Private Antitrust Litigation
Europe vs. United States

A Comparative Discussion Providing Practical Advice for a Successful Global Defense Strategy

March 10, 2016
Private Antitrust Litigation - Topics

- Overview
- Jurisdiction in International Cases
- Who Can Sue? The Basics of “Standing”
- Access to Evidence
- Collective Actions and Class Actions
- Joint and Several Liability and Contribution
Overview of Private Antitrust Legal Regimes

Europe
EU Antitrust Law Basics
The Treaty on the Functioning of the European Union

• **Article 101 (cartels)**
  - “[P]rohibited […] all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market […].”
  - “Any such agreements or decisions shall be automatically void.”

• **Article 102 (abuse of a dominant position)**
  - “Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.”
EU Damages Directive 2014/104/EU

- Must be implemented into national law by 27 December 2016.
- No retroactive effect on substantive issues.
- The main objectives are to optimise the interaction between public and private enforcement and to ensure that victims of competition law infringements can obtain full compensation for any harm suffered.
- Compensation for:
  - actual loss (*damnum emergens*)
  - loss of profit (*lucrum cessans*)
  - Interest
- No punitive damages.
EU Antitrust Law Basics
Private Right of Action for Damages

- **UK position**
  - Common law
  - Treaty on the Functioning of the European Union
  - Competition Act 1998
  - Competition Appeal Tribunal Rules 2015

- **Form of action**
  - Follow on
  - Standalone

- Germany/Netherlands – Similar issues, Local courts
Overview of Private Antitrust Legal Regimes

United States
U.S. Antitrust Law Basics
The Sherman Act

- **Section 1 (Conspiracy)**
  - “[E]very contract, combination . . . or conspiracy in restraint of trade . . . is declared to be illegal.”
  - Applies to concerted conduct between two or more separate actors, typically competitors.

- **Section 2 (Monopolisation)**
  - “Every person who shall monopolise, or attempt to monopolise, or combine or conspire . . . to monopolise any part of the trade or commerce among the several States or with foreign nations shall be guilty of a felony.”
  - Applies to single-firm conduct.
U.S. Antitrust Law Basics

- **State Law**
  - All 50 states have antitrust laws that generally mirror the Sherman Act.
  - Consumer protection and unfair trade practice laws, common law claims (e.g. “unjust enrichment”).

- **Private Right of Action for Damages**
  - Clayton Act, Section 4: Allows the recovery of damages by “any person injured in his business or property by reason of anything forbidden in the antitrust laws.”
  - “Any person” includes individuals, partnerships, corporate entities.
  - “Congress encouraged these persons to serve as ‘private attorneys general.’” (*Hawaii v. Standard Oil Co.* (S. Ct.)).
Jurisdiction in International Antitrust Cases

Europe
Jurisdiction in International Antitrust Cases
European perspective


Recast Brussels Regulation

- **Article 4**: Defendants domiciled in a Member State are entitled to be sued in the courts of that Member State.

- **Article 7**: Special Jurisdiction
  - Defendants may be sued in another Member State in matters relating to tort in the courts of “the place where the harmful event occurred or may occurred”.
  - This is either (i) the place where the damage occurred (where the direct harmful consequences are suffered); or (ii) the place of the event giving rise to it.
  - Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV* indicates that the place where the damage occurred “is located, in general, at [the] victim’s registered office”.

- **Article 29**: Where two or more Member States can (and do) validly assume jurisdiction of identical proceedings, the ‘court first seized’ rule applies.

- **Article 30**: Where proceedings are related but not identical, the courts that are not first seized can (in their discretion) stay proceedings, but are not obliged to do so.
Case C-352/13 CDC v. Evonik Degussa and Others

- All undertakings fined by the Commission for participation in a single and continuous cartel, can be sued:
  - in the court in the country of domicile of any defendant (the anchor defendant), regardless of their domicile (as long as within the EU);
  - at the place of the conclusion of the cartel (not suitable for complex cases); or
  - at the place of the domicile of the damaged undertaking (forums actoris; not suitable for SPV actions).

- AG Jääskinen’s Opinion of 11 December 2014: once a court properly acquires jurisdiction under Article 6(1) of Brussels I Regulation 44/2001 this is not be affected by withdrawal of the claim against anchor defendant provided this did not amount to an abuse.

- Jurisdiction and arbitration clauses only lead to an exception from the above if they explicitly cover damages actions for competition infringements.
What if anticompetitive conduct was outside the EU?

*Emerald Supplies Limited v British Airways plc*

- Can the claimants bring a claim for alleged infringement of Article 101 TFEU/Article 53 EEA in relation to charges for air freight services provided by parties to a cartel to which British Airways was a party on routes between *countries both of which are outside the EU and EEA*?

