

Private actions for breach of competition law

What will be the impact of the recent reform proposals?

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There is already a steady stream of private competition law actions now being brought in the UK. The European Commission and the UK government have recently published legislative proposals and other guidance intended to further encourage private actions, in particular follow-on damages actions. In this briefing we look at some of the key features of the proposals and the likely impact of the proposed changes for private actions in the UK.

Background and overview

Recent years have seen a significant increase in the number of private competition law actions brought before EU member state courts for breaches of competition law, particularly so-called "follow-on" damages actions, whereby the claimant seeks to rely on a previous infringement finding by the European Commission (EC) or national competition authority in order to seek redress for any damage it can prove it suffered as a result of the infringement. However, significant obstacles to bringing such claims remain and, due to differences in national law, the development of private actions has been more significant in some EU member states than others. Such claims are now relatively common in the UK before the English High Court (High Court) and the Competition Appeal Tribunal (CAT), albeit not on a collective basis – see the boxes opposite and on page 3. In particular, there are significant obstacles to bringing collective (class) actions, which are likely to be necessary for purchasers to obtain redress where no one individual claimant suffers a large amount of harm as a result of the competition law breach, e.g. where a cartel primarily harms consumers.

In light of this, the EC and the UK government have, for some time, been committed to introducing reforms in this area to encourage private actions. However, at the same time, both have been concerned to ensure that any reforms are appropriately balanced and do not encourage frivolous or unmeritorious litigation. Both have now published proposals for their respective reforms. In this briefing we summarise some of the key features of these proposals and comment on their likely impact on private actions in the UK, in particular on follow-on damages actions.¹

What's happening and when

In June of this year, the EC published a series of documents aimed at removing some of the obstacles to bringing private damages actions for loss suffered as a result of breach of competition law. The proposals aim to harmonise and clarify the law across EU member states.

The key documents include:

- a proposal for a Directive on rules governing damages actions for breaches of competition law (the Proposed Directive);
- a Communication and a Commission Recommendation encouraging EU member states to have in place collective redress systems based on a set of common principles for violations of EU law, including competition law (the Collective Action Recommendation); and
- a further Communication, and an associated Practical Guide, which offer guidance to national courts and parties to litigation on the various methods for quantifying damage in EU competition law damages actions (the Damages Guidance).

UK private actions: the story so far

Private actions for breaches of competition law in the UK have seen significant growth in recent years, in particular before the High Court and the CAT. Most commonly, these are follow-on damages actions based on a prior decision of the EC or Office of Fair Trading (OFT) (or a UK sectoral regulator). Often, these claims are pan-European in that they encompass all loss suffered by a claimant company or group of companies on purchases anywhere in the EU of products found to be the subject of a cartel by the EC.

Aided by a relatively permissive approach taken by the High Court and CAT to establishing a jurisdictional link and perceived advantages of litigation in England (e.g. a strong disclosure regime and loser-pays costs rules), England and Wales has become one of the most popular jurisdictions (if not *the* most popular) for bringing follow-on damages actions in the EU. However, there has not been a similar development as regards collective actions in the UK – see the box on page 3.

¹ Note that this briefing only addresses private actions before the Competition Appeal Tribunal and the High Court under English law and does not comment on private actions brought under Scots or Northern Irish law.

Once finalised, the only binding document will be the Proposed Directive. The UK and other EU member states will have two years to implement its provisions in national law.

The day after the EC proposals were announced, as part of the package of measures designed to reform competition and consumer law in the UK, the UK government set out its own proposed approach to reform in this area in the draft Consumer Rights Bill (the Draft Bill). We do not expect the Draft Bill to be finalised and passed into law before mid to late 2014 at the earliest.

A number of the EC proposals are already reflected in the law or court procedure rules of England and Wales and the Draft Bill anticipates some of the other EU proposals. However, a number of the provisions set out in the Proposed Directive will require subsequent legislation in due course. In addition, as regards certain elements of the (non-binding) Collective Action Recommendation, the UK government appears set on a different course to that advocated by the EC.

Private competition law actions: what's the problem?

Claimants bringing private actions before EU member state courts, including in England and Wales, continue to face a number of obstacles. Some of the key obstacles include:

- proving and quantifying loss;
- organising a collective action on behalf of multiple claimants; and
- funding the case.

The EC and UK proposals focus in particular on these obstacles.

