Changes to the private litigation regime in the UK: are more collective damages actions on the way?

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Private damage litigation is an important component to public enforcement of UK and EU competition law by the Competition and Markets Authority ("the CMA") or the Commission ("the Commission").

With regard to the former, the CMA now has a number of collective actions pending and has another collective action under investigation. In May 2017, the CMA approved the joint referral of a collective action brought on behalf of six customers of the gas provider National Grid in England and Wales (in a so-called 'opt-in' collective action) to the CAT on the basis that the action had suffered from a long delay.

The CAT now has a number of cases where it has granted such permission under the new collective action regime, to give SMEs greater access to redress for breaches of competition law.

An important feature of the new collective action regime is that where a CPO has been granted, the CAT can now authorise a representative claimant to bring proceedings on behalf of all members of the class identified by the CPO, in what is commonly referred to as an 'opt-out' collective action.

To address the difficulties of the current 'opt-in' regime, the 2013 Financial Services Act introduced a new 'opt-out' collective action regime, as a complement to existing 'opt-in' actions, with the CAT given power to grant injunctions, make declarations, award costs, and make exemplary or punitive damages orders by way of compensation, by bringing civil proceedings.

The Bill also foresees collective settlements for both opt-in and opt-out claims, which the CAT may approve where there has been a settlement...
Collective Proceedings

In June 2013, the Commission published the Recommendation, setting out unbundling proposals to be implemented by Member States to introduce collective redress schemes to provide effective means for private enforcement of both citizens and companies of their rights under EU competition law.

The Commission has recommended the introduction of opt-in collective actions, with group members having to be identified and give consent before a claim is brought. According to the Commission, civil actions are to be the exception and should be permitted only where justified by the need for sound administration of justice. The Commission also recommended that compensation fines and punitive damages be prohibited, so re-establishing the fundamental remedying concept of civil law.

It remains to be seen whether the introduction of ‘opt-in’ actions in the UK will be consistent with the Commission’s Recommendation that these actions should be the exception and not the rule.

Draft Antitrust Damages Directive

In June 2013, the Commission published the draft Antitrust Damages Directive, which is intended to harmonise national rules governing actions for damages for infringement of EU competition law, whether individual or collective actions. This followed a lengthy process beginning with the publication in 2008 of its White Paper on Damages Actions for Breach of the EC Antitrust Rules.

On 17 April 2013, the European Parliament adopted the draft Directive. Whilst not enacting the introduction of collective action procedures, the draft Directive sets out a number of other key provisions for civil damages actions for breaches of the EC Antitrust Rules.

- Excluding damages in respect of full compensation, including for actual losses and loss of profit, plus interest. However, this does not extend to recovery of punitive, multiple or other types of damages.
- Introducing standardised rules on limitation periods, allowing at least five years to bring claims.
- Requiring courts to ensure enhanced but proportionate access to evidence held by claimants, defendants and third parties, including competition authorities. Such access will be subject to the protection of information that is confidential or privileged and also of corporate leniency statements and settlement documents, including:
  - requiring that claims resolve full compensation, including for actual losses and loss of profit, plus interest. However, this does not extend to recovery of punitive, multiple or other types of damages.
  - introducing standardised rules on limitation periods, allowing at least five years to bring claims.
  - requiring courts to ensure enhanced but proportionate access to evidence held by claimants, defendants and third parties, including competition authorities. Such access will be subject to the protection of information that is confidential or privileged and also of corporate leniency statements and settlement agreements. This includes in UK law(leniency and settlements documents are protected from disclosure in damages actions, in order not to discourage companies from seeking leniency or settling unlawful conduct in return for leniency. However, leniency remains the Court of Justice's judgment in 
- permitting the passing-on defence to be available for claims by both direct and indirect purchasers, with the defendant passing the burden of proof to show that any overcharge was passed on by the claimants to their own customers (such that the claimants suffered no loss).
- Providing a rebuttable presumption as to the existence of harm resulting from a cartel, which will be supported by compelling evidence from the commission or procurement of damages.

Whilst the draft Directive contains considerable flexibility for Member States, whose legal systems are very different from each other, it will clearly remove some existing ability to obtain damages and the financial liability of companies that have infringed EU competition law through for damages. It is evident that, whilst it introduces new and potentially significant rules (for example, concerning what is a 'passing on' defence), it is not clear whether these are intended to encourage or discourage claims. The draft Directive also fails to provide clarity as to how effective these will be in ensuring those affected by anti-competitive behaviour, whether cartels or abuses of a dominant position, can recover damages.

Even when (and not if) new collective damages actions are introduced in the UK, it will still remain to be seen how effective these will be in ensuring those affected by anti-competitive behaviour, whether cartels or abuses of a dominant position, can recover damages.

Much will depend on the extent to which litigation funding will be available for such actions, particularly as claims may need to enter into contingency arrangements (such as damages based agreements) in order to be brought. In addition, the passing-on defence to passing-on claims in England and Wales means that, after the event, recognise defendants and conditional fee arrangements (which must be permitted by claimants and are not receivable from defendants). This may make Funding claims more difficult to manage. Litigation funding is a contentious issue and whether effective this will be in encouraging and enabling collective actions in the UK, it will still remain to be seen how effective these will be in ensuring those affected by anti-competitive behaviour, whether cartels or abuses of a dominant position, can recover damages.

The draft Directive introduces new rules in the UK, which will be supported by compelling evidence from the commission or procurement of damages.