

Quick guide to private litigation in competition cases

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1 INTRODUCTION

- 1.1 This quick guide is designed to provide a basic outline of the rights of individuals and businesses to bring private actions for relief in the UK courts for breaches of competition law.
- 1.2 Competition law aims to promote, among other things, innovation, consumer choice and lower prices for consumers and other customers. Consumers, other customers and competitors who suffer loss from breaches of competition law may seek redress in respect of such loss by bringing claims for relief¹ in the courts against the business(es) who committed the breach or by pursuing other means of dispute resolution such as settlement or arbitration.²
- 1.3 This quick guide is intended to provide high-level general information only and anyone considering competition law litigation should first seek legal advice. Such advice would cover, among other things, the cost-benefit analysis of bringing an action, how any such action could be funded and the different stages of the process and possible outcomes.

¹ Relief means the award by a court of, for example, damages or an injunction to address the harm a claimant has suffered.

² See section 5 below for further discussion of alternative types of dispute resolution.

2 WHEN A CLAIM CAN BE BROUGHT

Breach of competition law

2.1 An individual or business may bring a claim before a court if it has suffered loss as a result of a relevant infringement of competition law. A claimant will have to show that the defendant breached one of the main competition law prohibitions summarised below.

Article 101 and Chapter I Prohibition

2.2 Article 101 of the Treaty on the Functioning of the European Union ('TFEU') and Chapter I of the Competition Act 1998 ('CA98') prohibit any agreements or concerted practices between businesses which prevent, restrict or distort competition, unless an exemption applies.³ The types of agreement most likely to be caught by these prohibitions include those which:

- fix the prices to be charged for goods or services
- limit production
- carve up or share markets.

Illustrative example

Competitors A and B sell sprockets in the UK. After a price war, A and B consider that the market price is much too low and agree that they will both increase their prices to a fixed level and that they will not sell to each other's customers. A and B are likely to have committed a breach of the Chapter I prohibition and/or Article 101 TFEU that led to higher prices for customers. Customers and consumers of sprockets who have suffered harm as a result of A and B's agreement may be able to bring a claim.

³ See OFT Guidance Agreements and concerted practices (OFT401).

Article 102 and Chapter II Prohibition

2.3 Article 102 TFEU and Chapter II of the CA98 prohibit the abuse of a dominant position.⁴ A company will hold a dominant position in a market if it is able to behave independently of the normal constraints imposed by competitors, suppliers and customers. It is the abuse, rather than the holding, of a dominant position that is unlawful. In general, a company will be found to be abusing its dominant position if it behaves in a way that exploits customers or has an exclusionary effect on competitors. The types of conduct most likely to be caught by these prohibitions include:

- charging excessively high prices
- predatory low pricing aimed at driving a rival competitor out of business
- refusing to supply an existing long standing customer without good reason.

Illustrative example

Domco has a very high share of the market for supplying widgets. Newco enters the widget market. In an effort to drive this new competitor out of the market, Domco reduces its price to below its average variable cost such that it makes a loss on each widget it sells. This is likely to be a breach of Chapter II and/or Article 102. A competitor such as Newco who has suffered harm as a result of Domco's conduct may be able to bring a claim.

2.4 Articles 101 and 102 TFEU apply to agreements or conduct which have the potential to affect trade between EU countries while the Chapter I and Chapter II provisions of the CA98 apply where trade in the UK may

⁴ See OFT Guidance Abuse of a dominant position (OFT402).

be affected. It is usually unnecessary for the claimant to specify which of EU or UK law applies to the agreement or conduct, however.⁵

Proof of breach

2.5 If a relevant competition authority such as the OFT or European Commission has made a decision that competition law has been infringed, a claimant can rely on the decision as proof of the breach. If there is no such decision, the claimant will have to obtain and submit evidence to prove the breach itself. This is dealt with in more detail in section 3 below.

Proof of causation and loss

2.6 As well as showing that the defendant breached competition law, the claimant will also have to prove that the breach actually caused them loss. In practice, a claimant will need to prove that their loss would not have occurred 'but for' the competition breach and that the type of loss suffered was reasonably foreseeable. If the claim is for damages or monetary relief (see section 3 below), the claimant will also have to prove the amount of loss suffered.

⁵ The European and UK laws are similar in substance. Under section 60 CA98, the courts are required to interpret UK competition law consistently with the equivalent EU provisions.

3 THE COURTS

3.1 A claimant may bring a claim in the following UK courts, which have jurisdiction to hear competition law cases:

- the Chancery Division of the High Court of England and Wales⁶
- the Court of Session and Sheriff Court in Scotland
- the High Court of Northern Ireland, and
- the Competition Appeal Tribunal.

3.2 For the remainder of this quick guide the term 'ordinary courts' is used to refer to the Chancery Division of the High Court of England and Wales, the Court of Session and Sheriff Court in Scotland and the High Court of Northern Ireland.

