Litigation

Caroline Edwards

Caroline Edwards
Partner, Travers Smith
caroline.edwards@traverssmith.com

The rise and rise of competition litigation in England – what might the future hold in a brave new post-Brexit world?

The reputation of London as a jurisdiction of choice for private competition damages claims is well documented. Recent developments had looked like cementing London's status even further. These include:

- Substantial reforms of the competition private actions regime in the UK introduced by the new Consumer Rights Act with effect from 1 October 2015, which has materially expanded the jurisdiction of the Competition Appeal Tribunal to hear private action damages claims and introduced both opt-in and (for UK-domiciled claimants) opt-out class actions, as well as the possibility of collective settlements for collective damages actions.

- The implementation of the new EU Damages Directive* which is supposed to be implemented by the end of this year. The intention of the Directive is to make it easier for claimants to bring competition damages claims and to harmonise the minimum standard for such claims which are required to be met across the EU. Those standards include certain rebuttable presumptions (for example, as to pass-on) and the requirement to introduce a disclosure regime. In theory, the introduction of a minimum standard might mean that other EU jurisdictions become more attractive destinations to bring a claim than they may previously have been. However, the fact that many aspects of the EU Damages Directive have long formed part of English law (much of the Directive was modelled on the English system) such that England already has an experienced judiciary (and experienced body of legal practitioners), well versed in matters such as disclosure, means that England could expect to retain its status as a go-to jurisdiction following implementation.

- Recent significant judgments from the English courts, including on issues such as disclosure, limitation and the territorial limits of claims, which have served to develop further English law jurisprudence and

TRAVERS SMITH

to clarify the law in this field, providing greater certainty to litigants.

In 2016 alone, Commission fines for cartel infringements have already exceeded €3bn. On these figures, plus the well-publicised £14bn claim which it is understood will be brought by way of class action against MasterCard on the horizon, the future of cartel damages disputes in England had looked to be well settled. However, following the referendum on 23 June 2016, the question now, naturally, is what the future holds for England as a destination for these claims.

While Brexit may mean Brexit, it is still far too early to tell what the impact will be on London's current status as a premier destination to bring private action competition damages claims. Everything will, of course, depend on the Brexit terms which the UK is ultimately able to negotiate (and, importantly, whether the UK remains part of the EEA or not). Key issues will include:

While Brexit may mean Brexit, it is still far too early to tell what the impact will be on London's status as a premier destination to bring competition damages claims.

- the status of Commission decisions as evidence of infringement in private damages claims;
- jurisdiction (and the risk of parallel proceedings, inconsistent decisions and possible anti-suit injunctions issued by other courts); and
- the enforceability of English court judgments in Europe.

However, while there will be a risk of jurisdiction challenges, multiplicity of proceedings and inevitable uncertainty, English and EU competition law are closely intertwined after 43 years of the UK's membership of the EU and a post-Brexit deal could still preserve much of what underpins England's status as a go-to destination for these claims (particularly if a post-Brexit deal sees the UK as a member of the EEA). Moreover, with the existing well-established competition disputes infrastructure in London, England still has much to offer as a jurisdiction in which competition disputes should be determined. This includes:

- the specialist legal and economic expertise of the Competition Appeal Tribunal, and a number of High Court judges with significant competition law expertise;
- favourable procedural rules (including as to disclosure and limitation), combined with well-established judicial experience in applying those rules and a reputation for efficient and effective case management;
- ever-increasing depth in the legal and expert economist market; and
- the well-established presence of litigation funders with substantial familiarity with English law and the bringing of competition damages claims in the English courts, as well as a continuing strong appetite to fund competition damages claims.

If the terms of the Brexit deal enable England to retain jurisdiction of claims for EU-wide losses, we should certainly expect there still to be much for English competition litigators to do. Moreover, with the latest indications being that article 50 will not be triggered until the start of 2017, at the earliest, there is potentially a long tail of claims which may still be brought in the English courts regardless of what the Brexit deal ultimately is and (depending on the transitional arrangements) even the possibility of a sharp spike in cases as claimants look to bring pre-existing claims prior to the actual exit date to ensure that they benefit from the pre-Brexit regime.

**Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the European Union.*

Caroline Edwards is a partner in the dispute resolution department at Travers Smith and a member of the firm's regulatory investigations group. Her practice covers a broad range of high-value complex commercial disputes, including competition disputes. She has acted in a number of high-profile cartel damages cases brought in the English courts, including acting for members of the Schott group in their successful strike-out of the claim brought against them by members of the iiyama group of companies following the European Commission's CRT glass cartel decision.