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Competition Litigation in the United Kingdom: What Lies Ahead?

Renato Nazzini
Kings College, London

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I. INTRODUCTION

The process of reform of private actions in the United Kingdom has been a long one. Probably, rightly so. Any reforms aimed at making it easier to bring competition law claims by definition allow claims to be brought that would not have been brought otherwise. This increase in litigation imposes a cost on society that must be justified by a genuine broadening of access to justice for claimants having a meritorious case and, possibly, wider benefits such as enhanced deterrence of anticompetitive conduct and the associated improvement in economic welfare. Balancing the need to provide the right set of incentives and safeguards for claimants in competition cases while at the same time guarding against the risk of unmeritorious or unnecessary litigation is a complex exercise.

Over the years, however, since the inception of this debate by two papers published by the Office of Fair Trading ("OFT") in 2007,[2] there has been a growing agreement around some general principles while others remain controversial. Perhaps the least controversial is the desirability that a specialist court of first instance have jurisdiction to hear competition cases.

Still fairly widely accepted is the idea that civil damages are designed to compensate the claimant, not to punish the defendant. As a consequence, damages must be primarily compensatory. This does not necessarily mean that damages claims do not have, and should not have, a deterrent effect. It means, however, that the quantification of damages must be guided by the objective of compensating the claimant. This rules out the award of multiple damages as a general rule in competition cases.

More controversial is the need for an opt-out collective action regime. Opinions remain sharply divided although the desirability of a more efficient way of ensuring collective redress where individual claims are not, in themselves, of sufficient magnitude to justify the cost of the proceedings is difficult to deny.

After extensive consultation, in January 2013 the U.K. Government announced its proposal to make significant changes to the procedures whereby competition cases are litigated in England and Wales. In *Private Actions in Competition Law: A consultation on options for reform—government response* ('Government Response'),[3] the Government sets out the main pillars of the new regime. Some of the changes, such as the introduction of an opt-out collective

[1] Professor of law, King's College, London.

[2] *Private actions in competition law: effective redress for consumers and business* Recommendations from the Office of Fair Trading, November 2007, (OFT916resp) and *Private actions in competition law: effective redress for consumers and business*, April 2007, (OFT916).

[3] Private Actions in Competition Law: A consultation on options for reform—government response (BIS/13/501, 29 January 2013).

action, appear significant. Others are incremental and an improvement of the current system rather than a "revolution." However, one striking feature of the proposals is their level of generality. Much of their impact will depend on how these general proposals are actually implemented.

II. THE CENTRAL ROLE OF THE COMPETITION APPEAL TRIBUNAL

The centerpiece of the reforms is the role that the Competition Appeal Tribunal ("CAT") will play as the major venue for competition cases in England and Wales.[4] Currently, the CAT has jurisdiction over appeals against certain decisions of the Office of Fair Trading ("OFT")[5] and other U.K. competition authorities. It only has a limited jurisdiction to hear claims for damages or other monetary relief where the competition law infringement has already been established by a decision of a U.K. competition authority or the European Commission (so-called follow-on claims).

Following the implementation of the Government's proposals, the CAT will have jurisdiction to hear follow-on and standalone cases; that is, also cases where the infringement has not been previously established in a decision by a competition authority. Furthermore, the CAT will have jurisdiction to grant injunctions as well as awarding damages and other sums of money. Finally, the High Court and the CAT will have the power to transfer competition cases to each other, so that cases can be decided in the better-suited forum. The transfer will work both ways, but it is likely that cases will be transferred from the High Court to the CAT rather than vice versa. Indeed, the likelihood of a transfer to the CAT will act as a major disincentive to start a case in the High Court unless the competition issue arises in the context of a wider case.

In order to improve access to justice, particularly for small and medium-sized enterprises ("SMEs"), the Government proposes to introduce a fast track procedure for simpler cases in the CAT. There is very little, or close to nothing, in the Government Response on the rules that will apply in the fast track procedure. Almost every aspect of it is left to the CAT's Rules. The procedure will "focus" on injunctive relief but, it appears, will not be limited to applications for injunctions. It will be for a CAT Chairman to decide whether a case is to be allocated to the fast track although there "will be" a presumption that cases brought by an SME "will be considered" for the fast track.

