Private enforcement of competition law and follow-on actions in the UK

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The landscape for private competition actions has undergone considerable evolution in recent years, in particular with the introduction of:

• The Consumer Rights Act 2015 in the UK (the main provisions of which are due to come into force on 1 October 2015).

• Directive 2014/104/EU on actions for damages under national law for infringements of competition law provisions of the member states (Anti-trust Damages Directive), the provisions of which must be transposed into the national law of member states by 27 December 2016.

The changes at UK level are intended to maintain the UK as one of the most popular jurisdictions for bringing private actions for damages. The reforms seek to extend the power and remit of the UK specialist competition tribunal, the Competition Appeal Tribunal (CAT), which itself has been consulting on new procedural rules to accommodate its new powers (Draft CAT Rules).

WHEN AND HOW CAN A CLAIM BE BROUGHT?

Claims for breaches of competition law can be brought on either a follow-on or standalone basis, or as hybrid claims that contain a mixture of both.

Follow-on actions

Under section 47A of the Competition Act 1998, a person who has suffered loss or damage by virtue of a relevant infringement of EU or UK competition law is entitled to bring a claim for damages or other relief. English law characterises the claim in tort as a breach of statutory duty (see Case C-453/99 Courage Ltd v Bernard Crehan, and joined cases C-295/04 and C-298/04 Manfredi).

A relevant infringement for these purposes is either:

• A European Commission finding that that either Article 101(1) or Article 102 of the Treaty on the Functioning of the European Union (TFEU) has been infringed.

• A decision by a UK competition authority that Article 101 or 102 TFEU and/or Chapter I or Chapter II of the Competition Act 1998 has been infringed.

A follow-on claim must relate to precisely the same facts as the infringement decision of the competition authority. Where claims are brought on this basis, the competition authority infringement decision acts as proof of the existence of an infringement (sections 47A(9) and 58A, Competition Act 1998). In other words, in follow-on actions, claimants do not need to establish an infringement (which has already been established by the infringement decision itself) and therefore need only demonstrate causation and loss.

Standalone actions

Breaches of competition law can also be brought on a standalone basis where there is no pre-existing infringement decision on which a claimant can rely. In such cases, the claimant must prove first that a breach of competition law has occurred and that it suffered loss as a result. Given this additional evidential requirement, standalone claims face more hurdles than follow-on claims. The applicable standard of proof as regards the existence of an infringement is the civil standard, that is, the balance of probabilities.

Hybrid claims can also be brought. These are claims which contain a combination of follow-on and standalone elements, for example alleging a longer period of infringement and/or wider geographic or product scope.

Collective actions

The Consumer Rights Act 2015 (CRA) received Royal Assent on 26 March 2015. Section 81 gives effect to Schedule 8 of the CRA, which in turn establishes a framework for collective proceedings and settlements. The CRA allows for collective proceedings to be brought under section 47B of the Competition Act 1998, combining two or more claims that may be brought under section 47A.

Technically, claimants already have the legal right to bring collective actions in the UK in the High Court either through representative actions (under rule 13.6 of the Civil Procedure Rules (CPR)) or through a Group Litigation Order (GLO) (under rule 19.10 of the CPR). However, in practice, representative actions are not always suitable for competition damages claims because, among other things, it is necessary in a representative action for the parties to have the same interest in the claim. This would prevent, for instance, both direct and indirect purchasers from participating in the same representative action because a passing-on defence would benefit indirect but not direct purchasers and the claimants would therefore have conflicting interests (Emerald Supplies Limited and Another v British Airways plc [2010] EWCA Civ 1284).

A GLO is concerned with the case management of a number of separate claims. It is an opt-in procedure and a register must be maintained on which the claims managed under the GLO are identified. It is therefore of limited use where the class of claimants is not readily identifiable at an early stage. The procedure has not to date been employed in a competition case. Certain specified bodies can bring collective actions in the CAT under the existing regime under section 47B of the Competition Act. However, this has only been used once, in a claim by the consumer group Which? against JJB Sports in relation to the alleged price fixing of replica football kit (The Consumers Association v JJB Sports Plc [Case 1078/7/9/107]).

