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# UK's Department of Business, Innovation and Skills Proceeds with Private Competition Action Reforms

The U.K.'s Department of Business, Innovation and Skills (BIS) has issued a 'government response' or plan for reform indicating that the government will move forward with a number of substantial changes to the U.K.'s antitrust private action regime. The government explained the actions it intends to take following a public consultation in 2012 on proposals for reforming private antitrust actions in the U.K.[1] Most significantly, the government announced it will introduce an opt-out class action mechanism for antitrust claims in front of the U.K.'s Competition Appeal Tribunal (CAT). Other components of the reforms include expanding the authority of the CAT to hear stand-alone (as well as follow-on) competition cases and to issue injunctions. The new regime also would establish a "fast-track" procedure for simpler cases that would empower small and medium enterprises (SMEs) to bring competition actions more easily before the CAT. The government response outlines several measures that will encourage the use of alternative dispute resolution (ADR) in competition actions. Importantly, the government decided to reject a presumption of loss in private cartel damages actions, a proposal that would have shifted the burden of proof from plaintiffs to defendants and given plaintiffs increased (and we believe unwarranted) leverage in collective actions. Most of the announced measures will require legislative action and are therefore subject to Parliamentary approval and timing. However, Iain Mansfield, Assistant Director of Competition Policy at BIS, recently stated that the proposed changes could be introduced in Parliament as early as May 2013. Depending on timing, the proposals might take effect as early as mid-2014.

## Expanded Role of Competition Appeal Tribunal

The government intends to make the CAT a "major venue" for private competition actions in the U.K. Under the changes announced in the consultation response, the CAT would be permitted to hear stand-alone and follow-on competition cases and have the power to grant injunctions. Under the current regime, the CAT has the authority to hear only follow-on claims and may only award damages, with no power to grant injunctive relief. Through the consultation process, BIS concluded that the ordinary courts and Civil Procedure Rules, including the U.K.'s current opt-in collective action regime, have made it difficult for many private claimants to bring competition actions. The planned changes also would allow other courts to transfer cases to the CAT (or vice versa) and would harmonize the limitation periods of the CAT with those of the High Court of England and Wales.

The government response also introduced a "fast-track" procedure for certain competition claims heard before the CAT. The fast-track procedure likely will be implemented through changes to the CAT's Rules of Procedure and is intended to focus on "simpler" competition claims. The government stated that the fast-track procedure will make it easier for SMEs to challenge anticompetitive behavior. For fast-tracked cases, injunctive relief would be considered early on in the judicial process. All cases brought by an

1 The publication is available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf. Skadden submitted comments during the consultation. *See* Skadden, Response to Department of Business Innovation & Skills Public Consultation: Private Actions in Competition Law: A Consultation on Options for Reform (July 24, 2012), *available at*: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69136/private-actions-in-competition-law-a-consultation-on-options-for-reform-responses-o-to-z.pdf.

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SME would be considered for fast-tracking, and cases between large companies could be fast-tracked subject to mutual consent of the parties. As contemplated in the response, the fast-track procedure would be cost-capped and the CAT would have the discretion to limit the number of experts and the amount of evidence introduced.

## Opt-Out Collective Actions Before the Competition Appeals Tribunal

The most dramatic change announced in the government's responses is the introduction of a "limited opt-out collective actions regime" for competition claims. The CAT would serve a gatekeeping function and determine whether a collective action should be permitted and whether it should proceed on an opt-out or an opt-in basis. Further, the CAT would be the sole venue for opt-out actions. Collective actions under the opt-out regime could be brought by the actual claimants or "genuine representatives" of the claimants (which would include trade associations and consumer advocacy associations). However, law firms, special purpose vehicles and "third-party funders" would not be permitted to bring opt-out collective actions.

The government announced a number of additional "safeguards" to the opt-out regime that are designed to protect against the potential for abusive litigation, a frequently cited concern of interested parties during the consultation period. First, the announced measures call for a "strong process of judicial certification" to assess the adequacy of the representative as well as a "preliminary merits test" intended to screen out frivolous suits. The opt-out collective action would be limited to U.K.-domiciled claimants, although non-U.K. claimants could still opt in to collective actions. Contingency fees as well as treble and exemplary damages would be prohibited, and the U.K.'s "loser-pays" rule would be maintained. Settlements reached under the opt-out collective action mechanism would require judicial approval, including a review of the reasonableness of attorneys' fees, and claimants would be able to opt out of settlement agreements. Any unclaimed damages would be paid to the U.K.'s Access to Justice Foundation.