Proving and quantifying loss

Even where a competition authority has found a breach of competition law, claimants face a number of issues in relation to proving and quantifying loss, including accessing relevant evidence, calculating how much loss they suffered and the issue of whether any overcharge was passed on.

Disclosure

Claimants seeking to prove their loss need access to the factual and economic evidence which would enable them to establish their case. However, such information is often in the hands of the infringer (or another third party) and/or in the file of the competition authority which originally investigated the infringement. Currently, the disclosure rules of EU member states vary significantly. The Proposed Directive therefore includes measures aimed at ensuring claimants will have sufficient access to such evidence, including documents in the hands of third parties. It also clarifies the limits of an infringer's disclosure obligation and of disclosure by the EC or national competition authority, including, importantly, absolute protection against disclosure of leniency corporate statements (the key leniency admissions of a whistle-blower) and settlement submissions.

Quantification

Quantifying harm is often a very complex and costly exercise for claimants. For example, it will commonly be necessary to instruct experts to carry out sophisticated economic modelling exercises. Further, key information from the period of the infringement, or from the periods immediately before or after the infringement, may no longer be available. To assist the claimant in this regard, the Proposed Directive provides for a rebuttable presumption that, in the case of a cartel infringement, the infringement caused harm, in particular by way of a price effect.

The Proposed Directive does not include any presumed level of that overcharge (as was previously rumoured) and as such is arguably of limited value. However, the Practical Guide forming part of the Damages Guidance cites a recent study for the EC by Oxera, which examined prior academic data and found that 93% of the cartel cases considered did lead to an overcharge, with the average overcharge observed at around 20%. Claimants in follow-on damages cases in England and Wales are already routinely citing this average overcharge level, at least at the outset of a claim, in the absence of other evidence.

Passing-on

The "passing-on defence", in which the infringer argues that a claimant has suffered no, or a reduced level of, loss because any overcharge from the cartel was passed on in whole or part to the claimant's own customers, is explicitly permitted in the Proposed Directive (subject to a limited exception).

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Further, in order to assist claims from indirect purchasers, where an indirect purchaser can prove an overcharge to the direct purchaser, the Proposed Directive incorporates a rebuttable presumption that the overcharge was passed on. The national court will have the power to estimate what proportion of the overcharge was borne by the indirect customer. However, again, as no particular proportion of pass-on is prescribed, the benefit of this presumption may be limited.

Perhaps more so than in many EU member states, the litigation framework in England and Wales is already in line with many of the provisions of the Proposed Directive. However, further legislative amendments (in addition to those set out in the Draft Bill) will be required as regards certain of the provisions, including the absolute protection of leniency statements and the presumptions of harm to direct purchasers and of passing on.

Organising a collective action

The existing mechanism for bringing collective actions on behalf of consumers for breach of competition law before the CAT is widely viewed as not having been successful – see box opposite. The UK government is concerned that this is leaving categories of harmed parties unable to obtain redress and as such, the Draft Bill sets out significant amendments to the collective action procedure before the CAT.

The Draft Bill widens the collective action mechanism before the CAT beyond consumers to any group of claimants. The CAT will be able to accept claims on a collective action basis where they raise the "same, similar or related issues of fact or law".

At present, collective actions can only be brought on an opt-in basis, where all members of the class of claimants must have specifically elected to participate. Controversially, the Draft Bill would also allow opt-out claims, where members are automatically included in the class of claimants (and must specifically opt out if they do not want to participate). This would be for UK-domiciled claimants only, although non-UK claimants could opt in to the claim. However, to discourage speculative or unmeritorious claims, the Draft Bill provides for a series of safeguards to the opt-out regime. All such claims must be certified as suitable by the CAT before they can proceed. Damages-based agreements will be prohibited (discussed further below) and the standard "loser pays" costs rule will be retained for opt-out claims. Finally, exemplary damages cannot be awarded in collective actions.

The Draft Bill also provides for approval by the CAT of settlements of opt-out collective actions where the CAT considers the terms just and reasonable. Unclaimed award amounts following an award in an opt-out collective action will be paid to a nominated charity.

Who can be a "representative"?

Whether the collective action is opt-in or opt-out, the question arises as to who is a suitable representative for the class. The Draft Bill expressly provides for a class member (i.e. a person who falls within the class of persons claiming to have suffered harm) to act as a representative. As regards other representatives, the proposals regarding who may be approved as a representative are broadly drafted and it will be left to the CAT to determine the detail subject to a broad "just and reasonable" standard.

