Antitrust Litigation 2022

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Introduction
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Global Overview – Antitrust Litigation 2022

Antitrust litigation in the form of follow-on damages claims against cartels is now the norm in most European countries. The volume of claims has increased significantly in recent years since the implementation of the EU Damages Directive. France, Germany, the Netherlands and Spain in particular have seen a sharp increase in the volume (and value) of antitrust litigation, partly fuelled by a huge volume of individual claims against the trucks cartel. Litigation has been a standard part of the antitrust enforcement process for even longer in the USA, Australia, Canada and New Zealand. While antitrust litigation continues to grow and embrace new procedures and approaches in those jurisdictions (not least, class actions), the focus in terms of developing jurisdictions is now moving to Asia. As China, Japan and Korea are seeing a growth in cartel investigations, so antitrust damages claims in those jurisdictions will start to become more common.

To date, England and Wales has been the leading jurisdiction within Europe for EU-wide damages claims, in light of its highly respected commercial courts, specialist competition judges and a litigation procedure most like the USA’s, including extensive disclosure requirements on both claimants and defendants. The first grant by the UK Competition Appeal Tribunal (CAT) of a collective proceedings order (CPO), in the Merricks v Mastercard collective action, has seen a huge boost to the development of collective (or class) actions for competition claims in the UK.

Class actions

Class actions are increasing in popularity in a variety of jurisdictions in Europe, particularly in England and Wales, and most recently, with the introduction of collective action legislation, in the Netherlands. The significance of antitrust litigation, both as a type of general commercial litigation and as one of the pillars of competition enforcement, is demonstrated by the fact that procedures are being introduced in some jurisdictions exclusively for antitrust litigation, whether it is the introduction of disclosure of documents across Europe for antitrust damages claims or the introduction of opt-out class actions for antitrust damages claims in England and Wales. There will be numerous examples of as yet unidentified procedural issues which will work their way through the courts for some years to come on issues relating to identifying the relevant class or disclosure of documents, particularly in those jurisdictions in which wide-ranging disclosure is an entirely new approach in any form of litigation.

The first grant by the CAT of a CPO in the Merricks v Mastercard collective action, in August 2021, has been a huge boost to the development of collective (or class) actions in the UK. After the CAT refused the application for a CPO on a variety of grounds, the Court of Appeal allowed the appeal by the proposed representative claimant and ordered that the CPO application be remitted to the CAT for re-hearing. In December 2020, the Supreme Court handed down its judgment dismissing Mastercard’s appeal against that judgment. The claim has now been certified by the CAT along with (as of the date of writing) seven of the 18 collective action claims currently pending before the court. These include opt-in as well as opt-out claims, follow-on claims relying on pre-Brexit EC decisions (which remain binding post-Brexit), as well as standalone abuse of dominance claims, including claims against the large tech platforms Meta, Apple and Google.

Collective actions including the “trucks” litigation, which were previously stayed pending the
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outcome of the Merricks appeal, have been cer-
tified and are continuing in the CAT.

The Brexit effect
The UK has now left the European Union and
completed its post-exit transition period. This
means that statutory changes passed by the UK
government have become effective, bringing an
end to the direct jurisdiction of EU institutions
and treaties in the UK. UK courts are now able to
diverge from EU competition law, and European
Commission decisions issued after the UK’s
Brexit transition period will no longer be binding
on the UK courts. However, there are a number
of grandfathering provisions which will preserve
elements of the pre-Brexit framework, and UK
courts will be free to have regard to EU juris-
prudence in applying competition law in the UK.
Importantly, decisions of the EC issued prior to
the end of the Brexit transition will still be binding
in the UK courts. In addition, if alleged breaches
of EU competition law took place before the end
of the transition period, the UK courts will be
required to apply EU law as at the end of transi-
tion. The UK’s exit from the European Union has
also given the UK competition authorities free-
dom to conduct investigations and market stud-
ies in areas of interest to the EU autonomously
from the European Commission. The Competi-
tion and Markets Authority (CMA) has taken a
renewed interest in digital markets and online
platforms (eg, its market study into Apple and
Google’s mobile ecosystems) and further deci-
sions can be expected in this area, with litigation
to follow, in the coming years. Where the CMA is
not investigating, the European Commission can
no longer intervene to stay standalone claims
brought in the UK courts, making the jurisdiction
increasingly attractive as a forum for antitrust
claims with a global reach.

