Leading the Way in EU Private Competition Litigation; UK Legislative Developments

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Legislation on private competition litigation in the EU is moving forward at two levels. The Directive on Antitrust Damages Actions (Damages Directive), the EU-wide harmonising directive, provides for an overarching regime covering all EU Member States. At the same time, many individual Member States are pushing forward with their own regimes, supplementing the Damages Directive.

The UK's status as an EU Member State may change[1]. However, in the meantime, relations are normal and EU legislation continues to be implemented and enforced. The Damages Directive must be implemented (in force) in each Member State by 27 December 2016 and the UK is in the vanguard of the countries taking steps to do this[2]. The Directive will dramatically change competition litigation in many Member States, for example in relation to the availability of disclosure. The changes will be less significant in the UK, but nevertheless the UK consultation raises several issues of note.

At the same time, extensive changes to UK domestic legislation on competition law litigation are just bedding in. These changes were introduced by the UK Consumer Rights Act 2015 (CRA 2015). They are expressly intended further to increase the attractiveness of the UK (particularly English) courts as a venue for private competition litigation in the EU (not just for damages claims) and to improve UK small businesses' and UK consumers' ability to enforce their rights under competition law.

Implementing the EU Directive on Antitrust Damages Actions in the UK

The UK's consultation on implementation of the Damages Directive ran from 28 January 2016 to 9 March 2016. The consultation document[3] trumpets that the UK already has a well-developed mechanism for allowing claims for breaches of both EU and domestic competition law and that during the negotiation of the Damages Directive, the UK successfully ensured that it was based closely on the UK model. The document also makes the point that the

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[1] On 23 June 2016, UK voters will be asked the following question in a referendum: *"Should the United Kingdom remain a member of the European Union or leave the European Union?"*.

[2] The European Commission, DG Competition website, consulted on 25 February 2016, lists eight states (including the UK) which have launched or completed public consultations on proposed implementing measures. See http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html.

[3] UK Department for Business Innovation & Skills, Consultation: Implementing the EU Directive on damages for breaches of competition law, January 2016, available at https://www.gov.uk/government/consultations/damages-for-breaches-of-competition-law-implementing-the-eu-directive.

CRA 2015 changes saw further enhancements to the rules for seeking damages for breaches of competition law.

Policy issues

The consultation considers the changes that will be necessary to domestic competition law to bring this in line with the Damages Directive. It focuses on three policy issues before considering more specific implementation issues. The policy issues are:

- whether to implement a separate regime for breaches of EU competition law (including where EU competition law is applied in parallel with UK competition law) to sit alongside the regime for cases under UK competition law (a "dual regime") or instead whether to apply the changes required by the Damages Directive to cases brought as a result of breaches of either EU or UK law (or both) (a "single regime");
- how to handle the Damages Directive's provisions on limitation periods for bringing claims for damages; and
- when implementation should take place (which as noted must be done at the latest on 27 December 2016)[4].

The issue behind the dual regime/single regime question is that the Damages Directive only applies to cases where EU competition law is applied (alone or with domestic competition law) and, in accordance with the subsidiarity principle, not to cases in which only domestic competition law applies. Despite misgivings about the over-reach of EU law (even where not required by the EU law itself), legal certainty and simplicity of operation surely militates in favour of a single regime and this is the approach suggested in the consultation document.

Addressing this issue, the document states:

"The Government believes that creating a system where there are two sets of procedures will lead to uncertainty and confusion for business, as well as higher familiarisation costs for businesses. The two systems would be largely similar but would differ in certain key respects, for example the point at which limitation periods start. We believe that this two-tier system will make it difficult for businesses and consumers to understand which regime applies to them and could result in an increase in satellite litigation, where parties contest which regime applies. While a single system will go somewhat beyond the requirements of the Directive [a controversial point for many in the UK], this would provide certainty for businesses and consumers."

[4] This simple timing issue is not considered further, although it could have a significant practical impact on certain claims.

In relation to the limitation period for claims, the Damages Directive requires the following:

- the period shall only start to run when the breach of competition law has stopped and the claimant knows or can be reasonably be expected to know of the behaviour and the fact it constitutes an infringement of competition law, the fact the infringement caused harm and the identity of the infringer;
- it shall be at least five years; and
- it can be suspended in various circumstances, including in order to allow a competition authority to investigate the breach of competition law.

It can be seen that the under the Damages Directive several conditions must be complied with before the limitation period for a claim will start to run. Those conditions are very favourable to a claimant/plaintiff.

Current UK (English) law provides for a six year limitation period (so longer than the five years required by the Damages Directive), but this starts to run from the accrual of the cause of action. This is subject to an extension on the basis of deliberate concealment (likely to be relevant in cartel cases, for example). However, there is no need, in particular, for a claimant to know or reasonably be expected to know that there was an infringement or that harm was caused.

