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BRIEFING

# Vitamins cartel judgment

Will it encourage damages claims?

## Executive summary

A judgment in the vitamins cartel litigation means that it could now be easier to bring damages claims in cartel cases in the English courts, and possibly elsewhere. This briefing examines the judgment as well as the implications for those engaged in cartel-related litigation.

In *Provimi Limited v Aventis Animal Nutrition SA & Ors and other cases* [2003] EWHC 961 (Comm), judgment of 6 May 2003, the High Court held, on applications to strike out and/or for summary judgment that it is arguable:

- that a subsidiary that merely charges a price fixed by a cartel, whether or not it knew of the cartel arrangements, implements the cartel and therefore participates in an infringement of article 81(1) of the EC Treaty and can be sued in tort. In other words, there is no need for the subsidiary to know anything about the cartel in order for it to be liable for damages for breach of article 81(1); and
- that a European customer of the cartel can bring a cartel damages claim in the English courts against the English subsidiary within the cartel group, even if that customer did not purchase any products from the English subsidiary. In other words, liability flows merely from the charging of the cartel price by the English subsidiary.

If these principles are correct, and the matter is still subject to possible appeal, the ruling could allow any subsidiary of a cartel's group to be liable if it sells products affected by a cartel arrangement entered into higher up in the group. Since each subsidiary can be sued in its home courts for all the losses, this will create a breeding ground for forum shopping. This is because the principles apparently established in *Provimi* concern the proper interpretation of article 81(1) of the EU Treaty, and that interpretation must be consistently applied in all EU countries.

The practical effect is that a customer who has purchased directly from a cartel's group will be able to select the forum in which to bring proceedings for damages having regard to the most favourable rules of procedure. The claimant will also be able to join in the proceedings all of the companies within its group that bought any relevant products from the cartel's group. It will also be able to join, as defendants, all of the other selling subsidiaries. As an alternative, it could seek full recovery of the group's alleged losses from the single subsidiary.