Claims based on an abuse of a dominant
position
In Europe and beyond, as competition regulators
switch their focus to the big technology com-
panies and increase the number of investiga-
tions based on abuse of a dominant position,
the number of antitrust litigation claims based
on such allegations has increased. Such claims
are not limited to follow-on damages claims, but
encompass standalone damages claims and/
or injunction applications to prevent an alleged
abuse of a dominant position, often as a mat-
ter of urgency. Such injunction applications are
often settled privately, without a court hearing,
and never see the light of day. However, most of
these claims are unsuccessful and the cost con-
sequences in those jurisdictions that order costs
to be paid by the losing party (including in the
UK) can be significant. As a result, such claims
– particularly on a standalone basis – should be
considered very carefully.

Trends in antitrust investigations
In recent years, authorities around the globe
have been focused on investigating a number
of prominent technology companies, including
the European Commission’s investigations into
Apple’s App Store Rules and Apple Pay, the US
DOJ and 11 state Attorneys General filing a civil
antitrust lawsuit relating to alleged exclusionary
practices in the search and search advertising
markets, and the UK’s CMA opening investi-
gations into both Google and Apple over sus-
ppected anti-competitive behaviour. There has
also been a particular focus in Europe and the
UK in recent years on investigations into phar-
maceutical companies, principally focusing on
allegations of excessive pricing and/or anti-com-
petitive agreements. These investigations may
lead to follow-on damages claims.
Principled assessment
The majority of cartel damages claims are settled prior to the trial hearing. In the more significant claims in terms of value of sales and quantum claimed, it may take many years to arrive at the point where a principled settlement can be achieved, which is a genuine estimate of the claimant’s loss, including an assessment of the extent to which such loss has been passed on to third parties. Such a principled assessment will require the parties to go through the steps of disclosure of documents, factual witness statements and expert economic reports to quantify the loss suffered (potentially, in addition to interlocutory applications on issues such as jurisdiction and/or limitation). In lower-value claims, parties may consider it worth trying to achieve a settlement in advance of doing the bulk of such work, particularly where the legal costs of years of trial preparation might exceed the value of the claim itself.

Specialist firms
The presence of specialist (often US) claimant firms in an increasing number of European jurisdictions and the growth in litigation funding (generally, but specifically in the context of antitrust damages claims) are having a significant impact on the strategy for managing such claims. US claimant firms have zealously pursued the introduction of class actions, positioning themselves as being on the side of the angels standing alongside the competition authorities and against the combined forces of the cartelists.

Antitrust litigation in other jurisdictions
Other jurisdictions seeing an increasing volume of antitrust litigation include Israel and some jurisdictions in Latin America which have active national competition authorities, including Argentina, Brazil and Mexico. Israel also has a class action regime and the claimant lawyers are beginning to focus on antitrust claims.

Antitrust litigation post-pandemic
Many of the legal issues arising from the pandemic to date concern consumer law issues (rather than competition law issues), such as price gouging. Many businesses have considered co-ordinating their activities with others in response to the pandemic. This may have entailed the development of common standards, exchanging sensitive information, and coordination to address supply chain issues. However, where businesses are rivals or co-operation could otherwise result in the disclosure or receipt of competitors’ competitively sensitive information, such collaboration could amount to competition law infringements. Many competition authorities around the world including the CMA in the UK and the European Commission have taken a reinvigorated interest in potential competition law breaches affecting consumer prices as the world adjusts to post-pandemic economic conditions. The CMA has stated that it will consider any evidence that companies have broken competition law, for example by charging excessive prices, and take appropriate action. Follow-on damages claims may follow from any such enforcement action.

The last financial crisis resulted in the largest global cartels in terms of volume and value at the time: the Libor cartel and the foreign exchange cartel. It remains to be seen whether the next financial crisis will result in an increase in cartels and cartel damages litigation. However, the usual motivation for cartels in a financial crisis – falling profit margins – combined with working from home and the risk of lighter-touch compliance in the new post-pandemic circumstances is a potentially toxic combination which may well lead to an increase in cartel damages claims in years to come.
Clifford Chance has a global antitrust litigation group that has handled many of the most significant antitrust damages claims over the last 20 years, including leading judgments on issues relating to disclosure, limitation and quantum, as well as group actions.

Contributing Editor

Elizabeth Morony is a partner at Clifford Chance in London and is head of the global antitrust litigation group. She represents companies in UK and EC cartel investigations and antitrust litigation in the UK and European courts. She has acted in many of the leading antitrust litigation cases in the High Court and the Competition Appeal Tribunal including the ongoing litigation against Google relating to the Play Store. She acted for the immunity applicant in the European Commission’s cartel investigation into euro interest rate derivatives (EURIBOR) and related litigation in the High Court, and litigation relating to the electrical and mechanical carbon and graphite products cartel in the Competition Appeal Tribunal and the Supreme Court. Elizabeth is the past co-chair of the International Bar Association (IBA) Antitrust Committee.

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