Private damages actions and global recovery solutions for multinationals: understanding the pitfalls of US class actions

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International cartel behaviour does not only affect consumers; in many cases of price fixing for producer goods, the victims are corporations. Many of these companies believe they have an obligation to their shareholders to diligently pursue recovery for overcharges. US companies face a trade-off between participating in class actions and pursuing separate litigation (alone or as part of a group of similarly-situated companies) to recover these overcharges. Class actions operate almost entirely independently of the companies, requiring no investment but also affording no ability to control the litigation, the ongoing relationship with the suppliers, or the outcome of the case. Separate litigation (referred to as 'opt-out' litigation) requires some commitment of company resources, but gives the company complete control over the litigation and the negotiation of an appropriate resolution with the suppliers. Larger US companies have increasingly selected the opt-out route as the best way to manage those considerations, in large part because they want to maintain viable business relationships with their suppliers while securing reasonable recovery.

The situation is more complicated for multinational corporations. Companies that do business not only in the US but also in Europe, Asia and the rest of the world are often not able to view a US-only strategy as a viable vehicle for satisfying their shareholders that overcharges have been reasonably recovered. For those companies, a global solution is necessary, particularly given recent US court rulings, as well as certain peculiarities of US class action litigation. This article offers assistance to multinationals in understanding the landscape of the recent US court rulings, and in considering how to make sophisticated decisions about whether to rely on US class litigation or globally-oriented opt-out litigation as the appropriate means of recovering damages.

The increasing role of private antitrust enforcement

For years, competition authorities around the world have recognised that coordinated efforts are needed to combat the increasing globalisation of cartel activity. In the US, the Antitrust Division of the Department of Justice (DoJ) has targeted for prosecution companies and "executives who victimize American business and consumers by engaging in international cartel offenses,"[1] regardless of whether those executives have ever stepped foot in the United States. Japan, Canada, Korea, France and Britain now have laws that provide for criminal penalties for cartel activity. 'Cooperation' and 'convergence' have become the buzz words of the day for criminal antitrust enforcers. As a result, the world truly is becoming a more dangerous place for members of international cartels.

But is the same true for potential civil damages recovery by cartel victims? In a recent speech, Neelie Kroes, the European commissioner for competition policy, reiterated her view that "private enforcement actions are a key component of an effective antitrust system – they not only secure compensation for injured parties, but also play an important part in encouraging compliance with the rules."[2] It has long been recognised that "[p]rivate enforcement thus increases the likelihood that a violator will be found out, greatly enlarges the penalties, and thereby helps discourage illegal conduct. The statutory scheme thus supplements public enforcement, which is inevitably selective and not always likely to concern itself with local, episodic, or less than flagrant violations."[3] At its core, a complementary policy regarding private damages actions is pro-competition and, therefore, pro-business.

Thus, although there is little debate (i) that there are benefits to discouraging international cartels; (ii) that civil enforcement can effectively discourage cartels[4]; and (iii) that multinational corporations are feeling increasing pressure to recover for cartel overcharges, private cartel litigation remains largely a US phenomenon. The European Commission's recent green paper on Damages Actions for Breach of the EC Antitrust Rules[5] has triggered academic discussion and debate, but little to no litigation. Nor is there significant private damages litigation in other parts of the world. Moreover, recent US court decisions interpreting the Foreign Trade Antitrust Improvements Act (FTAIA) indicate that, although US antitrust law will apply to foreign conduct that affects US commerce, it will not apply to wholly foreign conduct that gives rise to no US effects.

This paper first examines the framework that US courts are using in considering whether they have jurisdiction over international cartels and foreign conduct, and considers what effect this framework may have on multinationals with US and foreign purchases. Second, to the extent that US courts do not exert jurisdiction over all purchases in these cases, the paper also considers whether these cases may have the unintended consequences of forcing multinationals to opt out of class settlements in order to ensure that they can recover for foreign purchases.

