National Grid (UK)*. Disclosure of statement of objections, responses to requests for information and confidential version of Commission decision permitted
  • *V4 (Germany)*. Interests of leniency applicant take priority – only anonymised version of decision and list of secured evidence disclosed
  • *Netherlands*. NMa opposed to giving leniency materials but possible legislative solution
Access to evidence (2)

• Damages Directive:
  • Creates minimum harmonisation on disclosure side based on “proportionate” disclosure (Article 5(1)), request specificity (Article 5(2)), and protection of business secrets (Article 5(4))
  • Creates various bars on disclosure:
    • Absolute protection for voluntary immunity/leniency corporate statements and settlement discussions (Article 6(1))
    • Temporary protection for, e.g., responses to RFIs, SO (Article 6(2))
  • Member States must have sanctions for document destruction and non-compliance

• But differences will certainly remain even with harmonisation
Proving damage

• Damages generally accepted as compensatory so object is but for price and how this affected profits, volumes etc

• Economic evidence generally based on various forms of regression model, e.g., before and after method

• Damages Directive:
  • Presumption of loss (Article 16(2)): rebuttable by Defendant
  • Binding NCA/court decision “irrefutably established” (Article 9)
  • Decision from another member state “evidence” of infringement (Article 9). Article 6 ECHR?

• Joint & several liability (Article 16(2)) but immunity applicant liability limited to own damage
Direct & indirect purchasers (1)

• Today, there is no harmonisation on whether cartel can argue that plaintiff passed on loss

• Different positions in Member States:
  • UK probably allows defence (see Emerald, Devenish, Newsom) since damages are compensatory under English tort law.

• Key issue of burden of proof also unresolved:
  • Plaintiffs argue that issue of pass on is simply one of mitigation of loss, so defendant bears burden
  • Defendants argue that as damages are compensatory plaintiff must show an actual loss, which is predicated on an absence of pass on by plaintiff

• Uncertain position is one of main reasons why cartel follow-on cases settle
Direct & indirect purchasers (2)

- Damages Directive:
  - Pass-on defence available (Article 12)
  - Burden is on defendant, who may reasonably require disclosure from plaintiff and third parties (Article 12)
  - Indirect purchaser *deemed* to have proven pass-on to him/her where defendant infringed competition law, there was an overcharge to the direct purchaser, and indirect purchaser procured goods/services that were subject of cartel (Article 13(2))
  - But Article 12 and 13(2) presumptions are contradictory and may raise problems in practice
  - Some rules on avoiding double recovery (Article 15) but (1) vague, (2) no concrete mechanisms proposed and (3) raises inter-Member State complexities in practice
Umbrella damages (1)

• If A, B, and C are the only sellers in a market & form a price-fixing cartel resulting in prices being set above the competitive price, it is easy to see how affected purchasers can sue one or more of them for the overcharge.

• But suppose A & B are in the cartel, but C is not. C nonetheless raises its price because it sets price according to the prevailing market rate – in other words C raises prices under the artificiality of the A/B “umbrella” increase. Can purchasers from C sue A/B for damages for breach of statutory duty (not to infringe competition law) for the excess they have paid to C?
Umbrella damages (2): good in law?

• Con
  • Such claims are bad in law: if C raises its prices, that is an unilateral act of C unconnected with the A/B price-fixing agreement
  • Even if not automatically bad in law such claims should be presumed too remote since they are inherently speculative, and necessarily involving highly complex and theoretical damage calculations about how non-cartelists set their prices (cost of production, marketing strategy, elasticity of demand, and the price of comparable items)

• Pro
  • The economic basis for damage is clear: C will face an increase in demand due to the substitution away from the A/B cartel. In this circumstance, C’s typical profit maximising is to increase its price, even if entirely ignorant of the cartel
  • There can be no a priori policy bias as to causation & proof: it depends on the facts. Indeed, the inquiry as to damage in umbrella cases is not conceptually different in any material sense to claims from those who had a contractual link with the cartelists
Umbrella damages (3): *Kone*

- The principle that any individual is entitled to claim compensation for loss sustained by him where there is a causal relationship between that loss and an infringement of the competition rules follows from EU law itself (*Manfredi*)
- The right of any individual to claim compensation for such a loss caused by a violation of the competition rules strengthens the working of EU competition law, since it deters anticompetitive agreements (CJEU, §23)
- A phenomenon such as umbrella pricing is recognised as one of the possible consequences of a cartel: market price is one of the main factors taken into consideration by an undertaking when it determines the price at which it will offer its goods or services. If so, a non-cartelist *may* raise its own price during a cartel in a way that it would not have had their been normal competition (i.e., but for the cartel) (CJEU, §28-29)
Umbrella damages (4): *Kone*

