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Practice Group(s):

Antitrust,  
Competition & Trade  
Regulation

## UK government consults on Radical Proposals to Promote Antitrust Damages Actions

By Neil A. Baylis and Jennifer P. M. Marsh

### Introduction

The UK's Department for Business, Innovation and Skills ("BIS") is seeking views on how to boost antitrust damages actions. As stated in the consultation document<sup>1</sup>, "*Research by the Office of Fair Trading (OFT) shows that businesses view the present approach to private actions as one of the least effective aspects of the UK competition regime.*"

The consultation proposes a number of far-reaching and quite radical changes to the existing regime, as detailed below.

### Collective Actions

BIS is analysing obstacles to bringing "collective actions", which see consumers and businesses grouping together to seek redress from antitrust infringers. Such collective actions are considered to be a necessary element of effective private antitrust enforcement because the loss incurred as a result of anti-competitive conduct is often spread around a large number of individuals and therefore no one individual has suffered a sufficient amount of loss to merit litigation. The goal is to make it easier to identify claimants and enable them to group together.

One proposal is the introduction of an "opt-out" system whereby an action could be brought before the Competition Appeal Tribunal ("CAT") on the basis of an estimation of the total size of the claimant group. (This was seen as the fatal flaw in the *Replica Football Kits*<sup>2</sup> case where less than 0.1% of potential claimants signed up to the antitrust damages action despite widespread publicity.) Such an "opt-out" system would be closer to the model adopted in the US, where antitrust damages actions are much more prevalent. However, there would still be a number of distinctions between the two regimes, for example, "punitive" or "treble" damages can be awarded in US courts; such a change is not mooted in the UK.

Another proposal is that a rebuttable presumption be created that the claimant has suffered loss as a result of cartel activity. This would mean that the burden would be on the defendant to prove that the claimant did **not** suffer loss as a result of its conduct. BIS moots the possibility that the "presumed loss" be set at 20% of the price paid. Such a presumption would make damages actions significantly more difficult to defend.

### Increased Powers for the CAT

One of BIS' key aims is to reinstate the CAT as the preferred venue for antitrust litigation. While the CAT was set up as a specialist competition court, more and more damages litigants are choosing the High Court instead, where claims can be filed without a prior decision from an antitrust authority (i.e. on a standalone basis). BIS is proposing that the CAT should also be permitted to hear such "standalone" cases in addition to cases which "follow on" from a finding of

<sup>1</sup> <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/p/12-742-private-actions-in-competition-law-consultation.pdf>

<sup>2</sup> *The Consumers Association v JJB Sports PLC* CAT 1078/7/9/07.

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infringement by an antitrust authority. In addition, the CAT would have the power to grant injunctions requiring the offending party to cease its anti-competitive activity.

Another proposal relates to the introduction of a "fast-track" procedure for small- and medium-sized businesses ("SMEs") that will allow simpler cases to be dealt with much more quickly and cheaply. BIS' concern is that such cases may not be an enforcement priority for antitrust authorities and that SMEs may not themselves have the wherewithal to fund a "standalone" damages action. The fast track is aimed at encouraging these claimants to come forward.

### ADR and Schemes of Redress

In addition, BIS is also considering how to promote alternative dispute resolution ("ADR") so that the courts are only used as a last resort. It is also being considered whether the OFT should have the power to order a company found guilty of a competition law infringement to implement a redress or compensation scheme, or to certify such a scheme on a voluntary basis. However, it is not currently envisaged that the adoption of such schemes would lead to a significant reduction (beyond 5-10%) in any fine imposed by the OFT or other antitrust authorities.

### Impact on Public Enforcement

BIS is looking into how to promote greater private enforcement without undermining the activities of public agencies such as the OFT. This is a concern because public agencies often rely on whistleblowers to come forward and identify cartel activity in return for immunity from fines. If damages actions grow significantly in terms of their volume and the damages awarded as a result, cartellists may be less likely to come forward, as this may be seen as advertising for damages actions to be brought against them, from which there is no whistleblower immunity.

### Comment

This initiative by BIS comes as the European Commission plans to adopt new measures relating to damages actions later this year. In the roadmap for the legislative proposal<sup>3</sup> it is stated *"The main objective of this policy initiative is to ensure that victims of infringements of EU antitrust law have in all member states access to truly effective mechanisms for obtaining full compensation for the harm they suffered... The Commission wishes to guarantee, in every member state, certain minimum standards allowing victims effectively to claim, and obtain, full compensation from the infringers of the EU antitrust rules."* On 25 April 2012, Viviane Reding, the Justice Commissioner, confirmed at the European Parliament that the Commission's work programme for 2012 envisaged activity on collective redress.

In the UK, as in other European jurisdictions, antitrust damages actions have traditionally been seen as the poor relation of public enforcement; this consultation seems to be focussed on redressing the balance. It seems unlikely that the UK (or EU) is on the verge of a wholesale shift to a US model. However, if implemented, the proposals would surely lead to a significant upsurge in UK antitrust damages actions.

Interested parties will have the opportunity to submit comments until 24 July 2012. If you have any questions as a result of the information contained in this article, please contact Neil Baylis or Jennifer Marsh of K&L Gates LLP.

<sup>3</sup>

Available at [http://ec.europa.eu/governance/impact/planned\\_ia/docs/2009\\_comp\\_023\\_damages\\_breaches\\_antitrust\\_en.pdf](http://ec.europa.eu/governance/impact/planned_ia/docs/2009_comp_023_damages_breaches_antitrust_en.pdf).

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