Post-*Empagran* recovery complexities: can US courts still provide a single-forum solution?

In 1982, Congress enacted the FTAIA[6] in an effort to limit the extraterritorial application of the US antitrust laws. In relevant part, the FTAIA provides that the antitrust laws shall not apply to conduct concerning foreign trade, "other than import trade or import commerce".[7] As a result, a court's jurisdictional determination necessarily begins with the FTAIA's initial distinction between conduct that affects US imports and conduct that only affects non-import commerce.

Conduct concerning import commerce

The FTAIA does not remove conduct concerning import commerce from the reach of the US antitrust laws. In this respect, the statute embraces the widely accepted jurisdictional standard set forth by the United States Supreme Court in *Hartford Fire Ins Co v California*, that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[8] The standard was clarified in *Dee-K Enter Inc v Heveafil Sdn Bhd*, 299 F3d 281, 286-87 (4th Cir 2002), where the court was asked to consider whether *Hartford Fire* only applied to conduct was that wholly foreign, as opposed to partially foreign and partially domestic. The court observed that "mixed foreign and domestic elements" were simply part of modern global business and that "[t]his sort of mixed fact pattern will […] become increasingly familiar as global economic links and assertions of transnational jurisdiction increase." The court concluded that the test was not limited only to

"wholly foreign conduct," but applied even where the challenged foreign conduct was "primarily" but not "wholly foreign".

Conduct concerning non-import foreign commerce

The jurisdictional limitation set forth by the FTAIA applies to all illegal conduct concerning non-import foreign commerce (ie, US exports or wholly foreign transactions), unless such conduct: "(1) has a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce, and (2) 'such effect gives rise to [an antitrust] claim.'"[9]

The 'effects' test

The first prong of the FTAIA exception requires that, to be actionable under US law, the cartel has a "direct substantial and reasonably foreseeable effect" on US commerce. "A domestic effect is 'direct' if it 'follows as an immediate consequence of the defendant's activity,' and it will be considered 'substantial' if it involves a sufficient volume of US commerce and is not a mere 'spillover effect.'"[10] At the pleading stage, courts generally have found this prong to be satisfied where a plaintiff alleges that, as a result of defendants' conspiracy, prices in the United States increased.[11]

Courts have made clear that the location of the effect and not the location of the illegal conduct is the relevant consideration. As a result, if the economic consequences of a cartel's activities are not felt in the United States, the fact that such activities took place in the United States is irrelevant.[12] Conversely, conduct committed wholly outside of the United States may, in fact, satisfy the test, if it gives rise to effects in the United States.[13]

The 'gives rise to' test

Until recently, US courts were split on the application of the 'gives rise to' prong when the anti-competitive conduct significantly and adversely affected customers both inside and outside the US. Some courts allowed foreigners, who had purportedly suffered an independent foreign harm, to sue as long as someone had a claim based on the domestic harm.[14] Other circuits held that foreign plaintiffs could only sue in US courts if the effect on US commerce was the cause of the plaintiff's own injury.[15] The Supreme Court resolved this dispute in *F Hoffman-La Roche Ltd v Empagran SA*, (*Empagran I*)[16] by holding that jurisdiction is not established "where the [foreign] plaintiff's claim rests solely on the independent foreign harm".[17] The Supreme Court did, however, note that jurisdiction may lie if "the domestic effects were linked to [the] foreign harm."[18] The case was ultimately remanded to the United States Court of Appeals for the District of Columbia Circuit to determine the requisite nexus between domestic effect and foreign injury for the FTAIA exception to apply.

On remand, the DC Circuit (*Empagran II*) held that, for the FTAIA exception to apply, the domestic effects of defendants' illegal behaviour must be the "proximate cause" of a plaintiff's foreign injuries.[19] A number of US district courts have subsequently adopted this standard.[20] All of these courts have held that mere allegations of price arbitrage or maintaining super-competitive prices in the United States to assure a cartel's effectiveness in foreign markets do not meet the 'proximate cause' standard.