Mindful of the limited use of private collective actions to date, the government has used the CRA to introduce a framework for collective actions. Significantly, this includes provisions which give the CAT the power to hear opt-out collective actions for the first time (as opposed to opt-in actions, which have been the only option historically). Opt-in collective actions are those brought on behalf of each class member that specifically opts in by notifying a designated representative, in a manner and by a time specified, that its claim should be included in the proceedings.
Opt-out collective proceedings on the other hand are brought on behalf of each class member except those that specifically opt out by notifying the representative. The new opt-out procedure is only applicable for claimants domiciled within the UK. For non-UK claimants, only the opt-in procedure is available. Even under an opt-out procedure, class members who are domiciled outside the UK will therefore not be included as claimants unless they actually opt in.

Proceedings in the CAT are currently governed by the CAT Rules 2003. The Draft CAT Rules, which are intended to give effect to the CAT’s new powers under the CRA, are expected to come into effect during 2015. Under Rule 74(1) of the Draft CAT Rules, actions are begun by sending a collective proceedings claim form to the Registrar of the CAT, which must include, among other things, information on the collective nature of the claim. The claim can only proceed once the CAT has made a collective proceedings order (CPO).

Under section 47B(5) there are two key criteria for making a CPO:

- The CAT must consider that the person who brought the proceedings is a person who, if the CPO were made, the CAT could authorise to act as the representative of the class of persons described in the CPO.
- The combined claims must be eligible for inclusion in collective proceedings.

As regards the first requirement, section 47B(8) provides that a person can be authorised by the CAT as the representative:

- Whether or not that person is a person falling within the class of persons described in the collective proceedings order for those proceedings (a class member).
- Only if the CAT considers that it is just and reasonable for that person to act as a representative in those proceedings.

A BIS Consultation Paper entitled Private Actions in Competition Law: A consultation on options for reform – government response (January 2012) stated that the government had decided not to allow law firms, third party funders, or special purpose vehicles to be nominated as representatives. Instead, it would allow claims to be brought “either by claimants or by genuinely representative bodies only, such as trade associations or consumer associations”. These provisions have not been codified in the CRA or the Draft CAT Rules, but in practice it is likely that the CAT will retain significant discretion in authorising class representatives.

As regards the second requirement eligibility for inclusion in the same class is set out under the new section 47B(6) as follows:

“Claims are eligible for inclusion in collective proceedings only if the [CAT] considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.”

This test differs from the existing test which requires that claims may be combined if they “relate to the same infringement. It is also significantly broader than the test for allowing representative actions in the High Court under CPR 19.6, which requires that the claimants must have the same interest in a claim.

**JURISDICTION AND GOVERNING LAW**

**Jurisdiction**

Private actions for breach of competition law often involve multiple (potential) defendants domiciled across a number of member states. As such, jurisdiction is usually a critical upfront consideration for claimants. England and Wales is generally considered to be a claimant-friendly jurisdiction given, in particular, the generous disclosure rules and the willingness of the English courts to take jurisdiction.

Following *Provimi v Aventis* [2003] EWHC 961 and subsequent cases, participation in the implementation of a cartel by an English subsidiary company, even where the subsidiary was not an addressee of the decision and had no knowledge of the existence of the cartel, is sufficient to establish jurisdiction, although the Court of Appeal has expressed the view that decisive influence of the parent or group company over the subsidiary is necessary to impute unlawful conduct (see *Cooper Tire & Rubber Company v Shell Chemicals UK Limited* [2009] EWHC 2609 and *Toshiba Carrier UK and others v KME Yorkshire Limited and others* [2012] EWCA Civ 1190).

