Client Alert | Antitrust/Competition / Commercial Litigation

New era dawns in UK competition damages actions

October 2015

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The entry into force of the UK Consumer Rights Act 2015 (the "CRA") on 1 October 2015 marks the introduction of opt-out class actions in the UK, further transforming the legal landscape for private damages claims in the UK.

Together with further changes as a result of the UK's implementation of the new EU Damages Directive, and the pragmatic approach of the English courts to difficult but important procedural issues, such as disclosure, this reform will likely confirm the popularity of England & Wales as a jurisdiction for bringing such claims.

Enhanced role for the CAT

In spite of its name, the CRA does not only deal with consumer rights. It modifies the Competition Act 1998 and the Enterprise Act 2002 to enhance the role of the dedicated Competition Appeals Tribunal ("CAT"). Henceforth, the CAT will be on an equal footing with the High Court, enabling it to hear standalone and hybrid cases, and not only pure "follow-on" claims, i.e. those based on an existing finding of a competition infringement by the UK or EU authorities.

Class Actions in the UK

The most eye-catching reform is the introduction of an "opt-out" collective action regime. This replaces the current system, which some critics claim is ineffective, whereby all the claimants must have opted in to a representative action.

Under the new regime, the CAT may permit, by a "Collective Proceedings Order", a representative to bring proceedings in the name of a defined class of claimants in the UK (other than those who have opted out). It remains to be seen how this will work in practice; the scope of Collective Proceedings Orders is likely to be the subject of fierce debate. The regime contains safeguards against the development of a "litigation culture" by precluding exemplary damages and the use of contingency fee arrangements (so-called damages-based awards) for opt-out claims. Another question is how the CAT will ensure that class actions are sufficiently funded, a requirement that is underlined in the European Commission's 2013 recommendation on collective redress,[1] and was recently illustrated in a decision by a German court that a claim brought by Cartel Damage Claims (CDC) against cement cartelists was inadmissible because it was insufficiently funded.[2]

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1 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (OJ L 201, 26.7.2013, p. 60–65).

2 See our client alert of March 2015: "German decision on collective redress".

More fine-tuning on the horizon

The EU's Damages Directive, adopted at the end of 2014, introduced minimum rules to facilitate bringing competition damages claims in the EU. Member States have until 27 December 2016 to transpose the Directive into national law, but may do so sooner. The UK is expected to launch a public consultation later in the year on the legislative changes needed to implement the directive.

In most respects, the UK already goes beyond the requirements of the directive. For example, English courts are already prepared to order the disclosure of the confidential version of the underlying infringement decision, albeit under appropriate conditions to protect the confidentiality of the information provided to the competition authority by third persons.[3] Thus, the directive will likely require some fine-tuning of the UK regime but not radical reform.

White & Case team Charles Balmain, Bryan Gant and James Killick discuss the potential for US-style class actions to come to the UK

White & Case report on handling global investigations

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[3] For instance, the Order of Mr Justice Henderson of 5 March 2015 in Secretary of State for Health & Ors v Servier Laboratories Ltd & Ors [2015] EWHC647 (Ch).