Private Antitrust Litigation 2021

Contributing editor
Elizabeth Morony

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Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

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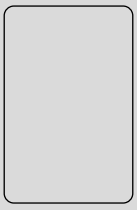

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Clifford Chance LLP

Lexology Getting The Deal Through is delighted to publish the eighteenth edition of *Private Antitrust Litigation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Brazil and India.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Elizabeth Morony of Clifford Chance LLP, for her assistance with this volume.

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For further information please contact editorial@gettingthedealthrough.com

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Cross-border antitrust litigation in Europe – Practical questions

Lukas Rengier and Fabian Kolf
Allen & Overy LLP

Antitrust litigation in Europe is evolving rapidly. In particular, damages claims relating to cartels and dominance abuses are growing exponentially. Whenever the European Commission or a national competition authority issues an infringement decision, customers will consider potential damages claims. Law firms specialising in private enforcement join forces with litigation funders or service companies and proactively invite customers to enforce claims. Claiming cartel damages has become such a common occurrence that commercial relationships do not necessarily suffer if parties are negotiating a settlement or even litigating in court.

Increasingly, claims relating to the same infringement are being made in several jurisdictions in parallel. Cartel decisions of the European Commission often sanction Europe-wide cartels that could potentially affect customers right across Europe. Currently, the Commission's Trucks case dominates the antitrust litigation landscape in Europe. Truck manufacturers face claims in practically all European countries. Many other cartel decisions have also triggered parallel lawsuits in several European countries, among them are the Commission's decisions in the vitamins, synthetic rubber, hydrogen peroxide, elevators and escalators, gas-insulated switchgear, candle wax, car glass, air cargo, consumer detergents, TV/computer monitors and polyurethane foam cases.

European law, in particular the EU Damages Directive, has harmonised the legal framework for antitrust litigation in national civil courts on many aspects. Fundamental questions are regulated in the same way across Europe including standing to bring a claim, presumption of harm and joint and several liability of defendants. Even plaintiffs and defendants who are not familiar with the respective national regimes will, therefore, have a good idea of what to expect. Details and, in particular, the practical approaches taken by national courts of course still vary.

In addition, in cross-border litigation cases, both claimants and defendants face a variety of practical questions. These include strategic questions such as the jurisdictions in which to file claims or the alignment of the defence across jurisdictions as well as operational questions such as the handling of large quantities of data and the use of legal tech solutions.

This chapter addresses 10 of the most common practical questions in (cross-border) antitrust litigation cases in more detail and explores how they are typically approached by the parties involved.

Forum shopping

A fundamental question for claimants can be where to file claims and, for defendants, where to expect them.

The applicable European regulation 'Brussels I' allows claimants to choose between the courts of various jurisdictions including where the defendant is domiciled, where the infringement took place or where it impacted the market.

Often claimants opt for their 'home courts' or the courts where the defendants are domiciled. Other factors the claimants may take into account are the ability to bundle claims, rules on costs and the availability of litigation funding, expected damages amounts and the likely duration of proceedings.

'Forum shopping' is a frequent occurrence in Europe. Statistically, most claims end up in the three traditionally preferred jurisdictions: England, Germany and the Netherlands. Notably in the Trucks case, most bundled claims filed in these three jurisdictions include claims lodged by customers located in various Western and Eastern European countries. It remains to be seen how Brexit will impact the claimants' choices.

Individual claim versus collective claim

Another important question for claimants is whether to pursue claims individually or as part of a collective claim.

Rules on the admissibility of collective proceedings differ across Europe. Collective proceedings are available in a number of European jurisdictions, including the UK and the Netherlands. However, the exact prerequisites are not settled and no collective action has yet been certified. In countries that do not allow collective proceedings in antitrust matters, such as Germany, claimants have developed other models to bundle claims. The most frequently used model is the 'assignment model' pioneered by CDC.

