A fast evolving landscape: update on follow-on cartel damages litigation in the EU

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Introduction – a fast-evolving landscape

- Dynamic tension between EU law and national procedural autonomy

- A fast-evolving landscape:
  - EU Damages Directive 2014/104/EU - partial harmonisation plus principles of equivalence and effectiveness
  - Multiple claims in multiple jurisdictions at multiple levels of the supply chain in respect of EU-wide or worldwide cartels (e.g. Airfreight)

- Settlement is the ultimate objective but law is not yet settled
Overview – a landmark year

- **Legislation:**
    - Member States must implement into national law by 27 December 2016; no retroactive effect
  - Collective actions (Legislation in France and UK in the light of Commission Recommendation)

- **Case law:**
  - Jurisdiction *(CDC v. Evonik Degussa and Others)*
  - Access to documents *(Airfreight, Hydrogen Peroxide and Perborate)*
  - Limitation *(Arcadia Group Brands Limited and others v Visa Inc and others)*
  - Damages *(Kone v. ÖBB-Infrastruktur AG)*
Access to evidence (Articles 5 to 8)

- Partial harmonisation of rules in respect of disclosure of evidence
- Presumption in favour of disclosure of evidence by defendants, claimants and third parties (Article 5)
- Additional provisions concerning evidence “included” in the file of a competition authority (Article 6)
• Access to evidence (Articles 5 to 8)

  • No disclosure of leniency statements or settlement submissions (the “Black List”) (Article 6(6))

  • Certain categories of documents may only be disclosed once competition proceedings are closed (the “Grey List”) (Article 6(5)) (see recital 25 e.g. Statement of Objections, response to information request)

  • All other evidence may be disclosed subject to relevance and specificity (the “White List”) (Article 6(9))

  • Directive is without prejudice to the rules and practices on public access to documents under Regulation 1049/2001

  • No change to National Courts’ freedom to request information directly from the Commission (Article 15(1) of Regulation (EC) No. 1/2003)
EU Damages Directive – key elements (3)

- Full compensation (Article 3)
  - actual loss (*damnum emergens*) and loss of profit (*lucrum cessans*); no punitive damages
  - interest – simple, compound?

- Limitation (Article 10)
  - Minimum of five years (Article 10(3))
  - Period begins to run at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated (Article 10(4))
  - Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know (Article 10(2)):
    - of the behaviour and the fact that it constitutes an infringement of competition law
    - of the fact that the infringement of competition law caused harm to it
    - the identity of the infringer
EU Damages Directive – key elements (4)

- **Joint and several liability (Article 11)**
  - right of contribution between co-infringers; this is limited in respect of immunity recipients

- **Presumption of harm (Article 17)**
  - in particular by effect of cartel on prices
  - presumption is rebuttable – this is another important battleground for experts
EU Damages Directive – key elements (5)

- **Passing on defence (Articles 12 to 16)**
  - Burden of proof on defendant to show overcharge was passed down the supply chain
  - Commission to issue guidelines on how to quantify pass on to indirect purchasers
  - National courts must take due account of related actions in other Member States from claimants at different levels of the supply chain (Article 15)
  - Key battleground for forum shopping and experts
Collective Actions – a new frontier (1)

- Commission Recommendation of 11 June 2013
  - non-binding principles; changes to be implemented by Member States by 26 July 2015
  - all breaches of EU law not just EU competition law
  - opt-in principle
Collective Actions – a new frontier (2)

  - implements opt-in principle by providing for opt-in collective actions

- UK Consumer Rights Bill
  - deviates from Recommendation by proposing to implement opt-out collective actions
  - Competition Appeal Tribunal – draft rules for certification of collective actions
Jurisdiction - a key battleground (1)

- **Case C-352/13 CDC v. Evonik Degussa and Others**
  - AG Jääskinen’s Opinion of 11 December 2014 – once court had properly acquired jurisdiction under Article 6(1) of Brussels I Regulation 44/2001 this would not be affected by withdrawal of claim against anchor defendant provided this did not amount to an abuse
  - If followed by ECJ, this will increase flexibility of claimants and anchor defendants in crafting settlements
Multiple claims in multiple jurisdictions at multiple levels of the supply chain

- For example, *Air Cargo* - UK, Netherlands, and Germany with indirect and direct purchasers

- Revised Brussels Regulation 1215/2012 of 12 December 2012 applies from 10 January 2015 – Article 30 stay in favour of court first seised is discretionary for national court

- Article 15 EU Damages Directive

- High risk of conflicting national decisions on e.g. passing on; high likelihood of references to ECJ on interpretation of Brussels Regulation
Access to documents – Regulation 1049/2001

• **Schenker - disclosure of Commission Case File and Decision**
  
  • Case T-534/11 – *Schenker AG v Commission*, 7 October 2014 – Schenker sought access to Airfreight Case File and Decision pursuant to Transparency Regulation 1049/2001
  
  • Case File - the Applicant has not shown why access to the documents included in the case file or the unredacted Airfreight Decision are necessary to the extent required to establish a superior public interest justifying the access based on Article 4(2) of Regulation No 1049/2001
  
  • Decision – Commission has infringed Article 4(6) of Regulation No 1049/2001 by not providing to the Applicant a non-confidential version of the Airfreight Decision in which the information which had been redacted, including confidentiality, continued to be claimed by the undertakings concerned.

