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E-ALERT | Antitrust Litigation

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UK TO INTRODUCE "CLASS ACTIONS" IN ANTITRUST LITIGATION

The UK Government has published proposed changes to the mechanisms for bringing private actions for alleged breaches of antitrust law. The most significant change is to introduce an 'opt-out' collective redress mechanism, allowing claims to be brought on behalf of persons who need not be active participants, or may not even be aware of the claim. This change is likely to increase the volume of competition litigation in the UK.

BACKGROUND

Following a nine-month consultation process,[1] the UK Government has announced proposals for far-reaching changes to the mechanisms for seeking redress in antitrust actions.[2] Both during the consultation process and in the proposed reforms, the Government has focussed on making it easier for small and medium sized enterprises (SMEs) and consumers to bring claims.

AN OPT-OUT MECHANISM FOR COLLECTIVE REDRESS

According to the consultation, claims alleging cartel or collusive behaviour by suppliers are rarely brought by SMEs or consumers. Although anticompetitive behaviour can cause large losses in the aggregate, the losses are frequently spread across very large numbers of businesses and consumers at various levels in the downstream supply chain. Given that antitrust claims are expensive to pursue, it is frequently uneconomic to seek redress on an individual basis, where recoveries are typically low.[3]

The Government will therefore introduce an "opt-out" mechanism for collective redress. The key features of this new mechanism are:

1. Claims must be brought in the Competition Appeals Tribunal (the CAT), rather than in the High Court.
2. Claims can be brought by claimants, or by representatives (such as trade associations), but law firms and third party funders will not qualify as "representatives".
3. Judicial oversight will be needed. There will be a certification stage, where the CAT will: apply a preliminary merits test; consider the suitability of the representative bringing the claim; and determine whether the claim should be brought on an "opt-in" rather than an "opt-out" basis.
4. Non UK-domiciled claimants must actively opt-in to participate in a claim. This is to prevent defendants facing duplicate claims, as a foreign court may not recognise a UK judgment that sought to bind an unwitting foreign participant. The defendant may face a further claim by the foreign participant in the foreign jurisdiction, notwithstanding that the UK judgment was predicated on the on the assumption that it would award redress to the foreign claimant.

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[1] See Covington & Burling E-Alert of June 28, 2012 at link.

[2] Click here for the Government's full proposals.

[3] Section 47B of the Competition Act 1998 allows designated bodies to initiate collective actions on behalf of consumers. To date, only one claim has been brought under this mechanism. This route has proven ineffective because: (a) consumers must 'opt-in' to participate in a claim; and (b) it is only available in "follow-on" claims, where a regulator, such as the European Commission or the OFT, has found a breach of competition law.

FURTHER PROPOSALS

The Government has proposed further, albeit less dramatic, changes:

1. A new opt-out collective settlement mechanism. This will be modelled on the Dutch Collective Settlement Act 2005, and will allow a defendant to pro-actively pursue a settlement binding on all potential claimants. The process would be managed by the CAT, to safeguard the interests of all potential claimants.
2. Certification of voluntary redress schemes. The UK regulator will be able to 'certify' schemes that voluntarily seek to remedy the adverse impact of antitrust breaches. Certified schemes could lead to a 5-10% reduction in fines imposed by the UK regulator for antitrust breaches.
3. Encourage claims in the CAT. The Government wants to encourage claimants to pursue redress in the CAT, rather than in the High Court. Currently, the CAT only has jurisdiction for follow-on claims, it will in future be able to hear claims that are in part, or entirely, stand-alone. A new fast track scheme will be introduced to the CAT, this new scheme will focus on injunctive relief to restrain the wrongdoing, rather than on awarding damages.

The Government rejected certain claimant-friendly proposals, such as: treble damages; contingency fees; and a rebuttable presumption of overcharge. Furthermore, the losing party shall remain liable to pay the winner's legal costs and there will be no change to the pass-on defence.[4]

COMMENT

The proposed changes will likely cement the UK as the European forum of choice for private antitrust actions. The opt-out collective redress mechanism is a radical proposal, and could significantly increase the volume of competition litigation in the UK. Previously, where faced with individual claims brought by large intermediate customers, defendants could seek to argue that any economic impact was predominantly borne by the ultimate consumers, safe in the knowledge that consumers would not launch claims. This will not be the case in the future.

The Government is silent on whether these new routes for redress will be available where the cause of action has already accrued, i.e., for past wrongdoings. The Government may allow this retrospective application, as the reforms merely change the mechanisms for seeking legal redress, rather than the substantive law.

Primary legislation will be required to implement the majority of the proposed changes, so it is unlikely that significant changes will be made in this session of Parliament.

If you have any questions, please do not hesitate to get in touch with:

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[4] In other words, claimants at an intermediate stage in the supply chain will likely only recover to the extent that they did not "pass on" the overcharge further downstream.