Recent developments in private litigation, merger control, cartels and markets work

In this Briefing we consider a number of developments across different aspects of competition law, both in the United Kingdom and at the EU level.

We consider first the changes that the recently published Consumer Rights Bill will make to private competition litigation, in particular by introducing 'opt-out' collective actions brought on behalf of consumers. This may profoundly alter competition enforcement in the UK, as would parallel proposals for an EU directive published by the European Commission.

We also consider a number of other developments, including:

- important judgments of the General Court and the Competition Appeal Tribunal concerning the assessment of, respectively, mergers in emerging markets and minority shareholdings;
- the outcome of the Competition Commission's aggregates, cement and ready-mix concrete market investigation; and
- the European Commission's settlement of several cartel investigations.

Consumer Rights Bill: changes to competition litigation

The Government recently published its long awaited Consumer Rights Bill. The Bill seeks to streamline the overlapping and often complex rules relating to consumer protection. It will make a number of significant changes to private competition litigation, by extending the jurisdiction of the Competition Appeal Tribunal ("CAT"), introducing 'opt-in' collective actions and 'voluntary redress' schemes. If the Bill is enacted to give effect to the Government's proposals, it will radically alter competition litigation in the United Kingdom.

Background

Consumers are often affected by anti-competitive behaviour, in particular by cartels and abuses of a dominant position, which can increase prices and reduce choice. As victims, they are entitled to compensation for the losses suffered as a result of such anti-competitive behaviour.

However, whilst consumers are able to bring actions to seek redress for competition law infringements, there has been an almost total absence of such 'private enforcement' in the UK, even though the Competition Act 1998 enables specified consumer bodies to bring damages claims on behalf of consumers on an 'opt-in' basis.

Indeed, there has only been one such collective action since they were introduced, the Consumers' Association's action on behalf of 130 affected customers against JJB Sports following an Office of Fair Trading ("OFT") decision in 2003 to fine ten businesses a total of £18.6 million for illegally fixing the retail prices of replica England and Manchester United football kits. Although this action settled, with JJB Sports agreeing to repay affected consumers up to £20 per shirt, it faced numerous practical issues, including identifying affected consumers and funding. It remains the only 'opt in' action under the current legislation commenced by a consumer body.

Given the absence of consumer follow-on damages actions in the UK, and in the EU generally, both the UK Government and the European Commission have been considering proposals to reform civil litigation procedures to facilitate follow-on damages actions.

New 'opt-out' collective actions by consumers

To address the current ineffectiveness of 'opt-in' actions, the Consumer Rights Bill will introduce a new 'opt-out' collective action regime, as a complement to existing 'opt-in' actions, with the Competition Appeal Tribunal ("CAT") having jurisdiction to hear such collective claims and to approve collective settlements. In parallel and in anticipation of the Bill becoming law, the CAT has published draft procedural rules for such collective actions; in due course, these will be subject to consultation as part of a wider review of the CAT's procedural rules.

New opt-in and opt-out actions

The Bill will introduce 'opt-in' collective actions brought on behalf of consumers who notify the representative that their claim should be included in the collective proceedings. In addition, provision is made for 'opt-out' collective proceedings, which can be brought on behalf of a 'class' of members other than any member of that class who notifies the representative that their claim should not be included in the collective proceedings.

It is not necessary that all individual claims be made against the same defendants in order for them to be combined into a collective proceeding.

Approval of collective actions by the CAT

In order to allay fears that the introduction of collective proceedings will give rise to an American 'class action culture', the CAT must first certify proposed collective actions by way of a 'collective proceedings order' ("CPO"), following the filing of a collective proceedings claim form by the proposed class representative.

This form must, amongst other things: explain that the claims have a real prospect of success, identify the class, estimate the likely size of the class and estimate the aggregate damages sought.

Before making a CPO, the CAT will hold a case management conference and hear the parties. The CAT will specify how an authorised class representative must give notice of the collective proceedings to the class members and it will also specify the time period to opt into or out of the proceedings.

The CPO will identify and authorise a representative claimant, define the class of persons whose claims are eligible to be included in the collective proceedings and specify whether the case is to proceed on an 'opt-in' or 'opt-out' basis. The CAT can make a CPO only if individual claims raise the same, similar or related issues of fact or law.

