HAUSFELD
FOR THE CHALLENGE

UK COMPETITION & GROUP LITIGATION WINTER NEWSLETTER 2021

Although 2020 was a difficult and uncertain year across the board, for existing and prospective claimants it was a year of steady progress, with positive developments for both corporate claimants and consumers in this jurisdiction. We expect this to continue in 2021 and in this newsletter, we embark on a whistlestop-tour of the key judgments and developments of 2020, and look to the post-Brexit horizon in 2021.

Progress for claimants

The CAT considered which recitals in a Commission settlement decision are binding in follow-on litigation

The Trucks litigation continued to make headway in the CAT, with a significant win for many of Hausfeld's claimants in a preliminary issue relevant to follow-on claims across the board – namely whether recitals in European Commission settlement decisions are binding on the CAT. The CAT agreed that they are, and furthermore held it to be an abuse of process for the defendants to contest the findings of the European Commission in a national Court. The CAT's decision of March 2020 was unanimously upheld on appeal to the Court of Appeal in November 2020 – and the Defendants have not sought to appeal to the Supreme Court. This judgment (and the Court of Appeal's resounding endorsement of the same) is a stark warning to defendants considering re-litigating aspects of settlement decisions of the European Commission. Read more.

The Supreme Court clarified the application of the law on pass-on

In a seminal judgment on pass-on, the Supreme Court in June clarified how the law on pass-on is to be applied – alongside settling the hotly contested issue of whether MasterCard's and VISA's interchange fees are unlawful in view of Art.101(1) TFEU. The Supreme Court held that the defendants – who bear the burden of proving that the claimants may have passed-on any overcharge – do not need to prove the level of pass-on to any degree of precision if that could not reasonably be achieved. The Supreme Court further clarified that the claimants bear the burden of demonstrating how they dealt with the overcharge, setting out four principal ways

in which a merchant may respond to an increased cost. It remains to be seen how the English Courts will apply the Supreme Court's guidance – and, in particular, where the 'broad axe' will fall. We look forward to the first remittal following this judgment, which will take place later this year in the Sainsbury's v MasterCard proceedings, and which will shed light on how the test is to be applied in practice. Our Perspectives sets out a full summary.

The Google/Fitbit merger and Privacy International

Also in June, Google notified the European Commission of its proposed acquisition of Fitbit – a merger which cuts across both competition law and data/privacy issues. Hausfeld was instructed by global NGO Privacy International to file submissions before the European Commission as part of the Google/Fitbit merger review process.

Privacy International's submissions focused on the likely adverse consequences of the merger, including how it would further cement Google's dominance with negative ramifications for consumers.

Whilst the European Commission cleared the merger in late December, its clearance was subject to compliance with certain commitments offered by Google which will be in place for a ten-year period. The commitments include a restriction on Google's ability to harvest data from Fitbit devices and the way in which Google may store other data. For further summary.

The long-awaited Supreme Court judgment in Merricks

The month of December breathed new life into the UK's nascent collective opt-out regime, following the Supreme Court's long-awaited judgment in Merricks. In its judgment, the Supreme Court found that certification is not a merits test and that the certification hearing itself should not be a "mini-trial". The Supreme Court recognised that the collective opt-out regime facilitates access to justice for those who would otherwise not be able to bring individual claims.

Hausfeld was instructed by the Consumers' Association (Which?) to intervene before the Supreme Court.

Anthony Maton comments on the Decision.

'In conversation with…' vlog series

Leading experts ranging from funders, lawyers and barristers to economists exchange views with Anthony Maton about this landmark judgment and what it means for the UK collective redress regime.

Sir Gerald Barling - Former President of the Competition Appeal Tribunal
Tristan Jones – Barrister at Blackstone Chambers
Susan Dunn – Founder of Harbour Litigation Funding
Richard Swallow – Head of Disputes and Investigations at Slaughter and May
Lisa Webb – Senior Lawyer at Which?
Robin Noble – Partner at Oxera
Prof. Rachael Mulheron – Professor at the School of Law, Queen Mary University London

Increased use of the CPR 19.6 procedure for data breach cases

Collective actions in the CAT permit opt-out claims for breaches of competition law. In the data protection field, Part 19.6 CPR provides an increasingly used mechanism for bringing representative opt-out claims in the High Court for breaches of data protection law. These claims fall into two categories: claims seeking redress for data breaches or hacks, and claims seeking compensation for business practices that are unlawful by design.

Hausfeld represents claimants in two of the four claims brought in 2020: the first being *McCann v Google* – the first collective action in Europe to be brought on behalf of children against a technology firm; the second being *Bryant v Marriott* – relating to the hacking of 300 million customers' records from Marriott's global database from at least as early as 2014 to 2018.

Leading the way in group litigation

In June 2020, Hausfeld launched an investigation on behalf of consumers and businesses affected by Mercedes' alleged cheating of emissions tests. It is estimated that hundreds of thousands of Mercedes diesel vehicles manufactured between 2009 and 2018 may contain 'defeat devices' which falsely lowered emissions during tests so that the vehicles would comply with EU regulations. The team discusses.

