COVINGTON

First Antitrust Class Certification Hearing in the UK: The Revolution Postponed?

December 16, 2016

Antitrust/Competition

After a wait of nearly 15 months from the introduction of class actions in the UK for antitrust damages claims, the first class certification hearing took place before the UK's Competition Appeal Tribunal (the "CAT") between December 12 and 14.

Having heard argument, the CAT is considering whether to refuse certification or to adjourn the certification hearing in order to allow the proposed representative to reformulate their claim (and, potentially, narrow the scope of the claim brought) and/or seek evidence to substantiate the currently proposed sub-class.

In its handling of this certification hearing, the CAT, through its President, Sir Peter Roth, has sent out a strong signal that it intends to consider rigorously all such applications for certification and will require that proposed representatives have given proper thought to proposed classes, sub-classes and the extent of losses said to have been brought about by infringements.

Background

In 2014, the Office of Fair Trading (the "OFT"), then the UK's competition regulator, found that Pride Mobility Products Limited ("Pride") and eight retailers had infringed the UK Competition Act by entering into agreements and concerted practices aimed at prohibiting the online advertising of certain models of mobility scooter below Pride's recommended retail prices. Although the OFT was aware that Pride had a policy to the same effect that applied to all retailers, it made no finding as to the legality of that policy as a whole.

On May 26, 2016, an application was made by Dorothy Gibson, the General Secretary of the National Pensioners' Convention, for a collective proceedings order permitting her to act as the class representative in bringing follow-on opt-out collective proceedings in relation to damage caused by the conduct the OFT had punished.

The Act introduced a U.S.-style opt-out class action mechanism to the UK for antitrust damages claims. The Act provides that 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. Sub-classes are expressly envisaged by the regime.

The Certification Hearing

The proposed class was said to comprise any person who purchased a Pride mobility scooter in the UK between February 1, 2010 and February 29, 2012, the duration of the infringement found by the OFT, other than those who made the purchase for the purposes of a business. Critically for the question of class certification, four subclasses of consumer purchasers of scooters were identified - those who purchased:

- online from one of the eight retailers identified in the OFT's decision;
- from a physical store of one of the eight retailers identified in the OFT's decision;
- online from a retailer other than one of those identified in the OFT's decision; or
- from a physical store of a retailer other than one of those identified in the OFT's decision.

In essence, the case put forward by Gibson was that Pride's conduct (its policy as well as the implementation of that policy through the eight agreements the OFT found infringed competition law) had an umbrella effect across the market, including price competition for mobility scooters sold online and/or in physical shops of retailers with whom Pride had no agreements or concerted practices. At the class certification hearing, the judge questioned the proposed class representative's economic expert as to whether he had distinguished between the effects of the conduct as regards the eight retailers the OFT had found had committed the infringement and other retailers. On hearing that he had not, the judge concluded that he would be unable to distribute any award for aggregate damages between the proposed subclasses, and he therefore indicated that he felt unable to grant the proposed collective proceedings order.

The CAT was also dissatisfied with other aspects of the proposed claim. Although the finding of the OFT was confined to the arrangements with the eight retailers, the claim as formulated proceeded on the basis that Pride's more general policy had affected the market as a whole but which the OFT had not held infringed the Competition Act. Prior to the Act, the CAT's jurisdiction was limited to strictly follow-on claims that fell exclusively within the scope of the infringement found by the relevant regulator. However, following the Act, stand-alone claims arising after October 1, 2015 can be brought in the CAT. As the mobility scooter cause of action arose before that date, it appears that the proposed representative sought to use the concept of umbrella damages to get around that limitation. Roth J., however, was sceptical, observing that damage flowing from Pride's policy, as opposed to the eight agreements, may be "conceptually plausible," but that any damage that could be "reasonably estimated" should stem from the actual infringement found.

Given its concerns with the proposed class, the CAT is now considering whether to refuse the application for certification, or to grant an adjournment to allow the proposed representative to reformulate the argument and/or to gather more evidence pertaining to distinctions between the subclasses.

Comment

The CAT's approach indicates that it will be rigorous in interrogating attempts to use its new jurisdiction, confounding the expectations of some that it would be relatively permissive in the early years.

Perhaps most significant is the warning this approach gives to the proposed representative in *Merricks v MasterCard*, a claim said to be worth £14 billion. That claim, arising out of MasterCard's interchange fee arrangements, is brought on behalf of a single proposed class, namely individuals who between May 22, 1992 and June 21, 2008 purchased goods and/or services from businesses selling in the UK that accepted MasterCard cards, at a time at which those individuals were both: (1) resident in the UK for a continuous period of at least three months, and (2) aged 16 years or over. No distinction appears to have been drawn between different retailers, nor between different categories of individual purchasers (those using cash, cards, or cheques).

It would seem reasonable to assume that at the certification hearing on January 18 and 19, which is also before Sir Peter Roth, there will be a close interrogation of whether a single class is indeed appropriate in that case. The CAT's focus on damages that can be "reasonably estimated" as having stemmed from the precise infringement found, rather than from a more general policy of which the infringement was an implementation, may also have come as an unpleasant surprise to members of the claimant bar.

More generally, and given that in the UK claims can be brought by both direct and indirect purchasers, the CAT's insistence that there should be evidence that will enable a court to differentiate between the damages to be awarded to different sub-classes, in this case, purchasers from different categories of retailers, suggests that it may well be challenging to persuade it that indirect purchaser claims can be brought in a single class. If so, the "class action revolution" may well be considerably less extensive than many had hoped.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Antitrust/Competition practice:

Elaine Whiteford	+44 20 7067 2390	ewhiteford@cov.com
Johan Ysewyn	+32 2 549 52 54	jysewyn@cov.com