Judgments and damages awards

Where proceedings are certified as collective actions, any subsequent CAT judgment is, unless specified otherwise, binding on all represented persons. The CAT may not award exemplary damages in collective proceedings and before awarding other damages must assess the damages recoverable by each represented person; any damages award must be paid to the representative and distributed in accordance with the CAT's directions, including as to the amounts payable to individual represented persons. In opt-out actions, any damages not claimed within a specified period must be paid to charity.

Collective settlements and costs

The Bill also foresees collective settlements for both opt-in and opt-out claims, which the CAT may approve only if satisfied that the settlement is 'just and reasonable', which may require the parties to submit evidence on this point.

Collective settlements may be made both in actions where a CPO has been made and in those where an order has not been made; in the latter situation, the CAT must make a collective settlement order in approving the settlement, approving the proposed representative and the period for parties to opt-in or opt-out, as appropriate.

In all cases, the CAT will specify how the settlement is to be distributed and how persons can opt into or out of the settlement. Defendants must indicate if they wish to be bound by a collective settlement.

The CAT will also have power to award costs to or against the class representative in opt-out proceedings and, in limited circumstances, against other represented persons.

Expanding the CAT's jurisdiction to hear damages actions

The Bill will also expand the jurisdiction of the CAT to hear private actions and revise its procedures for such actions. The CAT will:

- have jurisdiction to hear **stand-alone claims**, where there is not an existing decision (for example of the Competition and Markets Authority ("CMA") or European Commission) finding that the defendants have infringed UK or EU competition law. In such cases, the claimant must itself establish both infringement and also that it is entitled to damages by the infringement causing it loss;
- have the **power to grant injunctions**, to restrain on-going infringements or suspected anti-competitive behaviour, although this will not apply in Scotland. If an injunction is not complied with, contempt proceedings may be brought in the High Court;
- be able to use a **fast track procedure**, to give small and medium-sized businesses greater access to redress for breaches of competition law, which can be used in simpler cases.

New voluntary redress schemes

The Bill also envisages the CMA having the power to approve redress schemes, under which companies found to have infringed UK or EU competition law voluntarily agree to pay compensation to those harmed by their infringement. Whilst applications for approval of such redress schemes may be made before the CMA or European Commission adopts an infringement decision, the CMA may only approve the scheme after the relevant decision has been adopted. Where a redress scheme is approved, it may be enforced by either the CMA or persons entitled to compensation, by bringing civil proceedings.

Is the Government swimming against a European tide?

As noted above, the European Commission has been considering proposals for collective redress that would apply throughout the EU, including in competition damages actions. In June 2013, the European Commission published a non-binding recommendation that Member States should adopt collective redress schemes to provide effective means for private enforcement by both citizens and companies of their rights under EU law, including under competition law.

The Commission has recommended the introduction of 'opt-in' collective actions, with group members having to be identified and give consent before a claim is brought. According to the Commission, opt-out actions are to be the exception and should be permitted only where justified by the need for sound administration of justice. The Commission also recommended that contingency fees and punitive damages be prohibited, so rejecting the concept of US class actions.

It remains to be seen whether the introduction of opt-out actions in the UK will be consistent with the Commission's recommendation.

The Commission has also published a draft Directive on Antitrust Damages Actions, which is intended to harmonise national rules governing actions for damages for infringement of EU competition law, whether individual or collective actions. If adopted, the UK courts, including the CAT and the English High Court, will need to apply the Directive's principles when hearing private damages actions based on UK and/or EU competition law. The draft Directive does not mandate the introduction of collective action procedures, but does introduce a number of other steps to facilitate private damages actions, including:

- ensuring that **victims receive full compensation**, including for actual losses and loss of profit plus interest;
- introducing standardised rules on **limitation periods**, allowing at least five years to bring claims;
- enhanced but proportionate **access to evidence** held by defendants and third parties, including competition authorities, subject to the protection of information that is confidential or privileged and also of corporate leniency and settlement agreements;
- permitting the **passing-on defence** to be available for claims by both direct and indirect purchasers, with the defendant bearing the burden of proof to show that any overcharge was passed on by the claimants to their own customers (such that they suffered no loss);
- a **rebuttable presumption as to the existence of harm** resulting from a cartel, supported by non-binding guidance from the Commission on quantification of damages.

