



The landscape for competition damages actions in London's Olympic year

The European Commission has for some time sought to encourage private claims against companies which have infringed European Union ("EU") competition laws. That is set to continue in 2012 with the Commission intent on removing perceived obstacles to such claims being brought in national courts. Depending on the Commission's response to its consultation on collective redress, which closed in April 2011, this year may also see competition-specific measures proposed in relation to collective claims.¹

Meanwhile, at the national level, competition damages actions have continued to be brought in the jurisdictions which are most amenable to such actions. This includes England & Wales, where damages may be sought in the Competition Appeal Tribunal ("CAT") or in the High Court. The CAT hears follow-on damages claims, which rely on existing decisions of competition authorities to establish that the defendant infringed competition law. The High Court hears both follow-on claims and standalone claims in which the burden is on the claimant to prove the infringement.

Developments in 2011

Last year saw a number of important developments in the field of competition damages actions both in the English and the EU courts:

- In January, the Court of Appeal agreed with the CAT that a claimant had failed to establish that it suffered loss as a result of unlawful conduct by the defendant, which had been fined by the Office of Rail Regulation for abusing its dominant position in the market for coal haulage by rail.² The Court of Appeal nevertheless found that the CAT should have considered itself bound by findings of fact contained in the rail regulator's decision. The case illustrates that, even though an infringement might not need to be demonstrated in a follow-on damages claim, proving causation can still be challenging.
- In March, the CAT struck out cartel damages claims against an English company on the basis that, unlike its parent company, it had not been an addressee of an infringement decision by the European Commission (i.e., it was not named as having infringed competition law or as subject to a fine) in the carbon and graphite products cartel.³ This can be contrasted with the position in the High Court (see below).

¹ See the speech delivered by Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, to the ECON committee of the European Parliament on 22 November 2011 (SPEECH/11/785).

² *Enron Coal Services Ltd (in liquidation) v English Welsh & Scottish Railway Ltd* [2011] EWCA Civ 2.

³ *Emerson Electric Co v Morgan Crucible Co Plc* [2011] CAT 4.

- In May, the CAT ruled that a claim against a defendant, which had been found by the Commission to have participated in the carbon and graphite products cartel, was time barred. The limitation period for follow-on claims before the CAT runs for two years from the later of the date on which (i) the right to appeal against the infringement decision expires, (ii) any such appeal is concluded, or (iii) the cause of action accrued. In this case, the defendant had not appealed the infringement decision and more than two years had run before the claim was brought. The fact that other addressees of the infringement decision had appealed did not extend the limitation period against the defendant in question.⁴ The ruling was contrary to a 2007 ruling of the CAT (concerning the same defendant) that the limitation period had not yet started to run because other addressees of the infringement decision had lodged appeals.⁵ At the time of writing, the matter is awaiting judgment in the Court of Appeal.
- In June, the EU's highest court handed down judgment in *Pfleiderer AG v Bundeskartellamt*,⁶ ruling that it is for national courts to decide whether to grant disclosure of documents submitted to competition authorities by cartel leniency applicants. The Court of Justice of the EU ("CJEU") concluded that national courts must assess whether to disclose such documents on a case-by-case basis. That assessment should involve a "weighing exercise" which takes account of both the rights of cartel victims to obtain redress and the need to ensure effective application of EU competition law (which might suffer if disclosure of leniency documents deters whistleblowers from coming forward).
- Prompted by the CJEU's ruling in *Pfleiderer*, National Grid Electricity Transmission plc, which had brought a claim in England against companies found to have participated in a gas insulated switchgear cartel, applied for disclosure of documents which may contain material from leniency applicants.⁷ In response to an invitation from the High Court, the European Commission submitted that *Pfleiderer* did apply and that factors to be taken into account include the relevance of the documents sought to the damages claim and the availability of alternative sources of evidence which would be equally useful to the claimant.⁸
- In October, the High Court refused to strike out, or summarily dismiss, claims against English domiciled "anchor" defendants which had allegedly implemented an illegal cartel in the area of industrial tubes.⁹ Unlike their non-English domiciled parent companies, which were also named as defendants, these subsidiaries had not been addressees of the Commission's cartel decision. However, their inclusion as defendants provided a basis for the English court to establish jurisdiction. The result is consistent with the outcomes of similar applications in two earlier English cases and further demonstrates the possibility of claimants bringing claims in England & Wales by identifying English subsidiaries of companies which were addressees of Commission infringement decisions and naming them as "anchor" defendants.