The most significant feature of the fast track procedure is that costs must be capped at an early stage and that a claimant is allowed to withdraw a case with no costs following the CAT's decision on the appropriate level of the cap. If, on an application for an injunction, the CAT imposes a cross-undertaking in damages, the amount of recoverable damages must also be capped. These provisions aim at giving claimants, and their funders, certainty as to any potential liability in costs if the case is ultimately unsuccessful.

[4] This should, at the very least, lead to reconsidering the name of the Tribunal, whose main role may well change from that of hearing appeals against decisions by piblic authorities to that of a court of first instance in civil cases.

[5] Under proposed legislation, the OFT will be replaced by a new Competition and Markets Authority ("CMA"). In this article, references to the OFT include the CMA and vice versa, unless the context clearly requires otherwise.

The significant expansion of the jurisdiction of the CAT is complemented by the harmonization of limitation periods. Currently, the limitation periods before the CAT are different from the limitation periods before the ordinary courts. In the CAT, there is a two-year limitation period that runs from the date of the cause of action accruing or the date of the relevant decision of a U.K. competition authority or the European Commission becoming final, whichever is later. Following the reforms, a six-year limitation period running from the cause of action accruing will apply before the CAT as it does currently before the ordinary courts. This is probably an inevitable consequence of the jurisdiction of the CAT to hear standalone claims but has the added benefit of avoiding the procedural complexities that the two-year limitation period gave rise to.[6]

III. OPT-OUT COLLECTIVE ACTIONS

Perhaps the most controversial reform announced by the Government is the possibility of bringing a collective action in the CAT on an opt-out basis on behalf or businesses, consumers, or a combination of the two. The CAT will have exclusive jurisdiction to hear such collective actions, thus "insulating," so to speak, the competition regime from the rest of the civil justice system. The CAT will be required to certify whether an action can proceed as a collective action and whether it can proceed on an opt-in or an opt-out basis. Claimants can be either persons who have standing to bring a claim under the ordinary rules or genuinely representative bodies such as trade associations or consumer associations. However, they cannot be law firms, third party funders, or special purpose vehicles.

The proposals set out a number of safeguards that are designed to avoid the emergence of a "litigation culture" and the bringing of unmeritorious claims.

These safeguards are the following:

- a strong process of judicial certification, including a preliminary merits test, an assessment of the adequacy of the representative, and a requirement that a collective action must be the best way of bringing the case;
- the "opt-out" aspect of a claim will only apply to U.K.-domiciled claimants, though non-U.K. claimants would be able to opt-in to a claim if desired;
- the prohibition of treble damages and exemplary damages in collective actions;
- maintaining the loser-pays rule and clarifying in the CAT Rules of Procedure that this should be the starting point for cost assessment by the CAT, while retaining the CAT's discretion to depart from such a rule in "exceptional circumstances," (for instance by cost capping);
- the prohibition of damages-based agreements ("DBAs") and contingency fees in collective actions in the CAT. This move is contrary to the very recent reforms in the Legal Aid, Sentencing and Punishment of Offenders ("LASPO") Act 2012, which, on the

[6] *BCL Old Co Ltd and others v BASF plc and others* [2012] UKSC 45; *Deutsche Bahn AG and others v Morgan Crucible Company plc and others* [2012] EWCA Civ 1055 (an appeal is pending before the Supreme Court).

contrary, allows DBAs in civil litigation in England and Wales, subject to certain safeguards;

- any unclaimed sums in an opt-out collective action will be allocated to the Access to Justice Foundation but the parties are free to settle cases on a different basis; for instance, on the basis that unclaimed sums would revert to the defendant or that they would be applied to a given purpose (so-called *cy-près*), subject to approval by the CAT; and
- any opt-out settlement is to be judicially approved, with the approval including a consideration of the reasonableness of the legal fees, and with underlying claimants given an opportunity to opt-out of the settlement.

It is interesting to note the Government's preoccupation to address concerns about opt-out class actions, to the extent of promising to prohibit treble damages, even though treble damages cannot be awarded under English law and legislation would be necessary to introduce them! However, critics of opt-out class actions will not be impressed by the proposed safeguards. They are very general and all will depend on how they are implemented.