The future

The Consumer Rights Bill is at the Committee Stage in the House of Commons. It remains to be seen whether the more controversial aspects of the Bill will survive Committee and House of Lords' scrutiny before becoming law. The draft CAT rules will, in due course, be subject to public consultation by the Department for Business, Innovation and Skills. The Commission's proposed Directive remains a proposal. In December 2013, the EU Council gave the Council Presidency a mandate to negotiate the text of the Directive with the European Parliament and the European Commission.

Even if new collective damages actions are introduced in the UK, it will still remain to be seen how effective these will be in ensuring those affected by anti-competitive behaviour, whether cartels or abuses of a dominant position, can recover damages.

Much will depend on the extent to which litigation funding will be available for such actions, particularly as claimant lawyers will not be able to enter into contingency arrangements (such as 'damages based agreements') in opt-out actions, only in opt-in actions. In addition, the Jackson reforms mean that ATE insurance premiums and CFA success fees must be paid by claimants and are not recoverable from defendants. This may make funding claims more difficult. Other challenges include identifying a group of individuals with sufficiently similar claims to constitute a class (which is not necessarily a straightforward step) and whether indirect purchasers will be able to mount effective claims (which will depend upon whether direct purchasers have passed on any overcharge).

Mergers: General Court dismisses appeal against Microsoft/Skype merger

The General Court has dismissed appeals by Cisco and Messagenet against the European Commission's decision to approve Microsoft's acquisition of Skype in October 2011. The Court's judgment provides important guidance on the assessment of mergers in emerging or fast-growing markets, such as in the hi-tech sector, where products are often given away for free to consumers or are subject to short innovation cycles.

High market shares are not necessarily anti-competitive

The Commission had approved the merger even though, post-merger, Microsoft would have had an 80% to 90% share of the market for consumer communications on Windows-based PCs. Such market shares usually give rise to significant competition concerns. However, the Commission considered that this was a growing market with numerous players and the high market share was not an indicator of durable market power.

The Court upheld the Commission's conclusion. It confirmed that very high combined market shares do not necessarily lead to a significant lessening of competition, as they are only "indicia of competition concerns". High market shares are not necessarily indicative of market power in emerging, dynamic and fast-growing markets, provided that there remains effective competition, including from new entrants. Indeed, they may well be "ephemeral" and fluctuate significantly over short periods of time, in view of short innovation cycles and ease of consumer switching, both between services and different platforms (notably, tablets and smartphones) for accessing consumer communications services, where Microsoft and Skype had weaker positions and faced more competition from

Google, Apple and others. Consumers' ability to download multiple services also meant that there were no network effects from Microsoft's large share, which might theoretically have created barriers to entry and switching, which was confirmed by considerable recent entry.

The Court also confirmed that a merger can be prohibited only if it leads to consumer harm: it is not enough to simply find that the post-merger market share is high. Even if the merger had increased Microsoft's market power, this did not lead to consumer harm: if Microsoft had tried to charge for video communication services (which were currently available for free) or degrade its service quality, consumers would in all likelihood have switched to other free providers, thus confirming the existence of effective competition.

Conglomerate effects are unlikely in fast-moving markets

In approving the merger, the Commission also rejected conglomerate concerns, including that Microsoft might have either degraded Skype's interoperability with competing services or 'tied' Windows with Skype, thereby limiting others' ability to compete. It found that the dynamic characteristics of the market, including short innovation cycles, meant that the merged entity would continue to face significant competition, so could not raise prices or limit rivals' ability to compete.

The Court upheld the Commission's approach to possible conglomerate effects. In view of the fast-moving nature of technology markets, the possibility of market foreclosure by degrading interoperability or tying were too uncertain and speculative to be considered a direct and immediate effect of the merger, not least because there was no existing interoperability between Microsoft's Lync product and Skype, which would require lengthy and complex work to develop.

