

SUMMARIES

Reform of the private enforcement regime

Josh Sherer

This article provides an overview of the changes to the private enforcement regime, including the consultation process and the main reforms.

Collective actions: loss in complex cases

Tristan Jones

This article considers the challenges which may arise in complex ‘collective actions’ in which the members of the claimant group have not suffered identical loss. It draws in particular on antitrust and competition class actions in the US and Canada to highlight common difficulties which arise in considering whether issues common to the proposed class predominate over individualised issues.

The proposed UK competition law class action and treatment of unclaimed sums: a policy and practical perspective

Molly Herron

This article considers from a policy and practical perspective the proposed introduction of an opt-out collective action for competition law claims and the justifications for this, focusing in particular on the proposed mechanism for dealing with unclaimed sums. It goes on to consider whether the introduction of the collective action will achieve the UK Government’s stated aim of increasing redress for consumers by revisiting the *Replica Football Kits* follow-on claim and its likely outcome under the new regime.

Private enforcement and collective redress: a claimant perspective on the proposed BIS reforms

David Lawne

This article discusses the proposed opt-out regime and highlights the potential of collective settlements as a model for effective collective redress. It also offers some initial thoughts on the difficulties which practitioners are likely to face in attempting to find ways to fund opt-out claims.

The evidential gap – the elephant in the room

Nicholas Frey and Jonathan Hollis

The approach taken in the BIS Report seems premised on a ‘prevalent view’ that claimants are disadvantaged in private competition actions, particularly from an evidential perspective. We argue in this article that this ‘prevalent view’ needs to be re-assessed, given recent developments in case-law and investigatory practice. These developments mean, in particular, that increasingly more information is available to claimants when bringing cases. Claimants have perhaps never had it better; attention should now turn to the protection of defendants’ rights (including in relation to leniency materials).

Pursuing effective remedies in private competition actions

Francesca Richmond

A number of factors, or uncertainty as to how those factors will be handled, are perceived as inhibiting potential claimants from bringing private competition damages actions in the EU. These include routes for collective redress, access to information, costs, forum-shopping for jurisdiction, uncertainty over quantification of damages, scope for indirect claims and the passing-on defence. Procedural reforms proposed in the UK and EU will address some of these issues but developments in some key areas, such as quantification and access to information, remain most likely to be addressed piecemeal by national courts and regulatory authorities or through the publication of non-binding guidance rather than by any overarching statutory instrument. This article discusses the anticipated reforms and possible ways forward on quantification of loss and access to information.

Private action reform: will it really benefit SMEs?

Lisa Navarro

The private actions reform initiative was intended, amongst other things, to assist SMEs in resolving competition law problems through the courts. Various key barriers were identified, including the perceived regulatory enforcement gap, and the cost and complexity of court action. This article draws on the experience of the Competition Pro Bono Scheme, and asks whether the proposals adequately address the issues, or if alternative solutions should be pursued.

Price relationships in internet selling – what can a supplier do?

Richard Eccles

This article discusses price relationship agreements in the light of the European Commission's investigation in the e-books case and the OFT's 2012 report on price relationship agreements, including cross-platform agreements and cross-customers agreements. The article focuses on the application of the resulting principles in relation to internet selling and considers the issues for a supplier wishing to control the price of its products on internet platforms. Use of an agency model in this context is examined and the requirement (highlighted in the *e-books* case and the OFT's *booking.com/Expedia/Intercontinental Hotels* case) that the agent be allowed to share its commission with the customer, is explained.

The role of the 'equally efficient competitor' in the assessment of abuse of dominance

Martin Mandorff and Johan Sahl

In a series of recent cases – most notably in *TeliaSonera* and *Post Danmark* – the equally efficient competitor principle has been explicitly recognised by the Court of Justice of the EU; more clearly so than by courts in the US, where the principle originates. However the exact scope of application of the principle in the EU remains to be defined. While its use in cases concerning predatory pricing and margin squeeze appears to be settled, it is still unclear to what extent the standard applies to other price-based forms of exclusion. And is the principle at all useful in the assessment of non-price-based exclusionary conduct? This article discusses the conceptual basis for the equally efficient competitor principle, and attempts to define its role in the assessment of exclusionary abuse in the EU.

OECD Competition Committee roundtable on market definition: developments in UK mergers guidance and practice

Carol Begent, Chris Walters and Ian Windle

The OECD Competition Committee debated Market Definition in June 2012. The roundtable covered market definition from a legal and economic point of view, the institutional 'embeddedness' of the concept of market definition and discussed new methods such as merger simulation models, compensating marginal cost reductions (CMCR) and pricing pressure indices (PPI). This paper, which formed the basis of the UK submission to the roundtable, describes the approach of the UK competition authorities to market definition and its

relationship with the assessment of competitive effects, in the context of their joint revised Merger Assessment Guidelines (September 2010), and ongoing application to merger cases.

The implications of state aid modernisation

Nicole Robins

Current reforms to state aid rules could lead to a number of far-reaching changes, with the European Commission focusing on those cases that represent the most pressing threats to the internal market. For cases that pose fewer concerns, under the Commission's envisaged reforms, Member States would have an increased role in ensuring that aid is in line with the Commission's regulations. How this will play out in practice depends on the degree of any resistance to the proposals from Member States, and whether there are sufficient incentives for compliance.