The Pressures to Settle Cartel Claims: Reaping the Benefits in Follow-On Actions

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June 2015

CPI COMPETITION POLICY INTERNATIONAL

Introduction

In the ongoing battle against cartels, the Damages Directive (Directive 2014/104/EU) promises to be a potent weapon for claimants bringing private damages claims once Member States have implemented it into national law.

But, as the recitals to the Damages Directive acknowledge, follow-on damage claims are only one element of an effective private enforcement regime for competition law infringements. One of the Damages Directive's aims is to encourage infringers to settle early – both with the investigating authority and with private claimants.

The Directive also offers benefits to whistleblowers – in particular, the recipient of immunity will only be liable to damages claims brought by its own direct and indirect purchasers (rather than purchasers of fellow cartelists).

Immunity recipients: limiting follow-on liability

Where a business discovers that it may have been involved in an unlawful cartel, the immediate benefits of whistleblowing to the competition authorities are plain: under the Commission's leniency programme, the first company to disclose the existence of a cartel may be awarded 100% immunity from fines; even if a company is not the first to blow the whistle, it may still obtain a significant reduction in any fine imposed.

The Damages Directive provides an important added incentive to blow the whistle, as it places limits on the immunity recipient's liability in follow-on damages claims. The general position under Article 11 of the Damages Directive is that all defendants in follow-on damages claims will be jointly and severally liable for all of the harm caused by the cartel. This includes "umbrella" claims brought by injured parties who did not purchase goods or services (either directly or indirectly) from any of the members of the cartel but were charged higher prices by non-cartelists due to competition being restricted and therefore prices being generally higher in the market.

This could potentially result in any member of the cartel, regardless of the extent of its participation in the cartel or its share of fault, being liable for the whole of the damage caused to the market. That said, there are certain exemptions provided for SMEs and a general right to seek contributions from other members of the cartel. Nevertheless, the threat of facing full primary liability is considerable.

The added incentive for the successful whistleblower is that the immunity recipient will not be jointly and severally liable for the whole of the harm caused to the market (Article 11(4)). It will only be held to be liable for the harm caused to its own direct and indirect purchasers (and any contributions paid to other cartelists are limited in the same way).

However, the full extent of this protection for immunity recipients is watered down by an exception in cases where injured parties are unable to obtain full compensation from the other cartelists. This ensures that, whilst an immunity recipient is in a more favourable position than the other cartelists, this is not ultimately at the expense of cartel victims.

Leniency and settlement procedures: protection from disclosure

A key feature of both the leniency and settlement regimes (in contrast to commitment decisions, where no finding of an infringement is made, for example) is the requirement to admit culpability i.e. that the infringer did in fact participate in the unlawful cartel.

However, the Damages Directive recognises that infringers may be discouraged from making such an admission if statements made during preceding leniency or settlement discussions could be subsequently disclosed and used against them by claimants in follow-on damages claims. The Directive therefore expressly prevents any leniency statements or settlement submissions from being disclosed to claimants for the purposes of any follow-on damages claims (Article 6(6)).

Although this protection was previously held to be necessary by the ECJ in *Pfleiderer,*[1] the certainty given by this codification and the harmonisation across the EU will be welcomed by many, particularly given the current divergence between Member States' national laws in respect of disclosure and legal privilege. Many jurisdictions, such as England and Wales, will already recognise a right of 'without prejudice' privilege over settlement discussions. The recent English case of *Property Alliance Group Ltd v Royal Bank of Scotland Plc*[2] established that this right extends to settlement discussions with a regulator as well as in civil litigation. However, this may not be the case in other jurisdictions.

The absolute restriction from disclosure in the Damages Directive also avoids the risk that a party settling with a regulator could be found to have waived their privilege over those communications by referring to the outcome of that process (as the English High Court found had happened in the *Royal Bank of Scotland* case).