The rules regarding jurisdiction for EU-domiciled defendants are set out in Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation), which came into force on 10 January 2015. The provisions of the Recast Brussels Regulation are also applicable to the European Free Trade Association (EFTA) states under the Convention on Jurisdiction and the Recognition of Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention). When defendants are domiciled in countries which are neither EU or EFTA member states, jurisdiction is subject to the English common law rules.

Article 4(1) of the Recast Brussels Regulation sets out the general principle that a defendant should be sued in the jurisdiction in which it is domiciled. However, there are a number of exceptions to this, including:

- Article 7(1), in relation to contract claims and performance.
- Article 7(2), in relation to tort claims.
- Article 25, relating to jurisdiction agreements.
- Article 26, in relation to submission to jurisdiction.
- Article 29, regarding related actions.

Article 8(1) sets out the rules on anchor defendants and provides that a claimant can bring proceedings against all defendants in the national courts of the jurisdiction in which any of the defendants are domiciled, provided that the claims are so closely connected that it is expedient to hear and determine them together. This can help to avoid the risk of conflicting or irreconcilable judgments arising from separate proceedings.

In *Case C-352/13 Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel and Others* the European Court of Justice (ECJ) ruled that Article 6(1) (now Article 8(1)) continues to apply even if the case brought against an anchor defendant domiciled in the member state where the court was first seised is withdrawn. In other words, the withdrawal of the action against the anchor defendant domiciled in the same member state as the court seised does not, in principle, deprive that court of jurisdiction to hear and determine actions brought against other cartelists not domiciled in that member state, unless the claimant and the anchor defendant had colluded to artificially induce the applicability of this provision.

The ECJ also held that Article 5(3) (now Article 7(2)), which provides that a defendant can be sued in the member state in which the harmful event occurred, can allow a claimant to bring its claim against several cartelists before the courts of the member state either:

- Where the cartel was definitively concluded.
- Where one agreement in particular was concluded that can be identified as the sole causal event that gave rise to the loss allegedly suffered.
- Where its own registered office is located. However, where there are multiple claimants, the location in question must be identified in respect to each one of them.

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Hydrogen Peroxide and Ryanair Limited v Esso Italiana SRL [2013] EWCA Civ 1450 confirms that a jurisdiction clause under a contract can only be relied on to find or displace jurisdiction if it specifically envisages the bringing of a claim for a breach of competition law.

**Governing law**

In those cases where the English courts are seised, it should not simply be assumed that English law will be the governing law of the claim. Rather, the applicable governing law will turn on whether the infringing conduct occurred before or after 11 January 2009. For those cases giving rise to harm before 11 January 2009, the conflict of laws rules provide that the applicable law for any claims in tort will be the law of the jurisdiction in which the harmful events occurred. For those cases giving rise to harm post-11 January 2009, the English courts will apply Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) to determine the applicable law. The general rule under Article 4 of Rome II is that tortious claims should be based on the law of the country in which the damage occurs, regardless of where the infringing events occurred. In multi-jurisdictional cartel cases, this can be a complex assessment.

Rules relating to the choice of law in cases concerning unfair competition and acts restricting free competition can be found in Article 6. Under Article 6(3)(a), where the market that is, or is likely to be, affected by the restriction of competition is limited to one country, the law applicable to a non-contractual obligation will be the law of that particular country. Under Article 6(3)(b), where the markets are, or are likely to be, affected in more than one country, the claimant who sues in the country of the defendant's domicile may choose to base its claim on the law of that country, if the claimant who sues in the country of the defendant's domicile may choose to base its claim on the law of that country, if the market in that member state is directly and substantially affected by the restriction of competition. It is not clear whether a defendant could bring its claim in the country of the defendant’s domicile, but elect to do so on the basis of the law of another member state.

**FORUM**

In England and Wales, a claimant is able to bring an action before:

- The High Court of England and Wales.
- The CAT.

Claims in the High Court are governed by the CPR.

