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BRIEFING

Competition actions before the courts: where next?

Executive summary

There have been three recent judgments in the English courts on private enforcement actions. In this briefing we look at these cases and some of the issues that arise when private action is used as an alternative to regulatory enforcement.

Introduction

Enforcement of competition law by means of private damages actions has long been touted as an effective alternative to regulatory enforcement. However, few such actions have been brought. None has yet led to an award of damages by a UK court.

Private actions are strongly encouraged by the Enterprise Act 2002 (which provides new damages procedures through the Competition Appeal Tribunal and obliges the courts to follow certain decisions of the Office of Fair Trading (OFT)). They should also become more prevalent after the 'modernisation' of EC procedures from 1 May 2004.

In the three recent judgments (*Provimi v Aventis Animal Nutrition*, *Arkin v Borchard Lines* and *Crehan v Innpreneur Pub Company*), the English courts have started to grapple with some of the practical issues such private enforcement actions raise including:

- where such actions can be brought;
- who may bring such actions;
- proof of the infringement;
- proof of causation of loss; and
- proof of the measure of damages.

Where can damages actions be brought?

In *Provimi*, a German company brought an action for damages in England for losses allegedly caused to it by a pan-European cartel. It claimed damages from the English subsidiary of one of the cartelist, although it had not traded with that subsidiary. The English court decided that the action could still be brought in England.

This means that a party who has bought from a number of a cartelist's subsidiaries throughout Europe can bring a single action for damages in one location. It need not have made any purchases where the proceedings are brought. This ruling encourages 'forum shopping' (the ability of a claimant to choose the jurisdiction that is most favourable) depending on tactical issues like disclosure, representative actions and the untested availability of exemplary damages. At least some of these issues point to England as an attractive jurisdiction for some cases.

Interestingly, this ruling mirrors recent US authority (*Empagran v Hoffmann-La Roche* and *Kruman v Christies*) which allows actions for damages to be brought in the US for cartel purchases made outside the US.

Who can be a claimant?

Some defendants had claimed that the English doctrine of *in pari delicto* (no damages if you are also at fault) might prevent claims for damages by one party to an anti-competitive agreement against another party. In *Crehan*, the ECJ held that such a party could seek damages provided the claimant did not bear 'significant responsibility' for the infringing conduct.

However, a recent German decision (*Max Boegl Bauunternehmung et al v Hanson*) has restricted potential claimants in a different way. It has decided, under analogous German law, that only parties that had been individually targeted by a cartel could bring damages claims in respect of the cartel. This approach (which has

been floated in academic writing) would substantially reduce the risk from claims, since targeting is very difficult to show in a general price-fixing cartel.

Questions of proof

Proving the infringement

In both *Crehan* and *Arkin*, the judges carried out their own analyses of the markets in which Mr Crehan and Mr Arkin were active, to determine whether the competition rules had been infringed. However, the analyses undertaken were very different from the approach that would have been used by the regulators (which focus much less on economic issues). In the case of *Crehan* at least, they arguably reached different conclusions.

The court held that the beer supply arrangements from Interbrew to Mr Crehan's pub did not actually breach EC competition rules. However, the European Commission's analysis of beer ties in the UK in the early 1990s and the provisional view expressed by the Commission in *Crehan* itself (the notification which led to this preliminary view was withdrawn before the Commission had reached a definitive view) strongly showed breach. The judge concluded that the Commission's analysis was not convincing and carried out his own evaluation.

While the judge was under no formal obligation to follow the Commission's previous decisions (to which the defendant had not been a party), his approach sits uneasily with the EC law principles of consistent interpretation, the approach in the Enterprise Act and the modernisation regime (Regulation 01/03) and the traditional respect for the competence of the specialist authorities. The judge's approach may discourage claims by potential claimants, which would otherwise have been boosted by related findings of breach by regulators. The departure from 'soft' authority and the different analysis undertaken indicate that the English courts are less likely to form a satisfactory venue for the resolution of complex competition law disputes.

Proving causation of loss

To recover damages, a claimant has to show that the defendant's anti-competitive conduct caused his loss. In both *Arkin* and *Crehan*, the courts were provided with detailed evidence concerning the business decisions taken by the claimants in response to the defendants' conduct.

In *Arkin*, the court decided that the claimant's own irrational pricing policy was the predominant cause of his business failure. Again, it is arguable that a regulator would have looked more at the wider market analysis and given less weight to individual behaviour. In contrast, in *Crehan*, the court clearly felt that Mr Crehan's position was constrained by the supply arrangements and held that he would have proved causation.

The measure of damages

In *Arkin*, the court was provided, as is increasingly common, with detailed expert econometric evidence as to the position the claimant would have been in but for the anti-competitive conduct of the defendants. However, the judgment places no weight on this material and is sceptical as to its worth. The judge preferred what he called a 'common sense approach'. In discounting the economic evidence, the judge was following a lead given by the Chancery Division in *The Premier League* (28 July 1999), where the court found itself unable to prefer the evidence of one economics expert over another, having described that evidence as 'of limited assistance'. It seems that a major challenge for any party relying on economic evidence will be to render this intelligible, credible, persuasive and relevant to the judge.

Where next for private competition actions?

Victims of anti-competitive behaviour have long awaited the development of coherent rules on private competition actions for damages. These recent judgments help, but leave significant problems that may still deter claimants from litigating, particularly with regard to concerns over the value of related prior regulator decisions and the difficulty of proving loss. Under developing regimes, there will be correspondingly greater need for co-operation between the courts and the regulators. Clearly, each case must be considered on its own merits. But these cases do not always sit comfortably with current policy.

For further information please contact

Paul Lomas
T + 44 20 7832 7059
F + 44 20 7832 7001
E paul.lomas@freshfields.com