Hausfeld is also representing gymnasts who are in the early stages of commencing a group action to seek redress on behalf of many elite and recreational gymnasts who have suffered from the abusive practices and culture within British Gymnastics. The proposed claims are against British Gymnastics (the national governing body for the sport), individual gymnastics clubs and/or gymnastic coaches who are, or who have been, involved in toxic training practices such as physical and psychological abuse of athletes. For further details.

The year ahead

Group litigation is on the rise

At the time of writing, nine collective competition claims are waiting in the wings in the CAT pending a certification hearing, and the impact of Merricks is already evident in the CAT's busy 2021 diary.

The first application for a Collective Proceedings Order to be considered will be heard as soon as 9 March in respect of the two Trains collective cases brought by Justin Gutmann, in which Hausfeld (London) are co-instructed with Charles Lyndon by the proposed class representative.

The Merricks CPO application will be re-heard later in the month, on 25 March. It is very likely that 2021 will see at least one collective opt-out claim certified by the CAT, with a potential increase in further claims being filed following the Supreme Court's ringing endorsement of the regime.

The first carriage dispute will take place in the CAT in July 2021 in the context of the two competing collective claims in the FX proceedings. Hausfeld (London) is acting for proposed class representative Mr. Phillip Evans in one of the claims. The CAT's judgment on the carriage dispute will set an important precedent as to how competing claims will be handled.

Turning back to the other mechanisms for group litigation, the Supreme Court will hear Google's appeal in the representative action brought by Richard Lloyd. Mr. Lloyd represents 4.4 million iPhone users whose personal data was allegedly gathered and exploited by Google on Apple's Safari browser in breach of the Data Protection Act 1998. In 2019, the Court of Appeal granted Mr. Lloyd's application to serve the claim on Google outside of the jurisdiction – reversing the 2018 High Court judgment.

The Supreme Court is expected to hear the appeal in April and will consider key issues regarding the use of the CPR 19.6 mechanism for data claims against foreign defendants, such as Google.

The enforcement of competition law in the UK changes post-Brexit

Now that the UK has exited the EU, EU law will play a lesser role in UK legislation. EU regulations will only continue to apply in the UK to the extent that they have been retained in domestic legislation.

This has consequences for the enforcement of competition law in the UK, as well as on private actions. In respect of competition enforcement, the EU retains jurisdiction only over ongoing investigations under Articles 101/102 TFEU which fall within the "continued competency" criteria.

The CMA and the UK's concurrent regulators may no longer investigate possible breaches of Articles 101/102 TFEU in the UK, rather only possible infringements of the Chapter I/II prohibitions.

These changes will require the CMA and the concurrent regulators to take on a greater and more independent role in competition enforcement in the UK. Alongside the work of the regulators, we expect to see greater private enforcement of competition law, and in particular stand-alone claims, helping to supplement and support public enforcement in the months and years ahead.

Enforcement trends for the year to come

We anticipate that the CMA will adjust to its newly expanded role in 2021 and at the same time continue to pursue some of the enforcement priorities that it has developed over the course of 2020.

The continued and increased regulation of digital markets is high on the agenda for 2021.

The CMA has been advising the UK Government actively on the most effective and proportionate means of regulating digital markets (we reviewed the CMA's market study on online platforms and digital advertising, as well as the Digital Markets Taskforce recommendations on a new pro-competition regime for digital markets).

One of the key proposals focuses on the creation of a specialised Digital Markets Unit with duties to address the market power of the most powerful digital firms.

According to the proposal, the DMU should be empowered to impose a very wide range of pro-competitive interventions and to introduce and enforce a new code of conduct to govern the behaviour of relevant digital firms.

The UK Government has committed to establishing and resourcing the DMU by April 2021 and is consulting on proposals for the new regime in early 2021.

Another area of activity is the pharmaceutical sector, which continues to come under the spotlight in the context of excessive and unfair pricing, market sharing agreements and pay-for-delay agreements.

A series of decisions are expected to be published by the CMA in 2021, including in respect of Nitrofurantoin capsules and Prochlorperazine tablets (both relating to market-sharing agreements), whilst a number investigations are currently ongoing, including in respect of Liothyronine tablets (relating to excessive and unfair pricing) and Hydrocortisone tablets (relating to excessing and unfair pricing and pay-for-delay agreements respectively).

The CMA's focus is likely to be to ensure that the NHS does not pay significantly more than it should for essential drugs, and that consumers who depend on such medicines do not lose out.

Concluding remarks

2021 will mark a new era in domestic competition law, as the UK begins to steer its own course following Brexit. We foresee increased activity from the regulators in scrutinising key sectors such as tech and pharma, as well as a maturing role for private enforcement alongside the regulators, with the increased use of private enforcement and group litigation to provide redress for claimants.

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