This generality is, however, also a risk for the viability of opt-out collective actions. The most important example is judicial certification. Currently, all that is possible to say is that the CAT will have very wide discretion. But whether opt-out collective actions will be a realistic way of achieving redress for business and consumers or will remain a theoretical possibility on the statute book will depend on how judicial certification is designed and works in practice. How will the criteria for certification be drafted? A stringent merits test, for instance, may well rule out all standalone cases. This could be a positive development for some but, from a general perspective, it is more important that standalone actions are brought as this would lead to more infringements been detected and deterred and, in follow-on cases, redress may be achieved in other ways, for instance by a scheme certified by the competition authority (see below).

Judicial attitudes towards opt-out collective actions will play a fundamental role in promoting or stifling the use of the procedure, particularly if, as it seems likely, the certification stage will be characterized by a very wide discretion of the CAT.

IV. PROMOTING ADR

The Government Response is very clear in its encouragement of ADR and out-of-court settlements. Apart from general statements of policy, two proposals deserve special mention.

A. The Opt-Out Settlement Procedure

The first proposal in the field of ADR is the introduction of an opt-out settlement procedure in the CAT. As for collective actions, the opt-out element of the scheme will be available only to claimants domiciled in the United Kingdom while claimants domiciled abroad will be able to opt into the scheme.

Under such a procedure, expressly modeled on the Dutch mass tort settlement Act, a representative of a class of claimants and a defendant will be able to agree on a settlement on an opt-out basis and apply for approval of the settlement by the CAT. The CAT will first have to certify whether the case is suitable for an opt-out settlement. The certification criteria will be

similar to the certification of an opt-out collective action but without the merits test, clearly redundant in the case of a settlement.

Then, the CAT will decide whether to approve the settlement. The test will be whether the settlement is "just, fair and reasonable," which, in the words of the Government Response, means to assess whether the settlement gives "satisfactory recompense to those who have suffered loss, taking into account both the degree of loss alleged and the likelihood of a collective action claim succeeding (were it to be brought in absence of settlement)."

The procedure envisages representations by the claimant representative and the defendant as well as by third parties, an apparently optional hearing, and the power of the CAT to appoint an expert to assist and advise the Tribunal in the procedure. Following the approval of the settlement, the CAT will have the broadest discretion to issue directions as to how the settlement implementation.

B. The Power to Certify Redress Schemes

The second proposal in the field of ADR is to give the OFT the power to certify redress schemes proposed by undertakings. The certification scheme would be about the process followed to establish the scheme—not the amount to be awarded. It is envisaged that a scheme will have certain features; for instance, an independent appeal panel to handle disputes between claimants and the undertaking establishing the scheme.

In practice, this mechanism could work in the framework of an OFT decision whereby a reduction in the fine of around 5 - 10 percent is given if the undertaking found to have infringed competition law establishes a redress scheme that is certified. It is also possible that undertakings facing substantial claims in the United Kingdom may wish to apply for such certification regardless of any infringement decision in the United Kingdom.

V. PUBLIC AND PRIVATE ENFORCEMENT

Finally, in order to preserve the integrity of the regime and ensure consistency between public enforcement by the OFT and private actions in the CAT, the Government proposes to:

- require the CAT to notify the OFT when private actions cases are initiated;
- to allow OFT to act as an intervener, where appropriate, in private actions cases; and
- to ensure the CAT has the power to stay cases being investigated by a competition authority.

VI. CONCLUSION

In conclusion, the reforms announced by the U.K. Government in January 2013 are wide-ranging. They have the potential to have a significant impact by establishing a strong first instance tribunal for the resolution of competition law disputes by a variety of suitable procedures, including a fast track procedure for simpler claims, a standard procedure, an opt-in collective action, and an opt-out collective action. The certification of redress schemes by the OFT also opens potentially interesting opportunities to experiment with efficient and novel ways of achieving collective redress.

However, the proposals as they currently stand are still at a very general level. They can succeed or fail—and success or failure here is not the same thing for different constituencies—based on the details of the implementation and the judicial approach that will prevail in the CAT.

The OFT and its successor, the CMA, will also have a role to play in encouraging ways to achieve collective redress in the framework of public enforcement. In this area too, all will depend on the policy of the OFT and the CMA and whether the authorities will be able to devote sufficient resources to encouraging ADR as well as prosecuting and punishing anticompetitive behavior.