Multinational corporations, however, raise a different issue for US courts. In the case of multinationals, purchases are neither wholly foreign nor wholly domestic. Frequently, purchases are made by a centralised sourcing function that procures products for facilities all over the world. Factual variations are endless, but the bottom line for these companies is that some level of purchasing negotiations has been centralised at the global level. Similarly, defendants treat these companies as global purchasers and coordinate global sales to these companies. Where multinationals are paying a single global price, they can argue that the cartel activity was the proximate cause of their increased price and the effect was felt both in the US and abroad. To date, no US court has squarely confronted the issue of whether it has jurisdiction over all purchases made by multinationals who were the victims of cartels that operated in the US or abroad.

Although the 'gives rise to' test and proximate cause standard have not been considered outside of the class action and wholly foreign purchases context, the DC Circuit provided several examples of when proximate cause may exist.[21] The first concerned a "conspiracy that operated both domestically and internationally."[22] The second concerned a "foreign injury [that] was 'inextricably bound up with the domestic restraints of trade.'"[23] And the third concerned a case in which an FM radio station in the British Virgin Islands brought an antitrust action against a competing radio operator claiming lost revenue from sales to US advertisers. The plaintiff alleged that its competitor preserved its monopoly through misrepresentations about the plaintiff's broadcasting reach, which caused US advertisers to pay too much for advertising.

These developments suggest that additional guidance may be forthcoming from courts on whether jurisdiction exists for 'global purchasers' who are victims of international cartels and whether any US conduct in a cartel case can be the proximate cause of foreign harm if only foreign purchases are at issue.

Class actions: do multinationals need to opt out to protect global recoveries?

As a practical matter, any discussion of global private damage actions must consider class actions. Virtually without exception, class actions will be filed sometimes within hours of the announcement of dawn raids or DoJ 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 under the Multi-District Litigation rules. And in many instances, class action complaints are also filed on behalf of indirect purchasers in states with *Illinois Brick* repealer statutes.

Class actions have been the target of substantial criticism by the US Congress and the courts. In 2005, the Senate Judiciary Committee noted that "[a] mounting stack of evidence reviewed by the Committee demonstrates that abuses are undermining the rights of both plaintiffs and defendants."[24] Congress blamed lax procedures in state courts and enacted the Class Action Fairness Act of 2005, making it easier to remove class actions based on state law claims (including indirect purchaser actions) to federal court.

Criticism of class actions extends to settlements. One court recently reflected that "judges have been too quick to approve counsel as adequate to represent sprawling and amorphous classes, and then overeager to accept a settlement – any settlement – that will bring pending litigation to an end. The result all too often has been a virtual collusion between plaintiffs' counsel and corporate interests bent on buying peace and excluding consumers from access to court."[25] The results can be even less favourable for multinational victims of the international cartel, who often recover pennies on the dollar of actual damages, with no say in process, and get nothing for international purchases.

A company should consider several factors when deciding whether to opt out of a class action. The threshold question is whether the size of the potential recovery justifies the risks associated with an independent action. In cases concerning substantial potential damages, opting out of the class action provides a large corporation with the ability to exert greater control over how its case is developed and litigated. Additionally, large corporations generally believe that they can recover greater damages by bringing a separate

litigation because class settlements tend to benefit smaller purchasers the most. And some companies that have been defendants in previous class actions have negative views toward class counsel in general and may desire to opt out on that basis alone. But, perhaps the most important concern for multinationals who are cartel victims is that they must not only consider whether a class action settlement will cover their foreign purchases, they must ensure that the settlement will not preclude recovery for these purchases in the future.

Due in part to recent rulings by US federal courts post-*Empagran*, many class actions are limited to purchases made in the United States. These settlements must be evaluated very carefully by multinational corporations with global purchases. Despite the narrow scope of these recoveries (US purchases only), as part of these settlements companies will be required to sign broad releases. These releases frequently contain language that purports to release defendants "from all manner of claims from the beginning of the world until today arising under the antitrust laws of the United States, the Competition Laws of the European Union and its member states, or any other jurisdiction, or under any similar statutory or common law, whether sounding in antitrust, unfair or deceptive trade practice or unfair competition," or similarly broad language.

