

European Competition Law Update

Private Damages Actions

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State of play

- Volume of claims based on competition infringement being brought in the EU is growing
- Generally follow-on damage actions rather than stand alone claims for damages or injunctive relief
- Private enforcement encouraged by the Commission:
 - White Paper on Damages Actions for Breach of the EU Competition Rules (Com (2008)0165)
 - Guidelines on quantification may follow Oxera report

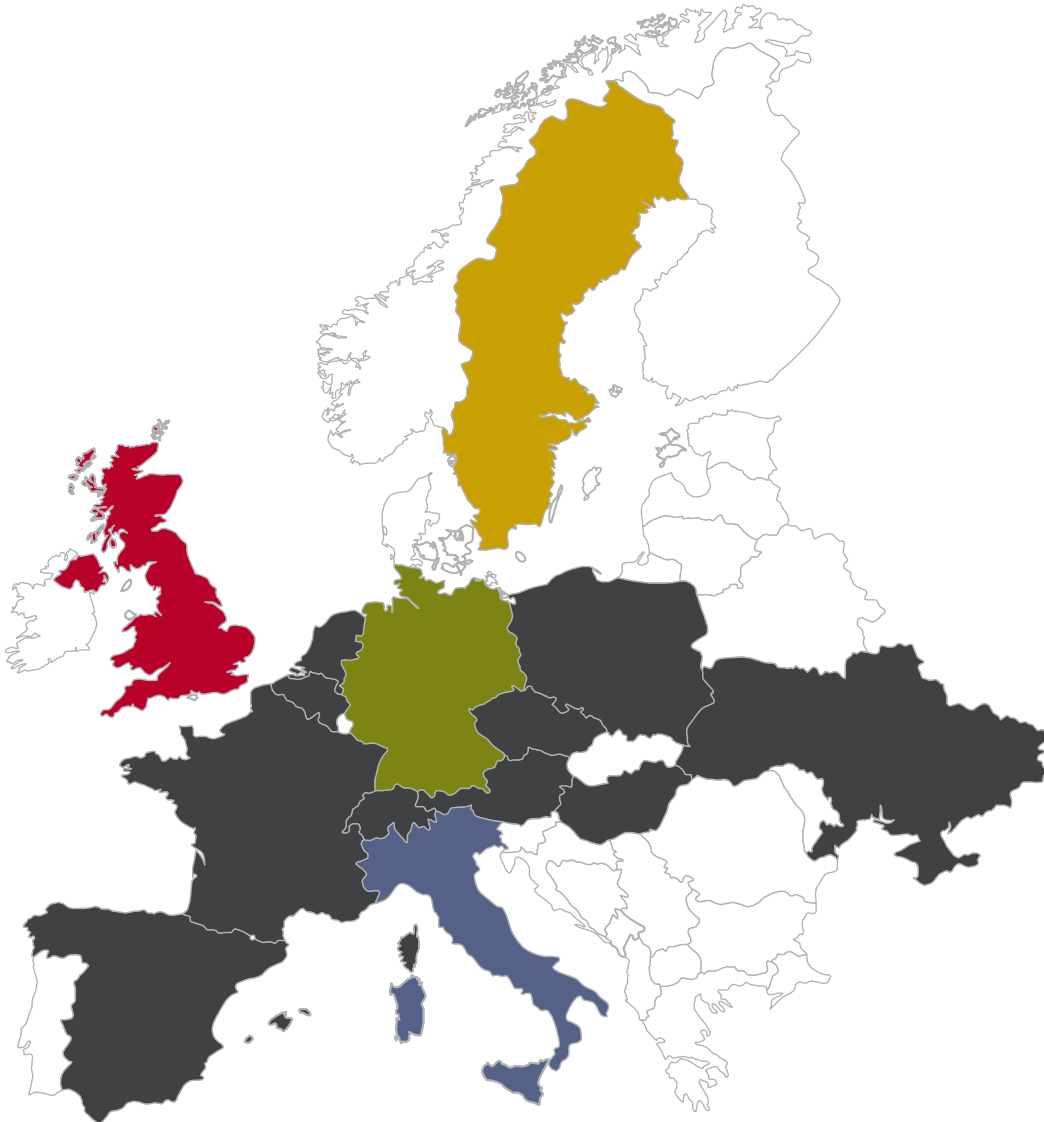


State of play (continued)

- No award of damages in England and Wales *yet...*
 - *Crehan* overturned by the House of Lords
- Some very substantial settlements (perhaps due to uncertainty over key elements of litigation)
 - *Marine Hose* – Parker ITR global settlement
 - *Healthcare at Home* settles after interim payment of £2 million awarded by the CAT



Damages: where, when and how much?