The Draft Bill does not make specific reference to claimant law firms. However, either through specific CAT rules or case law, law firms are likely to be prohibited from acting as representatives. Indeed, an earlier UK government consultation on these reforms stated that it is not intended that law firms will be able to act as representatives, and, other than class members, claims may only be brought by genuine representatives of claimants, such as trade or consumer associations.

The detail of the CAT's rules and case law on who can be a representative and approval of representatives in particular instances is likely to be a key factor in the practical ability to bring collective actions before the CAT. In particular, it will be interesting to see whether the CAT's approach will be sufficiently flexible to enable specialist claimant law firms, in practice, to identify and organise a class, even if not permitted to be the named representative. However, we note that regardless of this, given the restriction of any opt-out class to UK-domiciled claimants, pan-European collective actions seem unlikely to be brought before the CAT.

Why the EC prefers opt-in

In many respects, the proposals in the Draft Bill are in line with the (non-binding) recommendations of the EC in the Collective Action Recommendation. However, a significant difference is the UK proposal to permit opt-out collective actions. In contrast, whilst encouraging the provision of a collective action mechanism in each EU member state, the EC prefers an opt-in system. This reflects concerns as to the rights of claimants to decide whether or not to take part in litigation and also, it appears, concerns of encouraging unmeritorious litigation.

UK collective actions: the story so far

It is currently possible to bring a type of "opt-in" follow-on collective action on behalf of consumers, called a "representative action", before the CAT. However, certain features of this regime, in particular the opt-in requirement and the fact that any representative body must be designated by the Secretary of State, have made this an unattractive option in practice. Only one such case has been brought to date – the replica football shirts case brought by Which? against JJB Sports in 2008.

In addition, under the general civil procedure rules (not specific to competition law claims), it is also possible to bring a representative action or alternatively to obtain a "Group Litigation Order" (GLO) in the High Court. Of the two, the GLO regime is likely to be more workable for competition claims given the lesser standard as to the nature of the interest that the claimants must share ("common or related issues" as compared to the more stringent "same interest" for a representative action). The GLO regime provides for the co-ordinated case management of (including the provision of judgement in) multiple claims by different parties. However, even the GLO regime (which was introduced in May 2000) has not been widely used (whether for competition law or other claims) given a number of other perceived obstacles.

In *Emerald Supplies v British Airways*, a competition law damages action against BA, the High Court, and subsequently Court of Appeal, were not satisfied the claimants, who were both direct and indirect purchasers, had the requisite "same interest" and refused to allow the claim to proceed as a representative action. The High Court indicated that the GLO route might be more appropriate for such a claim, but the Court of Appeal did not address this point.

Funding the action

The cost of funding litigation can be a very significant obstacle to bringing a private competition law action, in particular a collective action. However, certain funding mechanisms are seen as potentially encouraging unmeritorious litigation.

To prevent abuse of the collective action procedure, the Draft Bill provides that damages-based agreements (or those providing for a contingency fee) for opt-out actions will be unenforceable. However damages-based agreements will remain permissible for private damages actions brought by individual businesses (or other claimants). Conditional fee agreements (where the fee depends upon the outcome of the case – see the box opposite) will continue to be able to be used in collective actions. However, these are less attractive than they used to be as, following recent legislative changes, the "success fee" element payable by the successful party to its advisers can no longer be recovered from the losing party as part of its adverse costs.

The EC is also concerned to get the balance right on funding of collective actions. It recommends that contingency fees should not be permitted where they risk incentivising unnecessary litigation. The Collective Action Recommendation also specifically advocates the possibility of third party funding, but recommends EU member states make it subject to certain conditions.

These limitations on funding may act as a constraint on the development of collective actions in England and Wales. However, that said, specialist claimant law firms have proven resourceful in recent years in finding practical funding mechanisms to assist harmed individual businesses, including conditional fee agreements and adverse costs insurance. The ability of these firms to structure effective funding mechanisms for collective actions should therefore not be underestimated.

