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Competition Litigation in the English Courts: Where Are We and What's to Come

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New statutory and case law have changed the field of private enforcement in the United Kingdom in 2016, and may presage changes in the EU member states after the European Commission ("Commission") Damages Directive comes into full effect by the end of this year. The changes in the UK set out last year in the Consumer Rights Act 2015 (CRA) have come to fruition, with the Competition Appeals Tribunal (CAT) playing a more prominent role in deciding competition cases. The CAT has acted in its enhanced role to deliver a significant judgment in *Sainsbury's v Mastercard*,[1] making highly significant findings on the concepts informing the quantification of damages caused by an infringement. The CAT has also issued noteworthy judgments relating to procedure under its new rules. Elsewhere in the UK, there has been important judicial consideration given to the question of the territorial scope of Article 101 TFEU (Art. 101) when applied in England and Wales, in two separate rulings of the High Court-- *Iiyama (1)*[2] and *Iiyama* (2).[3] This article will summarize these important developments.

The Competition Appeal Tribunal Comes of Age: *Sainsbury's v Mastercard.*

The CAT heard Sainsbury's claim for damages against Mastercard on a stand-alone basis, meaning that it was for the court to find an infringement of competition law and then consider the damages claim. Though Sainsbury's claim followed a 2007 Commission Decision that had found that Mastercard had breached Art. 101, an English High Court ruled in 2012 that the substance of the claim against Mastercard before it differed materially from that 2007 Commission decision. Therefore, liability had to be established on the pleaded basis in the claim before the Court in 2012. The claim was subsequently transferred to the CAT in 2015; a move which was possible following the enactment of the CRA, which empowered the CAT to hear claims on this basis. This, in addition to the value of the damages awarded by the CAT, (GBP 68.6M) in its finding against Mastercard, and the fact that it was one of the first major cartel damages claims issued in England in any forum to proceed to judgment, make the CAT's decision a landmark judgment in competition litigation in this jurisdiction. Of particular interest for future competition litigation, however, is the position taken in the CAT's judgment on the 'pass-on defense'.

The Pass-on Defense in *Sainsbury's v Mastercard*

The CAT's judgment in *Sainsbury* -- an indirect purchaser case -- recognized that while the pass-on defense is an established concept in competition litigation in the UK, there had not previously been any substantial judicial treatment of the topic.[4]

The CAT explained that pass-on serves not as a 'defense' per se, but rather as a mechanism for calculating the defendant's liability in damages to the claimant. According to the definition offered by the CAT, the pass-on concept operates as both a sword and a shield. For a defendant, it precludes the possibility of both multiple liability and overcompensation of the claimant for overcharges which had been passed on down the supply chain.[5] Its potential use for indirect purchasers is as a means of demonstrating that the overcharge had passed down the supply chain, which justified a claim against the

infringer with whom they did not have direct commercial relations.[6]

The exact parameters of the defense are also set out in the CAT's judgment in *Sainsbury's*. First, the CAT noted that if a defendant seeks to rely on the pass-on defense, the burden of establishing pass-on falls to the defendant. This position was mandated by the 'Damages Directive',[7] excerpts of which are quoted at length in the CAT's judgment.[8] It is unclear, however, where the burden falls if it is the indirect purchaser that relies upon the pass-on to support its claim. Although it can be reasonably inferred that this burden inevitably falls to the indirect purchaser seeking damages for the overcharge passed on to it, this is not explicit in the judgment. The CAT noted that Sainsbury's was an indirect purchaser that demonstrated a 100% pass-on of the overcharge to it.[9] The essence of what the defendant must prove was set out by the CAT in the following terms:

> *On the balance of probabilities, the defendant has shown that there exists another class of claimant, downstream of the claimant(s) in the action, to whom the overcharge has been passed on. Unless the defendant (and we stress that the burden is on the defendant) demonstrates the existence of such a class, we consider that a claimant's recovery of the overcharge incurred by it should not be reduced or defeated on this ground.[10]*

In specifying what a defendant must show in establishing pass-on, the CAT judgment added the following: "First...the pass-on defence is only concerned with identifiable increases in prices by a firm to its customers. Secondly, the increase in price must be causally connected with the overcharge, and demonstrably so."[11]

Considered with the findings later in the judgment, it appears that the defendant must therefore: first, identify an increase in the price of services or goods provided by the claimant caused by an overcharge flowing from an anticompetitive agreement, and then, demonstrate the 'nexus'between the price increase and the overcharge.