Although there are serious questions as to whether a foreign court would find that a release precludes a company from seeking recovery of overcharges for non-US purchases, a company should expect that cartel members will argue that the release is a valid settlement and precludes any further litigation anywhere. Accordingly, a small class settlement based solely on US purchases may have the consequence of releasing all of a multinational company's claims worldwide.

This problem is exacerbated because many multinationals are unaware they are class members, and that their claims are being litigated without their input. Most antitrust class actions are filed under Federal Rule of Civil Procedure 26(b)(3) and will automatically bind companies unless they take the affirmative step of opting out of the case. This is true even if they do not file a claim and never collect a dime. In these circumstances, it seems unlikely that a foreign tribunal would hold that a company was still bound by a broad class settlement release even when the company did not participate in the settlement, but defendants certainly will raise such arguments.

For all of these reasons, multinational companies may find that US class actions place them in a no-win situation. The company cannot ignore the class action because its US claims may be extinguished, yet participation in the class may require – or at least raise the risk of – forfeiting non-US claims. Consequently, an increasing number of multinationals with substantial cartel purchases have been opting out of US class actions and pursue litigation separately.

Conclusion: multinational corporations must consider multinational solutions

For now, it remains unclear whether multinational corporations with purchases in the US and throughout the world will be able to recover all of their overcharges in a single US lawsuit. This type of analysis is fact intensive and requires further clarification from the courts. What is clear, however, is that a multinational corporation must be careful that participation in a US class action settlement does not limit its right to seek a global recovery. If the company has significant foreign purchases, it must diligently consider opting out of the US class action settlement and must consider how it will recover all of its purchases.

Counsel who wish to pursue modern recovery actions must have a global strategy and may need to consider filing actions in multiple jurisdictions. The European Commission has taken steps to encourage private enforcement, including: the passage of European Commission Regulation 1/2003; the ability of private parties to take a final ruling by the commission and introduce it in a national court to establish liability; and the European Court of Justice's recent recognition in the 'Manfredi case'[26] of the availability of punitive damages in private actions. Recent decisions in national courts also suggest that some European countries[27] are starting to consider private enforcement and that it may no longer be solely a US phenomenon. Companies that stay abreast of these changes and approach private damages actions from a global perspective will stay a step ahead in the marketplace.

Notes

1 Scott D Hammond, deputy assistant attorney gen for criminal enforcement Antitrust Div, US Dep't of Justice, 'Charting New Waters in International Cartel Prosecutions', (2 March 2006), available at www.usdoj.gov/atr/public/speeches/214861.htm.

2 Neelie Kroes, European comm'r for competition policy, 'Competition Policy – 2005 Review, 2006 Outlook', (23 June 2006), available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/ 406&format =HTML&aged=0&language=EN&guiLanguage=en.

3 Phillip E Areeda & Herbert Hovenkamp, Antitrust Law 273-274 (2d ed 2000).

4 See, eg, Salil K Mehra, 'Deterrence: The Private Remedy And International Antitrust Cases', 40 Colum J Transnat'l L 275 (2002).

5 Commission of the European Communities, green paper on Damages Actions for Breach of the EC Antitrust Rules (19 Dec 2005), available at http://ec.europa.eu/comm/competition/antitrust/others/ actions_for_damages/gp_en.pdf.

6 15 USC section 6(a).

