

# Alert

## Antitrust/Competition

### UK Proposes Changes to Private Antitrust Enforcement Regime

*By Neil Rigby*

On June 12, 2013, the UK Government (Department of Business, Innovation and Skills) published a draft Consumer Rights Bill, which proposes a number of important changes to the jurisdiction of the UK Competition Appeal Tribunal (CAT) to hear antitrust damages claims. The proposals are intended to make the CAT a much more attractive forum in which to litigate private damages claims by introducing a new opt-out collective/class action regime that would be available only in the CAT, and by largely removing many of the current disadvantages of litigating in the CAT as compared to the High Court, which is the court of general jurisdiction for most civil litigation.

The draft Bill follows on from extensive consultation over the past year, during which the UK regulator (the Office of Fair Trading) broadly supported the Government's proposals. With some notable exceptions, the draft Bill is largely consistent with the European Commission's recently announced proposals to increase the level of private antitrust enforcement in national courts in the EU.<sup>1</sup> If implemented, the proposed reforms are likely to result in more actions being brought in the CAT, including collective/class actions that may increase the potential damages exposure for defendants being sued in the United Kingdom for infringements of UK or EU competition law. The draft Bill has been published for pre-legislative scrutiny to allow for further consultation, and comments are invited by September 13, 2013, after which a final version of the Bill will be prepared for Parliament and subject to the normal legislative process.

#### **New Opt-Out Collective/Class Action Regime**

The Government proposes to introduce a new collective/class action regime in the CAT providing for opt-out and opt-in proceedings. This is intended to enable many more claimants that have suffered loss from antitrust infringements to seek redress through collective mechanisms, as the current opt-in consumer claims regime in the CAT (under which authorized bodies, such as the Consumers Association, may bring claims on behalf of named consumers) is widely regarded as ineffective,<sup>2</sup> and attempts to bring collective/class actions under the current civil procedure rules of the High Court have been unsuccessful.<sup>3</sup>

The draft Bill proposes a new collective/class regime with the following features.

- **Collective/class actions to be available for all antitrust damages claims.** Collective/class actions could be brought either where there is no pre-existing infringement decision by a competition regulator (“stand-alone” actions) or following an infringement decision (“follow-on” actions), and could be brought on behalf of businesses and/or consumers.
- **Claims to be subject to certification process.** Actions may be brought only after the CAT has made a collective proceedings order determining that the claims raised “the same, similar or related issues” and are “suitable to be brought in collective proceedings”. The CAT would also need to determine whether the claims should be brought on an opt-out or an opt-in basis – the Government considers that opt-in claims may be appropriate where there are a small number of easily identifiable businesses that have been affected by an infringement.
- **Claims to be brought by a representative claimant or other representative.** The draft Bill proposes that claims be brought either by an individual class member or by another representative as may be “just and reasonable”, although the Government states that this other person should be a genuine representative of the class (such as a trade or consumer association) and not a law firm, third-party funder, or special purpose vehicle.
- **Opt-out claimants to be limited to UK-domiciled persons.** Opt-out proceedings may be brought on behalf of all UK-domiciled class members (unless the member opted out). Class members domiciled outside the United Kingdom would be able to opt in to the proceedings, which would have the potential to substantially expand the pool of claimants seeking damages in the CAT for harm suffered in Member States across the EU.
- **Damages awards to be compensatory.** The CAT would be unable to award exemplary (punitive) or treble damages in collective/class actions.<sup>4</sup> Unclaimed damages awards will be paid to a charity nominated by the Government (currently intended to be the Access to Justice Foundation).

- **Costs and fees rules.** Unsuccessful parties will be subject to adverse costs awards, consistent with the established “loser pays” principle under English law, but costs will be payable by the representative rather than by other members of the class. Damages-based agreements/contingency fees will not be permitted in collective/class actions (despite being permitted in most other litigation as from April 2013), although conditional fee arrangements<sup>5</sup> and after-the-event insurance for adverse costs will be permitted.
- **CAT-approved settlements of opt-out actions.** Settlement of opt-out collective/class actions will be subject to an order of the CAT and a requirement that the settlement be “just and reasonable”, and will be binding on the class, unless a class member opts out of the settlement.

