GCR
GLOBAL COMPETITION REVIEW

# Bar hopping

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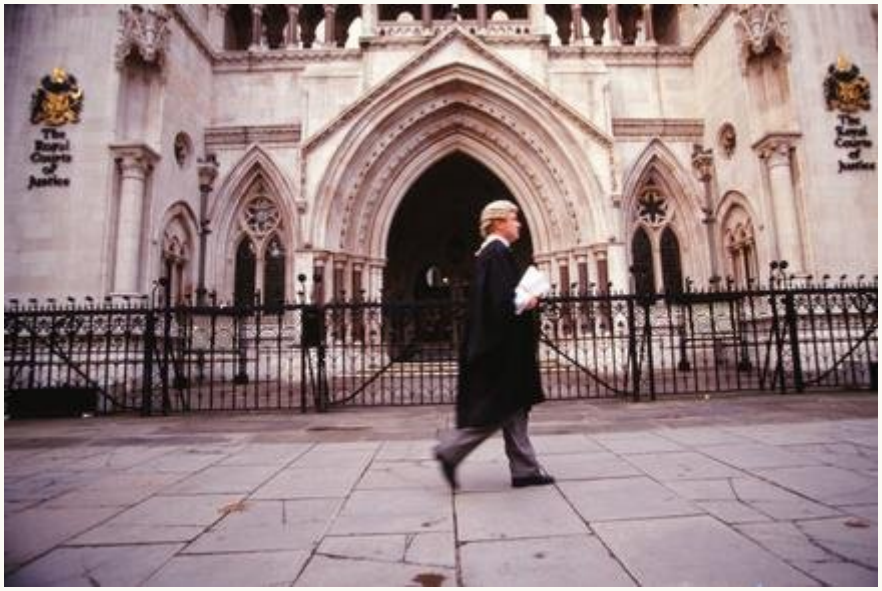
Europe is looking ever more plaintiff-friendly, as sweeping reforms at both EU and national level and a host of court decisions make it easier for businesses and citizens across the 28-country block to get compensation from cartelists. It's not surprising, then, that many of the big-name US plaintiffs' firms are taking note, says **Harry Phillips**.



London is becoming an attractive venue for cartel damages cases

When top US plaintiffs' firm Hausfeld LLP announced it would open an antitrust litigation shop in London, the reactions ranged from derision to perplexion to fear.

"People said we were going to export class actions and export US style," says Brian Ratner, a partner in the firm's Washington, DC office

who flies back and forth to London regularly. Michael Hausfeld, the firm's mercurial founder, cut a lonely figure at international conferences, Ratner said, as he outlined his vision of private enforcement on a worldwide scale, all the while trying to allay fears that a doomsday of treble damages, class actions and contingency fees was going to rain down over Western Europe.

Now, five years down the line, it looks like the gamble may have paid off. By Ratner's own estimate the London office now works on around half the private cartel recovery cases in Europe, representing companies large and small that want money back from suppliers found to have colluded with their rivals over pricing. Hausfeld's is now the first name that comes up in any conversation about the rise of a claimant-oriented bar in Europe. Now other firms now want in on the action, and much of the interest is coming from the United States.

"It's sort of a brave new world over there," says Los Angeles plaintiffs' attorney Keith Butler, whose firm Strange & Carpenter has advanced plans to open a London office.

The past year or so has seen a handful of American firms reputed for their plaintiffs' work opening up in London or another of the continent's capitals. Winston & Strawn and Quinn Emanuel Urquhart & Sullivan – both top-drawer firms known for representing plaintiffs and defendants alike in antitrust cases – opened in Brussels within months of each other. Boies Schiller & Flexner, too, quietly launched in London in 2014 with antitrust litigator Duane Loft splitting his time between New York and London. Constantine Cannon, a staple of the US plaintiffs' bar that has represented everyone from consumer classes to global retailers like Wal-Mart and Starbucks, has a growing cartel recovery practice in the UK capital. Many plaintiffs' firms in the US would probably be lying if they said they weren't watching the European market. That, or they're already hatching plans to move in.

“There is a willingness and an appetite for corporations that operate in Europe – whether they are US companies or not – to recover their damages if they’ve been the victim of a cartel,” says Jeffrey Shinder, managing partner of Constantine Cannon in New York, whose careful entry into the European market sees them targeting a mix of work including large damages claims but also advisory work and representation for defendants.

Indeed, after years of dithering, it seems Europe is making a pro-plaintiff push. Calls for more private recovery for cartel victims have echoed around the European Commission’s pristine hallways since the early 2000s, but only in more recent years has the pace picked up. This April saw the European Parliament pass a package of reforms making it easier for businesses and citizens across the 28-country bloc to get compensation from cartelists. In the UK meanwhile, reforms allowing “collective redress” and “damage-based agreement” fees – US class actions and contingency fees in all but name – have either been passed or are in the pipeline, making that market particularly hot for any firm with a decent track record recovering money for cartel victims. “Combine that with prominent and at times aggressive cartel enforcement from Brussels and there will be a real opportunity to bring claimant-side cases,” Shinder says.

Not only is the climate right, but there is potentially a lot of work out there. Butler argues that a big reason for the push from the European Commission and member states is that not enough potential claims are being pursued. This may be why, right now, the claimant bar is something of a muddle. Along with Hausfeld and a few boutiques like Sheppard Co, small generalist shops rub shoulders with specialist cartel claims vehicles, such as the German-based Cartel Damages Claims which buys cases from purchasers and litigates on their behalf. The elite competition practices – the Freshfields and Linklaters of this world – do not look likely to appear on the other side of the courtroom any time soon, observers say.

