Kluwer Competition Law Blog

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

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Private damages litigation is an important complement to public enforcement of UK and EU competition law by the European Commission and national competition authorities ("NCAs"), such as the UK's newly formed Competition and Markets Authority ("CMA").

Whilst there has been a noticeable increase in private litigation seen in the UK courts, whether 'follow-on' or 'standalone actions, this is entirely the result of companies (many not based in the UK) suing for losses suffered as a result of cartels or abusive conduct. Neither small and medium-sized enterprises ("SMEs") nor individual consumers, have brought actions, due to the absence of appropriate structures for low-cost group or representative actions and funding difficulties.

Both the UK Government and the European Commission ("the Commission") have brought forward legislation to reform civil litigation procedures to facilitate follow-on damages actions in competition cases by remedying the difficulties faced by claimants. In the UK, the Consumer Rights Bill ("the Bill") is being considered by Parliament and is presently at the Report stage in the House of Commons, before receiving its third reading and being passed to the House of Lords. At the EU level, the Commission has adopted a non-binding Recommendation on Collective Redress ("the Recommendation") and on 17 April 2014, the European Parliament approved the draft Antitrust Damages Directive ("the draft Directive")).

Once they become law, the Bill and the draft Directive will make significant changes to competition litigation in the United Kingdom, which are considered below. It is likely that we will see a significant increase in litigation, including both 'opt-in' and 'opt-out' actions by groups of claimants, particularly in the Competition Appeal Tribunal ("CAT"), whose jurisdiction will be expanded.

Competition litigation in the UK – background

There are an increasing number of damages actions before the CAT and the High Court. Although few litigated cases have reached trial, the CAT has twice awarded damages at trial for losses suffered by breaches of competition law, both following exclusionary abuses of a dominant position (in *2 Travel v Cardiff Bus* and *Albion Water v Dwr Cymru*), a number of other cases have settled following Commission cartel decisions, whilst others have failed on various jurisdictional and procedural grounds. Numerous other actions remain pending before both the CAT and High Court.

The High Court will shortly, following numerous procedural skirmishes, hear multi-million pound claims for damages following the European Court's decisions concerning the gas insulated switchgear and synthetic rubber cartels in *National Grid v ABB* and *Cooper Tire v Dow Chemical*, respectively. In addition, in *Arriva v. London Luton Airport* the High Court also recently found an abuse of a dominant position in 'free-standing' litigation, but did not at that point order specific relief.

Consumers are often affected by anti-competitive behaviour, in particular by cartels and abuses of a dominant position, which can increase prices and reduce choice. As victims, they are entitled to compensation for the losses suffered as a result of such anti-competitive behaviour. However, whilst consumers are able to bring actions to seek redress for competition law infringements, there has been an almost total absence of such 'private enforcement' in the UK, even though the Competition Act 1998 enables specified consumer bodies to bring damages claims on behalf of consumers on an 'opt-in' basis.

Indeed, there has only been one such collective action since they were introduced in 2002, the Consumers' Association's action on behalf of 130 affected customers against JJB Sports following an Office of Fair Trading ("OFT") decision in 2003 to fine ten businesses a total of £18.6 million for illegally fixing the retail prices of replica England and Manchester United football kits. Although this action settled, with JJB Sports agreeing to repay affected consumers up to £20 per shirt, it faced numerous practical issues, including identifying affected consumers and funding. It remains the only 'opt in' action under the current legislation commenced by a consumer body.

The Consumer Rights Bill

Overview

In view of the apparently insurmountable difficulties faced by consumers and SMEs in bringing damages, the UK Government has introduced the Bill to make a number of significant changes to private competition litigation, by extending the jurisdiction of the CAT, establishing procedures for 'opt-in' collective actions and introducing 'voluntary redress' schemes. The Bill's provisions on private competition litigation (which are set out in Schedule 8) will radically alter competition litigation in the United Kingdom.