If implemented, this new regime is likely to be attractive for claimants, as it addresses a number of the perceived weaknesses of the existing collective/class action regime by allowing claims to be brought on an opt-out basis, by private parties, and by businesses. However, as the proposals have proved contentious and the Government remains concerned to avoid encouraging frivolous claims, it remains to be seen whether the proposals ultimately will be adopted. It is also worth noting that these proposals adopt a somewhat different approach than the European Commission’s recent non-binding recommendations for collective actions, as the Commission appears to be more in favor of the type of opt-in model that the United Kingdom has found to be unsatisfactory and that these new proposals are intended to replace.<sup>6</sup>

### Expanded Jurisdiction for the CAT

At present, antitrust damages claims in England can be brought in the CAT only if there is already an infringement decision of a competition regulator, while claims can be brought in the High Court either following an infringement decision or on a stand-alone basis. While the CAT offers competition expertise, flexible procedures, efficient case management, and an opt-in collective/class action regime for consumer claims, there is currently a reluctance among many claimants to litigate in the CAT (rather than in the High Court). This is so because there are a number

of significant restrictions on the CAT's ability to hear claims, particularly on issues such as the identity of defendants that may be sued, the infringements that may be litigated, and the time when proceedings may be commenced. In addition, the CAT does not have the authority to issue injunctions to terminate infringements.

These restrictions create jurisdictional risks, impose delays, and prevent certain claims from being heard, all of which substantially undermine the attractiveness of the CAT as a forum to litigate in England. The Government's proposed reforms aim to address these limitations by levelling the playing field between the CAT and the High Court, as noted below.

### **Allowing stand-alone claims**

The draft Bill would remove the requirement for claims to be based on a prior infringement decision. The CAT would have jurisdiction to hear any claims for damages (including both claims based on a prior infringement decision and stand-alone claims based on an alleged infringement), and would be able to grant injunctions to terminate infringements. This proposed reform would address the current difficulties that arise because the CAT does not have jurisdiction to hear claims if a regulator has not already established an infringement in respect of the specific conduct and parties at issue. For example:

- **Current difficulties in proving liability against specific defendants.** At present, claims in the CAT must be based on a prior finding of infringement against each individual defendant.<sup>7</sup> Each defendant must therefore be an individually named addressee of the infringement decision or otherwise identified in the decision as having committed an infringement. This requirement can prevent many claims being brought in the CAT, as infringement decisions often focus on the liability of corporate groups as a whole and do not seek to definitively identify each national subsidiary that may have participated in the infringement and/or sold infringing products. This can also have implications for obtaining English jurisdiction – if there is no finding of infringement against a UK subsidiary, that entity cannot be sued in the CAT as an “anchor defendant” as a basis of joining claims against other non-UK defendants.<sup>8</sup>

- **Current difficulties in establishing the scope of the infringement.**<sup>9</sup> At present, claims in the CAT must be based on conduct that the regulator has already decided constitutes an infringement. While the CAT can resolve potential ambiguities and determine the scope of the infringement for the purposes of the damages action, the claim must fall squarely within the scope of the infringement decision.<sup>10</sup> However, decisions often fail to make definitive conclusions on issues relevant to damages claims, such as the specific products or customers affected by an infringement, or whether conduct that is not the central focus of the regulatory investigation amounted to an infringement.

These current restrictions can significantly reduce the range of cases that the CAT can hear, even if there is a prior infringement decision, because issues that are important for damages claims may not be fully explored in the infringement decision. The proposed reforms should remove these obstacles, as the CAT would be able to make its own findings as to whether an infringement had been committed in respect of specific products or by specific defendants, even if the infringement decision failed to make definitive findings on these issues.

### **Reducing delays in commencing claims**

The draft Bill would make actions in the CAT subject to the same timing restrictions that apply to the High Court – there would be no requirement to delay commencing proceedings pending appeal, and claims would be subject to the same limitation period as that applicable in the High Court (six years from the date on which the cause of action arose, or five years in Scotland).<sup>11</sup> These changes should avoid the delays that often result from the current CAT rules, and should eliminate the timing and jurisdictional disadvantages that can arise under these rules. In particular:

- **Delays pending appeals.** At present, the time when claims may be brought in the CAT is determined by reference to the timing of the infringement decision: claims can be brought only after an infringement decision has been adopted; if there are substantive appeals pending by any of the addressees of the decision (which is very often

the case with cartel infringements<sup>12</sup>), permission of the CAT is required before a claim is made; and the limitation period expires two years after the infringement decision has become final. These timing provisions have significantly impaired the ability of claimants to proceed expeditiously in the CAT, as claims are generally delayed while numerous appeals are heard.

