COMPETITION APPEAL TRIBUNAL

Minutes of the meeting of the Tribunal User Group

held on 31 October 2016 at 4.30pm

at Victoria House, Bloomsbury Square, London WC1A 2EB

Attendees:

On behalf of the Tribunal:
Sir Peter Roth – President
Charles Dhanowa – Registrar
Hilary Boyle – Référendaire

On behalf of the Users:
Nicola Boyle – Partner, Hausfeld & Co. LLP
Euan Burrows – Partner, Ashurst LLP*
Helen Davies QC – Barrister, Brick Court Chambers
Julia Dodds – Of Counsel, Hill Hofstetter Limited
Jon Lawrence – Partner, Freshfields Bruckhaus Deringer LLP
Catriona Munro – Partner, Maclay Murray & Spens LLP
Jon Turner QC – Barrister, Monckton Chambers
Stephen Wisking – Partner, Herbert Smith Freehills LLP*
Roland Green – Deputy General Counsel and Senior Legal Director, Competition and Markets Authority ("CMA")

From the Department for Business, Energy and Industrial Strategy (BEIS):
Chris Blairs – Head of Consumer and Competition Team
Carl Davies – Policy Officials
Peter Durrant – Policy Officials
Jane Carnegie – BEIS Legal
Nelli Orlova – BEIS Legal

Apologies:
Sarah Cardell – General Counsel, CMA
Tom de la Mare QC – Barrister, Blackstone Chambers
Paolo Palmigiano – Chairman, Association of European In-house Competition Lawyers
Polly Weitzman – General Counsel, Office of Communications

**Also provided written comments prior to the meeting*

1. President's introduction

1.1 The President welcomed everyone to the User Group meeting and explained that the primary purpose of this meeting was to discuss with representatives of the Department for Business, Energy & Industrial Strategy ("BEIS") points arising in relation to the implementation in the UK of Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU (the "Directive"). To this end, representatives of BEIS were in attendance to outline the current status of the implementation process, and to hear the views of the members of the User Group.

2. BEIS presentation

2.1 The BEIS representatives gave a brief presentation outlining the current status of the implementation process. Further to the consultation earlier in the year, a statutory instrument had now been drafted (the "Draft SI")[1]. However, the overall approach had changed since the last meeting of the user group. Following the EU referendum, the new set of ministers had opted to implement only what was necessary, and not to pursue a full copy-out approach. There were six broad topics on which BEIS wished to focus in the meeting. Given that it was now close to the end of the timetable, with the Directive due to be implemented by 27 December 2016, their preference was to focus on any structural failings in the draft statutory instrument which might give rise to the risk of protracted, costly litigation.

2.2 As to how the court and Tribunal rules fit into the process, it was noted that most amendments had been included in the draft statutory instrument. Minimal amendments would be made to the court rules. BEIS did not have *vires* to amend the court rules but had liaised with a sub-committee of the Civil Procedure Rule Committee (the "CPRC") and were due to have a final meeting with that committee this week. A response was awaited from the relevant bodies in Scotland and Northern Ireland. BEIS had also started the process of liaising with the Tribunal regarding any necessary amendments to its rules.

2.3 The President then proposed that the group discuss the discussion points arising from the Draft SI which had been set out in the agenda for the meeting.

3. Application (Part 10 of the Draft SI)

3.1 It was noted that a striking feature of the Draft SI was that, for the most part, it only applied to infringements of competition law occurring on or after 27 December 2016. This meant that most of its provisions would not be effective for a very long time. It was suggested that BEIS should establish, if it had not already done so, what the equivalent commencement provisions in other jurisdictions would be, particularly in Germany and the Netherlands which were currently considered to be favoured jurisdictions for private damages actions. If those jurisdictions had taken a different approach, there could be huge potential for forum shopping. It would also be quite striking if all of the other jurisdictions had taken a different approach.

3.2 BEIS considered that the approach they had taken was the least risky one, and this was the approach that needed to be taken to stay within the *vires* of the Directive. The user group members also expressed some doubt as to whether the approach proposed by BEIS was in line with the intention of Article 22 of the Directive. It appeared from the wording of the draft SI that where any part of the infringement

[1] The Draft SI had been circulated to the members of the user group in advance of the meeting.

began before 27 December 2016, the Directive would be irrelevant. Alternatively, it could be said that where an infringement straddled the period, there could be two infringements: one for the period up to 27 December 2016 and one for the period after it. However, either approach was liable to give rise to confusion.

4. Scope

4.1 A number of points arose as to the scope of the Draft SI, both in relation to the definitions in Part 1, as well as to certain provisions of the Directive on which the Draft SI appeared to be silent.

4.2 It was thought that the Draft SI did cover collective actions as the definition of "competition claim" referred to a claim made "*by or on behalf of* (emphasis added)" the person who suffered loss.