The consultation document implicitly seems to accept the need for changes to UK law and therefore proposes simply to adopt the language of the Damages Directive in relation to the triggering conditions for the period to start to run and the situations in which the period will be suspended (i.e. apply "copy-out" of the Damages Directive).

Specific implementation issues

In addition to these three policy issues, the consultation considers the proposed approach to all remaining provisions of the Damages Directive. The approach is slightly unclear, but in relation to all other provisions, even those considered to be already fully covered by UK law, the idea seems to be that "copy-out" is applied (if necessary replacing existing provisions). UK law would therefore contain all relevant provisions of the Directive in "copy-out" form.

Against this background, the consultation expressly considers five separate areas (where copy-out will still be applied but the position is worthy of separate comment):

- disclosure: disclosure, as required by the Damages Directive, is a well-established concept in the UK (and indeed one of the key reasons why the UK is currently one of the preferred jurisdictions for EU competition litigation). The consultation identifies one specific change which will be required, which is to provide for statutory protection for leniency documents (as required by the Damages Directive). This will therefore override the fairly extensive case law on this issue which has developed over the past few years;
- passing-on "defence": there are specific rules and presumptions in the Damages Directive about passing-on. Although generally accepted as available, the existence of the passing-on "defence" against overcharge claims has not definitively been settled in UK case law. The consultation states that, to put the matter beyond doubt, the proposal is explicitly to provide for the "defence";
- calculation of the level of damages: the consultation somewhat waspishly states that "in the UK, we would expect courts and the CAT [Competition Appeal Tribunal, the specialist competition court] to use the appropriate methodology for calculating ... harm". This is a reference to the requirement in the Damages Directive that national courts should be able to estimate harm. The proposal is explicitly to provide that harm may be estimated by UK courts, but, the consultation goes on to state (unnecessarily), "we do not propose to provide for a figure as to what harm has been estimated to have been caused" (which the Damages Directive does not require anyway);
- joint and several liability: although recognised in case law and generally accepted as applying to relevant competition law claims, joint and several liability does not appear in UK legislation. In addition, the Directive introduces specific requirements in relation to the application of the principle. The consultation proposal is therefore to introduce the principle expressly as well as to provide for the necessary exemptions in the case of SMEs and those companies which have received immunity under a leniency programme; and
- CDR and limitation periods: the Damages Directive requires consensual dispute resolution to be made available and the suspension of limitation in cases where it is undertaken. The consultation recognises that changes to UK law will be needed to provide for this.

Impact Assessment

The consultation is accompanied by an impact assessment (IA). This will be little read, but nevertheless some interesting points appear in it:

- the legal costs to businesses of a competition law claim before the courts in the UK are between £4.2 million and £7.5 million per case (and dealt with under the "loser pays" rule, if the case is not settled);
- there are seen to be likely economic benefits from an expected

increase in cases after the implementation of the Damages Directive, since cartel and other illegal activity would be deterred (and also due to the reduction in prices and in deadweight loss);

- On the assumption that there will be a single regime, it is estimated that there will be an annual 3.75% increase in the number of competition litigation cases taken to the ordinary courts and the CAT[5]. This is however less than one additional case per year;
- the legal presumption of harm from a cartel, contained in the Damages Directive, is considered. The IA states that the evidentiary burden of proof on claimants will be reduced as a result, but this is seen as a minor change since evidence will still be needed to establish the actual level of harm and the defendant can still rebut this. The IA does however also indicate that this presumption will "marginally increase" the likelihood of damages being awarded compared to the current position and therefore may increase the number of cases;
- the express inclusion of the passing-on defence is also seen as possibly increasing the number of cases, since the law will be clearer; and
- it is accepted that in some cases the changes concerning the limitation period will make it run for longer than before, making it "slightly easier" for some parties to bring a case.

A parallel regime to the EU Directive on Antitrust Damages Actions; UK Consumer Rights Act 2015

Entirely separate from the Damages Directive, and in advance of its implementation, the CRA 2015 significantly amended the regime for private competition actions in the UK. The idea was further to increase the attractiveness of the UK (particularly English) courts as a venue for private competition litigation generally and to improve small businesses' and consumers' ability to enforce their rights under competition law.

Two main developments

The rules contained in the CRA 2015 entered into force on 1 October 2015. At a high level, there were two main developments. The rules widened the types of competition cases that the specialist CAT hears. It is now able to deal with both "follow-on" claims and standalone actions. In addition, the CAT is able to grant injunctions, including under a new fast-track procedure.

