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THE VERDICT

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Who Gets In? Class Actions and Indirect Purchasers in Competition Law

Report of the C.D. Howe Institute Competition Policy Council

The Supreme Court will rule on Thursday, October 31, in landmark *Competition Act* decisions, *Pro-Sys v. Microsoft, Sun-Rype v. Archer Daniels Midland*, and *Infineon Technologies AG et autres c. Option Consommateurs et autres*. The key question before the Court is, when anticompetitive cartel behaviour is alleged in class action proceedings, should indirect purchasers, such as retailers and end consumers, have standing to sue for damages?

The Court's rulings will have important implications for class action law and competition practice. Given the structure of the Canadian economy, it may be that the group most affected by an international cartel's pricing behaviour will be indirect purchasers. Absent Canadian indirect purchasers having standing in a suit brought under the *Competition Act*, there could be no domestic route to a private action against an alleged cartel, and no domestic compensation for those who have suffered loss.

Accurately determining appropriate damages and to whom they should be awarded in cartel cases is a complex and uncertain undertaking. Whether, and to what extent, a cartel overcharge might get passed down the distribution chain is a difficult economic and practical question. Complexity, however, should not necessarily be a bar to indirect purchasers' obtaining standing, although they may make a class proceeding unmanageable. Given the likelihood that awards to individual class members might be very small, or zero, even should a suit succeed, it appears that deterrence, not compensation, should be the aim of law and policy. This is the consensus view of the C.D. Howe Institute's Competition Policy Council, which held its sixth meeting on October 24, 2013.

The Competition Policy Council comprises top-ranked academics and practitioners active in the field of competition policy. The Council, chaired by Finn Poschmann, Vice President, Research at the C.D. Howe Institute, provides analysis of emerging competition policy issues. Professor Edward Iacobucci, Osler Chair in Business Law at the University of Toronto and Competition Policy Scholar at the Institute, advises the program, along with Benjamin Dachis, Senior Policy Analyst. The Council, whose members participate in their personal capacities, convenes a neutral forum to test competing visions and to share views on competition policy with practitioners, policymakers and the public.

At Issue: The Supreme Court's rulings in three class action competition cases (*Pro-Sys v. Microsoft, Sun-Rype v. Archer Daniels Midland* and *Infineon Technologies AG et autres c. Option Consommateurs et autres*) will have major implications for class actions brought under the *Competition Act*. What are the potential implications of the Court's decision, for lower courts, for provinces, and for private actions brought under the *Act*?

The Cases Before the Courts

The Supreme Court of Canada agreed to hear two broadly similar cases from the British Columbia Court of Appeal, and one from Quebec. The issue involves whether a group of consumers, or other indirect purchasers – those who were not direct customers of the company or person who allegedly engaged in criminal anticompetitive behaviour – have standing as a matter of law to assert claims for damages as indirect purchasers. The Supreme Court's rulings, to appear Thursday, October 31, will be important in determining the types of plaintiff who may seek damages under the *Competition Act*, and may have implications for class actions more generally. The Council disentangled the various dimensions of the issue, as follows.

Private Enforcement Action: Under Section 36 of the *Competition Act*, a private actor who has suffered loss or damages as a result of alleged criminal anticompetitive conduct may "sue for and recover from the person who engaged in the conduct … an amount equal to the loss or damage proved to have been suffered by him …" This right of private actors to sue alleged cartel members, for example, may encourage those who claim they have been harmed by price-fixing to litigate in pursuit of damage awards.

Absent a class proceeding mechanism, individual companies or people harmed by an alleged cartel may view the legal costs of bringing the cases as outweighing the potential rewards. The advent of class proceedings legislation, together with recent developments in jurisprudence, has led to a substantial increase in the number of class actions brought under the *Competition Act*, such as the current cases before the Supreme Court.

Class Actions: A class action bands together a group of people alleged to have been harmed by illegal action. In theory, the class action mechanism can address the fact that the cost of an action to an individual may outweigh the potential reward from litigation.

In practice, it is hard to determine (a) who should be part of the class claiming damages and how to account for the conflicts among class members at different levels of a chain of distribution for an allegedly price-fixed product, (b) the validity of their claims, and (c) how much compensation different members of a successful class should receive.

A previous case illustrates the dilemma associated with including end-use purchasers within a class. The case involved an alleged price-fixing conspiracy for a component, pigment, contained in certain concrete blocks used in some houses.[1] The court needed to determine whether a class proceeding brought on behalf of indirect purchasers, homeowners, should be certified to proceed as a class action. The court in that case was persuaded that the case would not be manageable and refused.