7 Id.

8 509 US 764, 796 (1993). Courts have consistently applied the standard set forth in *Hartford Fire*. See, eg, *F Hoffman-LaRoche Ltd v Empagran SA*, 542 US 155 (2004); *Turicentro SA v American Airlines Inc*, 303 F3d 293, 305 (3d Cir 2002); *Dee-K Enters Inc v Heveafil Sdn Bhd*, 299 F3d 281, 294 (4th Cir 2002); *Crompton Corp v Clariant Corp*, 220 F Supp 2d 569, 572-73 (MD La 2002); *Betterware plc v Tupperware Corp*, 1998-1 Trade Cas (CCH) ¶ 171,158, at 82,025 (SDNY 1998); *S Megga Telecomms Ltd v Lucent Techs Inc*, 1997 US Dist LEXIS 2312 (D Del 1997); *Eskofot A/S v EI Du Pont De Nemours & Co*, 872 F Supp 81 (SDNY 1995); *United States v Nippon Paper Indus Co*, 109 F3d 1 (1st Cir 1997) (applying the *Hartford Fire* test in a criminal context).

9 *Empagran*, 542 US at 159.

10 *In re Dynamic Random Access Memory Antirust Litig*, 2006 WL 515629 (ND Cal 2006) (DRAM).

11 See DRAM, 2006 WL 515629; see also, *Latino Quimica-Amtex SA v Akzo Nobel Chem BV*, 2005 WL 2207017 (SDNY 2005).

12 See *Turicentro*, 303 F3d at 305.

13 See *In re Microsoft Corp Antitrust Litig*, 127 F Supp 2d 702, 715 (D Md 2001) (stating that "the House Report reflects that Congress did contemplate that the effects test would encompass not only conduct committed outside of the United States having effects within the United States, but also conduct committed within the United States having effects both within and outside of the United States") (citing HR Rep No. 97-686 at 10 (1982)).

14 *Kruman v Christie's Int'l plc*, 284 F3d 384 (2nd Cir 2002); *F Hoffman-La Roche Ltd v Empargran SA*, 315 F3d 338 (DC Cir 2003), vacated by, 542 US 155 (2004).

15 *Den Norske Stats Oljeselkap As v HeereMac VOF*, 241 F3d 420 (5th Cir 2001).

16 *Empagran I*, 542 US at 155.

17 Id at 159.

18 Id at 175.

19 *F Hoffman-LaRoche Ltd v Empagran SA*, 417 F3d 1267, 1271 (DC Cir 2005)

20 DRAM, 2006 WL 515629; *In re Monosodium Glutamate Antitrust Litig*, 2005 WL 2810682 (D Minn 26 Oct 2005); Latino Quimica-Amtex, 2005 WL 2207017; *eMag Solutions LLC v Toda Kogyo Corp*, 2005 WL 1712084 (ND Cal 20 July 2005).

21 See *Empagran II*, 417 F3d at 1269-70 (citing *Pfizer Inc v Gov't of India*, 434 US 308 (1978); *Industria Siciliana Asfalti Bitumi SPA v Exxon Research & Eng'g Co*, 1977 WL 1353 (SDNY 1977); *Caribbean Broad Sys v Cable & Wireless plc*, 148 F3d 1080 (DC Cir 1998).

22 *Empagran II*, 417 F3d at 1270.

23 Id (quoting *Industria Siciliana*, 1977 WL 1353, at *11).

24 S Rep No. 109-14, at 4 (2005), as reprinted in 2005 USCCAN 3, 5-6.

25 *In re Relafen Antitrust Litigation*, 231 FRD 52, 85 (D Mass 2005).

26 *Manfredi v Lloyd Adriatico Assicurazioni SpA*, C-295/04 ¶ 99 (European Court of Justice 13 July 2006).

27 For example, courts in the United Kingdom and Germany have awarded private recoveries. *Provimi v Aventis* [2003]; *Crehan v Inntrepreneur* [2004] rev'd by *Inntrepreneur v Crehan* [2006] UKHL 38) (recognising right of private recovery, but reversing on other grounds); LG Dortmund, Urt V 14/2004, 13 O 55/02, summarised in 11/2004 WuW 1182 (2004) (awarding damages in the vitamins cartel).

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