Claims should be brought in the Chancery Division or Commercial Court (see Competition Law Practice Direction). Claims in the CAT are currently governed by the CAT Rules, with the new Draft CAT Rules presently expected to come into effect during 2015. Only the High Court has been able to hear standalone claims and award injunctive relief to date. However, under the CRA the CAT will be granted equivalent powers and the distinction between these fora will be diminished. Under Rule 24 of the Draft CAT Rules, the CAT's ability to grant interim relief will not be limited to injunctions, but will be extended to allow the CAT to make any order which it can then go on to grant as a final remedy. Following the CRA, the CAT will be able to hear certain cases on an expedited basis. This fast-track procedure is designed so that straightforward anti-trust claims can be heard quickly (see Draft CAT Rules, Rule 57). It remains to be seen how this will play out in practice given that, by their very nature, competition claims tend to be complex.

**LIMITATION**

Limitation periods are, as a general rule, treated in English law as substantive, rather than procedural. Article 15(h) of Rome II states that the law applicable to non-contractual obligations (which will include claims in tort for breach of statutory duty) includes rules of limitation. As such, where a claim is governed other than by English law reference must be made to that foreign law's rules on limitation.

Where Rome II is not applicable, the Foreign Limitation Periods Act 1984 determines the law applicable to limitation. The Act also treats limitation as a substantive issue. Both Rome II and the Foreign Limitation Periods Act 1984 contain carve-outs where the application of the foreign law would conflict with public policy.

Where a claim is subject to English law, the limitation period contained in the Limitation Act 1980 applies. Under the Limitation Act 1980, the limitation period for bringing a civil claim under English law is six years from the date on which the cause of action accrued. In cases where there is deliberate concealment of the infringing conduct (which is often a feature of cartels), section 32(1)(b) of the Limitation Act provides that the six year period will not begin to run until such time as the claimant either discovered the infringement or ought reasonably to have discovered it.

In Arcadia Group Brands Ltd and others v VISA [2015] EWCA Civ 883, the Court of Appeal ruled that the six year limitation period begins to run when there is enough information in the public domain for the claimant to have sufficient knowledge to be able to bring a claim, and not simply when it has all the facts required to balance or enhance its claim. As such, so long as the claimant is in possession of facts sufficient to enable a cause of action to be pleaded in such a way that it cannot be struck out for want of particularity, section 32(1)(b) will not be available. Limitation periods across member states can differ significantly, although these variances will reduce following national implementation of the Anti-trust Damages Directive, which provides for a minimum limitation period of five years and sets out the circumstances in which limitation periods should be suspended or interrupted (Article 10).

**PROCEDURE**

**Competition claims**

Competition claims generally follow the same procedure as any piece of commercial litigation.

**Disclosure**

Claims in the High Court are subject to the usual disclosure rules under the CPR (see Practice Note: Disclosure: who must give disclosure and what is the disclosure obligation) http://global.practicallaw.com/5-203-8980. Privileged documents are immune from disclosure.

In proceedings before the CAT, the CAT can order disclosure to the extent it considers necessary for the just, expeditious and economic conduct of the case (rule 19(2)(k), CAT Rules). Disclosure has proven to be a contentious issue in private damages claims, especially in relation to leniency materials.

In Case C-360/09 Pféiderer AG v Bundeskartellamt, the ECJ set out that there is no overarching rule in EU law that automatically precludes the disclosure of leniency documents. Rather, national courts should decide whether or not to permit the disclosure of such documents based on their domestic rules on a case-by-case basis.

National Grid v ABB [2012] EWHC 869 (Ch) demonstrates the willingness of the English courts to conduct the Pfleiderer-style balancing exercise and to order, where appropriate, some limited disclosure in relation to leniency materials. However, rules on disclosure differ across the EU. The Anti-trust Damages Directive seeks to harmonise these different rules and identifies the three following types of documents which should receive specific treatment:

- Documents which merit protection and should be protected from disclosure, namely leniency documents and settlement submissions.
- Documents on the file of the regulatory authority, such as statements of objections, requests for information and replies to such requests, which should have temporary protection from disclosure until the point in time at which the regulatory investigation ends.