- Disclosure
- Damages
- Masterfoods Stay
- Limitation
- Time and Interlocutory Proceedings
- Torpedo
- Passing on
- Contribution

Forum shopping...

	ENGLAND & WALES	FRANCE	GERMANY	ITALY	NETHERLANDS
ANY ACTIONS?	YES	YES	YES	YES	YES
ANY AWARDS?	YES (overturned)	YES	YES	YES	NO (all settled)
RIGHT TO SEEK CONTRIBUTION	YES	YES	YES	YES	YES
PASSING ON?	YES	YES	NO (similar concept may apply)	YES	YES
DISCLOSURE	YES - WIDE	LIMITED	LIMITED	LIMITED	YES

Jurisdiction

- Likely multiple defendants: any number of possible jurisdictions to sue and be sued in
- Brussels / Lugano Convention or Brussels Regulation
 - All EU member states plus Denmark
 - Lugano covers Norway, Switzerland and Iceland
- Impact of *Provimis* in England
 - Concept of attribution to undertakings currently subject to challenge by Dow in Butadienne Rubber
- Torpedo actions

Stand alone damage claims

- Stand alone claims can be brought only in the High Court
- Claimant must establish infringement under Articles 101 or 102 TFEU / Chapter I or II and damage
- Six year limitation period in which to bring claim
 - Where the infringement has been deliberately concealed, as with a price-fixing cartel, the limitation period does not begin to run until the claimant discovers the cartel or the time that the court deems the claimant ought reasonably to have discovered it.



Follow on damage claims

- Rely on an underlying finding of infringement by the European Commission or NCA
- Can be brought in the High Court or CAT
- Two year limitation period in the CAT, running from the last date on which an appeal of the underlying infringement decision can be made:
 - appeals on penalty only will not act to prevent the limitation period running;
 - permission required to bring an appeal before the limitation period starts to run (no such permission required in the High Court).

High Court or CAT?

– HIGH COURT

- No permission required to bring a follow-on action
- *Masterfoods* stay possible where underlying decision is subject to appeal
- Robust case management
- Experienced in addressing questions of jurisdiction, applicable law, quantification etc

– CAT

- Currently limited to follow-on actions
- Permission required where defendants are appealing underlying decision ('decision' is infringement, not fine)
- Expert in competition issues
- Have made an interim order for payment (*Genzyme*)

Disclosure

- Access to documents is crucial to proving liability, loss and extent to which loss has been passed on.
 - No third party access to Commission / NCA file.
- England and Wales
 - Standard disclosure
 - Third party disclosure orders
 - Pre-action disclosure possible where request is targeted and documents can be readily disclosed at little cost or inconvenience to the respondents
- Consider protection of commercially sensitive information