The second main change was the introduction of opt-out collective actions ("class actions") before the CAT for damages suffered by a group of claimants. The opt-out collective actions are class actions since they involve a case being brought on behalf of a group of claimants to obtain compensation for their losses. This can be by representatives on behalf of individuals and/or businesses. Following the U.S. model, claimants would be automatically

[5] With a low estimate of 0 and a high estimate of 7.5%.

included into the action unless they "opt-out" in a manner as decided by the CAT on a case-by-case basis.

These actions are in addition to the already existing option of starting an opt-in case before the CAT. However, opt-in cases have been singularly unsuccessful, principally due to the difficulty of finding claimants to join an action and also problems with securing funding. The only example (concerning purchases of replica football kit by a small group of end consumers) was settled in 2008 and the claim was withdrawn.

The widened scope of CAT claims and evidence that the fast-track is already working

The changes to the UK rules are expressly intended to make the CAT the venue of choice for competition litigation in the UK. This is the specialist competition court and the idea is to push even more cases in its direction.

Although the opt-out collective actions regime has garnered the most attention, it could easily be the case that the extension of the CAT's powers will have most day-to-day impact. Not only can the CAT now hear standalone claims and grant injunctions, but there is a cost-efficient fast-track procedure before the CAT, including (importantly) a cap on the costs, which a losing litigant will have to pay.

Although in principle open to any litigant, the fast-track is squarely aimed at SMEs and consumers. Those types of litigants have to date often been put off litigation by legitimate concerns about the slow pace and vast expense of UK court proceedings. The procedure is not available for collective actions for damages, since it is intended in particular to protect claimants in situations where a quick resolution is needed to a pressing commercial issue such as access to supplies.

An important point in these fast-track cases is that the claimant, unlike in standard High Court proceedings or other CAT cases, will not necessarily be required to give a cross-undertaking in damages when it is granted an interim injunction. This further reduces the risk of proceeding this way.

There have at the time of writing already been two fast-track cases, one an abuse of dominance case concerning access to certification/accreditation[6] and one concerning an alleged anti-competitive restrictive covenant on land[7].

[6] Competition Appeal Tribunal case number 1242/5/7/15 (IN), NCRQ Ltd v Institution of Occupational Safety and Health, details available at http://www.catribunal.org.uk/239-9032/1243-5-7-15-NCRQ-Ltd.html.
[7] Competition Appeal Tribunal case number 1247/5/7/16, Shahid Latif & Mohammed Abdul Waheed v Tesco Stores Limited, details available at http://www.catribunal.org.uk/239-9099/1247-5-7-16-Shahid-Latif--Mohammed-Abdul-Waheed.html.

Both involve what appear to be SMEs (save for the defendant in the second case, which is a large supermarket chain).

The abuse of dominance case was registered at the CAT on 17 December 2015 and settled on 11 January 2016. The defendant was a health and safety membership organisation. Part of its role is the accreditation of qualifications in the health and safety sector. The claimant was a company that has developed qualifications, training material and courses in health and safety, including a diploma in applied health and safety. The claimant submitted an application to the defendant for the accreditation of its diploma qualification.

The claimant alleged that the defendant holds a dominant position in the market for the accreditation of qualifications in the health and safety sector and that its failure and refusal to accredit the claimant's diploma qualification was an abuse of its dominant position, restricting competition in the downstream market for the provision of training leading to qualifications in health and safety.

The claimant therefore sought:

(1) An injunction restraining the defendant from continuing to abuse its dominant position.
(2) A declaration that the defendant has abused its dominant position.
(3) Damages for breach of the Chapter II prohibition in the UK Competition Act 1998 and Article 102 of the Treaty on the Functioning of the European Union (i.e. the UK and EU prohibitions on abuse of a dominant position).
(4) Interest.
(5) Costs.
(6) Such further or other relief as the CAT considers appropriate.

The settlement appears to have given the claimant all that it sought, namely "accreditation at the level of graduate membership to the Claimant's Diploma in Applied Health and Safety", which "shall be granted upon and be subject to the same terms as apply to all course providers who are accredited by the Defendant, as set out in the Defendant's published guidance." The fast-track therefore seems to have worked more than satisfactorily in this case.

At the time of writing, the second fast-track case had just been registered at the CAT, but it does appear to raise more difficult issues than the first case. The claim arises from an alleged infringement of the Chapter I prohibition in the UK Competition Act 1998 (i.e. the basic prohibition on anti-competitive agreements) and/or the Chapter II prohibition in the Act and/or the English common law doctrine of restraint of trade.

The case is based on a 1997 sale of land by the claimants to the defendant. Pursuant to the land transfer agreement, the land retained by the claimants is

subject to a covenant "not to use or permit any of the Retained Land to be used for the sale of food convenience goods or pharmacy products". The claimants allege that the transfer agreement and/or the covenant constitute an agreement and/or concerted practice that has/have the object or effect of preventing, restricting and/or distorting competition on the relevant market within the UK.

