

## Key Competition Litigation Cases to Watch in 2019

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2019 is set to be another very interesting year for competition litigation (we looked back on 2018 in part 1), not least because of the UK's departure from the European Union (EU) on 29 March 2019. In this blog post, we share our predictions of what we think are the cases to watch during 2019. A review of the competition law landscape would not be complete without considering our departure from the EU - despite the yet undefined terms on which the UK will leave.

### Impact of Brexit

Although the parliamentary defeat of the Government's Withdrawal Bill on 15th January seemed easy to predict, anticipating the next step in the Brexit saga is more challenging. As things stand, the UK is still set to leave the EU on 29 March 2019. Whether Article 50 will be delayed, or the UK leaves with or without a deal, one thing is clear: the UK competition litigation landscape will be impacted.

On 30 October 2018, the UK government published a draft statute (the so-called Competition SI) accompanied by a guidance note produced by the Competition and Markets Authority (CMA).

The Competition SI would introduce a new section 60A Competition Act 1998 (CA 1998), replacing section 60 CA 1998. This new section would expressly permit UK case law to diverge from existing case law, established while the UK was a member of the EU, where such divergence is considered "*appropriate in the... circumstances*". This does not only mean that EU courts' and the Commissions' decisions and judgments which take effect after Brexit are no longer binding in the UK; the CMA and the UK courts also have discretion to deviate from pre-Brexit decisions.

If the UK leaves the EU with the currently proposed 'withdrawal agreement', that agreement will establish a "transition period" during which EU law will continue to apply to the UK as if it was still an EU member state. The transition period is currently proposed to last until 31 December 2020.

### Trucks cartel facing collective proceedings in the CAT

On 12 December 2018, the Competition Appeal Tribunal (CAT) gave directions in two applications to commence collective proceedings - similar to US-style class actions - on behalf of UK truck owners or lessees under S47B of the Competition Act 1998 (*UK Trucks Claim Limited (UKTC) v Fiat Chrysler Automobiles and Road Haulage Association Limited (RHA)*). These applications will be heard from 3 to 7 June 2019. Collective proceedings were made possible by the Consumers Rights Act 2015 but since then, only two applications have been made and both have failed for different reasons.

The proposed collective proceedings would combine follow-on actions for damages arising from the European Commission's July 2016 decision that five EU truck manufacturers participated in an illegal cartel in breach of Article 101 of the Treaty on the Functioning of the European Union (TFEU). If the UKTC proceeds on an opt-out basis, this action could result in thousands of affected truck owners in the UK receiving compensation without having to sign up to the claim, meaning it is potentially one of the biggest class actions in UK legal history.

The UKTC, formed specifically to represent affected purchasers of trucks registered in the UK, applied for a Collective Proceeding Order (CPO) permitting it to act as the class representative in the proceedings. The UKTC claim is pleaded on an opt-out basis, and an opt-in basis in the alternative. The RHS claim is pleaded on an opt-in basis. If the UKTC is granted permission to bring opt-out proceedings in the forthcoming hearing at the CAT, all those who fall within the proposed class will be covered unless they elect to opt-out. Individual traders would not have to sign up to anything until the CAT's determination of the total amount of damages due for their overall loss over the cartel period.

Preliminary issues relating to confidentiality/disclosure will be determined on **25 January 2019** ahead of the collective actions hearing in **June**.

## **Interchange cases**

### **Appeal before the UK Supreme Court**

The MasterCard and VISA saga continues with a 2019 Supreme Court hearing in relation to their intra-EEA and UK domestic Multilateral Interchange Fees (MIFs). In July 2018, after years of litigation, Sainsbury's and ASDA gained a significant victory before the Court of Appeal (CoA) which finally resolved three contradicting first instance judgments (two of the High Court and one of the CAT). The CoA found that MasterCard's and VISA's MIFs restricted competition under Article 101(1) TFEU, overturning the High Court's rulings, in which it had formerly accepted the defendants' so-called "death spiral" argument. This is the argument that if Visa set a MIF at a certain level, MasterCard needed to follow suit to remain attractive to the issuing banks benefiting from the MIFs - and vice versa. The defendants therefore argued that the MIFs were objectively necessary and, consequently, there was no infringement.