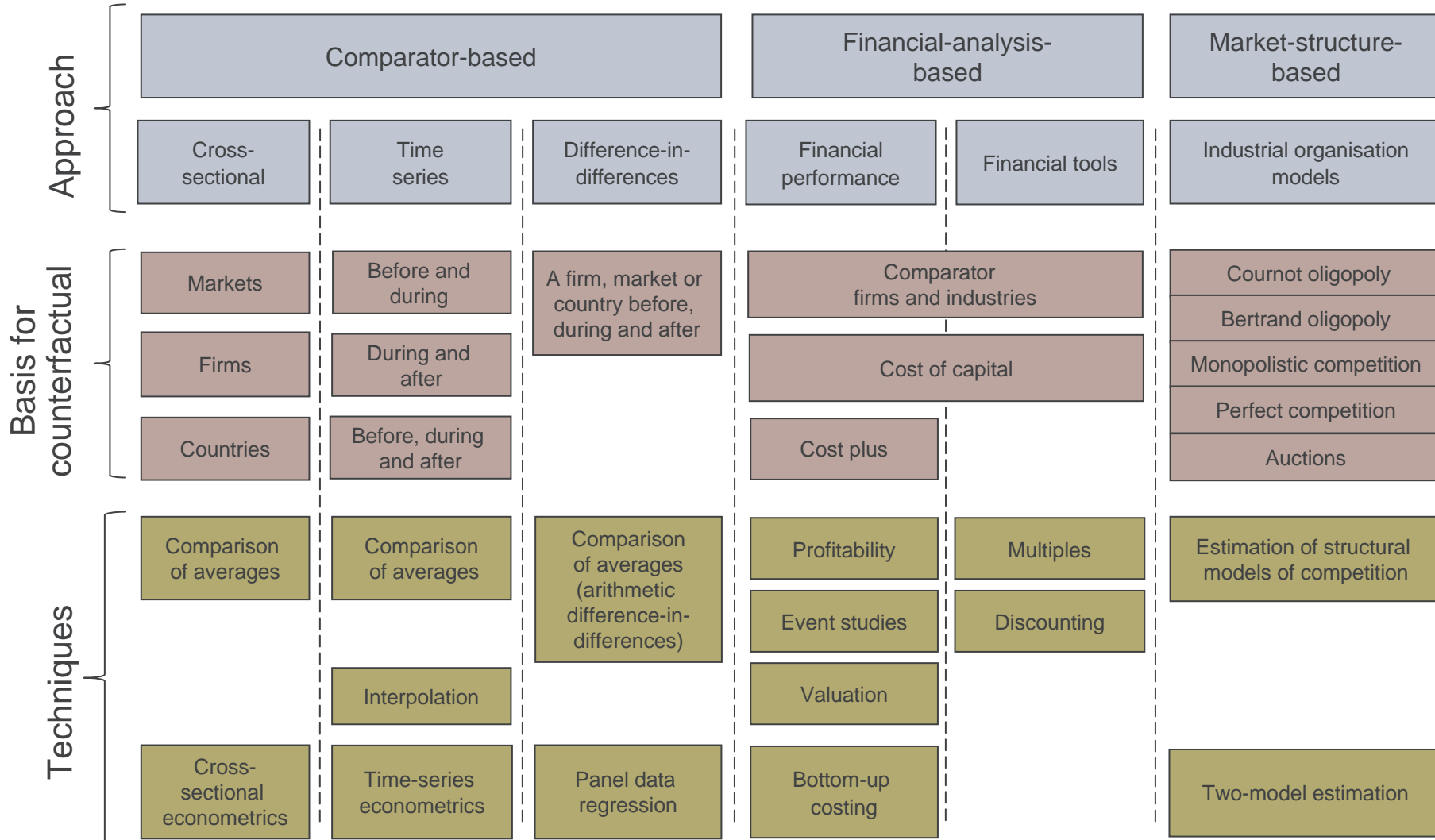
Causation of damage

- Claimant establishes loss resulting from infringement
 - Requires proof that a cartel price was implemented (underlying decision unlikely to state a definite effect)
 - Causation not proven in *Enron Coal Services v EWS*.
- Defendant establishes that loss passed on to ultimate consumer
 - *Manfredi*, "any individual" may claim damages where a "causal relationship" exists between the harm suffered and the prohibited agreement.
 - Indirect claims theoretically possible

Quantification

- Compensatory (“*but for*”)
 - Ordinary measure for tortious claims
 - Includes loss of profit and interest available as heads of damage (*Manfredi*)
 - How to calculate? Commission consultation and models...
- Restitutionary claim for unjust enrichment
 - *BCL* and *Genzyme*, claimed profits unlawfully derived from infringing conduct
 - Likely ruled out by *Devenish*
- Exemplary damages
 - *Manfredi* - available where they would be available for similar breaches of national law (UK/ Ireland/ Cyprus)
 - Unlikely where fines have been paid (*Devenish*)

Oxera methods and models



Settlement

- Timing
 - Protracted / costly litigation may give claimants an appetite to settle but may also attract other claims
- Finality of settlement may be difficult to guarantee
 - Joint and several liability
 - Right to contribution
- Confidential from other third parties who may claim but not co-cartelists?
- Claimant may want information and / or damages

Going forward...

- Claim for damages or to force a change in commercial behaviour?
- If faced with follow-on claims, consider:
 - claim / defence strategy at earliest possible stage
 - potential for delay mechanisms (torpedoes / *Masterfoods*)
 - use of contribution claims and allocation of liability between joint tortfeasors
 - arguments on applicable law regardless of jurisdiction
- If a claimant, is there potential for contractual claims as an alternative to tortious claims?
 - Use of arbitration / alternative dispute resolution may be possible