

UK & EU Competition Update

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This publication provides an overview of the key legal and policy developments in UK & EU competition law in November 2010. For further information, please contact your usual Burges Salmon contact or a member of our competition team.

Court of Appeal deals a blow to potential claimants in follow-on damages actions

Key points

- Follow-on damages claims in relation to an infringement of competition law must be brought within two years from the date on which any appeals against the infringement decision have been exhausted.
- If the claimant has missed this two year deadline, the Competition Appeal Tribunal does not have the power to exercise discretion to extend the deadline.

Background

Section 47A of the Competition Act 1998 gives a person who has suffered loss or damage by virtue of an infringement of EU or UK competition law (as established by a decision of the European Commission or the UK competition regulators) the right to bring a claim for

damages before the Competition Appeal Tribunal ("CAT").¹

In principle any individual who has suffered loss because of an infringement which has been the subject of an infringement decision can bring a claim for damages under section 47A. To date, such claims have been brought by a wide range of adversely affected parties including:

- competitors of companies found to have engaged in anti-competitive behaviour such as predatory pricing and margin squeezing;
- potential new entrants denied access to an essential facility by a dominant company; and
- purchasers of products the prices for which were inflated due to a cartel amongst manufacturers/suppliers of those products.

Rule 31 of the CAT Rules sets a two year deadline for bringing a damages claim, starting from the "relevant date". The relevant date is the later of: the date on which the cause of action accrued (i.e. when the infringement decision is published); the date on which a right to bring an appeal expires; or, the date of the final judgment in an appeal.

Facts of the case

In 2008, two companies, BCL and Grampian, brought follow-on damages actions under section 47A claiming for losses allegedly incurred as a result of the infringement of Article 101 TFEU established by the European Commission's vitamins cartel decision.

However, following a ruling of the Court of Appeal in May 2009, the CAT confirmed that these claims were lodged after the expiry of the two year deadline. Accordingly, the claimants both applied to the CAT for an extension to the deadline under Rule 19 of the CAT Rules which provides that the CAT '*may give such directions as it thinks fit to secure the just, expeditious and economical conduct of the proceedings.*' The directions that can be given include

¹ In the absence of an infringement decision, an affected individual or company must instead bring an action before the High Court on the basis of a breach of a statutory duty by the company who is allegedly acting in breach of EU and/or UK competition law. The limitation period for such an action is six years from the date on which the cause of action accrued - e.g. when the anti-competitive behaviour complained of occurred.

directions as to the 'extension of any time limits whether or not expired.'

In November 2009, the CAT rejected the applications by both claimants and refused to exercise its discretion to extend the time limit for them to bring their damages actions. However, crucially to the Court of Appeal ruling in this case, the CAT had openly stated that it believed that it had the power to extend the two year time limit if claimants were able to show that there was a 'good reason' to do so.

The claimants appealed the CAT's decision not to extend the two year deadline to the Court of Appeal.

Judgment

The key issue considered by the Court of Appeal was whether there is a power under the CAT Rules, in particular Rule 19, to extend the deadline for bringing proceedings under Section 47A.

The Court of Appeal ruled in categorical terms that Rule 19 does not confer a power to extend the time limit for bringing damages actions under Rule 31. Accordingly, the two year time limit is absolute and cannot be extended under any circumstances.

This ruling was based principally on a considered interpretation of the CAT Rules. The Court of Appeal concluded that it would expect that a power to extend time under Rule 31 would be created in express and specific terms. By way of comparison, the Court noted that the possibility of an extension in exceptional circumstances for the serving of a notice of appeal to the CAT is expressly set out in Rule 8(2). Therefore, if a power to extend time after the expiry of the period prescribed by Rule 31 was to be created, it would be expected that this would be found in Rule 31 itself (and it is not).

Implications of the judgment

This judgment may come as a blow to potential claimants in follow-on damages actions as (contrary to the CAT's own views) it removes any power for the CAT to exercise its discretion to allow actions for damages to be brought after the expiry of the two year time limit. Consequently, the judgment may well receive criticism from those advocating the growth of the private enforcement of competition law.

The Court of Appeal in this case recognised that '*preparing to make a claim under section 47A is by no means a light or easy task*' and cannot be done in a short space of time.

Accordingly, by way of practical guidance, the Court of Appeal expressed the view that, '*on the basis that there is no power to extend time for a claim under section 47A, if, for legitimate reasons, a party found itself needing to bring proceedings with*

very little time to prepare the documents required by Rule 32 [of the CAT Rules], it may be that the party could issue a claim form in short form, and then seek directions permitting it to be supplemented or amended.'

Although this proposed emergency solution may assist parties in future, overall the judgment serves as an important reminder to parties adversely affected by the anti-competitive behaviour of its competitors or suppliers to begin preparations for lodging a follow-on damages claim at the earliest possible opportunity.

Case reference

BCL Old Co Ltd v. BASF SE & others, [2010] EWCA Civ 1258, judgment of 12 November 2010.

Office of Fair Trading announces merger investigation into Ryanair's stake in Aer Lingus

Following the report in our July issue² on the EU General Court's prohibition of the Ryanair/Aer Lingus merger, the Office of Fair Trading ("OFT") announced on 29 October that it has begun its own investigation into Ryanair's shareholding of 29.82% in Aer Lingus.