BIS also reached conclusions on two important issues relating to proof of damages in private competition actions. One proposal contemplated in the consultation was the potential application of a "rebuttable presumption of loss" in cartel damages actions (such as an assumed 20 percent overcharge) once claimants proved anticompetitive behavior. The presumption would have shifted the burden of proof on damages to defendants in cartel damages actions. The government rejected this proposal, noting that such a presumption would represent a shift away from the basic principle of English law that plaintiffs must prove their losses. The consultation also contemplated potential legislation on the use of the passing-on defense, but the government declined to directly address the issue, noting that English tort law generally permits defendants to invoke the defense.

## Encouraging Alternative Dispute Resolution in Private Competition Actions

While seeking to make it easier for claimants to bring private competition actions before a tribunal, the government also recognized the value of ADR to avoiding lengthy court proceedings and reducing litigation costs for competition claims. The announced reforms include substantive measures that encourage the use of ADR in competition actions but would not make ADR mandatory. According to the government response, a new collective settlement opt-out system similar to that of the Dutch Mass Settlement Act (2005) would be administered in the CAT, with the goal of allowing businesses to settle claims "quickly and easily on a voluntary basis." The government also announced that it would grant the U.K.'s Office of Fair Trading or future Competition and Markets Authority the discretion to certify voluntary schemes for collective redress, thus making the schemes legally binding and enforcement of such arrangements easier.

## Consistency With Public Enforcement and Leniency Programs

BIS determined that it would abstain from taking steps at this time that are designed to prevent private actions from interfering with the leniency programs of the public enforcement regime because it expects the European Commission to address these issues in the near future. Specifically, it noted that the potential for disclosure of leniency documents in private actions was a major concern in the consultation, especially in light of the European Court of Justice *Pfleiderer* judgment in 2011. *Pfleiderer* held that European Union law does not preclude access to leniency materials but that the courts and tribunals of member states must balance the need to maintain the effectiveness of leniency programs with the rights of plaintiffs to claim damages.[2] The government noted its view that restrictions on the disclosure of leniency documents should include only documents created for the purposes of a leniency program, as opposed to ordinary course documents. However, the government ultimately decided to take a wait-and-see approach, noting that EU Competition Commissioner Almunia stated in June 2012 that he intended to propose legislation that would strike a balance between protecting the efficacy of leniency programs with the rights of antitrust claimants.[3] The consultation response noted that the U.K. government may seek to implement its own measures if the European Commission fails to take action in this area. Initially planned for 2012, EU legislative action regarding the protection of leniency material is expected this year.[4]

## Impact on Private Competition Litigation

The announced measures, if fully implemented, are likely to make the U.K. an even more attractive forum of choice for antitrust claimants than before, together with the Netherlands and Germany. As a result, companies are potentially exposed to an increased risk of antitrust litigation and damages claims in the U.K.

The true effect of these reforms, however, will depend on how they are implemented in practice. In particular:

- The opt-out regime enables damages to be aggregated across many claimants, which is likely to create an incentive to bring claims that would otherwise not have been viable for cost reasons (*i.e.* where the claimant would have been an individual consumer or business). It will, therefore, be up to the CAT in its role as 'gatekeeper' to ensure that the various safeguards surrounding the opt-out regime are properly implemented such that defendants are not faced with frivolous and unmeritorious claims.
- Similarly, the fast-track system in the CAT is likely to result in claims which would not otherwise have been pursued under the existing rules. Again, it will be for the CAT to demonstrate that it can effectively implement and control that process.
- It remains to be seen how far the promotion of ADR and early settlement options (including the new opt-out collective regime in the CAT) will actually influence litigants to resolve their disputes.

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2 *See* Case C-360/09, *Pfleiderer AG v. Bundeskartellamt* (June 14, 2011). For an analysis of disclosure issues surrounding leniency documents, see Skadden's article, *National Grid*: *Disclosure of EC Leniency Materials at Stake* (Nov. 29, 2011), *available at:* http://www.skadden.com/insights/inational-gridi-disclosure-ec-leniency-materials-stake.

3 Joaquín Almunia, Commissioner, European Commission, Address at the 19th International Competition Law Forum, St. Gallen (June 8, 2012), *available at*: http://europa.eu/rapid/press-release_SPEECH-12-428_en.htm.

4 The EU also is planning separate legislation on collective redress that is expected to encourage private competition actions by endorsing and enabling collective actions by consumers and businesses while attempting to avoid the extremes of "U.S.-style litigation," which the EU Commission has stated firmly it does not want to adopt.

As most of the proposed measures will need to be implemented through legislation, the precise timing of these changes is uncertain as it will depend on the Parliamentary approvals process. However, BIS announced that the changes could be introduced as early as May 2013 in the next Parliamentary session. The timing may depend on how the government prioritizes upcoming legislative efforts, but assuming Parliamentary approval, the reforms could take effect as early as summer 2014.