DOES ARBITRATION OFFER AN EFFECTIVE FORUM WHEN FIGHTING FOR COMPETITION DAMAGES?

BY WILLIAM TOWELL[1]

1 Counsel at Hausfeld & Co LLP based in the firm's London office.

CPI ANTITRUST CHRONICLE
JULY 2019

I. INTRODUCTION

Competition damages claims have become increasingly prevalent in recent years, with businesses and individuals looking to recover losses suffered as a result of anticompetitive behavior. A series of high-profile claims, for example the "interchange" proceedings against *Mastercard/Visa*[2] and the current wave of trucks claims against *DAF/Iveco*[3] and others, has thrust this type of claim firmly into the spotlight.

In this article, I consider some of the forums available within the EU to pursue these claims and analyze the effectiveness of arbitration in such matters.

II. COMPETITION DAMAGES CLAIMS – WHAT THEY ARE AND WHAT ISSUES THEY RAISE

In simple terms, EU competition damages claims – also known as private enforcement actions – are claims by businesses or individuals to recover damages suffered due to anticompetitive behavior, for example price fixing cartels.

These claims are grounded in Articles 101 and 102 of the Treaty on the Functioning of the European Union and their domestic law equivalents. The same substantive law therefore applies in whichever EU country the claims are pursued.

The European Commission has the power to levy huge fines for anticompetitive conduct. The most significant example is probably the €2.93 billion fine levied against five truck manufacturers in 2016. These fines, large as they may be, do not however assist an entity which has been harmed by that anticompetitive behavior to recover damages. It therefore falls to harmed individuals/businesses to pursue their own claims.

A. Binding Regulatory Decision

Theoretically, competition damages claims can be brought without any prior finding of anticompetitive behavior in the marketplace. However, for the most part, they tend to follow a binding decision of a regulatory body such as the European Commission. To pursue a claim without the benefit of a binding finding from a regulatory body creates more risk. Critically, the big concern is whether civil disclosure – even in a jurisdiction such as England where the rules are favorable – would provide sufficient information regarding infringements such as a cartel. The European Commission clearly has far greater investigatory tools at its disposition, such as dawn raids and an ability to issue Requests for Information to which a suspected cartelist is compelled to respond. These are obviously of great assistance in establishing anticompetitive behavior.

2 Including *Deutsche Bahn AG & Others v. MasterCard Incorporated & Others.*

3 *E.g. Suez Groupe SAS & Others v. Fiat Chrysler Automobiles N.V & Others.*

In such occasions, where the existence of anticompetitive behavior is already established, these claims concentrate on proving that the behavior has caused damage to the claimant(s) rather than having to establish the unlawful behavior itself.

B. Follow-on or Standalone

In most cases, a private enforcement action will cover a "follow-on" aspect as well as a "standalone" element. Broadly speaking the "follow-on" aspect is an allegation based entirely on the findings of the regulatory body. For example, if it had been found that MasterCard's interchange fee was anticompetitive in certain years, a purely follow-on claim would only be able to recover damages for that period/jurisdiction. In most cases, the claimant will also advance "standalone" allegations to seek damages which go beyond the findings of the regulatory body. Continuing the above example, a claimant might allege on a standalone basis that different time periods or other forms of payment cards were impacted.

C. Financial and Tactical Considerations

Competition damages claims often require significant economies of scale to make them financially viable, as damages flowing from a competition breach available to any individual claimant are frequently very small. For example, the price of most capacitors (as found to be a cartelized by the EU's March 2018 decision) is less than £0.01. For this reason, such claims are often mainly pursued by claimants (or groups of claimants) with significant volumes of purchases and financed by professional litigation funders. Building such claim in a manner which makes financial sense requires careful thought.

A further tactical decision to be made is which jurisdiction to pursue the claim in. Recent judgments in the iiyama[4] and *Vattenfall*[5] litigations have shown the potential geographic scope (i.e. potentially covering transactions that did not occur in the UK/Europe) the UK courts could be willing to consider, and the *aircargo* decisions show the Netherlands' judiciary is willing to hear cases with limited connection to that country. Lawyers pursuing such claims have several options when deciding which European jurisdiction would best suit their clients' claim.