However, it is perhaps difficult to reconcile the Damages Directive's fixed approach to disclosure with the need to ensure in EU competition law that national courts have the opportunity to balance the relevant interests involved. Arguably at least, this could leave the Damages Directive open to a challenge that it is incompatible with Article 101 of the Treaty on the Functioning of the European Union (TFEU), from which it derives.

In particular, Article 54 of the Damages Directive provides that the effectiveness of Articles 101 and 102 TFEU and the proper functioning of the internal market can be best achieved at an EU level. The Damages Directive has been adopted to that end, in accordance with the principles of proportionality and the principle of subsidiarity as set out in Article 5 TFEU. In *Pfleiderer* and *Donau Chemie*[3] the ECJ emphasised the principles of equivalence and effectiveness of rights from which individuals derive the direct effect of EU law (such as

Article 101 TFEU). The ECJ considered that any rigid rule, which provided either for absolute refusal to grant access to documents relating to a cartel, or for the granting of access as a matter of course, would be liable to undermine the effective application of Article 101 TFEU. Although those cases related to national rules on disclosure, it is by analogy not easy to reconcile the rigid rule in the Directive with the balancing act advocated by the ECJ as required to ensure the effectiveness of Article 101 TFEU (which the Damages Directive is intended to support).

Again, these protections are subject to limitations, which could potentially be significant for infringers. Settlement submissions that have been withdrawn are not protected from disclosure (at least once the European Commission has closed its proceedings – Article 6(5)). This provides a potentially powerful disincentive on infringers engaged in settlement discussions from pulling out.

If this were not enough, the recent case of *Timab*[4] demonstrates the risks of pulling out of settlement discussions: aside from losing a 10% reduction in the fine. In that case, the Commission altered its view on the part played by the infringer, and so on the level of the fine to be paid, after that infringer pulled out of the settlement procedure. Infringers involved in the settlement procedure with the Commission will need to think carefully before deciding to pull out, given the risks both that the level of the fine imposed will increase from that proposed during settlement discussions, and that those communications will be disclosable in follow-on litigation.

Minimising ammunition for follow-on claims

The protection from disclosure ensures that potential infringers are not disincentivised from engaging in leniency or settlement discussions with the Commission, but there is also a positive benefit of those procedures when it comes to follow-on claims. Final decisions issued by the Commission on infringers following the settlement procedure are likely to be shorter and less detailed than decisions addressed to non-settling infringers.

Given that cartel victims will usually possess little information on the details of the cartel (particularly if they are indirect purchasers or umbrella claimants) there may be a significant advantage for cartelists in limiting the information published in a final decision.

This presupposes that claimants will get access to the Commission's final decision for the purposes of follow-on litigation. This is far from certain. The ECJ cases of *Pergan*[5] and *Pilkinton*[6] established that where a decision refers to parties other than the infringers to whom the decision is addressed, the publication in full of a decision may undermine the presumption of innocence on the part of those non-addressees. This has in the past led to the publication of decisions being delayed for years while the parties discussed appropriate redactions for a non-confidential version of the decision.

However, in the recent English case of *Emerald Supplies Ltd & Others v British Airways & Others*[7] (which concerned the long-delayed publication of the Commission's decision in the air cargo cartel), the High Court held that the non-addressees' interests could be protected by the confidential decision being disclosed into a confidentiality ring. A similar approach was taken by the Commission in its opinion on the *Mastercard* interchange fee litigation.[8] If this approach becomes the norm, so that follow-on claimants become more likely to receive the Commission's decision at the outset of follow-on litigation (even before proceedings are issued), this will increase the incentive on infringers to limit the information in any decision, which relates to them.

Not every infringer will be able to benefit from the leniency and/or settlement procedures: other cartelists may have already provided the Commission with the information that it needs under the leniency regime and/or the Commission may decide that the case is not suitable for the settlement procedure.