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• Documents which existed before the investigation and should therefore be disclosable, subject to proportionality and a Pfleiderer-style balancing exercise.

In Emerald Supplies Ltd & Ors v British Airways & Ors [2014] EWHC 3513 ( Ch), it was decided that an un-redacted version of the Commission’s decision, which does not contain any legally privileged information or information relating to leniency application(s), should be disclosed into a confidentiality ring.

This case followed the decision of the Court of First Instance (now the General Court) in Pergan Hilfsstoffe Fur Industrielle Prozesse GmbH v Commission [2007] ECR II-4225, in which it was held that the presumption of innocence applies in the context of competition cases. Pergan, which was not an addressee of the Commission decision, sought to have all references to it removed from the Commission’s decision, which had otherwise contained detailed descriptions of Pergan’s alleged involvement in the cartel.

In circumstances where the Commission had discontinued its investigation against Pergan, the CFI held that Pergan was entitled to protect its professional secrets and to benefit from a presumption of innocence. However, in Emerald, having given the non-addressees of the decision the opportunity to make their confidentiality excisions, the High Court was frustrated by what ultimately led to the production of meaningless versions of the decision (or the potential denial of justice). That being the case, the High Court ordered disclosure into a confidentiality ring, noting that this would not be contrary to Pergan because such limited disclosure would still safeguard the presumption of innocence and professional secrets, while at the same time providing claimants with the information required to bring their claims. At the time of writing, this case is currently on appeal.

**Expert evidence**

Expert evidence often plays a key role in competition cases. The evidence is often provided by economists, but can also be provided by forensic accountants and industry experts. Given the significance of expert evidence, it is inevitable that parties will, with the information required to bring their claims. At the time of writing, this case is currently on appeal.

**Damages**

The principal remedy available to a party that has suffered loss as a result of a breach of competition law is compensatory damages. The starting point in a cartel case is to calculate the cartel overcharge. This is the difference between the actual price paid by the claimants for the cartelised goods or services and the price that would have been payable but for the operation of the cartel. It is usually necessary to adduce expert economic/accounting evidence to determine the applicable level of overcharge.

In June 2013, the European Commission published a Communication on quantifying harm in damages claims based on Article 101 and 102 of the TFEU. In Case C-557/12 Kone AG and Others v ÖBB-Infrastruktur AG, the ECJ confirmed the availability of so-called “umbrella damages”, subject to the provisions of national law.

Claims for umbrella damages arise from the customers of non-cartelists on the basis that the price paid by those customers was higher than would have been the case but for the operation of the cartel, because the effect of the cartel was to inflate artificially industry prices generally. These claims are in principle available even though the would-be claimant had no contractual relationship with the members of the cartel. The challenge for such claimants will be to demonstrate the causal link between the infringement and the alleged loss.

Claimants can also claim interest on damages. Given that the period of infringement can in many cases extend back for a significant period, interest on damages can be substantial and it is not unusual for it to exceed the level of damages themselves.

Only in exceptional cases will exemplary damages be available (see, for example, 2 Travel Group PLC (in liquidation) v Cardiff City Transport Services Limited [2012] CAT 19).

The passing-on defence is generally considered to be available to defendants under English law, although there is currently no settled authority on the point. This defence sees damages deemed payable to the direct victim of a cartel reduced or mitigated if the cartelist can show that the direct purchaser passed on all or some of the overcharge down the supply chain to its own customers. The Anti-trust Damages Directive provides that the pass-on defence should be available under national law.

**Injunctive relief**

The High Court has the power to award both interim and final injunctions. Following the CRA, the CAT will share the power to grant injunctions by reference to the same criteria under which injunctions can be obtained from the High Court (Schedule 8, paragraphs 7 and 4(3)(2), CRA).

**Declaratory relief**

The High Court and the CAT will be able to issue a statement confirming that (in the case of standalone actions) the specific breach of competition law took place and that the claimant suffered loss and damage as a result of this breach.

