# Private damages: opportunities for in-house counsel

Jerome Murphy and Daniel Sasse of Crowell & Moring LLP offer a 'how to' guide for in-house counsel wanting to recover money for their companies that have been injured by supplier cartels

You're an in-house counsel. Your purchasing department tells you that one of your main suppliers has been indicted for its part in a cartel. Or the department says that a major supplier has approached them, to settle a "little misunderstanding over pricing issues" with a "generous offer" for a "comprehensive release". What should you do? How can you advise them whether the offer is fair, especially as the details of the cartel are secret? And what should you do if you receive notice of a proposed class action settlement – stay in the class or opt out?

Increasingly, coordinated and aggressive cartel enforcement may mean that you face these issues sooner than you'd think. Worse: nobody will raise them when they should.

The US Department of Justice's antitrust division has made cartel enforcement its top priority. In November 2005, there were 56 sitting grand juries in the US, investigating suspected international cartel activity affecting billions of dollars in national commerce each year. The chance that your company has suffered damage from one of these cartels is increasingly likely.

No company wants to sue its suppliers. But no company can afford to be the victim of a cartel and to ignore recovery opportunities. Indeed, effective and responsible corporate governance requires in-house counsel to carefully evaluate situations in which the company has been victimised by collusion, and to balance the maintenance of important commercial relationships with the procuring of appropriate compensation.

## Why private recovery?

The levels of money involved make it almost impossible for companies to ignore possible recovery claims against price-fixing cartels. Recent US fines have been well documented – over US$1 billion for the vitamins industry and more than US$700 million for the DRAM computer-chip industry. The European Commission has also recently issued significant fines of more than €200 million for price-fixing of industrial plastic bags and of copper tubing. In such cases, private damages are likely to be significant – well over US$1 billion in the vitamins cartel.

To an in-house counsel, large fines and guilty pleas resulting in hefty prison terms should signal that the cartel's overcharges were significant. Counsel are increasingly aware of an obligation to pursue potentially sizeable compensation. As more companies pursue these actions, competitive pressures require others to keep up. By ignoring the possibility, a company not only loses out on the money, it is also at a competitive disadvantage if rivals have acted to recover their own losses.

Even so, companies may face internal resistance to pursuing recovery. The purchasing department may be apprehensive about the effect of a recovery action on supplier relationships. This may be a legitimate worry. But how negotiation, or even litigation, is conducted – rather than it being started – is frequently more important to the long-term business relationship. Many companies are also anxious about beginning litigation for fear that it will be drawn-out and costly. There are also concerns that recovery actions will divert management time and resources. Experienced external counsel can work with your company to minimise inconvenience and the commitment of resources, as well as preserve the business relationships.

## Assessing the case

The ultimate question for in-house counsel is whether pursuing the action is worthwhile. You must evaluate whether it is the right opportunity, and if so, how to overcome internal resistance that says recovery cases are not a worthwhile risk.

Good planning leads to success. In-house counsel should consider the following checklist in pursuing recovery opportunities:

- Engage in early assessment
- Set proper expectations
- Evaluate and assess class-action options
- Develop a global plan.

## Early assessment

The first obstacle to overcome is lack of information. The cartel members know how much and for how long they overcharged on which products. But they have no incentive to be candid with their customers about overcharges. You and your purchasing department know nothing about the details of the cartel. And your purchasing department may be reluctant to admit that it was overcharged at all, for fear that they will appear to have failed. Of course, the very nature of a secret cartel invariably makes it virtually impossible for customers to discover the extent of overcharges. That is where early consultation with counsel experienced in assessing these matters, together with competition economists, can help.

In-house counsel should meet with purchasing department personnel and other affected management as soon as possible to accomplish a number of immediate goals. You should take steps to preserve documents necessary to prove overcharges. You should determine which cartel members supply your company. You must also understand the business relationship with that supplier – is it the sole source for the product? Are contract negotiations in progress? It is important to educate company personnel not to settle or compromise any claims without consulting the legal department.

In the US, cartel members themselves can often be a valuable source of information. Once a cartel has been exposed, its members are engaged in a race to seek immunity from the enforcement authorities, to protect themselves from civil fines or criminal prosecution. Immunity applicants must cooperate with customers who bring civil lawsuits. The law itself does not specify a time frame for when an immunity applicant must begin cooperating, but legislative history provides that the "the legislation requires the amnesty applicant to provide full cooperation to the victims as they prepare and pursue their civil lawsuit." The law only protects those corporations that provide "adequate and timely cooperation". New rules and greater attention have encouraged companies to explore similar solutions in Europe.

An additional reason that early assessment is so important: if your supplier has specialist defence counsel, they will have been advised to try to settle early and cheaply with their major customers. They will probably try to settle quickly, before details of the cartel are made public, and often before class action is begun. Cartel victims should resist the urge to take the first offer that comes their way. In our experience, it will often significantly undervalue your company's actual damages.