Mergers: CAT upholds Competition Commission decision requiring Ryanair to divest most of its minority shareholding in Aer Lingus

The CAT has upheld a decision by the Competition Commission ("CC") requiring Ryanair to sell off almost all of its 29.8% shareholding in Aer Lingus because it led to a substantial lessening of competition ("SLC") on routes between the United Kingdom and Ireland.

The judgment provides further guidance on the relationship between UK and EU merger law and the CC's powers to impose remedies once it has found that a merger substantially lessens competition. It also confirms that, as appeals are assessed on the 'judicial review' standard and are not a full rehearing 'on the merits', it is difficult to challenge successfully the CC's (and in future, the Competition and Markets Authority's) substantive findings of an SLC and its discretion in identifying remedies.

Whilst the judgment is the latest setback for Ryanair in its nearly eight-year quest, before the UK and EU competition authorities and courts, to acquire its rival, it has already stated that it will appeal to the Court of Appeal.

Background

Ryanair had built this stake in its first attempt to takeover Aer Lingus, which was prohibited by the European Commission in 2007; this prohibition was upheld by the General Court in 2010, which also ruled that the Commission had no power under the EU Merger Regulation to require Ryanair to divest its minority shareholding. A second hostile takeover bid was prohibited by the Commission in February 2013; Ryanair has challenged that decision before the General Court.

The Court of Appeal has twice ruled that the OFT and CC had jurisdiction to review the minority shareholding, provided that in so doing they did not reach a decision that was incompatible with EU law.

Substantial lessening of competition arising from a minority shareholding

The CC concluded that although the minority shareholding would not weaken the strong competition between the two airlines, it nevertheless resulted in an SLC as it gave Ryanair the ability and incentive to affect Aer Lingus's commercial policy and thereby weaken its rival. In particular, it could prevent Aer Lingus's ability to raise capital, merge with or be acquired by another airline and manage it slots at Heathrow, which reduced its longer term effectiveness as a competitor to Ryanair.

The CAT upheld the CC's finding of an SLC.

First, the shareholding gave Ryanair material influence over Aer Lingus and therefore gave the CC jurisdiction. However, to find an SLC, the CC was not required to identify a causal link between such material influence and the SLC: an SLC resulting from a merger can arise irrespective of the means by which control is acquired and the CC must examine the competitive effects of the merger, however they arise.

Second, the CC had demonstrated that, on the balance of probabilities, Ryanair's acquisition of the shareholding led to an SLC. There was sufficient evidence to support each of the mechanisms by which it considered an SLC arose, as well as, importantly, the overall finding of an SLC. Even if the future events that the merger prevented (so leading to an SLC) were unlikely or uncertain to occur absent the merger, there was still sufficient evidence that they might occur, such that the finding of an SLC was neither unsupported by any evidence nor otherwise unreasonable.

Remedies

Having identified an SLC, the CC required Ryanair to reduce its stake to 5%, which it considered would not prevent Aer Lingus from combining with another air carrier.

The CAT upheld the CC's decision to impose the remedy.

First, the CC did not infringe EU law by imposing divestment remedies whilst Ryanair's appeal against the 2013 Commission prohibition was pending before the General Court. The CC was "mandated" to address the SLC arising from the shareholding, which was a different transaction from any full merger that the Commission might approve. Therefore, even if Ryanair's appeal were to be successful and the European Commission were subsequently to approve its acquisition of Aer Lingus, the CC's remedy did not prevent Ryanair from acquiring Aer Lingus if this would be approved by the Commission at some point in the future, even if the reduction in shareholding to 5% might make this more difficult.

Second, the CC has a wide discretion in exercising its powers to impose remedies, including ensuring that they are effective in addressing the SLC, provided that such remedies are proportionate. The CAT found that the divestment remedy imposed by the CC addressed the SLC and was proportionate. The CC had been entitled to reject as ineffective lesser, behavioural remedies proposed by Ryanair and a structural remedy was neither unreasonable nor disproportionate. The CC was also entitled to appoint a divestiture trustee to implement the remedy should Ryanair not do so.

Third, the CC was entitled to disregard any loss that Ryanair might incur in selling the shares, which had declined in value since their acquisition. Ryanair would receive fair market value and any loss was in reality avoidable: having acquired the shares in a 'book-building' exercise to support its first hostile bid, Ryanair took the risk that the bid would be blocked by EU merger control and/or that UK merger control would be applied to the minority shareholding.

