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VITAMINS HELP THE ENGLISH LEGAL SYSTEM TO WIN THE COMPETITION FOR PRIVATE DAMAGES ACTIONS

By Clare Canning, Alexander Weinberg and Gillian Sproul

Damages for breach of competition law have been in the headlines a good deal recently. The air cargo cartel that resulted last week in the European Commission imposing a fine of €799 m on 11 airlines has given rise potentially to multiple claims for damages both here in the UK and in the Netherlands. Notably, the Commission's press release announcing the fines specifically highlighted that individuals affected by the cartel could claim damages in their national courts. Private damages actions are becoming an established feature of the enforcement landscape. The Commission estimates that unrecovered damages for infringements of EU antitrust law alone amount to over €20 billion per year – that poses a challenge for claimants and defendants alike. Particularly, it also represents a contingent business liability to defendant businesses that is most unwelcome in these uncertain economic times.

For some time, the Commission and national competition regulators have been promoting private damages actions alongside regulatory enforcement as an effective means of deterring anti-competitive behaviour. The Commission's 2005 Green Paper on competition damages promised great things for claimants – and a draconian, US-style system for defendants, including treble damages. Although no final decision has yet been made on the shape of private damages litigation in the EU – and it is fair to say that subsequent communications from the Commission have seemed a little less enthusiastic - it is clear from a speech made by Commissioner Almunia on 15 October 2010 that an EU framework will be introduced, so that "*Europe's citizens and businesses .... have the effective right to obtain compensation for the losses incurred as a consequence of competition infringements*."

In that context, the English legal system has proved one of the more accessible forums in the EU for claiming damages, helped by the 2002 Enterprise Act. That introduced the specialist Competition Appeal Tribunal (CAT) and the concept of "follow-on" damages claims – claims following on from a finding of competition-law infringement by a regulator. Claimants here are now able to take the regulator's infringement decision to either the High Court or the CAT and to use that as a "springboard" to launch a claim for damages without re-litigating the issue of the defendant's breach. If the Claimant can establish that they have suffered quantifiable loss as a result of the breach, they will be able to secure a judgement for damages.

Many of the issues associated with bringing a claim here have been resolved in the long-running vitamins cartel damages cases before the High Court and the CAT. This line of cases has determined once and for all the nature of the damages that a court can

Clare Canning

Partner, Litigation & Dispute Resolution
ccanning@mayerbrown.com

Alexander Weinberg

Senior Associate,
Litigation & Dispute Resolution
aweinberg@mayerbrown.com

Gillian Sproul

Partner, Antitrust & Competition
gsproul@mayerbrown.com

award – compensatory only. It has also established the limitation period for bringing a claim before the CAT – the second anniversary of an infringement decision, or of a final appeal decision upholding an infringement decision. Finally, last week's decision of the Court of Appeal in *BCL Old Co v BASF* determined that the CAT does not have a general power to extend the limitation period. This creates legal and business certainty for both claimants and potential defendants operating in industries and sectors that are susceptible to investigation and enforcement activity by national and /or EU competition authorities. In the current economic climate, where certainty concerning liability is a heightened business priority, this is to be welcomed as is the relative speed and efficiency with which the CAT and Court of Appeal together disposed of the issues.

There are still outstanding issues to resolve. A key feature of the US system is the ability to bring antitrust class actions – they afford both claimants and defendants economies of scale. The recent decision of the Court of Appeal in one of the UK cases against the air cargo cartel makes it clear that representative actions – akin to US-style class actions – for breach of competition law will be entertained by the English courts. These present potential difficulties in our current system, however, as the Court's rejection of the representative aspects of the claim shows. The class in this case included both direct and indirect claimants. Their interests differed, breaking the rule that the interests of those represented must be aligned at every stage of the proceedings. So where now?

First , the Commission intends to deal with collective redress. It proposes to roll out a common approach and a general legal framework across the EU in Spring 2011. Then in the second half of 2011, Commissioner Almunia intends to present to the Commission a specific proposal on antitrust damages actions, setting common standards and minimum requirements for national systems of antitrust damages actions. Our experience in the vitamins litigation is reason to be optimistic that the Court of Appeal and CAT will again together provide a common sense and efficient mechanism for putting these standards into practice within the context of our existing English framework.