Regarding a possible exemption under Article 101(3) TFEU, the CoA set out eight guiding principles for remittance to the CAT, establishing quite a high threshold for MasterCard and VISA to prove that their MIFs were set on an exemptible level. Whilst refused by the CoA, the UK Supreme Court (UKSC) in November 2018 granted permission to appeal against the CoA judgment on all four grounds brought forward in MasterCard's and VISA's application as well as upon Sainsbury's application. The listing of the appeal hearing is not expected before March 2019 and will presumably not take place before the last quarter of 2019. The UKSC decision will put to rest the various legal questions that were preliminarily decided by the CoA, mostly in favour of the claimants.

### **Collective action**

In February 2019, *Walter Merricks'* appeal against the decision by the CAT of 21 July 2017 will be heard before the CoA. The CAT rejected certification of the class and therefore dismissed Mr Merricks' £14 billion opt-out, consumer claim against MasterCard. Initially refused by the CAT in September 2017, the CoA granted *Walter Merricks* permission to appeal in late 2018 confirming that it has jurisdiction to hear appeals against the CAT's decisions in collective proceedings, as opposed to the defendants' standpoint that this required judicial review proceedings.

*Walter Merricks v MasterCard* and *UKCT v Fiat & Ors* will therefore be one of two sets of interesting collective actions proceedings which will shape this relatively new regime further.

## **Appeal of Ofcom's decision to fine Royal Mail for abuse of dominant position**

In the case of *Royal Mail plc v Ofcom*, the Office of Communications (Ofcom) fined Royal Mail in August 2018 for abusing its dominant position in the UK wholesale bulk-mail delivery sector following a complaint by one of its wholesale customers. It was the highest fine imposed by a sectorial regulator with concurrent competition powers. Royal Mail appealed this decision in the CAT, arguing that Ofcom had erred in law in concluding that Royal Mail's dual pricing structure was likely to put its delivery competitors at a competitive disadvantage.

The appeal hearing is listed for five weeks between 4 June and 9 July 2019 and will be preceded by a case management conference on 27 or 29 March 2019 and a pre-trial review from 29 April to 1 May 2019. Businesses in regulated industries with dominant positions in a particular market are bound to closely monitor the outcome. As the CMA is likely to expand its role in safeguarding competition after the UK leaves the EU, it will be interesting to see how the outcome of this appeal might impact on the future role of industry regulators such as Ofcom to investigate possible infringements of competition.

## **Google Infringement Decisions and private actions against Google**

In 2017 and 2018, the European Commission (Commission) delivered infringement decisions against, and fined, Google LLC (Google) and Alphabet Inc (Alphabet) for abuses of their dominant position in the comparison shopping market, and the Android device manufacturer and mobile network operator markets.

In October 2018, Google and Alphabet launched a challenge to the Google Android decision, arguing that it should be annulled, or that the fine that the Commission had imposed should be annulled or reduced. 2019 is expected to bring further developments in the Commission's actions as a result.

Further, 2019 may see the stay in the private action of Unlockd v Google Ireland Limited, Google Commerce Limited and Google LLC. The Unlockd group claims that Google's decision to suspend the supply of AdMob services for the Unlockd product, and remove apps containing the Unlockd product from the Play Store, is anticompetitive and would have a detrimental effect on Unlockd's business. In October 2018, the Court stayed the proceedings until March 2019 to allow the administrators of the Unlockd group time to seek third-party litigation funding. If this stay is lifted, this case may progress in 2019 which will offer a useful insight into the CAT's handling of competition cases against businesses that are accused of abusing their dominant position.