• Thus, even if the determination of an offer price is regarded as a purely autonomous decision, taken by the undertaking not party to a cartel, it is a decision taken by reference to a market price distorted by that cartel and, as a result, contrary to the competition rules (CJEU, §29)

• The cartel members cannot “*disregard*” this fact (if it is a fact), i.e., that the cartel contributed to the distortion of price formation mechanisms governing competitive markets

• Umbrella claims cannot automatically or *a priori* considered bad in law (CJEU, §33). Damage is still subject to proof of causation in fact under the relevant national law rules: it must be established that the cartel at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently, and that those circumstances and specific aspects could not be ignored by the members of that cartel (CJEU, §34)

• In short: claimants have standing in law to bring umbrella claims but their success depends entirely on proof of causation in fact, under national law rules.
Umbrella damages (5): Causation & Kone

• Whilst Kone purported to leave the question of causation to national courts, some “shots across the bow” were fired:
  • There must be a sufficiently direct causal nexus between the harmful conduct and the damage alleged (AG Kokott, §34)
  • However, a direct causal link does not mean a “single causal link:” there is sufficient support for the assumption of a direct causal link if the cartel was at least a contributory cause of the umbrella pricing (AG Kokott, §36)

• But how much of a “contribution” is required?
  • The “but for” test appears relatively strict. However, English tort law sometimes recognises that it may be sufficient if the defendant's wrong made a “material contribution” to the damage, even where it is acknowledged that the contribution was not the sole or even the main cause of the harm (Bonnington Castings Ltd v Wardlaw [1956] A.C. 613)
  • Will this apply to umbrella claims?
Umbrella damages (6): Causation & *Kone*

- Is damage a binary question or is there scope for disaggregation?
  - *Thompson v Smiths Shiprepairers (North Shields) Ltd* [1984] Q.B. 405

- What about burden of proof?
  - In English law, burden almost always on claimant
  - But Damages Directive creates a rebuttable presumption that an indirect purchaser need only prove that an infringement of competition law resulted in an overcharge for the direct purchaser and that he purchased goods that were the subject of the infringement (Article 14). Parity of reasoning with umbrella claimant?

- Why limit umbrella compensation principle to agreement cases?
  - Excessive pricing claims?
Umbrella damages (7): in practice

• Did non-cartelist actually raise prices during the relevant period?
  • *Sine qua non* for claim
  • But effects may arise where competition is mainly quantity based

• The extent of market coverage of the cartel
  • Predicate is that those *outside* the cartel mimic, in part, cartel price effects
  • Greater coverage implies greater likelihood of market-wide effect
  • But even in case of 100% coverage may be effects outside relevant market

• Extent of substitution between cartel & non-cartel products
  • Whether products are homogenous or differentiated. Umbrella damages much less likely in latter case

• Contractual protection mechanisms
  • Locked-in or fixed prices
  • Cost-plus pricing

• How prices are actually set in the market
  • Are non-cartelists price-takers?
  • Do they price by reference to market price?
Umbrella damages (8): US law

• See accompanying separate handout

• *Sanner v. Board of Trade*, 62 F.3d 918 (7th Cir.1995)
  
  • The Board depressed the price of soybean future. A correlation between future and cash market prices existed. They were closely interrelated markets. Plaintiff soybean farmers affected by the depressed prices were therefore found to have antitrust standing on the basis that they were cash purchasers of soybean. Commodity (future) traders also had standing

• *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469 (7th Cir. 2002)
  
  • Case related to fixing the price of copper futures on COMEX exchange market. There was a clear contractual linkage (rigid price formula) between prices of physical copper cathode and copper futures prices. The contract price it paid its suppliers for copper was directly and explicitly based on the Comex settlement price, and therefore the manipulations directly and predictably had an impact on that price

• Parallels with LIBOR, EURIBOR, forex & commodity cases in EU?
Settling multi-party claims

• Very difficult if claims arise at multiple levels, direct, indirect, umbrella

• B2B settlements generally easier if plaintiff is ongoing customer but problems of discriminating

• Practical problems:
  • How to apportion responsibility. Market share?
  • How to bring in cartelist not part of claim (Cooper Tire)
  • How to stop early settler being brought back in via contribution claims (indemnity?) See Article 18 Damages Directive

• Global settlements even more difficult but novel methods appear to have worked well (Parker ITR (Marine Hose) (D put 16% of non-US affected product revenues in escrow for distribution to direct/indirects))