**Narrow reach**

Another factor driving the trend is the increased difficulty of bringing successful cases in the US (see our plaintiffs' bar survey), especially when the collusion at issue took place in far-flung capitals like Tokyo, TaiPei and Seoul and the price-fixed parts are a complex supply chain away from the consumer.

Hausfeld's move to Europe came in the wake of the Supreme Court's *Empagran* vitamin cartel decision, which barred foreign purchasers from bringing suits in US federal courts when their foreign injuries are independent from any adverse effect on US commerce. Since then, courts have further narrowed what kind of foreign conduct can be challenged. Just this year, the US Court of Appeals for the Seventh Circuit found that Motorola cannot recover overcharges for LCD panels its subsidiaries bought in Singapore, fixed into phones and then shipped to the US because the effect on American commerce is too indirect. Such cases, observers say, means companies now need to look outside the comfort of US courthouses to recovery what they overpaid, and they need lawyers there to represent them.

All the better if those lawyers have already prosecuted cases in the US and done some form of discovery there. The increased global nature of cartels means facts are converging and it's not hard to imagine that material from US litigation could make up a case in Europe too. Even if documents are not immediately available, knowing where the bodies are buried is undeniably useful, observers say. Firms with big multinational clients – a hedge fund in *Libor*, a car maker in *Auto Parts*, say – are especially well placed to replicate their business model elsewhere. "We say to clients: 'bring a case in the US and we can pursue those claims anywhere," Hausfeld's Ratner says.

## Class inaction

So why, then, are we not seeking the likes of Berger & Montague, Hagens Berman and Robins Kaplan working out of offices in London, Brussels and Berlin? In part, because the market is still very risky. The scepticism towards contingency fees in Europe – which is how most plaintiffs' lawyers make money in the US – means it is very difficult, if not impossible, for firms to offer the entirely risk-free approach they can in the US. "You see others looking at the same trends, but when you lift the hood up, this is still a fluid and rapidly changing area. It's still very complicated, risky stuff," Ratner says.

The EU's directive says nothing on fees, leaving rulemaking to each member state, and the law is different even in the three countries – the UK, the Netherlands and Germany – where the majority of private competition lawsuits are filed. Germany, for instance, does not allow any kind of contingency arrangement. The UK changed its law recently to allow some success-based fee arrangements, but these are restricted and do not allow the sort of "uplift" fees US firms may be used to. The loser-pays principle – common in European jurisdictions – is another hurdle to surmount, often requiring firms to take out special insurance for clients' claims. All of this spooks corporations, especially when they are already taking a great risk suing a business partner. It also means a huge financial commitment for law firms.

A major turn-off for some of the big-name class action lawyers in the US plaintiffs' bar, they admit, is a lack of clarity over just what sort of cases they could bring successfully. The EU's cartel damages directive, which still needs to be ratified by member states, for instance, allows defendants to argue in their defence that the plaintiff passed all overcharge further down the supply chain. In some jurisdictions, like the UK, defendants can conduct discovery on plaintiffs to support this so-called "pass-on defence", raising the spectre of endless pass-on that eventually puts everything on the consumer in jurisdictions where there is no bright-line rule on class

actions. “What the directive doesn’t cover is what I call the pure consumer-led cases,” says Johan Ysewyn of Covington & Burling, a defendant-oriented US firm. “We’re still miles away from that in Europe.”

**Settling down**

Until there’s some case law on these issues, the risk may be too great for some firms. And that is unlikely to come if, as is currently the case, most companies settle the cases they bring. The first UK cartel damage case to go to trial, for instance, was cut short in May after Dow Chemical settled with several tyre makers two weeks into hearings. Only a few cases get that far, with the risk of failure, judicial uncertainty and the understandable reluctance of companies to fight their suppliers in court weighing heavily on would-be litigants.

On the other hand, though, a handful of plaintiff-friendly rulings from diverse European courts could prompt a shift in course. In June, the European Court of Justice, whose case law governs national courts, ruled in an Austrian case that members of a cartel may be liable for so-called “umbrella pricing”, where their collusion prompts other competitors to raise their prices independently. Just a day later, an Amsterdam court held that foreign companies could be sued for competition violations in a Netherlands court, lining up with similar rulings in the UK and elsewhere on “anchor defendants”. Ever more relaxed rules about disclosure, especially in the UK, could also push more plaintiff corporations to go into discovery and seek out smoking guns.

Ratner argues that there will “absolutely” be more cases brought testing the issues, such as pass-through and the presumption of harm. “The defendant is still taking every point, even in the strongest cases, whether it be jurisdiction or statute of limitations,” he says. “They want to put it in the long grass and make every point under the sun to

delay”. Decisions on these points are likely to mean more case law, and ultimately more cases being brought.

If that happens, Strange & Carpenter’s Butler says, business will be easier to pitch for firms like his that are looking to break into Europe. They will be able to point to a “hall of fame” of companies that successfully won millions because of a supplier conspiracy. Right now, perhaps only Michelin – a company committed to making its legal department a profit centre – and Hausfeld client Deutsche Bahn fall into that category. It may take some time, but there’s ever more work to be done, and right now not enough plaintiffs’ lawyers to do it.