The OFT's crucial jurisdictional analysis will involve consideration of whether the shareholding gives Ryanair '*material influence*' over Aer Lingus. If so, the OFT may then proceed to investigate the acquisition in detail and may refer the matter to the Competition Commission if it suspects that the shareholding has caused a substantial lessening of competition in air travel between Ireland and the UK.

The fact that this merger has already been reviewed at EU level makes the OFT's decision to investigate unusual.

In particular, it highlights that under EU merger control rules, the European Commission will only intervene if a '*decisive influence*' is acquired, whereas at UK level, a relevant merger situation is created when only a '*material influence*' is acquired. Accordingly, whereas 29.82% was not enough at EU level to be regarded as decisive it may well be sufficiently '*material*' to justify an investigation in the UK.

Ryanair is openly furious about the OFT's decision to investigate and stated in a press release that: '*... this out of time query by the OFT, into a failed 2006 merger offer, between two non-UK companies, sets an alarming precedent for all current and future mergers involving non-UK companies.*'

The OFT expects to reach a decision by 24 December.

² (http://www.burges-salmon.com/Practices/commercial/competition/Publications/UK_EU_Competition_Update.pdf).

Secretary of State issues European intervention notice in News Corp's acquisition of remaining BSkyB shares

On 4 November, the Department for Business, Innovation and Skills ("BIS") announced that the Secretary of State has issued a European intervention notice in relation to News Corporation's proposed acquisition of the remaining 60.9% of BSkyB shares it does not already own.

The transaction has been notified to the European Commission for review under the EU Merger Regulation. However, the Secretary of State is considering whether to take appropriate measures to protect the UK's legitimate interests in ensuring sufficient plurality of persons with control of media enterprises in the UK.

The possibility of the Secretary of State's intervention in this case has been the subject of much debate in the media and, reportedly, News Corp's competitors (including the BBC) have been lobbying for the Secretary of State to take action.

It is argued by some opponents of the transaction that News Corp's acquisition of the whole of BSkyB would create an organisation of unrivalled power in the UK media market due to the combination of the largest satellite broadcaster and a company that owns four national newspapers, including the Times and the Sun.

OFT publishes results of its investigation into barriers to entry in retail banking

On 4 November, the OFT published its review of barriers to entry, exit and expansion in retail banking. The OFT has found that, whilst most firms are able to gain authorisation and establish operations to offer retail banking products, new entrants face significant challenges in attracting customers and expanding their market shares in retail banking.

This is mainly due to the reluctance of customers to switch providers, loyalty to established brands and the preference for banks with local branches, all of which result in customer inertia.

The OFT expects that its review will be relevant to the ongoing work of the Independent Commission on Banking, which is considering structural and non-structural measures to promote stability and competition in banking. The Commission is due to make recommendations by September 2011.

Commission fines air cargo carriers for participation in price-fixing cartel

On 9 November 2010, the European Commission announced that it has fined 11 air cargo carriers a total of €799m for participation in a worldwide price-fixing cartel. The carriers colluded to fix a flat rate fuel surcharge per kilo for all shipments and a security surcharge over a six year period. The objective was to ensure that changes to surcharges did not become subject to competition through the granting of customer discounts.

The largest individual fines were imposed on Air France (€182m) and British Airways (€104m).

Lufthansa received full immunity from fines under the Commission's leniency policy after it brought the cartel to the attention of the Commission and provided valuable information while four other carriers received 10% reductions for their limited participation in the cartel.

This is the Commission's sixth cartel decision so far this year and means that the Commission has imposed over €2,468m in fines so far during 2010. EU Competition Commissioner Joaquin Almunia stated: *"With today's decision the Commission is sending a clear message that it will not tolerate cartel behaviour"*.

OFT publishes results of its investigation into barriers to entry in retail banking

On 18 November, the OFT announced that it has decided on the grounds of administrative priority to close an investigation into suspected price co-ordination involving a number of retailers and suppliers in the UK grocery sector.

The OFT stated that it had been investigating whether suspected indirect retail price co-ordination involving suppliers³ and retailers⁴ had occurred between 2005 and 2008 (so-called A-B-C information exchange).

A-B-C information exchanges (also known as "hub and spoke" information exchanges) can arise where retailer A passes information to supplier B in order for supplier B subsequently to pass this information on to retailer C to help set prices. The OFT's infringement decisions in the Hasbro Toys⁵ and Replica Football Kits⁶ cases established the illegality of such indirect information exchanges.

³ Reportedly including Mars, Unilever and Reckitt Benckiser.

⁴ Reportedly the so-called Big Four supermarkets – i.e. Tesco, Sainsbury, Asda and Morrisons.

⁵ Case CP/0480-01, Agreements between Hasbro, Argos and Littlewoods fixing the price of Hasbro toys and games (21 November 2003).

⁶ Case CP/0871/01, Price-fixing of Replica Football kits (1 April 2003).

The OFT emphasised that its decision not to pursue this investigation does not mean that it would not prioritise suspect indirect A-B-C information exchange cases in future.

Furthermore, this decision to close the investigation may be regarded as unexpected given that the OFT had received leniency applications, which implies that at least some of the

companies involved have admitted some infringement. The OFT emphasised, however, that the receipt of a leniency application does not mean that the OFT will automatically find that an infringement of competition has occurred.

For further information please contact:



Laura Claydon
Partner

Tel: +44(0)117 939 2273
laura.claydon@burges-salmon.com



Marc Shrimpling
Solicitor

Tel: +44(0)117 939 2221
marc.shrimpling@burges-salmon.com