- To be answered by the English High Court as a preliminary issue.
Jurisdiction in International Antitrust Cases

United States
The Sherman Act applies to anticompetitive conduct that occurs in the United States.
  - U.S. cartel, U.S. company monopolist, etc.

But does it apply to anticompetitive conduct that occurs outside the United States?

For there to be U.S. court jurisdiction, a plaintiff must show (1) personal jurisdiction and (2) subject matter jurisdiction.
Personal jurisdiction refers to the court’s power over the parties.

- Clayton Act, Section 12: Antitrust statute authorises suit in any U.S. jurisdiction in which a corporation is an “inhabitant,” is “found,” or “transacts business”
- Due process: Requires sufficient contacts with the U.S.

U.S. subsidiaries?
- Jurisdiction typically exists.

Non-U.S. parent companies of U.S. subsidiaries?
- Practical instead of formalistic inquiry.
- Depends on extent of (1) control over subsidiary; (2) transactions with U.S. customers; (3) other connections to U.S.

It removes from the Sherman Act activity involving solely non-U.S. commerce.

But includes exceptions for:

- Import activity - Conduct outside U.S. intended to (and does) have substantial effect on U.S. imports
- Non-import activity that has a "direct, substantial, and reasonably foreseeable effect" on U.S. and that "gives rise" to the plaintiff’s claim
When does jurisdiction exist?

*The FTAIA is relatively clear at the extremes:*

- **Yes** – Manufacturer sells parts that are bought by or delivered to the plaintiff in the US → jurisdiction exists

- **No** – Manufacturer sells parts to the plaintiff abroad and the plaintiff resells them abroad → FTAIA bars jurisdiction
But what about the middle?

**Scenario 1**: Non-U.S. manufacturer fixes prices on a part that is bought by, paid for by, and delivered to a foreign company (e.g., the plaintiff’s foreign subsidiary). This part is incorporated into a product that is sold to the plaintiff in the U.S. *Actionable or not?*
Battle ground scenarios being litigated today. Recent cases include:

- *Lotes v. Hon Hai Precision Industry* (2d Cir. 2014) (patent licensing)
- *U.S. v. AU Optronics* (9th Cir. 2015) (LCD panel price fixing)
- *Motorola Mobility v. AU Optronics* (7th Cir. 2014) (LCD opt-out)

Trends from recent cases:

- It does not matter that parts are manufactured outside the U.S.
- When analyzing import commerce, interactions in and with the U.S. will be heavily scrutinized.
- “Direct effects” need not be direct: antitrust injuries can be transmitted through multi-layered supply chains.
Who Can Sue?
The Basics of Standing
Europe
Europe: Who Can Sue?

- Competitors
- Direct purchasers
- Indirect purchasers
- Umbrella / “coat hanger” claimants
- Classes
- Special Purpose Vehicles
Europe: Who Can Sue?

- **Direct purchasers**
  - Pass on defense can be asserted by defendant (no enrichment)
  - Damages Directive (Articles 12 to 16)
    - **Burden of proof on defendant** to show overcharge was passed down the purchasers supply chain.
    - European 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.
    - Key battleground for forum shopping and experts.

- **Indirect purchasers**
  - Damages Directive (Article 12)
    - “[C]ompensation for harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer”.

Europe: Who Can Sue?

- **Umbrella claimants**
  - Case C–557/12 Kone v. ÖBB-Infrastruktur AG, ECJ Judgment of 5 June 2014
    - 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”.
    - A victim of umbrella pricing may obtain compensation for the loss caused by the members of a cartel where it is established that the cartel at issue was liable to have the effect of umbrella pricing being applied by third parties.
Europe: Who Can Sue?

- **Special Purpose Vehicles** - Case C-352/13 CDC v. Evonik Degussa and Ors

  Enforcement of bundled claims against jointly and severally liable cartel members

  Payment of 100% of damages and interest to CDC

  Initial bundling of claims by sale and assignment

  Payment equivalent to 65 – 80% of enforced damages and interest
Who Can Sue?
The Basics of Standing
United States
Antitrust standing: *Not every action that harms another market participant is a violation of the antitrust laws.*

Plaintiff must allege “injury in fact” causally related to defendant’s actions, and antitrust injury

- “Injury in fact” means injury to business or property substantially caused by defendant’s actions, including lost sales or overcharges on purchases of affected products.
- Antitrust injury is an “injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.” (*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* (S. Ct.).)
Who Can Sue? Standing test applied

- **Direct Purchasers**
  - Typically have standing.

- **Indirect Purchasers**
  - No standing under federal law. (*Illinois Brick v. Illinois* (S. Ct.)).
  - BUT: standing under state law. *Illinois Brick* repealer states (include populous states such as California, New York).

- **Competitors**
  - Antitrust laws enacted for “the protection of competition, not competitors.” (*Brown Shoe Co. v. United States* (S. Ct.))
  - Sometimes yes: injury to competitor also harms competition
  - Sometimes no: harm from price competition
Who Can Sue? The Basics of Standing

Who else?

