Clarifying Competition Law: Antitrust Private Damage Actions in the UK

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Robert Bell is head of the EU & UK competition team at Bryan Cave. He is a market-leading competition lawyer with over 20 years’ experience in advising clients on their EU and UK competition law matters. He acts on a range of complex competition and regulatory matters and has been involved in some of the leading cases before the OFT, European Commission and the UK and European Courts.

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Robert is currently Chair of the City of London Law Society’s Competition Law Committee, which liaises with the UK Government and the EU & UK competition regulators in connection with the reform of competition law and practice.
Mathew Rea is a partner in the Commercial Litigation Client Service Group and International Arbitration team in London. He has practiced law for more than 20 years handling commercial disputes, including extensive trial experience in the High Court and arbitrations in the London Court of International Arbitration (LCIA) and the International Chamber of Commerce (ICC) Court of Arbitration. In addition to significant litigation and arbitration experience, Mr. Rea also has counselled clients on risk management and alternative forms of dispute resolution.

Mr Rea's client work has had a particular focus on the commodities, media and financial services sectors. His experience extends to contract and commercial disputes, shareholder and joint venture disputes, commercial fraud claims, professional negligence and breach of trust claims.
This webinar will examine the present state of the law on:

1. What is an antitrust private damages action?
2. Who can bring a claim and who can be sued?
3. Where and when can a claim be brought?
4. Evidence & disclosure
5. Major upcoming reforms
What is an antitrust private damages action?
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- Private civil action for compensation
- EU antitrust rules: Art. 101 & 102 TFEU (EU Commission, General Court)
- Tort claim – breach of statutory prohibition
- Economic tort of conspiracy
- Damages (actual loss, loss of profit, interest, loss of market share)
- Injunctions/Declarations
What is an antitrust private damages action?

- Follow-on actions
  - Infringement decision is proof of breach (operative part)
  - Only need to prove causation & loss

- Standalone actions
Who can bring a claim?
Who can bring a claim?

- Victims - direct or indirect (n.b. “passing-on” defence)
- Non-EU claimants
- Representative actions/Group Litigation Orders
Who can be sued?
Who can be sued?

Follow-on actions
• Named in infringement decision – joint & several liability
  - Leniency applicants (effect of successful appeals by other defendants)
  - Parent companies, controlling shareholders (“decisive influence”)
  - Subsidiaries? Individual shareholders? Entities outside EU

Stand-alone actions
• Other parties - infringement decision “persuasive”

Tactical considerations
• Logistics, cost and time of multi-party proceedings
Where and when can a claim be brought?
Where and when can a claim be brought?

- So far, UK, Netherlands and Germany are most popular
- Multiple defendants in different jurisdictions?
  - ‘anchor defendant’
  - subsidiary can anchor parent if subsidiary was “possibly” party to/implemented/aware of conduct
- Tactical considerations (picking the venue)
- The ‘Italian Torpedo’
Where and when can a claim be brought? - cont

- UK: CAT vs High Court (Chancery)
  - Follow-On action vs Standalone? Pure monetary relief?
  - 2 year CAT v 6 year High Court limitation period
  - Limitation period for stand-alone vs limitation period for follow-on
  - Effect on Leniency applicants, no appeal – the Morgan Crucible case
  - Procedure (e.g. disclosure), costs recovery
  - “Centre of excellence”
- English court, does that mean English law applies? (Rome II)
- DBAs/CFAs/Third Party funding
Evidence & Disclosure
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Evidence:

• Civil standard of proof – “balance of probabilities”

• Reasonably foreseeable loss - actual loss, loss of profit, loss of market share, interest
  - Damages resulting from “umbrella pricing”?

• Expert evidence key: economic & forensic accountancy evidence
  - EU Commission guidance (not binding)

• “Passing-on” defence (but Sale of Goods Act cases)

• Exemplary damages? Restitutionary damages?
Disclosure

- High Court vs CAT
- Third party disclosure
  - Access to CMA/EU Commission file
  - Leniency statements?
  - Whistleblower evidence?
- Access to evidence
  - CMA/EU Commission decisions? *Pergan* case. Delay?
  - N.b. EU transparency Regulation (Reg 1049/2001)
- Pre-action disclosure
Major upcoming reforms
EU Directive on Private Actions

• Will likely become EU law this month.
• Disclosure and access to evidence – A basic standard being adopted throughout the EU
• Effect of national regulatory decisions – National regulators binding on their own national courts but only prima facie evidence for foreign courts.
• 5 year limitation rule – A minimum. The clock starts when the claimant could or should have known of the cause of action and the identity of the infringer. National law should clear up any ambiguity.
EU Directive on Private Actions 2

- Passing on defence made available – to protect against double compensation for the same loss and un-meritorious claimants.
- Rebuttable presumption of cartel harm – no % agreed but still a presumption to assist compensation.
- Rebuttable presumption for indirect purchasers – to aid their claims. Works in conjunction with the passing on defence on the defendant.
- Joint and several liability for infringers – Leniency applicant not completely protected if no joint infringers can be found.
UK Consumer Rights Bill 1

• Likely October 2015 adoption. Currently in the House of Lords.

• The ‘JJB’ experience and the need for collective actions.

• Opt-out collective/class actions for anti-competitive behaviour.

• Collective proceedings may only be allowed or continued by order of the CAT.

• Damages based agreement unenforceable if related to opt-out collective proceedings.
UK Consumer Rights Bill 2

- In collective actions, any damages award surplus to be given to the Access to Justice Foundation
- Allow stand-alone cases in the CAT
- CAT given injunctive powers and a fast track procedure to grant these
- CAT limitation period extended to 6 years
- CAT approval of collective consumer settlements/CMA approval of redress schemes
- Changes to funding
- Costs cap for fast track procedure
Key Points

• You can bring litigation to claim compensation either following a regulatory finding of liability (follow-on) or prove the case from scratch yourself (stand-alone).

• Collective actions claims are coming to the UK in the Consumer Rights Bill.

• When bringing litigation consider finding a UK anchor defendant such as a UK parent company with deep pockets.

• When defending against competition claims consider invoking the strict limitation periods, the difficulty for the claimant in proving quantum and the availability of the passing-on defence for direct purchasers.
CPD Points

• CPD points and CLE credit are available for this webinar.

• CPD points and CLE credit may be collected by emailing: europe.marketing@bryancave.com