SLAUGHTER AND MAY

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Private Actions in Competition Law

Government Ushers in New Era for Collective Actions

INTRODUCTION

The Government launched a public consultation in April 2012 proposing reforms to improve the process for seeking redress for competition law infringements. The consultation was in response to the view held in some quarters that the present approach to private actions is one of the least effective aspects of the UK competition regime.

Among the more radical aspects of the potential reforms were a proposed move to an "opt out" collective actions regime, the introduction of a rebuttable presumption of loss for cartel cases (based on a hypothesis that cartels affect prices by 20%) and the protection of whistle-blowers from joint and several liability for damages in private actions. The two principal aims of the proposed reforms were to:

- increase growth by empowering small business to tackle anti-competitive behaviour; and
- promote fairness by enabling consumers and business who have suffered loss due to anti-competitive behaviour to obtain redress.

Having considered the responses to the consultation, the Government published its plan for reform on 29 January 2013. While the Government has decided against implementing the controversial proposals on presumptions of loss and joint and several liability, it has opted to proceed with the move to an "opt out" collective actions regime. The Government has also decided to implement a raft of other measures, including the encouragement of alternative dispute resolution mechanisms and changes to the role of the Competition Appeal Tribunal ("CAT").

COLLECTIVE ACTIONS

The current regime of opt-in, follow-on[1] consumer representative actions has been criticised as ill-equipped to maximise the economies of scale of collective actions. Although the competition authorities have adopted infringement decisions against a number of companies in respect of retail goods in the UK, to date, there has only been one collective action taken on behalf of UK consumers (*Which? v JJB Sports*). Commentators have identified difficulties associated with finding and recruiting claimants (especially with the low value of individual claims), providing evidence of eligibility and obtaining disclosure to calculate the losses caused as responsible factors.

The Government has therefore decided to introduce an "opt-out" collective actions regime with cases to be heard only in the CAT. The regime would include both follow-on and standalone cases and be available to both consumer

[1] A follow-on action is a claim brought where the alleged breach of competition law is already the subject of an infringement decision by a competition authority; a standalone action is brought where no such infringement decision exists.

and business complainants. The 'opt-out' aspect of a claim will only apply to UK-domiciled claimants but non-UK claimants will be able to opt-in to a claim if desired.

The Government anticipates that this will lead to much higher participation rates in competition law collective actions. The impact study published along with the response to the consultation notes that the median participation rates in opt-out cases have been between 87 and over 99 percent.

The Government recognises that there may be some collective actions which would be more appropriately brought on an opt-in basis (such as a case brought by a small number of businesses all of whom are clearly identifiable). It has therefore decided that the CAT will be required to certify whether a collective action brought in the new regime is suitable for collective action and whether it should proceed under an opt-in or an opt-out basis.

A number of the responses to the April consultation raised concerns that the Government's proposed reforms could lead to a US-style class actions culture. Recognising these concerns, the Government has decided to include a range of safeguards within the collective actions regime to protect against frivolous or unmeritorious cases being brought. In particular, the Government has decided to prohibit the award of treble or exemplary damages and also to prohibit the use of contingency fees.

The Government has also decided to limit the class of people that can bring such actions, permitting actions to be brought by the claimants or by genuine representatives of the claimants only, such as trade associations or consumer associations, but not by law firms, third party funders or special purpose vehicles. The Government considers that these measures along with a strong process of judicial certification and the maintenance of the "loser-pays" rule will weigh against a US- style culture of class actions.

The Government has, however, resisted calls for any unclaimed sums awarded following an opt-out action to be returned to the defendants noting that it was *"unconvinced that the party who has been found to be in breach of competition law should be the one to benefit from an unjustified windfall."* The Government has instead decided that any unclaimed sums will be paid to the Access to Justice Foundation,[2] though leaving defendants free to settle on other bases subject to approval by the CAT judge.

ALTERNATIVE DISPUTE RESOLUTION

The Government recognises that the court system is often a lengthy and costly process, and may not always be the most appropriate method for consumers. Nonetheless, access to the courts remains a basic right of private litigants. The Government has therefore elected to encourage the use of ADR procedures while not making it mandatory for competition claims.

For these purposes, the Government intends to introduce a new opt-out collective settlement regime to allow businesses to quickly and easily settle cases on a voluntary basis. Under this system, a representative of those who have suffered a loss and a potential defendant would jointly apply to the CAT to approve on an opt-out basis a mutually agreed settlement agreement. The Government believes that an opt-out collective settlement mechanism would facilitate the granting of compensation without the additional costs, risk and time consumed in lengthy court cases.

[2] The Access to Justice Foundation was established to receive and distribute financial resources to help provide pro bono legal assistance to those who need it most.

The Government also intends to enable the OFT or Competition and Markets Authority ("CMA") to certify a voluntary redress scheme offered by any company that has been found to have infringed competition law. Those companies who offer such a redress scheme may qualify for a reduction in the fine that might otherwise be imposed by the competition authority. The OFT's current guidance notes that a reduction in the range of 5-10% may be granted where a business has made redress.

ROLE OF THE CAT

The Government considers that the CAT has the necessary expertise and capacity to become a major venue for competition litigation and that both claimants and defendants are likely to benefit from its efficient case management and flexible procedures. Among the key reforms proposed by the Government are:

- To extend the CAT's jurisdiction to allow it to hear standalone as well as follow-on cases (while permitting the transfer of cases between the ordinary courts and the CAT).

- To enable the CAT to grant injunctions in order to bring anti-competitive behaviour to a halt.

- To introduce a fast-track procedure for simpler competition claims in the CAT. All cases on the fast-track should be considered for injunctive relief very early in the process and prioritised for injunctive relief where possible. The CAT will seek to prioritise cases involving companies which would otherwise find it more difficult to obtain access to justice.

COMPLEMENTING THE PUBLIC ENFORCEMENT REGIME

The Government recognises the importance of ensuring that an increase in the number of private cases does not undermine the role played or the tools used by public competition authorities. This issue is currently a hot topic in competition circles across Europe, especially following the European Court of Justice's decision in *Pfleiderer*[3] that EU law does not preclude the disclosure of a leniency applicant's submission in subsequent court proceedings.

Options considered by the Government in the consultation included measures to protect the leniency regime by exempting leniency documents from disclosure and removing joint and several liability from immunity recipients, as well as mechanisms to facilitate the OFT or CMA's interaction with the CAT.

Having considered the information received from the consultation, the Government has decided to focus on ensuring that consistency is maintained between the CAT and the UK competition authorities. For the time being, it has decided against taking any action in respect of the protection of the leniency regime, noting that the European Commission is expected to bring forward proposals in this area within the next few months.

[3] Case C-360/09 Pfleiderer AG v Bundeskartellamt, judgment of 14 June 2011.

NEXT STEPS

The majority of the proposed reforms will be subject to changes in primary legislation. Where this is the case, the reforms will be subject to Parliamentary timing and approval. The Government states that it will work in parallel with the competition authorities and other stakeholders to implement those other reforms that do not require Parliamentary approval.

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