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E-ALERT | Antitrust Litigation

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UK GOVERNMENT CONSULTS ON REFORM OF PRIVATE ANTITRUST CLAIMS

The UK Government is consulting on changes to assist private litigants in seeking redress for breach of antitrust law. Most radically, the government has proposed introducing an opt-out collective redress mechanism. This change alone could significantly increase the volume and impact of antitrust litigation in England, both against domestic and foreign-domiciled defendants.

Background

The majority of private antitrust claims in England seek redress either in relation to anticompetitive arrangements (e.g., price fixing or market sharing) or for abuse of a dominant position.[1] Investigation and enforcement is primarily performed by public regulators (the Office of Fair Trading[2] and the European Commission). Private claims pursued in court that rely on a regulator's finding of infringement are termed "follow-on" claims; as English Courts are bound by regulators' findings of infringement and the claimant need not prove liability. Private claims that do not benefit from a regulator's finding of infringement are known as "stand-alone" claims, where claimants face the additional burden of proving liability. England has two fora for bringing private claims: the High Court and the Competition Appeals Tribunal (CAT), a tribunal with specialist expertise in competition matters.

Competition claims can be both expensive to pursue and heavily reliant on complex economic evidence. The consultation paper argues that existing routes for collective redress are inadequate, posing particular problems where losses in the aggregate are large, but losses suffered by individual entities are small and therefore uneconomic to pursue in isolation. The Government has expressed its intention to increase the effectiveness of redress sought by private entities, "*the Government… [intends] to bring forward proposals to encourage private-sector led challenges to anti-competitive behaviour*."[3]

A new route for Collective Redress

The consultation proposes a new collective redress mechanism and considers options for its structure.

Stand-alone or follow-on: While acknowledging that restricting collective claims to follow-on claims would reduce the number of speculative and unmeritorious claims, the consultation paper argues that collective stand-alone actions would, in of themselves, increase detection rates as the entities that use the affected services/products are best placed to identify suspicious business practices.

Opt-in or opt-out: The consultation anticipates that an opt-out mechanism may draw adverse comparisons with class-actions in the U.S., but argues that it is specific factors present in the U.S. legal system, but absent in England, such as triple damages, contingency fees and lack of cost-shifting, that are "*more directly responsible*" for any such adverse effects (such as undue pressure to settle unmeritorious claims).

Standing: The paper argues that restricting standing to public bodies (such as the OFT) would overly constrain the impact of any new regime. Standing for private entities such as consumers and businesses is explored. Interestingly, the Government has not ruled out granting law firms and third party funders direct standing to bring claims. A 'certification stage' has been proposed to examine whether the

[1] Derived from Articles 101 and 102 of the Treaty on the Functioning of the European Union.
[2] The Enterprise and Regulatory Reform Bill proposes handing this responsibility to the new Competition and Markets Authority.
[3] Consultation document, paragraph 3.4

representative seeking to bring the claim is suitable and whether the claim is appropriate for collective redress. The consultation also considers granting standing to pre-authorised quasi-private entities such as trade associations.

Further proposals

The consultation document proposes a number of changes to make it easier to bring claims in the CAT.

Expanding the role of the CAT: At present the CAT can only hear follow-on claims, necessitating that stand-alone claims be brought in the High Court. The Government wants to increase the number of claims brought in the CAT and has proposed extending its jurisdiction to include stand-alone claims.

Introduction of presumptions on quantum: Establishing quantum can be an expensive process, heavily reliant on expert economic evidence. The Government is considering introduction of a presumption of a 20% overcharge in cartel cases. Defendants will be able to lead evidence to rebut this presumption. The consultation paper also highlights disputes on the extent to which direct customers "passed-on" any overcharge to their customers as particularly challenging, but ultimately recommends against imposing rebuttable presumptions on this issue.

Fast track route for SMEs: The paper considers a potential fast-track route for appropriate claims brought by SMEs, with cases heard within six months wherever possible. It is proposed that this mechanism would focus on providing injunctive relief to ensure that wrongful behaviour ceases urgently, rather than on awarding damages.

The consultation also seeks responses on a number of less dramatic proposals, such as encouraging the use of ADR, an opt-out collective settlement mechanism[4] and a power for regulators to oblige infringing companies to implement a compensation scheme for affected parties even prior to any action for damages being initiated. Finally, the consultation acknowledges that increasing the effectiveness of private actions for damages may discourage whistleblowing, and thus the detection of wrongdoing, and the Government is understandably keen to avoid this outcome.

Comment

The proposals outlined in the consultation document could increase the volume and impact of antitrust litigation in England. In particular, the prospect of opt-out collective actions for large aggregated losses should give potential defendants cause for concern. Within Europe, England is already viewed as a preferred forum for bringing antitrust claims, in part due to the perceived efficiency of the Courts and also in part due to the broader rules on discovery than in Continental Europe. The proposed changes could further incentivise claimants to attempt claims in England.

Covington & Burling LLP will respond to this government consultation, which is open until 24 July 2012. We expect that primary legislation would be required to make the changes outlined in the consultation paper and that change is unlikely prior to 2014.

If you have any questions concerning the consultation or Covington & Burling LLP's proposed response, please do not hesitate to get in touch with:

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[4] Potentially modeled on the Dutch 2005 Collective Settlement of Mass Damage Act.