Other proposals of note

While it is not possible to summarise all elements of the EC and UK government proposals in this briefing, in addition to the areas already highlighted, the following aspects of the proposals are worthy of particular note:

- **Protection of leniency applicants:** Protecting the position of leniency applicants is another key focus of the EC proposals. In addition to the protection against disclosure of key leniency documents noted above, the Proposed Directive also provides that, as a general rule, an undertaking that has been granted immunity (a 100% reduction in fines) may only be sued for the loss suffered by its direct or indirect purchasers (or providers), rather than all parties harmed by the cartel. The same general rule will apply in contribution proceedings brought against an undertaking that has been granted immunity by another defendant carteliser.
- **Assisting settlements:** The Proposed Directive also contains a proposal to assist individual defendant parties to settle in multi-party private actions. If one defendant settles, the claim will be reduced by the settling defendant's share of the harm and the remaining defendants will not be able to recover further contribution from the settling defendant. Currently there is no such rule in England and Wales and as such, any settling defendant remains exposed to potential claims for contribution brought by the other defendants. This can make it difficult for any settling defendant to achieve final closure of its involvement in the proceedings.
- **Standalone claims before the CAT:** Currently the CAT only has jurisdiction to hear follow-on damages actions. Standalone claims which are not based on a prior competition authority decision must be brought before the High Court. As the UK government is keen to develop the CAT as the forum of choice for private competition law actions, the Draft Bill provides for the expansion of the CAT's jurisdiction to standalone claims of breach of EU or UK competition law, including collective actions.
- **Harmonisation of limitation periods:** The Draft Bill removes the current difference in limitation periods for private actions before the CAT and High Court, so that in both cases, for follow-on actions, this will generally be six years from the relevant competition authority decision. The Proposed Directive also contains proposals on limitation periods. These are broadly in line with what the position will be in England and Wales following implementation of the Draft Bill (although limited further legislative changes may be required).

How will the EC and UK proposals change the private damages actions landscape?

As we have noted, private actions are an established feature of the competition law environment in the UK (as well as in a number of other EU member states), and therefore regardless of these new reforms, the possibility of a private action must now always be considered by infringing companies alongside the traditionally more familiar risks of an investigation by a competition authority and subsequent fines. Assuming the Proposed

Types of alternative legal fee arrangements

Conditional Fee Agreements (CFAs)

are agreements between a litigant and his lawyer which provide that the lawyer's fees and expenses, or any part of them, will be payable only in certain specified circumstances, the most common being a successful settlement or outcome at trial (the fees can be zero if an unsuccessful outcome results). Lawyers entering into this kind of arrangement also typically levy a "success fee", which is expressed as a percentage uplift on the lawyer's hourly rate. Due to recent changes to the Courts and Legal Services Act 1990 that came into force in the UK this year, in the event that the client wins at trial, the success fee must be paid in full by the client, and, by contrast with the previous position, does not form part of the costs that the losing side will (in normal circumstances) be required to pay. They are therefore a less attractive option than was previously the case.

Damages-Based Agreements (DBAs)

(also known as contingency fee agreements) have recently been introduced as an alternative method of funding. They were not previously permitted under English law (except in employment claims). They are a type of agreement between a client and lawyer under which the lawyer is paid by reference to an agreed percentage of the client's damages if the case is won. The maximum amount the lawyer can receive is limited by statute (generally 50% of the damages awarded). Under current regulations, lawyers do not appear to be permitted to combine a DBA with, for example, a reduced hourly fee rate payable regardless of whether damages are ultimately awarded.

Directive and Draft Bill are passed without significant amendment, the changes proposed by the EC and UK government will undoubtedly aid the further development of private actions in England and Wales and will also assist the efficient prosecution and settlement of those claims once brought. However, as regards claims brought by individual businesses, the effect of the EC proposals may be more dramatic in other EU member states which currently provide a less claimant-friendly environment.

The area where there is scope for a more significant change in the UK is collective actions, and in particular follow-on collective actions where the purchasers from the infringing parties were primarily consumers. These claims have been rare thus far in England and Wales. However, as we have noted, given the proposed restriction of any opt-out class to UK-domiciled claimants, it seems unlikely that England and Wales will develop as a centre for EU-wide litigation of collective claims in the same way it has for claims by individual businesses. Further, while collective actions on behalf of UK-domiciled claimants are likely to become more common, it is difficult to predict at this early stage quite how far this development will go. Much will turn on the impact in practice of details of the proposals in the Draft Bill. For example, the CAT's approach to approving class representatives is likely to be important and the relatively restrictive rules around funding may also have an impact.

How we can help

Our recent competition litigation experience includes acting on a number of complex follow-on damages claims.

This competition and EU law practice benefits from the firm's profile in the corporate and financial world. Sources say they are 'impressed with the level of service and assistance at the firm: it can handle complex competition matters very effectively.'

Chambers UK

This [seven] partner litigation team certainly punches above its weight, acting in a variety of high profile and commercially sensitive international disputes.

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