• *Schenker* establishes high burden on claimants to obtain case file from Commission via Regulation 1049/2001
Case T-345/12 – Akzo Nobel v Commission; Case T-341/12 – Evonik Degussa v Commission, 28 January 2015

- Commission proposed to publish a fuller non-confidential version of its Decision in respect of the Hydrogen Peroxide and Perborate cartel in 2011 after initially publishing a more redacted version; in 2012 President of the Court imposed interim measures preventing publication

- The information that the Commission proposed to publish consisted of *inter alia*, names of the products concerned by those contacts and agreements, figures concerning the prices applied, and the objectives pursued by the applicants as regards prices and the allocation of market shares; this information was over 5 years old and therefore no longer a business secret that could be protected pursuant to Article 30(2) of Regulation 1/2003 (*Evonik Degussa*).

- General Court (Akzo Nobel) held that “the applicants cannot legitimately oppose the publication, by the Commission, of information revealing the details of their participation in the infringement penalised in the…decision on the ground that such publication would expose them to an increased risk of having to bear the consequences, in terms of civil liability, of their participation in that infringement”; also applicants did not have legitimate expectation of no further publication.
Access to documents – current state of play

- **Commission File:**
  
  EU Damages Directive will allow claimants access to the Commission File with carve out for leniency statements and settlement documents

- **Commission Decision:**
  
  *Schenker* requires Commission to issue Decision redacted of all material that is subject to confidentiality claims pursuant to Regulation 1049/2001;

  Where information is no longer considered to be a business secret pursuant to Article 30(2) of Regulation 1/2003, the Commission may decide to publish a revised version and has a broad margin of discretion in that regard (*Akzo Nobel*); ambit of business secrecy is currently at issue in Case T-462/12 *Pilkington v Commission*

  Pursuant to e.g. *Pergan*, the Commission’s margin of discretion must be limited by reference to fundamental rights such as the presumption of innocence; this is on appeal in *Emerald Supplies v BA*
• Arcadia Group Brands Limited and others v Visa Inc and others [2014] EWHC 3561 (Comm), High Court England & Wales, 30 October 2014

  • Visa was sued for charging anti-competitive MIFs since 1977 for over £1 billion in damages
  
  • Visa applied to strike out the claim for the period between 1977 and 2007 (and thereby around half the value of the claim) on the basis that the claimants were out of time under the Limitation Act 1980.
  
  • The claimants relied upon s.32 Limitation Act to argue that Visa had concealed relevant facts and that they could therefore not have sued before 2007
• *Arcadia Group Brands Limited and others v Visa Inc and others* [2014] EWHC 3561 (Comm)

  • Simon J balanced on the one hand the important public interest that claimants “*should not be prejudiced where they lack sufficient information to advance a claim*” and on the other “*the general policy of limitation legislation, the public interest in ensuring certainty and finality in litigation*”

  • this was “*not a case of a ‘secret cartel’ operating over many years without the knowledge of victims and the authorities*” but one which was a matter “*of public knowledge, which had been notified to the competition authorities*”

  • Simon J concluded that the particulars of claim were derived from material available before the start of the six year limitation period (e.g. Commission and OFT decisions)

  • Article 10(2) EU Damages Directive may allow a more claimant-friendly approach
Case C-557/12 Kone v. ÖBB-Infrastruktur AG, ECJ Judgment of 5 June 2014

Question referred to the ECJ by the Oberster Gerichtshof in Austria was: “whether Article 101 TFEU precluded the interpretation and application of domestic legislation enacted by a Member State which categorically excludes, for legal reasons, any civil liability of undertakings belonging to a cartel for loss resulting from the fact that an undertaking not party to the cartel, having regard to the practices of the cartel, set its prices higher than would otherwise have been expected in the absence of the cartel”

ECJ concluded that “[t]he full effectiveness of Article 101 TFEU would be put at risk if the right of any individual to claim compensation for harm suffered were subjected by national law, categorically and regardless of the particular circumstances of the case, to the existence of a direct causal link while excluding that right because the individual concerned had no contractual links with a member of the cartel, but with an undertaking not party thereto, whose pricing policy, however, is a result of the cartel that contributed to the distortion of price formation mechanisms governing competitive markets”
• **Case C-557/12 *Kone v. ÖBB-Infrastruktur AG***

  • Consequently, the victim of umbrella pricing may obtain compensation for the loss caused by the members of a cartel, even if it did not have contractual links with them, where it is 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. It is for the referring court to determine whether those conditions are satisfied.

  • This case may provide some pointers as to how the ECJ will resolve future questions of interpretation in the wider area of follow-on damages litigation: the principle of effectiveness will trump “categorical” national procedural obstacles but the detailed factual analysis as to whether damages are recoverable in the particular circumstances of the case will still need to be carried out at national level.
England & Wales, Netherlands and Germany – will the Directive “level the playing field” for other EU jurisdictions?

- Access to documents
- Funding – in-house claimants’ firms; third party funders
- Cost
- Procedural flexibility – alternative dispute resolution including e.g. mediation
- Claimants’ bar
- Claims vehicles – seem to be allowed in Finland but not in Germany