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Damages Litigation In UK Competition Cases

Law360, New York (August 10, 2009) -- Although the ongoing policy discussions aimed at facilitating private competition law actions for damages across Europe have yet to bear significant fruit, the UK has come to be regarded as a relatively claimant-friendly jurisdiction.

Recent case law, however, underlines the fact that there remain a number of cautionary considerations to take into account when assessing the likelihood of a successful damages action in the UK: the regime is still far from fully developed.

The UK as a Forum for Damages Actions

Since around 2004, the European Commission and a number of member states' competition authorities (including the UK's OFT) have been actively seeking to facilitate the bringing of private competition law actions for damages, whether on a standalone or on a follow-on basis. These discussions are ongoing at both European and national level.

The UK has come to be regarded as a relatively claimant-friendly European jurisdiction for private damages actions, notably following the 2003 judgment in Provimi v Aventis [2003] EWHC 961 (Comm), which established that where there is an English element to a cartel, a claimant can bring a private action in London in respect of all its European losses, instead of having to pursue separate claims in multiple jurisdictions.

Damages actions may be brought in the Competition Appeal Tribunal (CAT) under section 47A of the Competition Act 1998, or in the High Court.

There is increasing pressure at governmental and practitioner level for the activation of section 16 of the Enterprise Act 2002, which would allow the High Court to transfer the competition elements of cases before it to the CAT, and would mean that the CAT would be likely to hear an increasing proportion of claims.

There has in recent years been a perceptible increase in the number of damages actions launched in the UK courts.

It is also understood that there has been a considerable increase in the number of competition disputes settled before proceedings are even launched, the threat of damages actions having apparently being employed as a negotiating tool.

The recent establishment of London offices by representatives of the U.S. plaintiffs' bar — accompanied by extensive lobbying activity — has further raised awareness within the legal and business communities of the availability of damages actions.

Cautionary Considerations

At the same time, despite the clear general desire in policy terms for an increased level of damages actions in the UK, there are a number of cautionary considerations — primarily attributable to the still-developing nature of the regime — which must be taken into account when assessing the likelihood of a damages action being launched in any individual instance, and the potential progress of an action once commenced.

First, there have been no damages awards to date in the UK. Although damages for breach of competition law have theoretically been available for many years, an award of damages in a private action has yet to be made.

That said, a number of claims are understood to have settled. The CAT also made an award of interim damages (£2 million) in Healthcare at Home v. Genzyme [2006] CAT 29, which settled in early 2007.

Secondly, it has been established that only compensatory damages will normally be available.

In Devenish v Sanofi-Aventis [2008] EWCA Civ 1086, the Court of Appeal confirmed the High Court's first instance ruling that, save in exceptional circumstances, damages for breach of competition law should be assessed on a compensatory, rather than punitive, basis. This precludes, for the time being at least, the possibility of U.S.-style treble damages being awarded in the UK.

Thirdly, there is currently no real equivalent in the UK to the U.S. class action system, where a named claimant brings an action on behalf of a class to which he belongs and which is certified by the court.

Whilst there is some scope for representative actions to be brought in the UK (in the CAT by designated consumer bodies under section 47B of the Competition Act, and in the High Court by the use of Group Litigation Orders under Part 19 of the Civil Procedure Rules), this is still recognised to be a relatively underdeveloped area.

To date, there has been only one action launched by a section 47B body, and that settled at an early stage.

The High Court also recently struck out the representative element of the claim in the ongoing proceedings in the air freight price-fixing case Emerald Supplies v British Airways [2009] EWHC 741 (Ch) (currently on appeal), on the basis that all members of the claimant class could not be identified when the claim was commenced, and that since some claimants could have "passed on" the inflated prices they paid, there was scope for conflict between different members of the class.

Whilst, therefore, representative actions have been a key area of focus for policy discussions, there has yet to be major progress towards increasing their prevalence in the UK.

Lastly, it appears that whilst damages actions may be progressed whilst European Court appeals are pending, they cannot be completed.

Following the June 12, 2009, judgment in National Grid v. ABB [2009] EWHC 1326 (Ch) a claimant seeking to recover alleged losses following on from a European Commission decision will be able to progress the damages action at the High Court even if appeals are pending at the Court of First Instance or European Court of Justice against the commission decision.

However, the High Court accepted that the matter could not go to trial whilst appeals are pending — meaning that, although a damages claim may potentially be "progressed" in terms of, for instance, written pleadings and disclosure, the hearing and outcome of the claim will still have to await the outcome of the appeal process, which may be very lengthy.

Claims before the CAT in these circumstances (where the appeal relates to substance, rather than size of penalty alone) cannot in any event be progressed without specific permission.

A number of these issues will doubtless be the subject of further debate in the context of the recently launched (July 31, 2009) High Court damages action on behalf of several European candle manufacturers against Shell and Exxon Mobil, following the European Commission's October 2008 paraffin wax cartel decision.

As in the National Grid proceedings, the commission's decision is currently on appeal in Luxembourg.

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