III. POTENTIAL FORUMS FOR COMPETITION DAMAGES CLAIMS

A. United Kingdom

The United Kingdom ("UK") has historically been regarded as a friendly forum for competition damages actions. Reasons for this include:

1. The English Courts have felt able to hear competition cases with a wide territorial scope, for example when the goods subject to a cartel were initially purchased in Asia (Court of Appeal decision in *iiyama*).

2. The UK limitation rules are helpful in dealing with cartel cases, as claimants are able to rely on section 32 of the Limitation Act 1980, which states that the standard (6 year) limitation period does not start to run until the cartel has (or could have) been uncovered.

3. The UK has a dedicated body, the Competition Appeal Tribunal (or "CAT"), specifically designed to deal with competition issues. The CAT is vastly experienced in competition matters and understands the complex economic issues such cases can bring.

It seems likely that the CAT will take an increasingly prominent role in competition damages cases following the introduction of the Consumer Rights Act 2015 ("CRA 2015"). That legislation transposed many of the provisions of the EU's Damages Directive into domestic law and also made the CAT a more attractive forum than previously:

1. The CAT has the ability to deal with "standalone" claims which, importantly, has retrospective application (i.e. a standalone allegation for anticompetitive behaviors pre-2015 can now be brought in the CAT). Previously, it was only able to deal with pure follow-on actions.

4 *iiyama (UK) Ltd. & Others v. Samsung Electronic Co. Ltd. & Others*, [2018] EWCA Civ 220.

5 *Vattenfall v. Prysmian and NKT*, [2018] EWHC 1694 (Ch).

2. The limitation provisions have been altered to align with the standard provisions under English law. Previously, the CAT could only deal with claims issued within two years of a final regulatory decision. However, this new position only applies to claims arising after October 2015, whereas most of the competition infringements currently before the courts predate this period.

Collective Proceedings Order ("CPO")

The CRA 2015 also heralded a new expectation that "collective proceedings," similar to class actions frequently seen in the U.S., could become common place in the UK. This would involve a representative individual or organization bringing a claim on behalf of a specifically identified "class" of entities harmed by anticompetitive conduct.

Unlike a normal claim for competition damages, collective proceedings have to first be approved by the CAT by the granting of a CPO. A key first step in this respect is (i) certification that the "class representative" is a suitable individual; and (ii) that the claims are brought on behalf of an identifiable class of persons, raise common issues and are suitable to be brought in collective proceedings. Collective claims can be brought on an "opt-in" basis, where the individual/business has taken a step to progress its claim or "opt-out" whereby it is automatically included unless it notifies otherwise.

To date, no CPO has been approved. The current commentary is focused on Mr. Walker Merricks CBE's (the former chief ombudsman of the UK's Financial Ombudsman Service) claim against MasterCard seeking some £14billion in damages for individuals aged over 16 who used a MasterCard between 1992 and 2008. The CAT initially refused to approve Mr. Merricks' claim, primarily on the basis that (i) there was insufficient data to determine how the end users of MasterCards would have suffered loss and (ii) it was not clear how any damages ultimately awarded could be fairly distributed amongst the class of claimants Mr. Merricks proposed to represent.

However, the matter was appealed and the Court of Appeal found that considerations identified by the CAT as needing to be determined at the initial "approval" stage (which simply decides whether the claim can/cannot go ahead) could be dealt with at a later point in the litigation. MasterCard has sought permission to appeal the judgment to the Supreme Court. Importantly, the CAT has recently made clear that it does not currently intend to deal with the aspects of the Trucks collective proceedings[6] which may be affected by MasterCard's potential appeal. Those interested in CPOs will be watching with interest whether any decision from the Supreme Court influences the future development of CPOs.

B. Netherlands

The Dutch Courts have been at the forefront of private damages decision in Europe for some time, dealing for example with consequences of aircargo, elevator, hydrogen peroxide, and paraffin wax cartels.

This jurisdiction offers a number of advantages:

1. A streamlined process avoiding some of the most cumbersome aspects of litigation (for example, there is no process for standard disclosure in the Netherlands).