Gauging the Unknown: Legal and Economic Pass-on

While the CAT recognized that as a matter of economic logic Sainsbury's would have sought to pass-on any overcharge it incurred,[12] the CAT nevertheless rejected Mastercard's presumption of pass-on. In refusing to do so, it pointed specifically to Mastercard's inability to locate a nexus between overcharge to the claimant and pass-on down the supply chain.[13] This was in part due to the multiplicity of the goods and services provided by Sainsbury's, a retailer, as well as the difficulty in assessing pass-on to consumers against other courses of action open to the claimant, such as reducing internal investment or sacrificing a degree of profit.

Complication in the court's analysis arose in its discussion of the interest to be calculated on the damages to be paid to Sainsbury's. The CAT found that because 50% of the overcharge was likely to have been passed on (as a matter of economics), compound interest was only calculable on the portion that was not passed on.[14] In setting out its reasoning, the court drew an explicit distinction between legal and non-legal—or economic-- pass-on; which highlights two remarkably divergent approaches to dealing with an acknowledged unknown.[15]

The Possible Impact of *Sainsbury's v Mastercard*

While Mastercard has applied to the CAT for leave to appeal, the judgment remains highly relevant to understanding the approach we can expect from the CAT in assessing claims for damages. It would appear to be an approach that is favorable to claimants in setting a high threshold for the degree of specificity required for a defendant to rely on the pas-on defense. However, by the same token an indirect purchaser may encounter difficulties in establishing a claim following a judgment, despite these difficulties

not being present for Sainsbury's in this particular case.

Further Developments in the CAT: Fast-Track and Limitation

Aside from the *Sainsbury's* judgment, the CAT's judgments on case management have continued to define its role in competition litigation in the English courts.

In July 2016 the CAT made a ruling in relation to the applicability of foreign laws in deciding the applicable limitation period in *Peugeot Citroën v Pilkington*.[16] This followed the publication of the new rules on limitation which apply to the CAT for claims arising after Oct. 1, 2015.[17] The CAT decided that despite the existence of a special two-year limitation rule in the CAT (starting from the date of a Commission or CMA decision), it cannot be used to displace local limitation laws which apply to claims where foreign law applies to the case; the rationale being that the special limitation period in the CAT ought not be a mechanism for sidestepping unfavorable local laws by issuing claims in the CAT.

Further to the announcement of the availability of a fast-track procedure in the CAT under the new regime, the CAT has exercised its power in expediting the hearing of *Socrates Training v The Law Society of England and Wales*.[18] The case was set to be heard on November 8, 2016, and is the third such application under the new rules.[19] At the Case Management Conference (CMC) in May, Judge Roth noted that both the claimant and the nature of the claim were suitable for fast-rack procedure, being "the sort of case with a small and medium sized enterprise where the issues are not over-complicated, and should be manageable. It is exactly the sort of case, shorn of any quantification issues, that can be heard under the fast-track".[20] This provides a useful, if broad, yardstick for claimants against which to consider a possible application for fast track hearings.

Iiyama (1) and (2): Defining the Horizon for Claiming Damages by Indirect Purchasers Under Article 101 TFEU

The judgments of the High Court of England and Wales in *Iiyama (1)* and *Iiyama (2)* dealt with applications by the defendants to strike out claims brought by Iiyama Corporation (Iiyama) for damages as an indirect purchaser of products sold subject to an anticompetitive overcharge. Iiyama's claims followed a decision of the Commission in 2010, which found that the defendants had participated in a world-wide price-fixing cartel. The grounds for the application for strike out the claims were that the claims' fell outside the territorial scope of Article 101 of the TFEU because the claims were for harm suffered as a result of sales outside the EU. The detailed analysis of Judge Mann (*Iiyama (1)*) and Judge Morgan (*Iiyama (2)*), though different in relation to the defendants' applications, invoked a consistent conceptual framework that provides an insight into the way the territorial scope of Article 101 may be interpreted in the English courts.