- Suppliers (e.g. monopsonization claim)
- Entity harmed or targeted by conduct who is neither purchaser, supplier, nor competitor
  - Injury suffered is “inextricably intertwined with the injury the conspirators sought to inflict.” (*Blue Shield v. McCready* (S. Ct.))
- Entities that acquire legal claims from others
  - *Sprint Communications Co. v. APCC Services, Inc.* (S. Ct.)
  - Ability to serve as class representative still in question.
Access to Evidence

Europe
Europe: Access to Evidence

• **Damages Directive (Articles 5 to 8)**
  • Presumption in favour of disclosure of evidence by defendants, claimants and third parties.
  • Additional provisions concerning evidence “included” in the file of a competition authority.
  • No disclosure of leniency statements or settlement submissions (the “Black List”).
  • Certain categories of documents may only be disclosed once competition proceedings are closed (the “Grey List”) (Recital 25 sets out examples such as: Statement of Objections and response to information request).
• **Damages Directive (continued)**
  - All other evidence may be disclosed subject to relevance and specificity (the “White List”).
  - 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 European Commission (Article 15(1) of Regulation (EC) No. 1/2003).
Europe: Access to Evidence

- **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 had not shown why access to the documents included in the case file or the unredacted Airfreight Decision were necessary to the extent: No superior public interest justifying the access based on Article 4(2) of Regulation No 1049/2001.
  - **Decision**: European Commission had 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* established a **high burden on claimants to prove they should obtain the case file** from Commission under Regulation 1049/2001.
Air Canada & Ors v Emerald Supplies Limited and Ors [2015] EWCA Civ 1024, 14 October 2015

- Peter Smith J ordered that an unredacted version (save for leniency material and material covered by legal professional privilege) of the Air Freight Decision be disclosed to the claimants within a confidentiality ring.

- Airlines appealed arguing an absolute entitlement under EU law to redact material covered by the principle identified in Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission.

- Court of Appeal upheld the appeal holding that Pergan protection is an absolute right and cannot be relaxed.
Access to Evidence

United States
• Discovery has historically been very broad
  • “…reasonably calculated to lead to the discovery of admissible evidence.”
  • Extremely expensive; can last for several years

• Recent amendment to Federal Rule 26:
  • “…relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit”
Written Discovery

- Initial Disclosures (FRCP 26)
- Requests for Production (“RFPs”) (FRCP 34)
  - Documents
  - Transactional data
- Interrogatories (“ROGs”) (FRCP 33)
- Requests for Admission (“RFAs”)
- Subpoenas (FRCP 45)
Depositions

- Out-of-court oral testimony of a witness for use in discovery and/or trial.

- Usually follow substantial completion of document discovery.

- 30(b)(6) deposition – A special type of deposition to discover information known or reasonably knowable to a corporate party.
  - Litigant subpoenas opposing party for a 30(b)(6) deposition about particular subject(s).
  - Subpoenaed party then chooses individual with knowledge of subject(s) to be deposed on behalf of the corporation.

- Non-party depositions – FRCP 45
  - Subpoena ad testificandum to depose third parties.
Expert Discovery

- Critical and often decisive in antitrust cases
- Experts conduct damages calculations, assist in settlement valuation, and are critical for class certification
- The materials that testifying experts rely upon are discoverable, and experts are subject to depositions.
Collective Actions and Class Actions

Europe
Europe: Collective Actions and Class Actions

- **The European Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms (OJ 2013 L 201/60)**
  - The only comprehensive EU regulatory proposal on collective redress.
  - Under 288 of the Treaty on the Functioning of the European Union, the recommendation is not binding.
  - Invites member states to introduce collective redress mechanisms.
  - Two or more natural and legal persons that have suffered harm resulting from the same illegal activity (constituting a "mass harm situation") should have recourse using collective redress mechanisms.
The rules on collective actions and class actions are member state specific.

For example:
  - Implements opt-in principle by providing for opt-in collective actions.
- UK: Consumer Rights Act 2015
  - Collective actions can now be brought on an “opt-out” basis in the Competition Appeal Tribunal.

System is more established in the U.S.
Pensioners angry at 'price fixing' on mobility scooters launch the UK's first class action lawsuit that could open the floodgates for campaigning consumers

- National Pensioners Convention alleges Pride breached competition law
- NPC said Pride banned retailers from advertising online prices below RRP
- Lawyers say case could be worth £7.7m and represent watershed moment
- Pride said it is not aware of evidence that consumers have suffered loss

By PAUL CAHALAN
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• Not classes, but really joined cases

• The court can consolidate different proceedings and try multiple claims together under general case management powers *(Civil Procedure Rules (CPR) 3.1(2))*.

