Double trouble

Matthew Hall reports on the expansion of competition law litigation in the EU

Each time the European Commission (EC) hands down a competition law fine, it reminds third party companies that they may be able to recover damages from the parties involved. It does this with a clear reminder at the end of its press releases, along the following lines:

Any person or firm affected by anti-competitive behaviour as described in this case may bring the matter before the courts of the Member States and seek damages...

a Commission decision is binding proof that the behaviour took place and was illegal. Even though the Commission has fined the companies concerned, damages may be awarded without these being reduced on account of the Commission fine.

Virtually every competition law fining decision imposed by the EC or the Competition and Markets Authority (CMA) in the UK (as well as the equivalent in some other EU member states) is now followed by such an action. Damages claims of this type, so-called ‘follow-on’ claims, are usually settled but are nevertheless giving rise to real payouts. They are as a result the best-known type of competition litigation, and worthy of particular focus.

Such claims are however only the tip of the iceberg. Stand-alone competition law arguments (not relying on a regulatory decision) are regularly used by businesses, whether as claimant or defendant in court or in an arbitration, or simply during commercial negotiations. They are a standard part of the arsenal available to defend or advance a company’s position.

The importance of competition law litigation of all types is only going to increase EU-wide, but particularly in the UK. Reforms are going on at EU level, and the UK government also has an express policy of promoting competition law claims and is bringing in legislation to support this. In April 2012, announcing the government’s ‘Private actions in competition law: consultation on options for reform’, the Minister of State said that he has an ‘ambition to promote private sector-led challenges to anti-competitive behaviour’. The reforms would therefore have two aims:

- empower small businesses to tackle anti-competitive behaviour that is stifling their business; and
- enable consumers and businesses who have suffered loss due to anti-competitive behaviour to obtain redress.

Companies of whatever size should be aware of these developments, since they give rise to opportunities and threats.

UK damages awards

Competition law infringements are broadly of two types. The first type is infringements of the general ban on anti-competitive agreements. This includes ‘hardcore’ activity such as cartels (including bidding and purchasing cartels), exchange of confidential information, resale price maintenance and restrictions on parallel trading, but also ‘simple’ anti-competitive exclusivity or other arrangements. The second type is infringements of the general ban on abuse of a dominant position. This can include a range of activities by a dominant company, which has a special responsibility not to impair
Companies are now regularly obtaining cash from third parties who have participated in competition law infringements impacting the UK. The first case followed a 2008 UK Office of Fair Trading (OFT; now replaced by the CMA) decision in 2 Travel Group plc (in liquidation) v Cardiff City Transport Services Ltd (trading as Cardiff Bus) [2012], which found that bus operator Cardiff Bus had abused a dominant position by engaging in predatory pricing. 2 Travel, a former competitor which had gone into liquidation, brought a damages action against Cardiff Bus based on the decision. The court awarded compensatory damages for loss of profits (of around £34,000 plus interest) but rejected claims for damages in relation to a number of other categories of compensatory loss. In addition, and very significantly, the court awarded exemplary (punitive) damages (of £60,000), since it considered that the basic compensatory damages award was insufficient alone to punish the defendant. Despite the low value of the award, the judgment was extremely significant since it demonstrated that private litigants can succeed before UK courts. Further, it provided the first precedent for the award of exemplary damages in a competition law case. The court recognised at the time that the award of exemplary damages in the case was likely to incentivise potential claimants in other cases.

The second judgment was handed down on 28 March 2013: Albion Water Ltd v Dŵr Cymru Cyfyngedig [2013]. The claim this time was based on the finding by the specialist competition court known as the Competition Appeal Tribunal (CAT) (following an appeal) that water company Dŵr Cymru had infringed the UK prohibition on abuse of dominance. This earlier finding of the CAT was that the price at which Dŵr Cymru was prepared to offer the third party, Albion Water, a common carriage service to carry water through its pipes amounted to an abuse by Dŵr Cymru of its dominant position, in that it:

- imposed on Albion a ‘margin squeeze’ (not allowing a sufficient margin between the wholesale and Dŵr Cymru’s own retail price so as to allow Albion to make a profit on its retail services); and
- was anyway excessive and unfair.

Albion contended that it had suffered various types of loss and damage by reason of these abuses. The CAT agreed and awarded Albion total damages of around £1.9m, plus interest. A claim for exemplary damages was dismissed.

This important judgment therefore marked the second time that the CAT after a full trial (or indeed any UK court) had awarded damages in a competition law case and showed again that private competition law litigation in the UK continues to develop apace.

**Beyond damages cases**

Damages cases and settlements of damages claims are however just one facet of this evolving story. There have been several court cases in the UK which demonstrate the breadth of competition law arguments available to parties. In 2004, the English Court of Appeal awarded £131,336 in damages to Mr Crehan for an infringement of competition law by Inntrepreneur Pub Company arising out of a beer tie agreement. On appeal, the House of Lords found that there had been no infringement of competition law, so ultimately no damages were awarded (Inntrepreneur Pub Company (CPC) v Crehan [2006]). In Healthcare at Home v Genzyme Ltd [2006], the CAT awarded £2m as an interim payment to Healthcare at Home in relation to its follow-on claim against Genzyme for abuse of a dominant position. The case was subsequently settled. These were both ‘follow-on’ dominance cases, relying on a regulatory decision to the effect that the defendant had abused its dominant position.
On 28 January 2014, in *Arriva The Shires Ltd v London Luton Airport* [2014], the English High Court found that, assuming it was dominant, the London Luton Airport operator had abused its dominant position (contrary to UK competition law) in the award refusal on services to new destinations in London and discriminating in favour of another coach operator, easyBus) seriously distorted competition between coach operators wanting to provide services from the bus station at the airport, without there being any objective justification for that distortion of competition.