Further or alternatively, the claimants allege that the defendant is dominant and/or has a significant market share and/or significant market power that the covenant protects, thereby preventing, restricting and distorting competition.

The claimants say that the covenant adversely affects trade within the UK (as it must do to give rise to an issue under the Competition Act 1998) as it adversely affects the ability of the claimants to develop and lease the retained land and/or it adversely affects the sale of groceries and pharmacy products within the relevant geographic market.

Further or alternatively, the claimants say that the covenant infringes the common law doctrine of restraint of trade and/or the Competition Act 1998 because it is wider in scope and duration than was necessary to protect the defendant's legitimate interests, if any, which may have existed in 1997 (when the land was sold).

The claimant is seeking:

(1) A declaration that the covenant is void and unenforceable.
(2) An injunction restraining the defendant and any associated bodies corporate from enforcing the covenant.
(3) Damages.
(4) Exemplary damages.
(5) Such other consequential orders as the CAT thinks fit.
(6) Interest.
(7) Costs.

These cases, and in particular the very speedy settlement of the first one, suggest that the fast-track will be a successful and popular route for claimants. The second case is particularly interesting as it involves an issue concerning land. There have been a number of recent competition law cases in the EU concerning restrictions on land, such as restrictions in commercial leases.

Class actions of a sort

At the time of writing, there had not been a class action filed under the CRA 2015, which is not surprising due to the complexity of this area.

The CRA 2015 includes various safeguards designed to ensure that the new collective actions, which can be follow-on or standalone claims, do not become full-blown U.S.-style class actions. In particular, the CAT will not be able to award exemplary damages in collective proceedings. Those are damages, permitted in the U.S., which are designed to be punitive rather than simply compensate for the actual loss suffered and which often drive U.S. defendants to settle claims rather than risk huge payouts. The intent is to ensure (as is the case now) that very large damages which do not reflect the losses suffered do not become a feature of UK damages litigation. This also applies to opt-in claims.

In addition, amongst other protections, claims can only be brought by certain suitable representatives, the CAT must certify the case as suitable for a collective action, only UK claimants are automatically included in opt-out cases (non-UK claimants can opt in) and contingency fees (under which some of the damages go to the legal representative) will not be permitted.

Consumer rights groups have welcomed the changes but, despite the safeguards, some lobby groups in the UK continue to warn of the risks. The Confederation of British Industry (CBI), a business lobbying organisation, commented that: "The opt-out scheme runs the risk of creating lucrative opportunities for those seeking to promote mass litigation and driving moves to a class action culture".

That remains to be seen, and is probably an exaggeration, but it is certainly the case that the ever-increasing number of specialist claimant law firms in the UK, many seeking to import U.S. practices, are chomping at the bit to use the collective claim provisions. Cases based on the various financial services sector cases seem like an obvious possibility. However, the first cases will not move quickly and there will inevitably be many skirmishes around issues such as the rules on funding of claims and how to define a suitable class. The CAT recognises that numerous procedural issues will arise, particularly at the outset, and these will need to be worked through.

It's also important to recall that opt-out actions are what they say. Potential claimants will, as in the U.S., be able to opt-out and bring a separate claim. These claims can in principle result in exemplary damages awards and defendants will inevitably face these at the same time as collective claims.

Conclusion and further comments

All 28 EU Member States have until 27 December 2016 to implement the Damages Directive into national law. At the time of writing, only eight countries (including the UK) had reached a public consultation stage. That is slow progress.

The European Commission (EC) is known to be concerned that some countries do not have a realistic chance of meeting the deadline. That is not surprising, particularly since the changes required in several countries are very significant (unlike in the UK). The most dramatic change in many cases will be the requirement to allow for disclosure/discovery of documents (protected by confidentiality rules), an alien concept in many countries.

The UK is clearly focused on remaining the jurisdiction of choice (competing with Germany and the Netherlands) for competition litigation in the EU. The CRA 2015 changes were expressly designed to do that, since the Damages Directive only sets a minimum standard and it does not cover collective claims.

The EC has recognised this, stating "there is still significant room for member states to compete on whether they have [a] better jurisdiction for these types of claim". Indeed, as has the UK, some countries may go beyond the requirements of the Damages Directive when they implement it.

Ultimately, the Damages Directive will be implemented in all member states. This will result in increased competition litigation in all jurisdictions, which given the low starting levels will be very dramatic in some. The UK is likely to see more as well, driven partly by the Damages Directive but mainly by the changes introduced by the CRA 2015. Of those latter changes, the focus on SMEs and fast-track litigation is likely to produce a significant uptick in cases, as demonstrated by the filing of two fast-track cases in the early months of the regime.