Procedural matters: access to evidence

The CAT also rejected Ryanair's complaints that the CC had improperly withheld evidence from it, for example, information about other airlines with which Aer Lingus had held merger talks. The CC had disclosed sufficient information and the 'gist' of any redacted information: Ryanair knew enough about the watchdog's case to defend itself.

Aggregates market investigation: the Competition Commission orders divestments to create a new cement producer

The CC has published its final report, of 468 pages, following its two year investigation into the supply of aggregates, cement and ready-mix concrete in Great Britain. It has imposed a series of structural and behavioural remedies to increase competition in the supply of cement, including divestments that will create a new cement manufacturer. These are a reminder of the broad powers that the CC has (and CMA will have) to improve competition following a market investigation.

Whilst the CC found no competition concerns in local markets for aggregates or ready-mix concrete, it did identify a number of features of the cement and ground granulated blast slag ("GGBS", a partial substitute for cement) markets which adversely affect competition.

The CC found that the concentrated nature of the cement market facilitates coordination between the three largest producers (Lafarge Tarmac, Cemex and Hanson), which may result in higher prices for customers. The CC concluded that producers focus on maintaining their respective market shares and do not compete effectively against one another, leading to higher prices and excessive profitability. The market structure also facilitated price discrimination, with customers that did not switch supplier paying higher prices than those which did switch. Producers' internal documents also confirmed coordination and strategies designed to achieve market stability. The CC estimates that higher prices resulting from this lack of competition cost cement users at least £30m a year.

To improve competition, the CC has required Lafarge Tarmac to sell one of two cement plants, together with limestone quarries and depots and, if required by the purchaser, a number of ready-mix concrete plants. The purchaser cannot be an existing GB cement producer.

In addition, the CC will impose remedies to reduce market transparency. First, restrictions will be imposed on the publication of GB cement market data, including by manufacturers and importers: publication must be delayed by at least three months. Second, cement suppliers will be prohibited from sending generic price announcement letters to their customers; letters will have to be specific to the customers receiving them.

The CC also found that certain features of the GGBS market result in higher prices for customers, of £15-20m a year. Presently, Hanson has exclusive rights to use the output of Lafarge Tarmac, the only domestic producer of the main input into GGBS, granulated blast furnace slag ("GBS") is a by-product of steel production. The CC will require Hanson to divest one of its three GGBS facilities to a buyer which is not an existing GB cement producer; Lafarge Tarmac will be required to enter into a long-term agreement to supply GBS to the buyer.

This is only the second time the CC has imposed structural divestments in market investigation (the investigation into BAA in 2009 was the first). The CC is also considering structural divestments in its current private healthcare market investigation, with its final decision due this month.

Antitrust: European Commission rejects complaint by Ryanair against Dublin Airport Authority and Aer Lingus

The European Commission has rejected a complaint by Ryanair against Dublin Airport Authority ("DAA") and Aer Lingus that DAA had abused a dominant position by increasing charges to recover investment in infrastructure at the airport and a breach of Article 101 by subsidizing Aer Lingus's move to a new terminal and developing policies that favoured Aer Lingus when it moved into the new terminal.

The Commission observed that the investments in Dublin airport were subject to an extensive prior consultation and assessment process. The Commission could not assess whether such investments were well-founded, but only their relevant background to the alleged infringements of Articles 101 and 102.

Ryanair claimed that DAA's Transfer Incentive Scheme ("TIS") clearly provided a direct and substantial subsidy to Aer Lingus, the anchor tenant of Terminal 2, financed by the users of Terminal 1 (including Ryanair). It claimed that it was excluded from the benefit of the TIS, which was introduced to reward Aer Lingus for its move to Terminal 2.

The Commission found that none of the elements of the TIS, nor its development and effects, suggested that the TIS was introduced as the result of illegal collusion between DAA and Aer Lingus. There was no evidence that this was not a legitimate business decision made by DAA, taking into account the business environment.

The Commission furthermore decided that there were not sufficient grounds to investigate the claims further and that the Irish Competition Authority or the national courts were best placed to address these matters.