A new 'opt-out' regime and a revised 'opt-in' regime for collective consumer actions

To address the ineffectiveness of the current 'opt-in' regime, the Bill introduces a new 'opt-out' collective action regime, as a complement to existing 'opt-in' actions, with the CAT having jurisdiction to hear such collective claims and to approve collective settlements. It also revises the procedures applicable to 'opt-in' actions.

In parallel and in anticipation of the Bill becoming law, the CAT has published draft procedural rules for the conduct of such collective actions; in due course, these will be subject to consultation as part of a wider review of the CAT's procedural rules.

The Bill introduces 'opt-in' collective actions brought on behalf of consumers who notify the representative that their claim should be included in the collective proceedings. In addition, provision is made for 'opt-out' collective proceedings, which can be brought on behalf of a 'class' of members other than any member of that class who notifies the representative that their claim should not be included in the collective proceedings.

It is not necessary that all individual claims be made against the same defendants in order for them to be combined into a collective proceeding.

Approval of collective actions by the CAT

In order to allay fears that the introduction of collective proceedings will give rise to an American 'class action culture', the CAT must first certify proposed collective actions by way of a 'collective proceedings order' ("CPO"), following the filing of a collective proceedings claim form by the proposed class representative.

This form must, amongst other things: explain that the claims have a real prospect of success, identify the class, estimate the likely size of the class and estimate the aggregate damages sought.

Before making a CPO, the CAT will hold a case management conference and hear the parties. The CAT will specify how an authorised class representative must give notice of the collective proceedings to the class members and it will also specify the time period to opt into or out of the proceedings.

The CPO will identify and authorise a representative claimant, define the class of persons whose claims are eligible to be included in the collective proceedings and specify whether the case is to proceed on an 'opt-in' or 'opt-out' basis. The CAT can make a CPO only if individual claims raise the same, similar or related issues of fact or law.

Judgments and damages awards

Where proceedings are certified as collective actions, any subsequent CAT judgment is, unless specified otherwise, binding on all represented persons.

The CAT may not award exemplary damages in collective proceedings and before awarding other damages must assess the damages recoverable by each represented person; any damages award must be paid to the representative and distributed in accordance with the CAT's directions, including as to the amounts payable to individual represented persons. In opt-out actions, any damages not claimed within a specified period must be paid to charity.

Collective settlements and awards of costs

The Bill also foresees collective settlements for both opt-in and opt-out claims, which the CAT may approve only if satisfied that the settlement is 'just and reasonable', which may require the parties to submit evidence on this point.

Collective settlements may be made both in actions where a CPO has been made and in those where an order has not been made; in the latter situation, the CAT must make a collective settlement order in approving the settlement, approving the proposed representative and the period for parties to opt-in or opt-out, as appropriate.
In all cases, the CAT will specify how the settlement is to be distributed and how persons can opt into or out of the settlement. Defendants must indicate if they wish to be bound by a collective settlement.

The CAT will also have power to award costs to or against the class representative in opt-out proceedings and, in limited circumstances, against other represented persons.

Expanding the CAT's jurisdiction to hear damages actions

The Bill will also expand the jurisdiction of the CAT to hear private actions and revise its procedures for such actions. The CAT will:

• have **jurisdiction to hear stand-alone claims**, where there is not an existing decision (for example of the Competition and Markets Authority ("the CMA") or the Commission) finding that the defendants have infringed UK or EU competition law. In such cases, the claimant must itself establish both infringement and also that they are entitled to damages by the infringement causing it loss.

• have the **power to grant injunctions**, to restrain on-going infringements or suspected anti-competitive behaviour, although this will not apply in Scotland. If an injunction is not complied with, contempt proceedings may be brought in the High Court.

• be able to use a **fast track procedure**, to give SMEs greater access to redress for breaches of competition law, which can be used in simpler cases.