Parties considering settlement will also need to bear in mind that by admitting liability, they will become clear targets for follow-on claims. Other alleged cartelists may choose, by contrast, to contest the allegations and appeal any decision of the Commission to the European General Court and the European Court of Justice (ECJ). It may be that any follow-on claims are stayed pending the outcome of such appeals, but as the ECJ set out in *Masterfoods,*[9] this need not always be the case.

However, where either or both of these options are available, and a business's internal review concludes that it has been involved in a cartel, admitting liability and settling with the Commission will bring potentially significant benefits in relation to any follow-on claims as well as a reduction in the level of the fine.

Settling follow-on damages claims

Once the Commission has issued its final decision, there are potentially many options as to where follow-on claims can be brought, and by whom. However, England and Wales, Germany and the Netherlands have established themselves as the most favoured jurisdictions for bringing follow-on claims. The Damages Directive aims to bring greater harmony to the various national regimes, but it remains to be seen whether this will lead to a significant widening of venues being used for follow-on claims.

Ironically, in one respect the prospect of claims being brought in multiple jurisdictions by different claimants runs counter to the aims of the Damages Directive. The more consolidated follow-on claims are for a particular cartel, the easier it is to pursue Consensual Dispute Resolution (CDR).

CDR can take the form of out-of-court settlement, arbitration, mediation or conciliation. The Damages Directive seeks to promote CDR by suspending the limitation period for any follow-on claims while CDR is being pursued (at least for those parties involved in the process).

The Damages Directive also looks to encourage settlement with claimants by precluding non-settling defendants from seeking contributions from those that have settled. Post-settlement, the size of the claimant's claim is reduced by the amount of the settlement, rather than by the amount of harm attributable to the settling party. This might leave the remaining defendants liable for a sum, which significantly exceeds the share of the harm for which they are responsible (under the principles of joint and several liability), without the ability to then claim contributions from the settling co-defendants.

Once again, this provision is watered down to the detriment of a settling defendant: if, following settlement, the non-settling defendants are unable to pay the remaining claim, the claimants can exercise their remaining claim against the settling defendant (notwithstanding their having already reached a settlement on liability).

This derogation can be expressly excluded under the terms of a settlement agreement, and any defendant considering settlement will no doubt be extremely keen to do so. Otherwise, the key reason for a defendant to agree to settle the private damages claim in the first place (to ensure finality and cap his liability) will be seriously eroded.

Towards a consensual approach

The Damages Directive was a long time coming, driven by the aim of allowing cartel victims to recover compensation for the harm they have suffered, through private actions against cartelists, which complement the Commission's own enforcement powers. Along with harmonising, and therefore increasing the use of, national regimes for private enforcement action, a key theme running through the Damages Directive is the promotion of consensual resolution and settlement with private claimants and the promotion of whistleblowing to, and settlement with, the Commission (to limit subsequent liability).

Clearly, the priority for any business that discovers potentially anticompetitive behaviour or that has been dawn raided by a competition authority is to establish whether they have indeed been part of a cartel. If the answer is yes, following implementation of the Damages Directive by Member States, there is more of an incentive than ever to look to limit liability by cooperating with the competition authorities. The benefits of this approach are potentially significant, particularly when it comes to follow-on claims.

[1] Case C-360/09 – Pfleiderer AG v Bundeskartellamt.

[2] [2015] EWHC 1557 (Ch).

[3] Case C-536/11 – Bundeswettbewersbehörde v Donau Chemie AG and others

[4] Case T-456/10 – Timab Industries and Cie financière et de participations Roullier (CFPR) v Commission.

[5] Case T-474/04 – Pergan v Commission [2007] ECR II-4225.

[6] Case T-462/12R – Pilkinton Group Limited v Commission.

[7] [2014] EWHC 3513 (Ch).

[8] Commission Opinion 5.5.2014 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty on the Functioning of the European Union – C(2014) 3066 final.

[9] Case C-344/98 – Masterfoods and HB [2000] ECR I-11369.