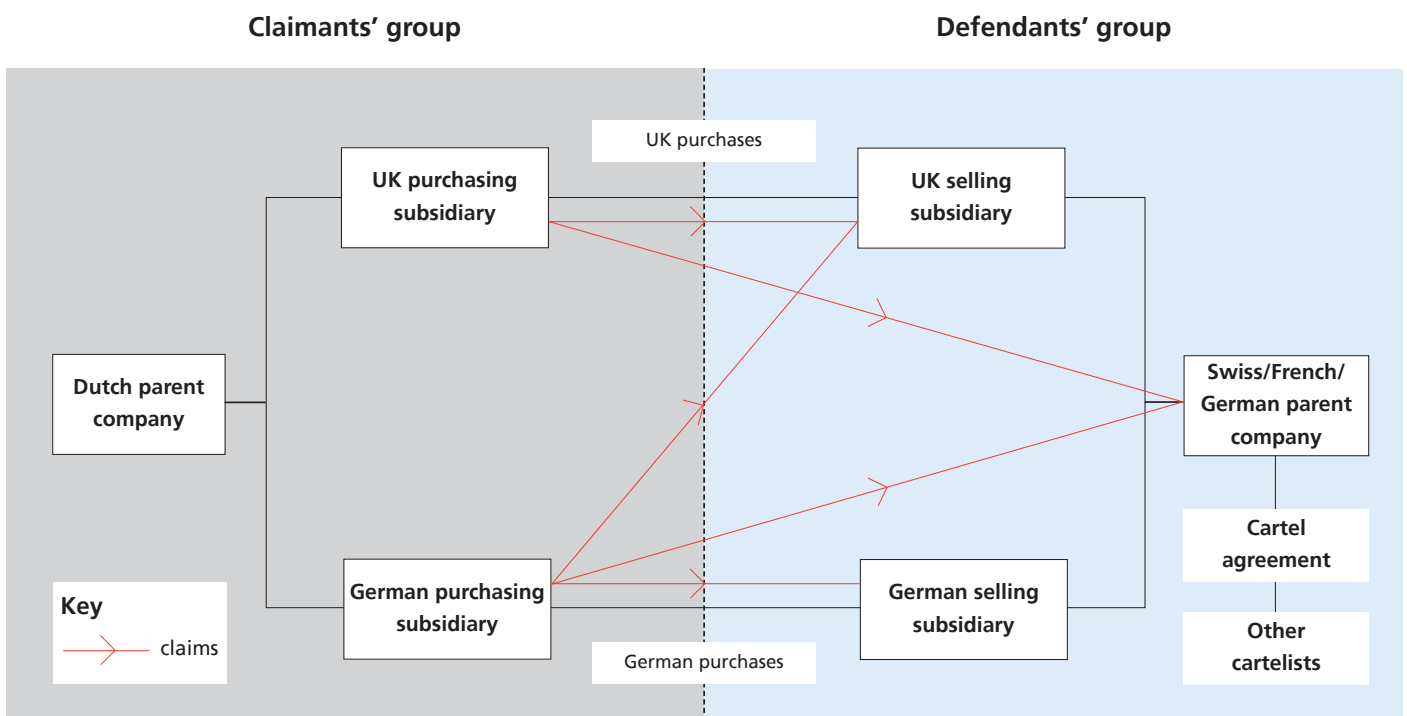
## The facts

The *Provimi* litigation arose out of the vitamins cartels detailed in the European Commission's decision of November 2001 (in Case COMP/E-1/37.512 – *Vitamins* [10.01.03] OJ L 6/1). This announced that various undertakings, including F Hoffmann-La Roche AG and Aventis SA (formerly Rhône-Poulenc), had participated in a series of price fixing and market sharing cartels in the vitamins sector.

In May 2002 the claimants, who had purchased vitamins from the Roche and Aventis groups during the existence of the cartels, brought separate proceedings in the English courts for damages against a number of the EU cartelists, including various companies within the Hoffmann-La Roche and Aventis groups. The damages claimed included the difference between the prices at which vitamins were sold during the cartel periods and the prices which the claimants maintained would have

prevailed but for the cartels. (The proceedings are ongoing and Freshfields Bruckhaus Deringer acts for the Roche defendants.)

The diagram below illustrates the basic structure of the claims in the various cases.



**Note**

- i) no purchases by the German purchasing subsidiary from the UK selling subsidiary;
- ii) no knowledge of the cartel on the part of the UK or German subsidiaries alleged; but
- iii) claims held to be arguable.

**Damages for breach of article 81(1)**

At the heart of the strikeout application was an important issue regarding the necessary ingredients of a cause of action in English law for damages for breach of article 81(1). (The nature of the cause of action for damages for infringement of article 81(1) is, according to English law, characterised as a private law claim for damages for the tort of breach of statutory duty (*Garden Cottage Foods Limited v Milk Marketing Board* [1984] 1 AC 130).) The central issue was whether or not it was necessary in such a claim for a claimant to plead and prove some degree of knowledge of the infringement on the part of the legal entity sued.

The defendants argued that the claimants must plead and prove a breach of article 81(1) by each of the defendants. It was argued that while the English defendant companies were indirect subsidiaries of the ‘parent’ ‘undertakings’ identified in the Commission’s Decision, there was no allegation of knowledge of the cartel arrangements on the part of the relevant subsidiaries – who were not named in the Commission’s Decision. (Article 81 of the EC Treaty applies to ‘undertakings’. This is an EC competition law concept and is broader than the English law notion of a corporate entity. It refers to economic units, and can embrace a number of corporate entities

within one economic unit.) Without an allegation of knowledge on the part of the subsidiaries, it was argued that a case of infringement of article 81(1) by them could not succeed as a matter of law.

Mr Justice Aikens held it arguable, at the interlocutory stage, that where two corporate entities are part of the same ‘undertaking’ and one of those entities has entered into cartel arrangements with other, independent, undertakings, then another corporate entity (which is part of the group) which ‘implements’ the infringing agreement, itself infringes article 81(1): ‘... if one entity of an undertaking is an infringer by agreeing to fix prices, another entity that has implemented the same infringing agreement, is also an infringer’.