• The judge retains considerable flexibility and discretion in whether and how to manage multiple individual claims together so that they become part of a *de facto* collective action.

• “de facto certification” of “de facto class actions”
In determining suitability, the CAT will consider (CAT Rules, rule 79(2)):

- Whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues.
- The costs and benefits of the collective proceedings.
- Any separate proceedings commenced.
- The size and nature of the class.
- Whether it is possible to determine for any person whether he is or is not a member of the class.
- Whether the claims are suitable for an aggregate award of damages.
- The availability of alternative dispute resolution and any other means of resolving the dispute.
Europe: Collective Actions and Class Actions
Certification

- Certification likely to be key battleground (as in the U.S).
- Will certification lead to a mini-trial to determine the class, whether there are common issues, suitability of the claims for a collective action and strength of a claim
  - this sounds like a full trial?
Europe: Collective Actions and Class Actions
Collective action by the back door

- **Bao Xiang International Garment Center v British Airways & Ors**
  - Claim brought on behalf of 64,697 Chinese claimants.
  - Application for strike-out based on solicitors’ lack of authority and abuse of process.
  - Rose J held that “[t]o allow this claim to proceed would […] be manifestly unfair to the airlines and would bring the administration of justice into disrepute among right-thinking people”.
  - Rose J noted in particular that it was “wholly irresponsible of Hausfeld to launch proceedings in the names of tens of thousands of additional claimants when there was no basis for signing a statement of truth”.
Collective Actions and Class Actions

United States
The Court must “certify” the plaintiff class

- A class is a group of plaintiffs whose claims can be resolved by the resolution of a common question.
  - Rule 23 “requires the plaintiff to demonstrate that the class members ‘have suffered the same injury’ . . . This does not mean merely that they have all suffered a violation of the same provision of law . . . Their claims must depend upon a common contention . . . That common contention, moreover, must be of such a nature that it is capable of classwide resolution.” (Wal-Mart v. Dukes (S. Ct.).)

Critical stage – “death knell of the litigation”

- Cases often settle if a class is certified.
  - Risk of damages at trial becomes too great
- Cases frequently end if class certification is denied.
  - Claimants must litigate on a case-by-case basis.
  - Only a collective action can justify the plaintiffs’ cost of litigation.
Before a court will certify a class, it must conduct a “rigorous analysis” under Rule 23.

“Class certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23 are met.” *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008) (internal quotations omitted).

“It is now indisputably the role of the district court to scrutinize the evidence before granting certification, even when doing so ‘requires inquiry into the merits of the claim.’” *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2013).
Rule 23 - Factors

- Plaintiffs in damages cases must show that both Rule 23(a) and (b)(3) are satisfied
  - Rule 23(a):
    - Numerosity
    - Commonality
    - Typicality
    - Adequacy
  - Rule 23(b)(3):
    - Questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.
Joint and Several Liability

Europe
Europe: Joint and Several Liability

- **Damages Directive (Article 11)**
  - Undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement.
  - An injured party has the right to require full compensation from any, or all, of them.
  - Contribution risks greatly complicates settlements in Europe.
  - Joint and several liability is limited in respect of small or medium-sized enterprises and immunity recipients – liable for harm caused to its own direct or indirect purchasers (i.e. no contribution).
Europe: Joint and Several Liability

- **Case T-43/11 Singapore Airlines and Others v Commission**
  - General Court annulled the Commission Decision against all appellant airlines (only in part against BA) on 16 December 2015.
  - General Court appears to have restricted scope for standalone actions by reference to conduct/liability that was “examined” in the Commission Decision.
  - An addressee of a decision can only claim contribution in circumstances where there is a finding of liability by the Commission as against the other party. This suggests that contribution claims cannot be brought against non-addressees of Commission decisions.
Joint and Several Liability

United States
U.S. Joint and Several Liability Rules

- Defendants are jointly and severally liable
- Plaintiffs are entitled to treble damages
- There is no right to contribution
• DOJ has “carrot and stick” enforcement strategy, rewarding voluntary disclosure and cooperation

• Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA)
  • Increases incentives for reporting criminal antitrust violations.
  • Successful defendant is not subject to joint and several liability or treble damages
  • Requirements:
    • Must provide timely cooperation to claimants
    • Cooperation must include the identification of all “potentially relevant facts”; documents; witness interviews or depositions
  • Court will determine whether “cooperation” was sufficient
Some Conclusions

- European litigation as real a risk as US litigation always was
- The risks are different, but approaches must be coordinated
- There remains considerable uncertainty on the European side, including risk of inconsistent judgements
- Case settlements, including global settlements, may have to take account of contribution claims in Europe
- As Europe is opening up for litigation, US courts are making it more difficult for plaintiffs
- Brexit may change the European perspective, and open up a separate ground for litigation
Questions
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