The following are a few factors that a claimant will consider when deciding how to bring a claim. Collective claims can be attractive for claimants because they often do not bear any costs (in exchange for ceding parts of their damages claims). Since service companies ('claims vehicles') typically run the proceedings, claimants do not need to bother with the case management themselves. For other claimants, however, this is not an option because they prefer to control the litigation strategy themselves and want to preserve a greater flexibility over settling cases. Collective claims also typically have a longer duration – currently, many questions around the admissibility of collective claims are unsettled and courts often decide first on these procedural questions and proceed to the substantive questions only once all appeals have been exhausted (eg, see the cases Merricks vs MasterCard in England or Financialright claims in Germany).

If bundled claims involve claimants located in different countries, additional practical issues arise. For instance, courts sometimes consider separating and grouping proceedings by country or region, which can lead to higher court fees. Proceedings can become quite complex if courts need to apply various foreign laws (mosaic approach). Another practical issue is the processing and submission of evidence, in particular, concerning the affected purchases, as the language and quality of the evidence may vary.

Limitation risks for claimants and defendants

In many cases, limitation risks determine the timing of proceedings.

Claimants regularly file claims shortly before the time bar lapses. However, the EU Damages Directive ensures that claimants in fact have ample time to assess and file potential claims after an infringement decision has been issued.

For defendants, the limitation rules concerning contribution claims are a common issue. Defendants are jointly and severally liable for all damages caused by the cartel but can claim contribution from their co-defendants for damages caused by them. However, in some countries (eg, Germany), the statute of limitation for contribution claims is not linked to the statute of limitation for damages claims. Therefore, gaps can arise and defendants may need to consider seeking protection.

Coordinating the defence in cross-border cases

If a defendant is simultaneously sued in several jurisdictions, the defence will need to be coordinated.

Different national regimes may warrant different approaches, for example when it comes to substantiating defence arguments. While in some countries the focus can lie on 'destroying' the plaintiff's case with little need to present the defendant's own evidence, in other countries the evidentiary rules may require a more 'constructive approach' and substantial input. At the same time, once evidence is disclosed in court in one country, it is not always possible to avoid it ultimately being introduced in proceedings somewhere else.

It is therefore important that defence arguments strike the right balance and work in all countries. Frictions can be avoided if the defendants' lawyers in the various relevant countries collaborate seamlessly.

Gathering evidence

It is often said that cases are won and lost based upon the facts. A good storyline, corroborated by sound evidence, is indeed fundamental. This requires access to relevant evidence.

Potential practical issues when gathering evidence are manifold. One of the most fundamental issues is information asymmetries. Certain information needed by one party may only be accessible to the opponent or third parties. For instance, it would help claimants to prove the occurrence of harm if they knew how the cartel operated or how the cartellists set prices. In turn, defendants regularly have difficulties in proving that claimants passed on higher prices caused by the cartel to their customers instead of simply absorbing any overcharges.

In common law jurisdictions such as the UK, such information asymmetries are remedied through extensive disclosure. The EU Damages Directive has introduced similarly broad disclosure regimes in all European member states. However, courts have a huge discretion and it remains to be seen to what extent they will make use of the new rules. Spanish courts, for example, have already applied the new rules and ordered the disclosure of documents in cases relating to the trucks cartel. In Germany, in contrast, courts appear reluctant. The traditional means in civil law jurisdictions such as Germany to deal with information asymmetries are evidentiary rules. For example, the German Federal Court of Justice ruled that the burden of substantiating a pass-on may shift from the defendant to the plaintiff once the defendant has established that a pass-on is plausible.

In cross-border litigation cases, these differences have additional implications. For claimants, they can be a factor when deciding where to file a claim. For defendants, they require particular attention when coordinating the defence. Where possible, strict confidentiality should be imposed to avoid documents the defendants are obliged to disclose in one country being used against them in another country. Disclosure exercises in large cross-border cases are also particularly costly and require significant time.

