Civil cartel litigation in Europe
The changing landscape

The recent preliminary ruling in the Provimi case cleared the way for foreign claimants to commence civil litigation in England against European cartel members. Marc Hansen, Brian Sher and Melissa Cacciotti analyse the features of the case and consider its implications.

On 28 April 2003, the English High Court held in Provimi Ltd v Roche Products Ltd et al ([2003] QBD, approved judgment at 6.5.03) that as long as it had jurisdiction over one of the claimants in an action, it would allow related claims by non-English companies to be brought in the same action. The case is significant in that it shows how an English court can assert jurisdiction over claims between entities from other European states in respect of products purchased at inflated cartel prices across Europe.

In light of this development, this article:

• Outlines the facts surrounding the Provimi case and analyses its most striking features.
• Highlights the issues to be resolved at trial.
• Considers the implications of the judgment.

**The Provimi case: facts and features**

The ruling in the Provimi case allows damages claims against Roche and Aventis, two of the parties found by the European Commission to have participated in the Vitamins cartel, to proceed to trial (Case COMP/E-1/37.512 – Vitamins of 21 November 2001 (OJ L 6/1)).

The case involves two damages actions against a number of companies in the Roche and Aventis groups (not all UK-based) by two English companies and one German company, each of which had been a purchaser of vitamins from companies within the Roche and Aventis groups. The judgment deals only with procedural issues raised by the defendants in an application to strike out (dismiss) the actions. The judge rejected the procedural defences, and the case will now proceed to trial.

The actions are construed under English law as private law claims for damages for the tort of breach of statutory duty (for failure to comply with Article 81 EC Treaty which prohibits agreements restrictive of competition). The claims rely on contracts, between some of the parties, for the purchase of vitamins. The actions rest heavily on the Commission decision which established the existence of the cartel and the parties to it.

The most striking features of the Provimi case are:

• That jurisdictional hurdles were overcome to allow a claim to proceed in England where the defendants were domiciled outside the UK, and where a claimant was not only domiciled outside the UK, but also purchased the vitamins outside the UK.

• The use of the EC law concept of “undertaking” to disregard legal structures within a corporate group.

• The broad *prima facie* approach to causation, in particular as regards the claim in an English court for purchases by a German company in Germany.

**Jurisdictional hurdles.** The jurisdiction issue in this case was key since several claimants and defendants were not domiciled in the UK. Moreover, all the contracts entered into between the claimants and the applicants for supply of vitamins had foreign jurisdiction clauses. The situation was further complicated by the fact that the parties to the contracts were not the same legal entities as those found responsible by the Commission for the cartel activities. As a result, the proceedings depended in the first place on the claimants being able to show that the English courts had jurisdiction.

Any application to establish jurisdiction is by no means certain and the arguments raised in, and facts of, this case are complex. However, by a combination of some of the claimants and some of the defendants being English domiciled the claimants succeeded in establishing English jurisdiction. This allows a series of claims, including one arising out of a loss suffered by a German claimant which purchased vitamins from a German defendant, to proceed to trial in England.

Before allowing the claims to proceed to trial, the court also had to consider whether the jurisdictional (choice of forum) clauses in the purchasing contracts prevented the case from being heard in England (as under provisions of Council Regulation 44/2001 and the Lugano Convention, an agreement among the parties choosing the jurisdiction of a particular member state gives exclusive jurisdiction to the courts of that member state). Significantly, the court found that the jurisdictional clauses in the purchase agreements had not been intended to cover the tort claims raised in this case.

**Undertakings.** In addition to the jurisdiction issue, the parties had to make a *prima facie* case showing sufficient linkage between the entities with which the claimants had contractual relations and the entities found responsible for the cartel activities.

The companies with whom the claimants had purchasing contracts were not the same legal entities as those found to have participated in the cartel. However, the claimants sought to show that those companies were in each case part of the same *undertaking* as the companies sanctioned in the Commission decision.

On this issue, the court followed the EC definition of undertaking (which does not have an equivalent in English law), holding that it was possible to say that the actions of legal entity A were those of legal entity B, so long as A and B were part of a single economic unit. This meant there was no need to show that the specific defendant entities knew about the cartels. Mr Justice Aiken stated in the judgment that “the mind and will of one legal entity is, for the purposes of Article 81, to be treated as the mind and will of the other entity” and that there was no need “to ‘impute’ the knowledge or will of one entity to another, because they are one and the same.”

**Prima facie causation.** The claimants also sought to show that the companies with whom they had purchasing contracts implemented the cartel agreements by offering vitamins at the agreed prices. On this issue, the court focused on whether the claimants would have been able to buy vitamins at lower prices and from other entities if there had been no cartel. It found that the cartel might have increased prices and thereby *prima facie* caused a loss. In doing so, the judge ruled that where the defendant entities implemented the cartel by selling at the prices agreed by entities within their respective undertakings “then their action in ‘implementing’ the cartel could cause the loss that the claimants allege”.

As a result of his findings, the judge appears to have accepted that the link between the German claimant, Trouw Germany, and the English defendants was established on the basis that but for the cartel, Trouw Germany might have bought from the English compa-
nies at lower prices – even though it actually bought from Roche Germany.

Issues to be resolved at trial
The *Provimi* judgment will again raise difficult and new issues at trial. Among the critical issues will be the measure of damages given that the English courts have not as yet awarded damages for breach of UK or EC competition law. In this regard, the judgment in *Arkin v Borchard Lines Ltd and others* ([No. 4] [2003] EWHC 687 (Comm)) gives a brief indication as to how English courts assess damages in competition cases. Although the judge in this case held that there had been no breach of either Articles 81 or 82 (abuse of a dominant position), he briefly commented on what he perceived to be the correct approach to the quantification of damages. He considered that the starting point was the relevant market as it existed at the time of the alleged infringements. It was then necessary to ask what loss, if any, the infringements had, as a matter of common sense, directly caused to the claimant. For this purpose it was necessary to reconstruct the most likely market conditions assuming that there had not been an infringement of Articles 81 and 82.

The pending case of *Crehan v Courage Ltd (and others)*, involving a party to an Article 81 violation suing another party to the violation for damages, is expected to provide more substantial guidance on this issue. While not a cartel case, it will cast light on the relationship among participants in a cartel and might indicate whether, and in what circumstances, one party to a cartel has grounds for seeking damages against another party. (This follows a European Court of Justice preliminary ruling on this issue in a related proceeding.)

Implications of the Provimi judgment
The *Provimi* judgment has wide reaching implications for forum shopping in damages litigation arising out of antitrust violations. Within Europe, the English courts have often been preferred by claimants because:

- The disclosure rules in England allow greater discovery than that available in continental European countries (where disclosure is often severely restricted or non-existent).
- Damages awards by English courts are likely to be higher than those granted by continental European courts, and can encompass, for example, exemplary (punitive) damages, which are not typically seen on the continent.

Following *Provimi*, English courts will become an increasingly attractive forum for civil cartel litigation. The case might also be expected to encourage a wide range of purchasers of products and services affected by cartels to seek redress in the English courts.

However, the issue of “contribution” (whether parties can recover a portion of damages awarded to third parties from their fellow cartel members) is key to predicting and influencing how cartel members will react to future civil damages actions. If there is no contribution in such cases, a situation similar to that in the US may arise, where there is a strong incentive for defendants to settle early for a low amount while delivering to the plaintiff all the evidence needed to pursue the other cartel members. The other cartel members are then forced to settle for far larger amounts, which they cannot recover against the “early settler”.

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