Whereas potential damages may be difficult to pinpoint, working with experienced counsel and economists will help you determine reasonable estimates. Several important components go into this estimation:

- the purchase volumes, which may be something that is easy for the company to determine from its records;
- the duration of the conspiracy, which may be disclosed in a plea agreement or commission fine; and
- the estimated overcharge, which usually requires analysis by a competition economist.

Litigation is always the last resort, but preparing for potential litigation will put your company in the strongest position possible to engage in pre-litigation negotiations with your suppliers. In these negotiations, do not rule out the possibility of non-cash alternatives as partial compensation. After estimating potential damages, your company should also consider whether a cash settlement is the best settlement. Cash certainly is often the preferred form of payment, but sometimes future discounts or other solutions are attractive for both parties.

## Manage expectations

Each cartel is different. But damages resulting from cartels are significant, on average resulting in overcharges of between 15 to 20 per cent. But one of the most important roles for in-house counsel is to manage internal expectations about recovery and ensure that conservative projections are used.

Your company and its lawyers must objectively guage the facts. Even if there has been a multimillion dollar fine or plea agreement, your company will ultimately have to prove its damages. Do not overestimate those damages to justify bringing an action. It is always better to make conservative estimates. Your company should also be prepared to provide documents to support its claims. And, although many cases settle fairly early in the process, you should be prepared for the long-haul because these cases frequently take years to conclude.

## Evaluate class action options

One thing that in-house counsel must consider – if your company is located in the US or made purchases there – is that by the time your company learns of the cartel, it is probably already part of a class action. Class actions will almost always be filed, sometimes within hours of the announcement of dawn raids or justice department plea bargains. Frequently, there will be competing class action complaints filed on behalf of direct purchasers. These actions are often transferred and consolidated, for all pre-trial purposes, before one federal judge as a multidistrict litigation. In many instances, class-action complaints are also filed on behalf of indirect purchasers in states with 'Illinois Brick' repealer statutes.

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After receiving notice of a pending class settlement, the first choice your company will face is whether to stay in or opt out. The notice will set a deadline for class members that wish to exclude themselves from the settlement, which is earlier than the deadline for submitting claim forms. Sometimes, participating may be the best way for a company to pursue a recovery. But in many cases, opting out will be your company's best choice.

Several factors should be considered when deciding whether your company should opt out of a class action. The main question: whether the size of the potential recovery justifies the risks associated with an independent action. When substantial damages are at stake, opting out provides a large corporation with the ability to exert greater control over how a case is run. Additionally, large companies generally believe that they can recover greater damages by bringing a separate litigation because class settlements tend to benefit smaller purchasers more. Finally, some companies that have been defendants in previous class actions will usually have negative views towards class counsel in general and may want to opt out on that basis alone.

## Find global solutions

Increasingly, our clients are global companies, which purchase products throughout the world. Likewise, cartels are becoming worldwide operations. In such cases, companies affected by cartel activities should seek global solutions to recover for the overcharges, which sometimes cover a period of a decade or more.

You should not think of the US as the only country to recover antitrust overcharges. Many features of US litigation, such as notice pleading requirements, liberal discovery rules and treble damages, make it the best place. But some US courts have barred or limited foreign claims. For example, in a recent case involving the global vitamins cartel, the DC circuit court required "a direct causal relationship – that is proximate causation" to show that plaintiffs' wholly foreign injuries were caused by the domestic US effects of the defendants' anti-competitive conduct. But this decision and others like it do not necessarily address the case of a truly global market or customer, with significant purchases both within and outside the country, seeking to bring a claim for all purchases in a US forum. There will continue to be a significant amount of litigation on this point.

As US courts have set some boundaries on the scope of their jurisdiction over wholly foreign claims, the European Commission has encouraged cartel victims to bring private actions in Europe. Regulation 1/2003 is widely expected to spur private litigation in Europe. This regulation allows for private parties to bring private damages actions based upon Article 81 and 82 in national courts and removes the commission's exclusive jurisdiction to grant exemptions. The practical effect of this regulation is that companies can now take a final ruling by the commission and introduce the finding in a national court to establish liability. The company will only need to prove causation and damages. The increase in private actions is largely aspirational to date. But the UK and Spain have instituted new courts, specialising in competition law with more favourable procedures. Germany has also significantly modified its competition laws in support of the regulation. The European Commission's green paper also examines ways to further facilitate private damages actions in the national courts of EU member states.

Counsel who wish to pursue modern recovery actions must have a global strategy and may need to consider filing actions in multiple jurisdictions. Decisions such as *Provimi v Aventis* and *Crehan v Inntrepreneur*, the increased activity by European authorities and more favourable procedural rules in national courts all ensure that private recovery actions are no longer limited to the US. Companies must be aware of this to stay a step ahead.