Economic expertise

Economic issues lie at the centre of many competition litigation cases. In cartel damages, the three fundamental economic issues are the occurrence of harm (causal link), the damages amount and the pass-on rate. Both plaintiffs and defendants therefore typically instruct their own economists and submit economic reports.

Success hinges on the quality of these reports. They must not only be economically sound, but also support the legal arguments. Lawyers and economists need to collaborate closely to develop the right – and often novel – arguments. This requires a good mutual understanding of each other's disciplines.

Cross-border litigation presents additional challenges. For example, economic models for estimating damages must take account of all the factors impacting the price of the cartelised products. These factors can, however, vary across countries as market conditions are not always uniform. Sophisticated cross-country models or separate models for each country may be required.

Level of damages

Another key question for plaintiffs is how much they can expect in terms of damages and interest. Conversely, for defendants, this question lies at the heart of their risk assessment.

Although the first cartel damages claims in Europe date from the early 2000s, there is still little case law on this central aspect. Not many judgments that award damages exist. And most of these judgments relate to cases with small values, and the damages calculation is based on rather simplistic methods. They, therefore, do not necessarily allow conclusions to be drawn for larger cases requiring a textbook economic damages estimation. For example, many Spanish courts have awarded damages in smaller cases relating to the trucks cartel at overcharge rates of 5–15 per cent. These rates have been based on general and abstract considerations such as references to the well-known Oxera study – a meta-study from 2009 compiling all the then-available economic research on the price effects of cartels. It also remains to be seen whether these judgments will ultimately stand after all appeals are exhausted.

While it can be difficult to predict the damages amount, the interest rules are relatively straightforward. Interest can be a significant factor – since damages claims regularly relate to cartels that took place 10 or more years before, large sums of interest accrue and can make up more than half of the damages amount. Interest rates such as seven percentage points above the European Central Bank (ECB) base rate in the Netherlands and five percentage points above the ECB base rate in Germany are substantial – especially in the current low interest rate period.

Costs and fees

Court, attorney and economist fees can be significant.

For claimants, this typically raises the question of whether to resort to third-party funding. Collective claims are typically financed by litigation funders. They bear all the costs in exchange for a portion of the damages amount awarded to the claimants. Although rules on the admissibility of litigation funding and contingency fees differ across Europe, 'all-round carefree packages' for claimants are offered in most countries.

For defendants, the main goal is to fend off any damages claims. In particular, in cross-border cases, ensuring cost efficiency of the defence work is another key objective. A good and open collaboration among the defendants' lawyers in the various jurisdictions involved saves costs. Project management tools can further help increase efficiency. Finally, legal tech solutions are relied upon more and more.

Legal tech

Large, cross-border litigation cases are an important and growing field of application for legal tech tools.

Both plaintiffs and defendants need to collect, process and host huge volumes of data, in particular data on the purchases that were potentially affected by the infringement. Legal tech solutions can support this.

Handling high numbers of proceedings also requires automated processes. Law firms are developing bespoke platforms for case management (eg to monitor deadlines) and (visualised) client updates. In mass proceedings, legal tech tools are used to analyse and categorise incoming briefs and court writs. Automation in the drafting of briefs is also developing.

Tactics in public investigation

Finally, defendants must anticipate the increasing risk of follow-on damages claims during the public investigation.

Litigation risks already feed into the decision of whether to apply for leniency and disclose the existence of an infringement. While the first leniency applicant is protected from any fines in exchange for cooperating with the authorities, there is no immunity from damages claims.

If the investigation is settled, the wording and scope of the infringement decision can be influenced to a certain degree. Since the decision forms the basis of all follow-on damages claims and binds civil courts, its wording and scope are fundamental. Nuances can make all the difference and the case law on cartel damages claims provides valuable lessons. Paragraphs in the infringement decision on aspects that only played a minor role in the investigation sometimes turn out to be at the heart of a dispute in court.

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