In the latest of a series of commentary pieces by Mayer Brown on the recent directive on private anti-trust damages actions (the “Directive”), we look at some key questions that businesses may have regarding these actions and the impact of the Directive in England. In the coming weeks, our multi-jurisdictional team will comment on the position in Germany and France, compare the position in the EU with that in the US, and look at some cross-jurisdictional issues such as choice of forum.

1. What is the current climate for private anti-trust damages actions in England?

The possibility of bringing private anti-trust damages actions has been part of the English litigation landscape since the 1980s. The introduction of follow-on damages actions in 2003 made these actions easier, and an increasing number of antitrust damages claims are being made in this jurisdiction.

Actions can be brought against businesses that have infringed the EU and/or UK prohibitions on anti-competitive agreements and abuse of market dominance. The defendant business does not need to be domiciled in England, as long as its infringement was implemented in England. Actions may not be brought against individuals unless they satisfy the definition of a business.

Claims may be brought in two ways:

- on a “standalone” basis before the High Court, or
- as a follow-on action before either the High Court or the Competition Appeal Tribunal (CAT), a specialist competition court.

Follow-on actions are attractive to complainants because all they need to do to prove that the defendant has infringed competition law is to cite a finding of infringement in a decision of the European Commission or UK competition law authorities. The decision must be a final decision, either because all avenues of appeal have been exhausted or because the deadline for appeal has expired. The infringement finding must, however, relate to the subject-matter of the claim.

Anti-trust damages in England are generally awarded on a compensatory basis. The actual amount of damages often depends on a complex forensic and economic analysis, which will be addressed in a future commentary piece.

The vast majority of claims brought in England have been “business to business” actions, flowing from EU cartel decisions such as vitamins, graphite and inter-change fees, where the issues are complex and the sums involved are significant. The fact that very few claims have been brought by consumers is an indication of the prohibitive cost involved.

England is an attractive venue for claims of this nature because of its well developed procedural systems, its wealth of lawyers and experts well versed in the claims, its specialist competition court (the CAT), and, in particular, its extensive disclosure rules, which put significant pressure on defendants.

Funding remains a challenge for claimants, however: while third party funders are interested in these types of claims, the market is still relatively small, and the risks large.

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1 See: http://www.mayerbrown.com/files/Publication/0a238e8a-eef2-4ca6-bab6-1645ecdf3403/Presentation/PublicationAttachment/d6064027-fc48-41b2-b672-4d1dba30b5e0/antitrust_update_dec14.pdf
2 Directive 2014/104/EU on antitrust damages actions
2. How will the Directive affect the position in England?

Procedurally, the impact will be limited, with one exception. England has already implemented many of the requirements of the Directive. The Directive has, however, clarified some more detailed issues that remained open under English law. The most significant change will be to lengthen significantly the periods within which claims can be brought in the High Court. We comment on this in section 4.

The new UK Consumer Rights Bill (the “Bill”), currently in the final stages of the parliamentary process, is likely to be a more significant development (if and when it becomes law), in that it will:

- expand the jurisdiction of the CAT, to allow it to hear standalone as well as follow-on actions;
- promote alternative dispute resolution for competition claims; and
- enable collective actions to be brought on behalf of consumers an “opt-out” basis.

The third of these proposals is the most important, as it will provide a mechanism that makes large scale consumer actions viable. To date, a significant barrier to these actions has been that all potential claimants have actively had to sign up to them. If the Bill is enacted, all potential claimants will automatically be included in the claim unless they actively opt out.

More broadly, the Directive may make other jurisdictions more attractive as venues for competition claims because all Member States will be required to allow easier access to evidence. However, this is only one of a number of considerations to be taken into account when making a claim and the English system may retain a number of other advantages.

3. What are the funding options and costs implications for parties involved in anti-trust damages claims in England?

There is currently no realistic prospect of public funding for cartel damages claims, nor of pre-existing insurance covering such claims. The options are:

- self funding;
- success based fees – either no win/no fee or a proportion being success based;
- third party funding, with the funder taking a proportion of the damages; and
- damages based agreements, where the law firm takes a proportion of any damages recovered in lieu of charging fees.

In addition to the cost of bringing an anti-trust damages claim, the general English litigation rule will apply to High Court claims - that the loser will be liable for a significant proportion of the winner’s legal and expert costs. This rule does not apply in the CAT, but it may awards costs as it sees fit. In each case, this creates a significant risk for claimants, given the high costs of bringing and defending this type of claim. A claimant will often seek to mitigate or eliminate the risk by purchasing “after the event” insurance – but this comes at a price.