1 Chadha v. Bayer (2002).

The Council's Verdict: To frame its responses, the Council began by looking at two possible policy motivations for private rights of action in the competition context: compensation of those who have been wronged, and deterrence of wrongs.

If compensation is the primary motivation for permitting private rights of action, as the *Competition Act* allows, then those allegedly harmed should have standing to sue. As cartel overcharges will often affect purchasers who do not acquire goods or services directly from the alleged cartel members – for example, when competition among direct purchasers translates higher costs into higher prices – indirect purchasers should on this principle have standing.

Class actions are likely to be the only practical route for indirect purchasers to seek compensation. Indirect purchasers are diffuse, and their individual claims likely small. Pursuing actions individually would likely not be worthwhile, even if success were guaranteed. Litigation costs and the uncertainty of success, balanced against the small and uncertain amount of an individual damage award, would likely forestall actions.

The potential effectiveness of the class action process, however, is an issue that raised differences among Council members. Some members felt that the current reward system, under the *Act* and within current jurisprudence, is not an effective means of compensation, owing mostly to complexity in determining appropriate award amounts and to whom they should be awarded. Some observed that establishing all of these facts often proves difficult, yet, if jurisprudence is liberal in judging whether these steps have been achieved, the result may be class action cases that go forward even where there is little chance of helping consumers. Others felt that the quest for exactitude should not form a barrier to actions that were potentially socially beneficial.

As matters stand, it is often too costly and inefficient to attempt to pay compensation directly to those harmed, and settling parties in civil price-fixing cases will often make payments to charities. Under these so-called *cy-près* awards, funds are advanced to a charity or other group when it is too difficult to pay all proceeds of a class action to individual plaintiffs, because they are difficult or impossible to identify or the transaction costs of doing so would exceed the amount of an individual award.

In many indirect purchaser cases, the single largest payment is to the plaintiff's lawyers; defendants also pay handsome fees to their lawyers to defend these cases. A *cy-près* award to a charity does not result in compensation to indirect purchasers. Thus, in practice, giving standing to indirect purchasers in class actions under the *Competition Act* would be more readily justified from a policy perspective on deterrence grounds, rather than to meet compensation objectives.

The difficulties in practice with compensation, among other things, led the group to conclude that deterrence is a better justification for allowing indirect purchasers standing to sue. There are competing considerations relevant to deterrence, the following of which were the subject of discussion by the group:

- Even if indirect purchasers do not sue, direct purchasers may sue and if there is no "passing on" defence available, the deterrence effect of damages could be achieved via these direct purchaser actions, and without indirect purchaser standing;
- However, direct purchasers may be reluctant to sue their suppliers, with whom they may have a long-term relationship; moreover, with the international nature of cartels, there may be no Canadian direct purchasers with standing to sue;
- Calculating damages for indirect purchasers is a complex exercise. There is informed guesswork in estimating the appropriate damages to class members and it is not clear that errors one way or the other, in assessing damages for indirect purchasers, should be allowed to trump deterrence objectives.

- Good policy arguments are available to support and reject standing for indirect purchasers. There was consensus, owing to the unlikelihood of damages being delivered to harmed parties, in many cases, that deterrence and not compensation should be the focus of policy and therefore should guide the law.

Some members of the Council accepted that indirect purchaser standing would enable class actions that could be useful in deterring anticompetitive behaviour, so long as the court performs a meaningful screening function to ensure that such cases are manageable and sensible from the perspective of court and party resources. This would be accomplished, for example, by imposing a legal onus on potential class litigants to demonstrate clearly that there was a mechanism for the class – whether direct or indirect purchasers – to establish that they have been harmed by the impugned anticompetitive behaviour.

They noted, however, that because Canada is a relatively small economy, domestic class action suits would have little deterrent effect on international cartels. Legal exposure in Canada, on this view, was unlikely to significantly affect broader behaviour.

Conclusions

While complexity should not be a bar to actions, some Council members were concerned relatively easy standing for indirect purchasers could prove a drain on court or others' resources, and advance rent-seeking lawsuits.

Taken together, the Council reached the consensus that the current language in the *Competition Act*, to the extent to which it permits standing for private actors who can prove they were harmed by anticompetitive behaviour, was appropriate.

Members of the C.D. Howe Institute Competition Policy Council

Members of the Council participate in their personal capacities, and the views collectively expressed do not represent those of any individual, institution or client.

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* Not in attendance, October 24, 2013, and did not participate in discussion, and should not be assumed to agree with the review presented here. + Attended meeting in part.