4.3 It was noted that the definition of "*competition proceedings*" currently only related to damages claims, whereas it should also encompass other claims such as claims for an injunction or restitution claims. The words "*in respect of loss or damage*" in sub-paragraph 2(2) of Part 1 of Schedule 8A could perhaps be excluded. BEIS explained that there was a subtle distinction between the definitions of "*competition claim*" in sub-paragraph 2(2) and "*competition damages claim*" in sub-paragraph 2(3). The reference to "*loss or damage*" in sub-paragraph 2(2) was intended to reflect the wording of the Directive and indicate that some sort of harm had been suffered. In contrast, the "*competition damages claim*" definition was only used in Part 9 and only applied in relation to contribution claims.

4.4 As currently drafted, pre-emptive injunctive relief (where no harm had been suffered) did not appear to be covered. BEIS expressed a concern regarding its *vires* in this regard given that it was implementing a Directive. While it might be desirable to have this situation covered, it was unlikely to be necessary for implementation purposes.

4.5 BEIS confirmed that it would explicitly be provided that the definition of "*competition authority*" in sub-paragraph 3(1) included sectoral regulators.

4.6 As to the provisions of the Directive on which the Draft SI appeared to be silent, there was a discussion as to whether it would be useful to make expressly clear that the courts could estimate harm, something which the courts currently did in any event. BEIS said that where there was a strong case to argue that the position already existed in domestic law, their approach was not to make any unnecessary amendments.

4.7 The mandatory provision in Article 12(2) of the Directive was noted and a discussion ensued as to how that Article linked to Article 3 and Article 15. Articles 12 and 15 were not really covered in the Draft SI but it was difficult to see how they could be.

4.8 It was noted that Article 13 of the Directive was very specific as to the burden of proof. The recent judgment of the Tribunal in the *Sainsbury's* case was consistent with the approach of the Damages Directive. However, that judgment was potentially subject to appeal, and if it was overturned by the Court of Appeal on that point, the current position under English law would not be consistent with the Damages Directive.

4.9 BEIS confirmed that Article 14(2) would be addressed in the Draft SI.

5. Limitation (Part 5 of the Draft SI)

5.1 A number of issues arose in relation to limitation. There was a need to reduce the potential for satellite litigation on these issues as far as possible.

5.2 The definition of "*claimant's day of knowledge*" in sub-paragraph 16(2) of the Draft SI was considered to be problematic. For a standalone claim, it was arguable that the claimant would not know until the date of judgment that there had been an infringement of competition law, and this would lead to an absurdity. It was suggested that the wording should be aligned with that contained in the Limitation Act 1980 (the "LA 1980") such that reference would instead be made to knowledge sufficient to plead a claim. This would also be consistent with existing case law. It was noted that Recital 36 of the Directive could be used as a basis for improving the drafting as it currently stood. The need for certainty around the start and end dates of the limitation period was emphasised, particularly in the context of providing comfort to claimants, reducing uncertainty for defendant businesses, and enabling claims to be case managed together.

5.3 As to the suspension of the limitation period during an investigation by a competition authority, it was noted that the reference in sub-paragraph 17(3) to the decision becoming "*final*" could give rise to similar extended litigation already seen in the context of the old two-year limitation period in the Tribunal. It should be clarified, in line with existing case law, whether this meant that the decision became final where there was a final liability finding, even if there were appeals as to the level of fines. As to sub-paragraph 17(2), it was noted that the "*day on which the investigation begins*" could be different where there are different parties under investigation. There was a need for a mechanism whereby the competition authority would declare the investigation open and closed. It was suggested that the provisions of Article 25 of Regulation 1/2003/EC could perhaps provide useful guidance in this regard. It was also noted that different competition authorities could have different procedures. The user group members, including the CMA, would give the matter some further thought and any comments were to be sent directly to BEIS as soon as possible.

5.4 As to the suspension of the limitation period during a consensual dispute resolution process ("CDR"), it was very important to be clear what CDR meant in this context. It was key that there be an express agreement between the parties to engage in CDR for the purpose of paragraph 18 of the Draft SI. It was noted that if there was uncertainty over whether or not the limitation period had been suspended, this would deter settlement discussions. It was also important to clarify that suspension would only apply to the parties involved in the CDR process for as long as they agreed to participate in that process. The current definition of CDR in the draft SI was thought to be problematic as it was defined by reference to the process involved. In particular, the reference to arbitration in that definition was potentially problematic as arbitration agreements were usually entered into prior to the event and the process was not generally consensual as it could be triggered by only one party.