- **Delays affecting English jurisdiction.** Currently, delays in commencing proceedings in the CAT can have a major impact on the claimant's ability to obtain English jurisdiction in the CAT (as compared to the High Court, where these timing restrictions do not apply). As cartel damages claims in the EU often involve a number of potential defendants domiciled in different Member States, there are often multiple alternative venues in which claims may be litigated. In the resulting jurisdictional race to litigate in a party's preferred jurisdiction (which is not uncommon in cartel damages actions), the ability to bring a claim quickly may ultimately determine where the case is heard.<sup>13</sup> If claims cannot be commenced in the CAT pending appeal, this may provide opportunities for other claimants to commence litigation in their preferred jurisdiction, or for potential defendants to seek a preemptive application in another jurisdiction for a declaration that there has been no infringement and/or no damage.

The proposed reforms should eliminate these disadvantages, as the timing restrictions on commencing litigation in the CAT would be harmonized with those applicable in the High Court – where there is no restriction against proceedings being commenced pending appeals, or even pending completion of an on-going regulatory investigation.<sup>14</sup>

1 See [http://www.weil.com/files/upload/Weil\\_Alert\\_Antitrust\\_EU\\_June\\_2013.pdf](http://www.weil.com/files/upload/Weil_Alert_Antitrust_EU_June_2013.pdf).

2 Only one such action has been brought by the Consumers Association (which settled prior to trial), and the Consumers Association has indicated that it does not intend to bring further actions under the current opt-in regime.

3 See *Emerald Supplies Ltd & Anor v. British Airways Plc* [2009] EWHC 741(Ch). The High Court (upheld by the Court of Appeal) held that claimants seeking damages caused by the air cargo cartel could not bring a representative action on behalf of all direct and indirect

purchasers, as the members of the class would not have the same interest at all stages of the proceedings.

- 4 It is possible for the CAT and the High Court to award exemplary damages in other claims if fines have not been imposed by a regulator, although such awards are rare.
- 5 A conditional fee arrangement is an arrangement in which fees typically are increased by up to 100 percent for a successful outcome, or reduced to zero for an unsuccessful outcome. The fee uplift for success is not recoverable from the other party.
- 6 See [http://www.weil.com/files/upload/Weil\\_Alert\\_Antitrust\\_EU\\_June\\_2013.pdf](http://www.weil.com/files/upload/Weil_Alert_Antitrust_EU_June_2013.pdf). Interestingly, following earlier consultation, the Government has also decided to take a different approach from the Commission on several other issues, such as deciding against a presumption of loss in cartel cases, and deciding not to expressly define the parameters of a passing on defence.
- 7 See *Emerson Electric Co & Ors v. Mersen UK Portslade Ltd* [2012] EWCA Civ 1559.
- 8 Under the EU jurisdictional rules in Regulation 44/2001 (and in particular Article 2 and Article 6), closely connected claims generally can be brought against all defendants in the Member State in which any one of them is domiciled. Claimants may therefore seek to obtain English jurisdiction as against all defendants by bringing a claim against a UK “anchor defendant,” to which claims against the others may be joined.
- 9 See *English Welsh & Scottish Railway Limited v. Enron Coal Services Limited* (in liquidation) [2009] EWCA Civ 647.
- 10 See *Enron Coal Services Ltd (in liquidation) v. English Welsh & Scottish Railway Ltd* [2011] EWCA Civ 2.
- 11 To further reduce delays for simpler claims (particularly those brought by small and medium-sized businesses), the draft Bill proposes that the CAT rules should be amended to provide for a fast track procedure, subject to cost capping and focused on injunctions to stop harmful conduct.
- 12 Substantive appeals by any defendant will delay claims being made against any of them. See *Deutsche Bahn Ag & Ors v Morgan Crucible Company Plc & Ors* [2012] EWCA Civ 1055. Appeals only as to the level of fine do not have this suspensory effect. See *BCL Old Co Ltd & Ors v. BASF plc & Ors* [2012] UKSC 45.

13 Once a court is first seised of a claim, a court in another Member State must decline jurisdiction in subsequent proceedings if the cause of action and the parties are the same, and may decline jurisdiction or stay proceedings in closely related actions.

14 See *National Grid Electricity Transmission Plc v. ABB Ltd & Ors* [2009] EWHC 1326 (Ch), and *National Grid Electricity Transmission Plc v ABB Ltd & Ors* [2011] EWHC 1717 (Ch), where the High Court declined to stay damages claims pending appeals against the infringement decision, and held that the claims should proceed at least to the exchange of pleadings and disclosure.

If you have questions concerning the contents of this Alert, or would like more information about Weil's Antitrust/Competition practice group, please speak to your regular contact at Weil, or to:

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