

ANTITRUST DAMAGES RECOVERY

Our Credentials

Bringing legal actions to recover damages from suppliers (and others) that have engaged in cartel activity is a rapidly growing, but relatively new, phenomenon in Europe. In the U.S. it is a well-established practice. Crowell & Moring is a leading player in the U.S., where we have recovered approaching 1 billion USD for our clients. And we have been at the forefront of developments in Europe, making new law and recovering tens of millions of Euros already.

We are not, however, simply copying our U.S. model in a European context. We capture our extensive U.S. knowledge and experience by setting up case teams in which our European and U.S. lawyers work together to obtain the best results.

Our Approach

We offer to provide services to our clients at little or no upfront cost. We will – to the extent that this is possible taking into account applicable ethical rules – assist with the evidence gathering, preparation of economic analysis and any necessary litigation at our own cost and risk, and will look to our clients for payment only when and if we have achieved a result. We may work with third party funders to help cover litigation costs where appropriate.

We are not, however, class action lawyers. We always act for specific clients – sometimes alone, sometimes as part of a small claimant group – on the basis of direct instructions. That is part of our culture and our history. Our recovery practice has grown out of our representation of individual major corporations, on the basis that we can achieve better results for them acting individually than they could achieve through class action (often many times better).

As a result, client service is central to our approach. We work with our clients to achieve a solution that maximizes their recovery. That doesn't just mean maximizing the financial return. It also means

ensuring that relationships with defendants, who will frequently also be important suppliers, are preserved, and that the burdens on our clients in terms of real but hidden costs of management and staff time and resources are minimized. The goal, from our perspective, is to establish a long-term relationship of trust with our clients that is not limited to recovery work.

Preparation

Like most litigation, antitrust recovery cases are generally best resolved by a negotiated solution and settlement. In an ideal world, litigation would be avoided, and sometimes it is. However, the best results are obtained by preparing – and being prepared – to litigate if necessary. In the words of Theodore Roosevelt, “Speak softly and carry a big stick”. In our experience, this means careful practical preparation and careful strategic planning.

In practical terms, that means gathering, analyzing and preserving data, documents and witness testimony as early and as extensively as is practically possible. This can of course be a significant burden on the business. We understand that, and we will offer our manpower and resources to minimize that burden. Ultimately, our clients set the agenda and the needs of their ongoing businesses come first. We will work with information the business is able to provide given the constraints on it. However, typically, the more we can get, the better the result we can achieve.

An important factor is working effectively with economists. Economic analysis is often crucial in establishing the extent of the loss and proving the case. Whether the case settles early or goes the distance, involving economists early and in the right way can make a critical difference. We work closely with a number of leading economic consultancies in this area and consider our relationship with them a major strength.

Strategic Analysis

The strategic analysis involves deciding when, where and how to bring any litigation. The factors to consider are diverse, and the right answer will vary from case to case. Key issues to consider include:

Finding allies: sometimes it helps to look for allies and bring a claim as part of a group. Establishing a well-structured group of plaintiffs that preserves the ability of each member to make individual strategic decisions can create greater pressure on defendants, help in cost sharing, give access to more data and hence better analysis and reduce the (in our experience limited) risk of commercial retaliation.

Jurisdiction: claims are ultimately brought in national courts, and not every jurisdiction will be available in every case. Sometimes litigation in the U.S. can open up a powerful second front. Identifying the available options and the pros and cons of each is critical.

Access to evidence: courts in the U.K. and the U.S. give extensive access to documents and information held by defendants. In cartel cases, where the defendants have often gone to great lengths to conceal their activities, this can be a huge advantage. But it won't always be necessary. Cases can be pursued in other ways and other jurisdictions have other advantages.

Interest: courts in European jurisdictions will typically award interest on damages claims. But rates, the

dates from which interest is available and the way that interest is calculated vary. In long lasting cartels, it is not infrequent for interest to increase the value of a claim by a factor of two or more.

Costs: the cost of litigation varies widely between jurisdictions, with the U.K. being particularly expensive. But the ability to recover costs also varies significantly and in the U.K. a successful litigant will typically recover around two thirds of its actual costs from the losing side, while in many other jurisdictions cost awards are severely limited in practice.

Alternatives: sometimes mediation and/or arbitration can provide a useful alternative to traditional litigation.

Our multijurisdictional legal team has extensive experience in working through these issues and helping clients to make the right strategic decisions.

Representative Matters

- Represented Carrier Corporation in a successful damages action in the English High Court against parties to the industrial copper tubes cartel, resulting in settlements worth in excess of US\$10 million.
- Defended a number of different clients against claims for compensation for abusive discrimination in the media sector.

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