**SETTLEMENTS AND CONTRIBUTION**

In practice, most private actions for damages settle. Settlements may take the form of a financial settlement, commercial settlement, or a combination of the two. The CRA introduces a specific settlement procedure for collective actions. Under this regime, if it is satisfied that settlement is just and reasonable, the CAT can ratify collective settlements under a collective settlement order (CSO). However, a settlement can also be made without a CSO.

The CAT has discretion over how the settlement should be distributed. Cartelists are jointly and severally liable with their co-cartelists for any damage caused on account of the infringement. Going forward, this will be subject to some limited protection for immunity recipients who, under the Anti-trust Damages Directive, will be liable only for the loss suffered by their direct customers.

However, this itself is subject to an exception in cases where the claimants are unable to recover their losses from the remaining cartelists, in which case the immunity recipient will continue to be jointly and severally liable. It is therefore usual practice to ensure that any settlement agreement with a defendant includes an agreement by claimants not to sue the other cartelists in relation to the same damage. This may be combined with an agreement by the claimants to indemnify the settling defendant for any claims for contribution that are made against them by other defendants arising from other claims against those other defendants for the same damage. Claimants can therefore recover the entirety of their loss from a single defendant, leaving that defendant to seek contribution from the other cartelists (see, for instance, the use of the Civil Liability (Contribution) Act 1978 in Emerald).
In the context of contribution claims, to the extent that the defendants cannot agree the apportionment of liability between themselves, the Court will (under section 2 of the Civil Liability (Contribution) Act 1978) determine the amount to be paid by each defendant, based on what is “just and equitable” having regard to the extent of that defendant’s responsibility for the damage in question.

While there is no case law dealing specifically with this point, it is assumed that each cartelist is liable for damages in proportion to its own market share or sales. In IMI Plc and IMI Kynoch Limited v Delta Limited and Delta Engineering Holdings Limited [2015] EWHC 1676 (Ch), the High Court ruled that where a contribution is being sought by one cartelist from another, the latter could not resist the contribution claim by arguing that the claimant’s claim against the former was time-barred.

In the main action the defendant, IMI, argued that the claim had been brought by the claimant out of time. The claimant argued that the cartel had been concealed and so limitation had not expired. IMI sought to join Delta to the proceedings as a Part 20 defendant, who in turn sought to resist the contribution claim by arguing that the claimant’s action against IMI was time-barred on the basis that it had earlier knowledge of the cartel. In seeking the contribution from Delta, IMI relied on section 1(4) of the Civil Liability (Contribution) Act 1978 which allows a defendant that has settled a claim to seek contribution from a co-defendant provided that the defendant “would have been liable assuming that the factual basis of the claim against him could be established”. The Court held that on the basis of the pleadings at the time of settlement, the factual basis of the claim included the claimant’s assertion that the cartel was concealed and therefore the claim against IMI could have been established.

**COSTS AND FUNDING**

The costs of bringing a private action for damages can be significant and often act to deter would-be claimants from bringing a claim. In the High Court, the position is somewhat tempered by the general rule that costs follow the event, but that does not serve to provide immediate (or guaranteed) relief from the up-front costs of commencing a claim.

The general rule does not automatically apply to proceedings before the CAT, which has discretion to make any award it sees fit in relation to costs, although in the majority of cases the general rule is likely to be followed. Following the introduction of the Damages-Based Agreements Regulations 2013, damages-based agreements (DBAs) are now permitted in England. However, under Schedule 8, Part 1 of the CRA, which inserts a new section 47C(8) into the Competition Act 1998, a DBA is unenforceable if it relates to opt-out collective proceedings. As yet, it is unclear whether this extends to opt-in proceedings, although they are not explicitly included in section 47C(8). Third-party funders have also taken a growing interest in funding competition damages claims. In the case of follow-on claims, there is no need for the claimant(s) to prove infringement, and as such these are seen as safer cases to fund. The funding usually covers legal and expert costs and can be combined with after the event insurance to cover any adverse costs.