2. Cost efficiency, in that legal costs tend to be lower and while a "loser pays" principle exists, the recoverable costs are comparatively small.

3. An experienced judiciary having dealt with numerous competition damages claims.

As in the UK, there are a number of potential avenues when proceeding with a damages claim in the Netherlands:

1. It is possible for claims to be assigned to a claim vehicle (usually a special purpose vehicle created for the purposes of that litigation) which can progress claims on behalf of claimants, including those outside the Netherlands. Claimants need to take an active step in order to be included within such claims by assigning their cause of action, unlike the collective proceedings dealt with below.

6 *UK Trucks Claim Limited v. Fiat Chrysler Automobiles N.V & Others*, Case No. 1282/7/7/18; *Road Haulage Association Limited v. MAN SE & Others*, Case No. 1289/7/7/18.

2. The Dutch law of "Wet Collectieve Afwikkeling Massaschade 2005" or "WCAM" empowers the Amsterdam court of appeal (*Gerechtshof Amsterdam*) to make a settlement (agreed by the relevant parties to a litigation) binding on parties which were not party to those proceedings (so long as they did not "opt out" of said settlement).

Collective proceedings

Collective proceedings appear to be very much at the forefront of lawmakers in the Netherlands. Recently enacted provisions[7] mean a foundation ("stichting") or association ("vereniging") can bring class actions (distinct from the claim vehicles outlined above). Given that the Netherlands is already accustomed to dealing with large scale litigation involving several parties by way of the claim vehicles, this expansion into collective action is perhaps a natural progression.

Anyone considering collective proceedings in the Netherlands should keep in mind the strict requirements on these foundations and associations with respect to governance, litigation funding and representation. Similar to the system in the U.S., there is a procedure for choosing at least one lead representative of a class in the event that multiple foundations or associations bring claims arising from the same harm, on behalf of the same class of victims. The type of considerations in this context are likely to include the size and claim value of the group represented and previous experience of those looking to bring the claim. Additionally, these collective proceedings only have prospective effect from 15 November 2016 onwards, meaning it would be difficult to bring such a claim for existing cartels decisions (which mainly occurred pre-2016). Thus, the beneficial impact of this regime may not be felt for some time.

In any case, given the experienced judiciary, that the Dutch system avoids many of the most expensive phases of litigation and has a very limited loser pays principle, these developments look likely to make the Netherlands an attractive proposition for litigating this type of claim.

C. Germany

Germany is another key jurisdiction historically involved in the competition damages process. Unlike the current approach in the UK and the Netherlands of generally dealing with similar claims by the same Court/Tribunal, Germany's court system is decentralized with regional courts free to make findings on the same subject matter, leading to differing judgments. Taking the example of the Trucks cartel, we've already seen several first instance judgments from courts such as Hannover, Stuttgart and Dortmund in which claimants took very different approaches to the evidence needed to underpin their claims.

A unified conclusion is often only found if the issue is subsequently dealt with by the Federal Court of Justice (equivalent of the UK's Supreme Court). This tends to occur in the majority of competition damages cases given that German competition law is frequently evolving – for example as a result of the Damages Directive implementation – meaning that permissions to appeal to the German Federal Court of Justice are regularly granted to resolve any inconsistent findings from lower courts.

Another distinction of the German system is that the submissions and filings tend to be far more "front loaded," with substantial information, including economic evidence and analysis, generally needed in the early stages of a claim. This is in contrast to the Dutch system, where claims are often able to be commenced before any substantial details are available, or the UK system where pleadings are often developed once the parties have had access to disclosure.

D. Other

Given the huge reach of some of these infringements, it is not surprising that many other European countries have been charged with considering such cases. Especially in the case of the Trucks cartel, which obviously had a huge geographical impact, a series of judgments have been issued in Spain – with very different results – from various courts such as those in Madrid, Murcia, Valencia, Zaragoza and Barcelona. The Hungarian Courts have also been charged with claims resulting from the truck cartel, making a reference to the ECJ for interpretation of the relevant EU law.[8]

7 The Act on the Resolution of Mass Claims in Collective Action (*Wet Afwikkeling Massaschade in Collectieve Actie*) (WAMCA).