Cartels: European Commission fines foam producers €114 million in tenth EU cartel settlement

The European Commission has found that four producers of flexible polyurethane foam colluded to coordinate sales prices in Europe over the course of five years. The producers - Vita, Carpenter, Recticel and Eurofoam – were fined over €114 million.

This is a further example of cartel investigations being settled and also a reminder to companies of the high risk of anticompetitive behaviour when employees meet at trade associations, a common location of and opportunity for cartel meetings.

Flexible polyurethane foam is mainly used in household furniture such as mattresses or sofas, but also in the automotive sector, in particular for car seats. The aim of the cartel was to pass on raw material price increases to customers and avoid aggressive price competition between the four producers. The cartelists organised price coordination meetings at all levels of their European management teams, meeting on the fringes of European and national trade associations. They also had numerous telephone and other bilateral contacts.

Each of the companies agreed to settle with the Commission and received a 10% reduction in fine for doing so. Under the Commission's settlement process, parties must admit their participation in the cartel and agree to a shorter and more streamlined procedure (such as limited access to the file and no oral hearing).

This is the tenth settlement decision since the Commission introduced the procedure in 2008. The Commission recently stated that it believes its settlement procedure has now reached maturity, allowing settlement talks to progress faster. Overall the foam case took two years less to complete than it would have done had the standard procedure been used, with the settlement talks lasting 10 months. A significant number of further settlement cases are understood to be in the pipeline, which the Commission expects will conclude even more quickly.

Cartels: European Commission fines two power exchanges €5.9 million in cartel settlement

The Commission has also imposed fines on two leading European spot power exchanges, EPEX and Nord Pool for agreeing not to compete with one another. EPEX and Nord Pool both received a fine reduction of 10% for agreeing to settle the case with the Commission. It is a reminder that even legitimate contacts (in this case promoted by the Commission's Energy Directorate General) between competitors can lead to a risk of consequential illegal cartel behaviour.

Power exchanges are organised markets for trading electricity, with spot trading being same day or next day trading. The infringement took place in the context of discussions to establish the Internal Energy Market ("IEM"), a Commission initiative aimed at fully integrating national electricity markets. When exploring a joint approach on the technical systems to be used for cross-border trade, EPEX and Nord Pool also agreed not to compete with each other and to allocate European territories between them. The Commission found that these arrangements extended well beyond the legitimate purpose of the cooperation related to creating the IEM.

The infringement lasted for seven months in 2011 and 2012, ending when the Commission and the EFTA Surveillance Authority carried out unannounced inspections at the companies' premises. The anti-competitive contacts took the form of meetings, telephone and video calls and e-mails.

Dominance: European Commission fines Romanian power exchange for discrimination against EU electricity traders

The European Commission has imposed a fine of just over €1 million on OPCOM for abusing its dominant position in the Romanian electricity spot trading market by discriminating against electricity traders from other EU countries. This is an unusual form of abuse of a dominant position.

OPCOM operates the only power exchange in Romania. Between 2008 and 2013, OPCOM required spot market members to have a Romanian VAT registration and refused to accept traders that were already registered for VAT in other EU Member States. As a result, EU traders could only enter the Romanian wholesale electricity market by setting up a fixed establishment in Romania, which resulted in additional costs and other disadvantages compared to Romanian traders.

Burges Salmon Competition Group

Burges Salmon's Competition Group is one of the United Kingdom's leading competition and State aid practices.

We undertake the full range of high quality and challenging work. We advise clients on all aspects of UK and EU competition law, including merger control proceedings before the Office of Fair Trading, Competition Commission, European Commission and other competition authorities, as well as cartel and other antitrust investigations. Our lawyers have extensive experience of competition and State aid litigation in the UK and EU courts, including both appeals and follow-on damages actions.

In 2012, we were awarded *The Lawyer*'s 'Competition and Regulatory Team of the Year' award for our representation of the Co-operative Group in its successful appeal to the Competition Appeal Tribunal against the Office of Fair Trading's Competition Act decision in *Tobacco.* In 2013, we were runner-up for this award for our successful defence of a substantial follow-on damages action brought against Cardiff Bus.

Should you require any further information on the issues described in this Briefing or on any UK or EU competition law matter, please contact your usual contact or one of the members of our Competition Group.

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