Mr Justice Aikens held that knowledge on the part of the selling subsidiary, whether express, implied or imputed, is not a required element of the cause of action. Simply charging the cartel price is sufficient for ‘implementing’ the cartel, and so for participating in the infringement.

The defendants also argued that the German claimants could not show that the English subsidiaries had caused them loss. This was because prices were set centrally within the Roche and Aventis groups, and this would have been the case even in the absence of the cartels.

The defendants argued that while prices might have been lower but for the cartels (an issue the claimants would have to prove at trial), the local subsidiaries would not have been free to set their own prices. As the local subsidiaries would not have undercut each other’s prices, the German claimants would not have been able to get a better price elsewhere, ie in England. (It was accepted that the intragroup pricing structure did not in itself violate article 81(1).)

The Court found, however, that there was a triable issue as to whether the English defendants might have caused loss to the German claimants on the basis that, without the cartels, there could have been price competition between the Roche group and the Aventis group. The Court found it arguable that, as a consequence, the German claimants may, in those circumstances, have been able to buy vitamins from another group at a lower price. ‘If, as I have held, it is arguable that all the companies within an “undertaking” who “implemented” the cartels are infringers of article 81, then their action in

“implementing” the cartel could cause the loss that the claimants allege. On this analysis, each infringing entity is a tortfeasor. I do not think it matters whether they are to be regarded as joint or several tortfeasors for the purpose of the causation argument. Each entity would have contributed to a situation where it took part in the cartel, upheld the prices and so (arguably) caused loss’, said Mr Justice Aikens.

In separate applications, certain of the defendants invoked jurisdiction clauses in their standard terms and conditions in favour of, variously, Swiss, German and French courts, arguing that the jurisdiction clauses applied to give the nominated courts exclusive jurisdiction. They argued that the English court was required to decline jurisdiction in favour of the designated courts.

The Court found that the claimants had a good arguable case that the jurisdiction clauses did not apply to the claims in these cases. While the decision concerns the wording of the particular clauses, and the application of Swiss, German and French principles of construction to the clauses, the judgment is nevertheless significant in finding that the scope of the various clauses was not sufficiently broad to cover the claimants’ claims in tort for breach of article 81(1). Some of the clauses were, on their face, expressed in very broad terms (applying to ‘all disputes arising out of the legal relationship’).

The clear implication of the judgment is that it is highly unlikely that a jurisdiction clause contained in a selling subsidiary’s standard terms and conditions will be interpreted as sufficiently wide in scope to cover claims for damages based on article 81, unless express provision to that effect is made. For obvious reasons, this is unlikely in commercial reality and jurisdiction clauses are likely to have little, if any, effect on cartel damages claims.

## Conclusion

The ruling is consistent with a developing policy of facilitating cartel damages claims. That policy appears to be gaining momentum in the UK as well as at EU level. For example, in the UK, the Enterprise Act 2002 provides for the bringing of follow-on damages claims and group consumer claims before the newly established Competition Appeals Tribunal, giving potential claimants

a choice of forum between that Tribunal and the High Court. In the EU, Council Reg (EC) No 1/2003 ('Regulation implementing articles 81 and 82 of the Treaty' – this is the successor to Regulation 17/62 EEC and will come into effect on 1 May 2004) devolves additional powers to the national courts, in anticipation of a growing role for the Community's national courts in the enforcement of the EU's competition rules generally, including in the context of cartel damages claims.

As noted above, the judgment is likely to facilitate the bringing of claims by removing the need to prove knowledge on the part of the entity sued. It will also lead to careful forum selection, which may depend on the national courts' respective rules on disclosure, costs, limitation periods and remedies.

There are, however, a number of issues not addressed in *Provimi*. The position of 'indirect purchasers', (ie a customer who does not purchase directly from the cartelists' group but who purchases from a supplier who does), was not in issue in the proceedings and is not considered in the judgment. Moreover, Mr Justice Aikens clearly found a number of the issues novel and complex, and specifically suggested that the issue of when and how an infringement of article 81 takes place, and the circumstances in which a private law claim for damages can be maintained, may need to be considered by the European Court. The defendants may yet appeal – and even if there is no appeal the issues could be revisited at trial.

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