The court stated that a dominant undertaking can abuse its position either by distorting competition on the market on which it operates itself (the upstream market) or by distorting competition on the market on which its customers compete with each other (the downstream market). The fact that the airport operator was not a coach operator itself did not prevent any distortion of the downstream coach market arising from its conduct from being an abuse.

The potential scope of competition law arguments was also demonstrated late last year by a case concerning a commercial lease: *Martin Retail Group Ltd v Crawley Borough Council* [2013]. In the first UK judgment on the issue, the court considered the application of UK competition law to a commercial lease of a retail premises.

The case concerned a proposed permitted use restriction in a lease renewal. The landlord (which owned the other shops in the immediate local area) proposed that the permitted uses of the premises should expressly exclude the sale of alcohol, groceries, fresh food and other convenience goods. The tenant, a newsagent/tobacconist which wanted to compete with one of the other shops by selling convenience goods, argued that the proposal was unlawful on the grounds that it was prohibited by UK competition law and would therefore be void and unenforceable.

During the trial the landlord conceded that the clause as proposed would be *prima facie* anti-competitive under the relevant provisions of UK competition law. This left the issue of an exemption, which would be available if the countervailing benefits outweighed the anti-competitive effects. The judge found that an exemption was not available. None of the cumulative criteria for an exemption would be satisfied.

### EU-wide changes

Although it actively promotes competition litigation, the EC has long recognised that the structure of many of the national regimes in the EU limits the ability of claimants to use this route.

The EC therefore proposed in 2013 new legislation aimed at assisting private damages claimants in the EU. At the time of writing this had been finalised and was on the verge of formal adoption as EU law (with member states then having two years to put it into effect). The latest public version of the text of the proposed...
The legislation includes specific provisions ensuring discovery/disclosure can take place, protecting whistleblower evidence provided to a competition regulator from discovery (but not pre-existing documents), providing for the joint liability of defendants, ensuring full compensation for harm (with the possibility of a ‘pass-on’ defence where a purchaser has increased its prices to its customers) and providing for a minimum limitation period.

The overall effect should be further to increase the amount of private competition litigation in EU member state courts. Changes will need to be made in the UK to reflect the legislation. Not the least of these is the introduction of a presumption (included in the EU legislation) that a cartel (whether as found by a regulator or as proven by a claimant in a stand-alone action) causes harm. This is rebuttable, but the express intention behind it is to try to force courts to award some level of damages in the case of cartel activity. Inevitably it will also strengthen the hand of claimants seeking cash sums in settlement negotiations.

UK changes

The UK (particularly England and Wales) is already a centre for competition law litigation in the EU, with claimants actively choosing it to advance their commercial positions. Companies are aware of their rights under competition law and be protected from discovery/disclosure can take place, providing for the joint liability of defendants, ensuring full compensation for harm (with the possibility of a ‘pass-on’ defence where a purchaser has increased its prices to its customers) and providing for a minimum limitation period.

The overall effect should be further to increase the amount of private competition litigation in EU member state courts. Changes will need to be made in the UK to reflect the legislation. Not the least of these is the introduction of a presumption (included in the EU legislation) that a cartel (whether as found by a regulator or as proven by a claimant in a stand-alone action) causes harm. This is rebuttable, but the express intention behind it is to try to force courts to award some level of damages in the case of cartel activity. Inevitably it will also strengthen the hand of claimants seeking cash sums in settlement negotiations.

Changes to the dedicated competition court (the CAT) to improve matters for claimants. It would be able to hear stand-alone as well as follow-on cases and be given the power to grant injunctions. A fast track for simpler cases in the CAT would also be established, with the aim being to empower SMEs to challenge anti-competitive behaviour (swiftly and cheaply).

Introduction of an opt-out ‘class action’ regime. The aim of this controversial proposal is to allow consumers and businesses collectively to bring a case to obtain redress for their losses, particularly for relatively low-value individual claims.

Promotion of alternative dispute resolution (ADR). The government wants to encourage businesses and consumers to settle their differences outside of the legal system, particularly so that businesses which wish to make redress to those they have wronged should not be forced to face a lengthy and costly court case.

Of these proposals, the first is likely to have the most impact on ‘standard’ business-to-business disputes. The CAT has significant expertise in competition cases, so a streamlined competition disputes procedure before the CAT, aimed at SMEs (but also available to larger companies), would be a very valuable addition to the armoury of companies seeking to take advantage of competition law-derived rights.

Conclusion

Competition law is increasingly being used as a weapon in disputes in the UK (and more widely in the EU). Companies are aware of their rights and the possibilities for taking advantage of them.

High-profile ‘follow-on’ cartel damages claims are the most obvious example of this and virtually every