Looking Ahead to 2012

Although most attention on London in 2012 will be focused on its role as host to the world's greatest athletes, there will be a number of developments impacting on competition damages actions in England & Wales:

- The scope for claimants to bring claims in the High Court by identifying English "anchor" defendants will likely be examined by the Court of Appeal in an appeal from the industrial tubes case mentioned above.
- The Court of Appeal is also expected to hand down its judgment in the appeal mentioned above against the CAT's ruling that a follow-on claim was time barred because the defendant, unlike other defendants in the same proceedings, had not appealed against the Commission's infringement decision. In another case, the Supreme

⁴ *Deutsche Bahn AG v Morgan Crucible Co Plc* [2011] CAT 16.

⁵ *Emerson Electric Co v Morgan Crucible Co Plc* [2007] CAT 28.

⁶ Case 360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR (not yet reported).

⁷ *National Grid Electricity Transmission Plc v Arena SA* [2011] EWHC 1717 (Ch).

⁸ Observations of the European Commission pursuant to Article 15(3) of Regulation 1/2003 in *National Grid Electricity Transmission plc v ABB Ltd and others*, paragraph 19.

⁹ *Toshiba Carrier UK Ltd v KME Yorkshire Ltd* [2011] EWHC 2665 (Ch).

Court may rule on whether the CAT has the power to extend the deadline for follow-on claims to be brought.¹⁰ These cases will have important procedural and strategic implications for companies bringing and defending antitrust damages actions in England & Wales.

- The High Court is likely to determine the application by National Grid Transmission Plc for disclosure of documents which may contain leniency material. This judgment will reveal how the English courts are likely to interpret and apply *Pfleiderer*. Depending on the outcome, it may encourage further attempts to obtain such documents in support of competition damages actions.
- The High Court will decide on whether to stay a claim for damages in excess of £200 million brought by the National Health Service (“NHS”) against a French pharmaceutical company pending the outcome of a European Commission investigation. In July 2009, following its pharmaceutical sector inquiry which focused on patenting strategies, the Commission announced that it had opened a formal investigation (which does not imply any wrongdoing) into the French company and a number of generics manufacturers. The High Court is asking the Commission to provide information on its investigation with a view to assessing whether a stay would be appropriate.
- The European Commission’s Directorate-General for Competition intends to propose legislation to remove perceived obstacles to competition damages actions in national courts. Such a proposal may seek to address: the protection of leniency documents from disclosure; the evidential status of competition authorities’ decisions regarding infringements of competition law; standing requirements for claimants; and the “passing on” defence. Depending on political developments, the proposal may also include measures on collective damages actions (see below).
- The European Commission will publish the official response to its 2011 consultation on collective redress, which was conducted jointly by the Directorates-General for Justice, Competition and Health & Consumer Affairs. The response was due to be published in 2011 but has been delayed, reportedly as a result of conflicting views within the Commission. The response is expected to set out core principles for any EU initiatives on collective redress. It remains to be seen whether the Commission will go on to propose legislation on collective redress and, if so, whether such legislation will propose collective actions in general across all policy areas, or whether the result will be tailored collective action regimes for specific areas such as competition claims.
- Should proposals to facilitate competition damages actions be implemented at the EU level, it remains to be seen whether England & Wales would continue to be a favoured jurisdiction for bringing such actions amid the potential for even greater forum shopping. Aspects of the jurisdiction’s litigation procedure such as broader disclosure as compared with other European Union countries are nevertheless likely to see it remain a popular choice for such actions.

The combination of Sidley’s award-winning Competition Group and the extensive litigation experience of its Disputes Resolution Group make it ideally placed to advise companies on their exposure to competition damages actions or to assist them in responding to actual or threatened claims. For advice or further information, please contact:

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¹⁰ The case is *BCL Old Co Ltd*, in which the CAT refused an application for an extension of time and, on appeal from that ruling, the Court of Appeal held that the CAT could not extend the limitation period.

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