Double trouble

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

Matthew Hall is a solicitor and partner at McGuireWoods LLP, Brussels

'Damages cases and settlements of damages claims are 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.'

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

competition and is limited in its freedom of behaviour as compared with non-dominant companies. Abuses of dominance can include for example the imposition of an exclusive relationship, excessive pricing, predatory pricing, imposing unfair trading conditions and other matters.

EU and UK competition law both cover these types of infringements, with the principal difference between the two being that for there to be an infringement of EU competition law there must be an effect on trade between EU member states, which is not required under UK competition law.

Companies are now regularly obtaining cash from third parties who have participated in competition law infringements impacting the UK. In the area of cartel infringements, there has been no award of damages by a UK court. However, in this area the hidden story is one of settlements (often substantial), reached following, or independently of, national court proceedings. Litigation or the threat of it is a very effective tool against cartelists.

This is particularly the case where there has been a regulatory (eg EC or CMA) decision finding a cartel, so that the claimant does not have to prove the existence of the cartel. In this situation the deck is stacked against defendants. Claimants can rely on the regulatory decision to demonstrate the fact of the cartel and can generally rest assured that they have suffered some level of damage (although the quantum is of course greatly disputed). Further, the 'loser-pays' legal costs rule in the UK means that the defendant (faced with the likelihood of 'losing' since the claimants will usually be able to show some level of damage) is all the time facing mounting costs. Claimant law firms are expert at putting in place cost arrangements to attract their clients, including through the use of third party funders. These arrangements can completely remove the cost risk for claimants.

The fact that courts are able and willing to award damages themselves is nevertheless demonstrated by the two UK cases which have proceeded to and completed a full trial.

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.

Companies are now regularly obtaining cash from third parties who have participated in competition law infringements impacting the UK.

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 and operation of a coach concession from the airport.

The abuse found was the entering into by the airport operator of a new concession agreement with a particular coach operator, National Express. In doing so the airport operator abused its dominant position because the terms of the concession (a seven-year exclusivity period to National Express, giving National Express a right of first 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.

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 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 UK (along with Germany and the Netherlands) is one of the most accommodating (albeit expensive) jurisdictions, but even it can, in the EC's view, be improved.

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

directive is available at www.legalease.co.uk/private-damages-legislation.

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 litigate claims, whether or not the issues have a centre of gravity in the UK. This is driven by many factors, including, in particular, the extensive UK disclosure rules (so that evidence can be obtained), the use of English in international business, the reputation of the UK courts and the cost rules.

The UK government has a policy objective of expanding competition litigation in the UK, both at a business-to-business (including particularly for SMEs) and a collective level. The latter includes group claims, or 'class actions'. Following a consultation, in January 2013 the government announced its proposals, confirming that the overall goal was to:

> ... create the legal framework that will empower individual consumers and businesses to represent their own interests [via competition litigation].

The proposals were then included in the draft Consumer Rights Bill, which was published in June 2013 and at the time of writing was going through the Parliamentary process. Details of this bill and its progress through Parliament are available at http://services.parliament.uk/bills/2014-15/consumerrights.html.

In what will be a radical change to the current position, three specific areas for reform were identified:

- 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 cartel fining decision in the EU is now followed by claims from customers of the cartelists. Indeed, to some extent it is now seen as incumbent on the management of potentially affected companies to take or at least to consider action.

The UK (particularly England and Wales) is already a centre for competition law litigation in the EU.

However, the scope for claims is far wider than this, also encompassing 'stand-alone' cartel damages claims as well as claims of damages for abuse of dominance, actions seeking an injunction, declarations that a contractual provision is void and many other issues.

Companies should be aware of their rights under competition law and be prepared to put these to use in order to advance their commercial positions. ■

2 Travel Group plc (in liquidation) v Cardiff City Transport Services Ltd (trading as Cardiff Bus)
[2012] CAT 19

Albion Water Ltd v Dŵr Cymru Cyfyngedig
[2013] CAT 6

Arriva The Shires Ltd v London Luton Airport Operations Ltd
[2014] EWHC 64 (Ch)

Healthcare at Home v Genzyme Ltd
[2006] CAT 29

Inntrepreneur Pub Company (CPC) & ors v Crehan
[2006] UKHL 38

Martin Retail Group Ltd v Crawley Borough Council
[2013] EW Misc 32 (CC)