The potential advent of “opt-out” actions under the Bill will increase the scale of potential groups of claimants, and may therefore improve the availability of funding, given the greater potential rewards for successful claims.

4. Is there a time limit on making a claim in England?

A claim in the High Court must be brought within six years of termination of the infringement or, if the infringement was concealed (generally the case with cartels), within six years from the date on which the claimant discovered, or ought to have discovered, the infringement. Given the time taken for a competition authority to investigate and make a decision on infringement, this may mean that a follow-on action in the High Court would be time-barred unless the claimant has knowledge of the cartel and makes a claim within the six years, in which case the proceedings will be stayed pending the final decision.

This will change once the Directive has been enacted into English law. The Directive requires there to be a limitation period of at least five years, but in addition to that it requires the limitation period to be suspended or interrupted when a competition authority takes action for the purpose of investigating
the infringement. The suspension shall end at least one year after the infringement decision has become final. In practice, that could mean businesses face the risk of claims many years after the relevant facts, and for a significantly longer period than currently is the case, given the length of time that investigations (and consequent appeals) tend to take.

In the CAT, there is a time limit for follow-on actions of two years from the date on which the relevant competition authority’s infringement decision is issued, unless the finding of infringement in the decision (not just the penalty) is appealed, in which case the limitation period runs from the date on which the final appeal has been decided and no further appeals are possible. These rules apply individually to each defendant – in other words, a claim should be made within two years of the expiry of each defendant’s deadline for appeal, regardless of whether the other defendants have appealed. The Bill, as currently drafted, would increase the limitation period for follow-on actions in the CAT to six years, aligning it with the High Court.

5. What are the disclosure obligations on parties to a private damages claim in England?

The obligations are the same as in any piece of English litigation, in that they will be determined by the Court or the CAT from a menu of options. The most common is standard disclosure, whereby a party is required to disclose (a) the documents on which he relies; and (b) the documents which adversely affect his own case, adversely affect another party’s case, or support another party’s case.

This impacts both claimants and defendants, in that they will need to disclose documents going back many years in order to prove or defend a claim. This can be a significant burden for the parties involved. It is particularly unattractive for a defendant as cartel related documentation is likely to be damaging to its reputation, despite its historic nature. Although the Directive stipulates that national courts should not grant access to documents submitted to competition authorities in connection with a leniency application or settlement, the claimant may request access to the authority’s case file.

6. What is the standard of proof and what evidence is admissible in England?

The claimant must prove (i) that the defendant has infringed the EU and/or UK prohibition on anti-competitive agreements or abuse of market dominance, (ii) that it has suffered loss and (iii) that this loss has been suffered as a result of the infringement. The standard of proof is the civil standard – on the balance of probabilities – but because an allegation of breach of competition law is a serious allegation, the evidence presented must be “cogent and convincing”, which has led some commentators to say that there is a “heightened” civil standard of proof.

The High Court and the CAT will admit both documentary evidence and evidence in the form of witness statements, from witnesses of fact and experts. Special rules apply to expert evidence.

7. What evidence can be treated as privileged in England?

English law protects evidence from disclosure where it is subject to:

- Legal advice privilege – this covers confidential communications between an in-house or external lawyer qualified in any jurisdiction and his or her client, made for the purpose of giving or received legal advice. The “client” is narrowly defined to include only a small group of individuals within a business and not the entire business.

- Litigation privilege – this covers confidential communications between an in-house or external lawyer qualified in any jurisdiction and his or her client, or between one of these two parties and a third party, that come into existence after litigation is contemplated or has been started. The dominant purpose of the communications must be to obtain evidence, or information leading to evidence, for the purpose of the litigation. In the context of a private antitrust damages claim, litigation is likely to be treated as being in contemplation where the European Commission or a UK regulator has launched an investigation.
8. What steps should you take at this stage?

Businesses need to be aware of these changes.

Defendants to cartel investigations will already no doubt be fully up to speed on the risks of follow on claims, and should “opt-out” actions become a reality, those risks will undoubtedly increase.

Those who are potentially affected by cartel activity should be aware of the likely improvement of the climate across Europe for enforcing their rights against cartel members: anecdotally, we know of businesses that have taken a deliberate decision to target cartel members and have generated significant returns on the investment in such claims. Any type of business can potentially be affected: for example, manufacturers buying components or transportation services that have been the subject of cartels.

The relevant facts in these cases can often go back many years. Given the importance of historic records, particularly financial records, in these types of claims, businesses likely to be involved (on either the claimant or defendant side) should review their document retention policies to assess how well placed they would be to bring or defend a claim, particularly in light of the lengthening of limitation periods.

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