3.3 Deciding which court is right will depend in part on the type of action being brought and the type of relief sought. For example, if an injunction is sought, a claimant must go to the ordinary courts. However, this decision can be complicated and it is important to seek legal advice before bringing an action.

⁶ In some circumstances, the Commercial Court may hear cases: see Rule 58.1(2) of the Civil Procedure Rules.

4 TYPES OF ACTION

- 4.1 An individual or business wishing to bring a claim can commence either a **standalone** action or a **follow-on** action.

Standalone actions

- 4.2 A standalone action is a claim brought where the alleged breach of competition law is not already the subject of an infringement decision by the European Commission or OFT⁷ (or, where an OFT decision has been appealed to the Competition Appeal Tribunal or a European Commission decision appealed to the European courts, respectively, a decision of the Competition Appeal Tribunal or of the European courts). In this type of action, the claimant will have to prove to the court that the breach of competition law occurred and that he suffered loss as a result of that breach.
- 4.3 All standalone actions must be brought before the ordinary courts. The Competition Appeal Tribunal has no jurisdiction to hear standalone actions.

Follow-on actions

- 4.4 Where a breach of competition law has already been established in an infringement decision taken by the OFT or the European Commission, a claimant may bring a follow-on action. This means that the claimant can rely on the OFT's or European Commission's findings of infringement

⁷ UK regulators have concurrent powers with the OFT under the CA98. The UK regulators are: the Office of Communications ('Ofcom'), the Gas and Electricity Markets Authority ('Ofgem'), the Northern Ireland Authority for Utility Regulation ('NIAUR'), the Office of Rail Regulation ('ORR'), the Water Services Regulation Authority ('Ofwat') and the Civil Aviation Authority ('CAA'). For more details, see OFT Guidance Concurrent application to regulated industries (OFT 405). Reference to the OFT in this quick guide should be taken to include references to the UK regulators unless otherwise stated.

and fact⁸ and in most cases need only prove that he suffered loss as a result of that infringement.

Follow-on actions in the ordinary courts

4.5 Where a claim relates to precisely the same facts and parties as an infringement decision taken by the OFT or the European Commission, the decisions are effectively binding on the ordinary courts. A claimant can generally rely on them in the ordinary courts to prove the breach of competition law and findings of fact⁹ and will need to prove only that the breach caused him to suffer loss. Where a European Commission or OFT decision does not relate to precisely the same facts, it will not have the same binding effect on the court. The decision may be relevant however – for example if it concerns the same market but different parties – and it may still be admitted as evidence and is likely to have a persuasive influence on the court.

Follow-on actions in the Competition Appeal Tribunal

4.6 The Competition Appeal Tribunal is bound by infringement decisions of the European Commission and OFT (or, where an OFT decision has been appealed to the Competition Appeal Tribunal or a European Commission decision appealed to the European courts, respectively, a decision of the Competition Appeal Tribunal or of the European courts). This means that a claimant relying on such a decision need only prove that the infringement caused him to suffer loss.

Representative Actions

4.7 Follow-on actions for damages may also be brought before the Competition Appeal Tribunal by a body representing a number of

⁸ It is unclear whether all findings of fact, or only those that constitute the elements of the infringement, can be relied on. See Case no. 1106/5/7/08 Enron Coal Services Limited (in liquidation) v English Welsh & Scottish Railway Limited on 21 December 2009 ([2009] CAT 36).

⁹ If the decision is being appealed, the claim can only be brought with permission of the court.

consumers.¹⁰ Such representative actions are intended to facilitate claims against a defendant where a large number of consumers have suffered similar losses, but where each loss is too small for an individual claim to be worthwhile. This might happen where a large number of consumers have each been overcharged a relatively small sum as the result of a cartel.

- 4.8 A representative action may be brought only by a 'specified body' appointed by the Secretary of State, such as Which?, and only on behalf of named consumers. This means that a consumer will be included in the action only if he expressly agrees to join, or 'opts in'.
- 4.9 Currently, there is no statutory basis for representative actions involving businesses or for standalone actions involving consumers.¹¹

¹⁰ For example, Which? brought a representative action against JJB Sports plc to compensate consumers who were overcharged when they bought replica football shirts. (Case no. 1078/7/9/07, *The Consumer Association (Which?) v. JJB Sports Plc*).

¹¹ General rules of court may allow such actions, however. The OFT has recommended that the government widen the statutory basis for representative actions to include these categories. See OFT 916resp, 'Private actions in competition law: effective redress for consumers and business Recommendations from the Office of Fair Trading's recommendations to government'.

5 TIME FOR BRINGING A CLAIM

5.1 Whether in the ordinary courts or Competition Appeal Tribunal, a claim must be brought within a certain time from when the competition breach occurred (known as the 'limitation period').

5.2 For the purposes of this quick guide it is sufficient to note the following basic points:

- Claims for competition breaches in the ordinary courts must be brought within six years (five years in Scotland) of the date the claimant suffered loss, although there are some exceptions.
- Follow-on damages actions in the Competition Appeal Tribunal must generally be brought within two years from the latest of: the date on which the period for appealing against the European Commission or OFT infringement decision¹² relied on expires; when any such appeal has been determined; or, if the claimant does not suffer loss until after this date, two years from when the loss is sustained.