The two decisions employed the same tests, developed by the EU courts in deciding whether a claim fell within the ambit of Article101. The first and least controversial was that set out in *Woodpulp 1*: the decisive factor is whether an anticompetitive agreement or practice was implemented, rather than conceived of, within the EU.[21]

This test was supplemented by reliance on the test in *Gencor,*[22] which assessed the effects within the EU of the merger of two business entities that took place outside of the EU. The test, which has been referred to as "the qualified effects test," considers whether the legal acts in question produces "an immediate and substantial effect in the [EU]."[23]

While the validity of both tests was accepted in theory in both *Iiyama (1)* and *Iiyama (2)*, Judge Mann in *Iiyama (1)* distinguished immediate effects (required under *Gencor*) from the "knock on effects" down the supply chain that were sustained by the claimants, and "struck out" the claim for indirect claims. In *Iiyama (2),* on the other hand, Judge Morgan refused the strike out application because the claimants' arguments remained pleadable following the decision in *Iiyama (1)*. The claim was that had the cartel not been implemented in the EU, then prices of cartelized goods in the EU would not have been sold subject to an overcharge. Therefore, the claimants would not have purchased outside of the EU, and so would have not suffered the damage they did.[24] This was supported by the pleading that had the world-wide cartel not been implemented in the EU it would have been unsustainable; cartelised sales in the EU thus formed

an integral part of the damage suffered by the claimants.[25] The reliance of the court on both the *Woodpulp* 1 and *Gencor* tests likely will be useful to indirect claimants in indicating the way in which the territorial scope of claims under Article 101 will be assessed with respect to wrongdoing outside the EU that substantially injures claimants in the EU.

Notes on What is to Come

Cases involving Mastercard and its competitors who were found to have overcharged their customers on card fees will remain a prominent feature of UK competition litigation for the foreseeable future. While Mastercard is seeking permission to appeal the *Sainsbury's* judgment, it is facing similar claims from other major British retailers including Asda, Ocado and John Lewis in London's courts, as well as foreign companies such as Deutsche Bahn. The *Iiyama* claims similarly are set to continue at the appellate level. Following the High Court's refusal to grant permission to appeal on 25 October 2016, Iiyama sought permission to appeal from the English Court of Appeal. These future developments will doubtlessly lead to refinements in the judicial position taken with respect to both pass-on of damages in indirect purchaser cases and deciding the territorial scope for damage claims under Article 101.

Footnotes

[1] *Sainsbury's Supermarkets Ltd v MasterCard Incorporated & ors*, Case No. 1241/5/7/15(T).

[2] *Iiyama Benelux BV & Ors v Schott AG & Ors* [2016] EWHC 1207 (Ch).

[3] Iiyama (UK) Ld & Ors v Samsung Electronics Co Ltd & Ors [2016] EWHC 1980 (Ch).

[4] *Sainsbury's (n 1) 484 (3).*

[5] *Id.* 480.

[6] *Id.* 484 (1).

[7] Directive 2014/104/EU of the European Parliament on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

[8] *Id.* 480 (4).

[9] *Id.* 484 (1).

[10] *Id.* 484 (5).

[11] *Id.* 484 (4)

[12] *Id.* 463-467.

[13] *Id*. 469.

[14] *Id.* 526.

[15] *Id.* 525 (1).

[16] *Peugeot Citroën Automobiles UK Ltd & Ors v Pilkington Automotive Ltd & Another* (Case No. 1244/5/7/15),

[17] Competition Appeal Tribunal Rules 2015 (SI 2015/1648.

[18] *Socrates Training Limited v The Law Society of England and Wales* [2016] CAT 10.

[19] The first was brought by the National Compliance and Risk Qualifications against the Institute of Occupational Safety and Health (IOSH) in December 2015, and settled in January 2016.

[20] *Id.* CMC transcript 38 http://www.catribunal.org.uk/files/1249_Socrates_Transcript_160516.pdf.

[21] *Ahlstrom Osakeytio v. Commission* (1988) ECR 1-5913.

[22] *Gencor v Commission* [1999] All ER (EC) 289.

[23] *Id*. at [90].

[24] *Iiyama* (UK)(n 3) 49.

[25] *Id*. 51.

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