New voluntary redress schemes

The Bill also envisages the CMA to approve redress schemes, under which companies found to have infringed UK or EU competition law voluntarily agree to pay compensation to those harmed by their infringement. Whilst applications for approval of such redress schemes may be made before the CMA or Commission adopts an infringement decision, the CMA may only approve the scheme after the relevant decision has been adopted. Where a redress scheme is approved, it may be enforced by either the CMA or persons entitled to compensation, by bringing civil proceedings.

Is the United Kingdom swimming with or against a European tide?

As noted above, the Commission has also taken measures to improve collective redress procedures, which would apply throughout the EU, including in competition damages actions.

Collective Redress Recommendation

In June 2013, the Commission published the Recommendation, setting out no-binding proposals to be implemented by the Member States to introduce collective redress schemes to provide effective means for private enforcement by both citizens and companies of their rights under EU law, including under 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, opt-out 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 contingency fees and punitive damages be prohibited, so rejecting the fundamental underlying concept of US class actions.

It remains to be seen whether the introduction of 'opt-out' 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 its 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 following the publication in 2008 of its White Paper on Damages Actions for Breach of the EC Antitrust Rules.

On 17 April 2014, the European Parliament approved the draft Directive. Whilst not mandating the introduction of collective action procedures, the draft Directive does introduce a number of other steps to facilitate private damages actions, whilst protecting the confidentiality of leniency and cartel settlement documents, including:

• ensuring that **victims receive 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 enshrines in EU law that leniency and settlement documents are protected from disclosure in damages actions, in order not to discourage companies from seeking leniency or admitting unlawful conduct in return for lower fines. It therefore reverses the Court of Justice's judgment in *Pfleiderer*.

• permitting the **passing-on defence** to be available for claims by both direct and indirect purchasers, with the defendant bearing 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).

• creating a **rebuttable presumption as to the existence of harm resulting from a cartel**, which will be supported by non-binding guidance from the Commission on quantification of damages.

Whilst the draft Directive contains considerable flexibility for Member States, whose legal systems are very different from each other, it will clearly increase both victims' ability to obtain damages and the financial liability of companies that have infringed UK and EU competition law. Amongst the changes, it is notable that, in the UK, it is currently possible to award exemplary damages to punish flagrant infringements of competition law, although such an award can be made only in exceptional circumstances, as in *Cardiff Bus*, where the defendant (who had not been fined by the Office of Fair Trading) was shown to have deliberately engaged in predatory pricing to drive the claimant out of the market. It remains unclear whether it will, after entry into force of the draft Directive, such awards could still be made. Furthermore, the explicit legal protection against disclosure afforded to leniency materials would appear to require a change in English law: following the *Pfleiderer* judgment, in *National Grid v ABB*, the High Court had ordered disclosure of some (but not all) leniency materials.

The future

The Bill has completed the Committee Stage in the House of Commons. The next stage is the Report Stage, before it passes to the House of Lords. The draft CAT rules will, in due course, be subject to public consultation by the Department for Business, Innovation and Skills.

The draft Directive must now be approved by the Member States in the EU Council before it becomes law. However, this is just a formality, as, in March 2014, the Governments agreed the final, compromise, text which was approved by the Parliament. The Member States must implement the Directive within two years of it becoming law. If adopted, the UK courts, including the CAT and the English High Court, will need to apply the Directive's principles when hearing private damages actions based on UK and/or EU competition law.

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 claimant lawyers will not be able to enter into contingency arrangements (such as 'damages based agreements') in opt-out actions, only in opt-in actions. In addition, the Jackson reforms to civil procedure rules in England and Wales mean that 'after the event' insurance premiums and 'conditional fee arrangement' success fees must be paid by claimants and are not recoverable from defendants. This may make funding claims more difficult. Other challenges include identifying a group of individuals with sufficiently similar claims to constitute a class (which is not necessarily a straightforward step) and whether indirect purchasers will be able to mount effective claims (which will depend upon whether direct purchasers have passed on any overcharge).

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