5.3 The rules on limitation periods can be complex and there are a number of exceptions and nuances to these basic rules. It is therefore particularly important to seek legal advice on this developing area of the law, although as noted above such advice should be sought in connection with all aspects of bringing a claim of the type summarised in this quick guide.

¹² Where an appeal is against the level of a penalty only and not against the finding of an infringement, the time for bringing a claim will start to run when the time for appealing the **infringement** decision expires rather than when the penalty appeal is determined.

6 RELIEF AVAILABLE

6.1 There are three main types of relief available to a successful claimant:

- damages
- an injunction,¹³ and
- a declaration.¹⁴

6.2 A claimant may be awarded more than one type of relief in the same case. As explained at paragraph 3.3 above, the type of relief available in a particular case will depend on the court in which the action is brought.

Damages

6.3 Damages are intended to provide financial compensation for the loss the claimant suffered. A claimant will need to prove the amount of the loss they suffered. For example, in order to calculate their loss, someone harmed by a cartel would have to compare the price they were in fact charged with the price they would have been charged if the cartel had not existed. It may also be possible to claim for lost sales if the claimant can show he has lost sales as a result of the higher price he was charged. A claimant can also seek interest on any grant of damages from the date the infringement occurred to the date of the court's judgment.

6.4 This principle can be difficult to apply in practice. In particular, it may be difficult to assess the amount of compensation due where part of the immediate loss suffered has been passed on to a subsequent purchaser. For example, a retailer who has been overcharged by his supplier (as a

¹³ In Scotland, an injunction is called an interdict. References to an injunction in this quick guide should be taken to include references to an interdict.

¹⁴ In Scotland, a declaration is called a declarator. References to a declaration in this quick guide should be taken to include references to a declarator.

result of a cartel) may pass on part, or all, of that overcharge to his customers, reducing the amount of the loss he suffers.

Injunctions

- 6.5 An injunction (not available in the Competition Appeal Tribunal) is an order requiring the defendant to take steps to bring certain actions or omissions to an end (or requiring the defendant to do something positive, for example, to supply goods or services). In some competition law cases an injunction may be a more appropriate remedy than damages, for example where a claim relates to the terms of an ongoing supply agreement or an unlawful refusal to supply goods or services. The granting of an injunction is within the court's discretion, so a successful claimant has no automatic right to an injunction.
- 6.6 The ordinary courts may grant an injunction in cases where the claimant cannot be compensated adequately by damages alone. In this context, it is important to note that a claimant can also seek an interim injunction for a breach of competition law. This requires a defendant to take certain action pending the full hearing of the case, following which a final injunction may be granted. Interim injunctions are typically granted where there is a risk that the claimant will suffer irreparable harm by the time the trial comes to court (for example, where there is a risk that the claimant will go out of business as a result of the alleged anticompetitive behaviour).
- 6.7 Before granting an interim injunction the court will weigh up the relative merits of the parties' cases and consider the balance of convenience between granting and refusing the injunction. The court will not grant an interim injunction unless it is satisfied that:
- there is a serious case to be tried, and
 - if the injunction is later found to have been wrongly granted, the defendant can be adequately compensated by damages for the inconvenience of complying with the injunction.

Declarations

- 6.8 The ordinary courts have the power to make a declaration that a certain agreement or conduct is anticompetitive. For example, the court might declare that an agreement (or part of an agreement) is in breach of competition law and therefore unenforceable. A declaration may be available in conjunction with other remedies.

Costs

- 6.9 Both the ordinary courts and Competition Appeal Tribunal have wide discretion to award costs incurred in pursuing a case. These costs may include, for example, lawyers' costs and the cost of expert witnesses used in preparing evidence for the case. In most cases in the ordinary courts, the losing party will be ordered to pay the costs incurred by the successful party in the litigation. However, the court may take a number of factors into account when deciding what (if any) costs order to make, including the parties' conduct in the case and any attempts to reach a settlement.

Types of dispute resolution

- 6.10 There are many options for resolving disputes without going to court, including for example mediation, adjudication and arbitration. Court rules require a potential claimant to inform a potential defendant before it commences an action. Also, the courts encourage parties to make genuine attempts to settle cases before litigation and before trial. Given this, legal advice should be sought at an early stage of considering a private action in order to ensure that legal requirements are met and in order to assess whether a private action or an alternative method of dispute resolution should be pursued.
- 6.11 As regards settlement, it is possible, and relatively common, for the parties to a dispute to agree to settle their case before an action is filed or goes to trial. For example, a claimant may agree not to pursue a case in court in exchange for the defendant agreeing to pay a sum of money. Parties may also reach a settlement through other forms of dispute

resolution such as those mentioned in the previous paragraph. Private settlements can often result in the best outcome for both parties and reduce both parties' costs.