5.5 Further clarification was also desirable on the following issues:

- the application of the Foreign Limitation Periods Act 1984 where the applicable law is foreign law; and
- the interaction with the LA 1980 if the same facts give rise to causes of actions that are not competition claims (such as unjust enrichment, deceit, fraud, breach of contract and economic torts).

6. Indirect purchasers (Part 2 sub-paragraph 8 of the Draft SI)

6.1 The members of the user group queried why the provisions relating to indirect purchasers in the Draft SI were needed. It was already the case that indirect purchasers had the right to make a claim (*e.g.* the CAT's decision in *Sainsbury's* and the *Manfredi* and *Courage* cases at EU level), and it was not in any event the case that defendants were pleading that indirect purchasers had no right of action. It was suggested that these provisions be removed from the Draft SI.

7. Disclosure (Part 6 of the Draft SI)

7.1 It was noted that the provisions relating to disclosure would be coming into effect for claims brought on or after 27 December 2016. It was suggested that this part of the Draft SI could provide that the prohibition of disclosure of cartel leniency statements and settlement submissions extended to verbatim quotations from those documents, as provided for in Recital 26 of the Directive. However, it did not appear that there was a requirement to enact that part of Recital 26 and on balance it was likely to be preferable to adhere to the operative part of the Directive. This was really a policy question, and while the restriction on the use of cartel leniency statements in litigation was a live issue, in general there are different views as to whether their availability in litigation is desirable. BEIS would consider what the policy should be.

7.2 It was noted that the "*reasoned request*" provision in Article 6(7) of the Directive would be dealt with in the court and Tribunal rules. BEIS confirmed that sub-paragraphs 4(8) and 5(4) of the Draft SI would be removed. This point had also been raised by the CPRC, and it should be possible to rely on the court and Tribunal rules and the general jurisdiction of the court in this regard. A query was raised as to what "*accepted*" by the competition authority in the definition of "*cartel leniency statement"* would mean in practice, in particular whether the granting of a marker would suffice for this purpose. The CMA would provide comments to BEIS in this regard, and it was possible that sub-paragraph 4(4)(d) of the Draft SI would be deleted.

8. Joint and several liability (Part 3 (small and medium-sized enterprises ("SMEs") and Part 4 (liability of immunity recipients))

8.1 The reference in sub-paragraph 10(1)(b) to an undertaking's share of the market having been less than 5% "*at a point in time"* was thought to be problematic. It was unclear how, overall, the provision of the Directive relating to SMEs was supposed to work in practice, and the wording of the various language versions of the Directive was ambiguous. BEIS would check with the Commission as to how other Member States were proposing to implement this provision.

8.2 It was noted that the shielding of the immunity recipient from joint and several liability was important but it was not clear when, in practice, the claimant would know that it was unable to obtain full compensation from the other undertakings (sub-paragraph 12(e) of the Draft SI). This was a problem of drafting in the Directive itself and it was unclear how it would work in practice, including in relation to limitation.

9. Contribution and settlement (Part 9 of the Draft SI)

9.1 There was a discussion as to the extent to which Part 9, in particular sub-paragraph 34, was already covered by the existing provisions of the Civil Liability (Contribution) Act 1978 (the "CLCA 1978") and its Scottish equivalent. It was noted that section 2 of the CLCA 1978 allowed the court to assess the "just and equitable" level of any recoverable contribution.

9.2 BEIS was of the view that existing law did not necessarily address relative responsibility for the harm as a whole. It was difficult to work out what was required by Articles 19(2) and 19(4) of the Directive. Recital 52 referred to "*geographic scope"* and this potentially went beyond the scope of the CLCA 1978. However, it was pointed out that Recital 37 provided that the determination of the share of the harm was a matter for national law.

9.3 There was general agreement that the existing law worked well, and that the provisions of the CLCA 1978 could already be sufficiently flexible. To the extent that sub-paragraph 34(2) of the Draft SI was already covered by the CLCA 1978, it should not be included. There might be a case for retaining sub-paragraph 34(3), as quantum was not binding under the CLCA 1978. It was generally thought that Article 19 was a very difficult provision of the Directive to implement in practice and if the existing law was changed it gave rise to the possibility that there would be active contribution claim litigation in future.

9.4 A new query was raised by BEIS as to how section 35 of the LA 1980 (new claims in pending actions) operated in the competition framework. It was explained that this most commonly arose where claims were being amended. BEIS considered that section 39 of the LA 1980 meant that section 35 of the LA 1980 would not apply under the Directive regime. It was noted that these types of claims would be less likely to be time-barred because of the extended limitation periods provided for by the Directive.

10. Any other business

10.1 It was re-emphasised that BEIS was now working to a very tight parliamentary timetable and that any further comments should be provided to BEIS by the end of the week.

10.2 There was no other business. The President thanked those present for their helpful comments, and the meeting concluded at 6.50pm.