8 *Tibor-Trans Fuvarozó és Kereskedelmi Kft. v. DAF Trucks N.V.*, Case C-451/18, OJ C 319, 10.9.2018.

IV. ARBITRATION – AN EFFECTIVE FORUM?

Comparatively few damages claims have been pursued through arbitration. This is perhaps surprising as, in theory, a lot of the benefits offered by arbitration could apply equally to competition damages claims. For example, arbitration would offer the opportunity to have claims dealt with by competition experts and allow for confidentiality which can be relevant if, as is often the case, the parties are trying to maintain normal commercial relations while simultaneously engaged in a formal dispute.

The lack of arbitration in the competition damages sphere is, however, less surprising considering arbitration is a private agreement between two contracting parties as to how their disputes will be resolved. Trying to fit competition damages into a pre-agreed mechanism as to how their disputes will be resolved could create obvious issues:

1. In many occasions, such claims are not against the party one has directly contracted with. Taking two recent examples of recent high-profile claims (i) in respect of interchange fees, no retailer or individual has a direct relationship with Visa/MasterCard regarding the processing of payments and (ii) many Trucks claimants procured their trucks through intermediaries (dealers or lessors) whereas they are now pursuing the manufacturers themselves.

2. Even when direct privity of contract exists, there is a risk in most competition damages claims that a claimant will also pursue other entities involved in the cartel (not just those they purchased from) or, when they do not, the defendant may seek to join those parties into the proceedings. As those other parties would not be a contracting entity which agreed the arbitration provision, they would not be bound by its terms, thus creating a risk for both defendants and claimants of having to deal with several (arbitration/non-arbitration) proceedings on the same subject matter.

The appropriateness of arbitration in the competition damages context has been considered by several Courts. The Amsterdam Court of Appeal,[9] the Rotterdam Courts[10] as well as the ECJ in the CDC/Akzo proceedings showed a reluctance for these claims to be dealt with in arbitration (albeit the position has evolved to some extent following the ECJ's *Apple v. EBizcuss* decision). Conversely, the English[11] and Dortmund courts have shown themselves more willing to follow pre-agreed arbitration provisions.

The above "anti-arbitration" judgments took the approach that the parties were unlikely to have had in mind breaches of competition law when agreeing a wide-ranging arbitration clause, whereas the "pro-arbitration" decisions found that there was no reason to depart from the parties' contractual intention to resolve all disputes via arbitration. What is evident from the differing positions taken is the importance of (i) the national law of the country in which the litigation is being pursued and (ii) the specific contractual terms agreed by the parties and pre-contractual consideration that this type of claim would be dealt with in arbitration. How the latter point would play out in commercial negotiations is difficult to envisage, as a supplier would clearly be reluctant to suggest during negotiations that it may act anticompetitively and it may equally create commercial sensitives if a customer were to so allege.

Even if there was a way of overcoming some of the issues outlined above, there is a real question of whether it would be in the wider interest for these claims to be dealt behind arbitration's closed doors. Arbitration could lead to significant inefficiencies, as the relevant courts dealing with such claims would not have the benefit of seeing how other courts had approached similar issues involving the same anticompetitive conduct.

V. CONCLUSION

As this article shows, there are numerous options for pursuing competition damages claims. Each party will need to assess its own personal position to decide which forum is best for them, and whether they prefer to pursue their claims independently or as part of a collective action.

Defendants may try to push the parties and the court towards arbitration but, as is clear from the case law, the extent to which this will be accepted is difficult to determine. Even if it is accepted, a further question is whether it would be in the parties or the wider interest to do so.

9 *Kemira Chemicals Oy v. CDC Project*, 13 SA ECLI:NL:GHAMS:2015:3006.

10 *Stichting De Glazen Lift/Kone et al* ECLI:NL:RBROT:2016:4164.

11 *Microsoft Mobile OY Ltd. v. Sony Europe Ltd. & Others*, [2017] EWHC 374 (Ch).

CPI COMPETITION POLICY INTERNATIONAL

CPI Subscriptions

CPI reaches more than 20,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.