PRIVATE ENFORCEMENT OF COMPETITION LAW 2023

JUDGES' ROUNDTABLE

Remarks of Sir Marcus Smith (President, UK Competition Appeal Tribunal)

7 February 2023

"Private" enforcement implies an interest in enforcement, not merely the vindication of private law rights. In other words, the question is the extent to which there is a public interest in private enforcement. I'm going to say a few words about the UK's attitude. This depends on two things:

(1) The nature or form of the private enforcement action; and
(2) A developing appreciation of the importance of private enforcement in the public interest.

The UK Competition Appeal Tribunal (the "CAT"), which I am privileged to lead, recognises three types of private competition claim. Additionally, of course, we do appeals, and judicial reviews. I'm not going to talk about these…

So, three types of private competition claim:

(1) The "follow-on" action. This is where a claimant seeks damages arising out of an infringement that has already been established by a regulator. In the UK, that was formerly the EU Commission and the national competition regulator. Now just the latter, which is the UK's Competition and Markets Authority (the "CMA") and various "sectoral" regulators, like Ofcom. In the case of such claims, it is not possible to originate new allegations of infringement. You have to work with what is found in the decision being "followed". This, originally, was the only jurisdiction that the CAT had in the field of private enforcement.

(2) The "stand-alone" action. This is where a claimant articulates and establishes before the CAT a stand-alone infringement, and claims damages (or an injunction) arising out of that infringement. Here, clearly, the stand-alone action may incept independently of any public enforcement; or it may operate in parallel; or it may – slightly naughtily, in my view, try to "piggy-back" on public enforcement that is either anticipated or on-going.

(3) The “collective” proceeding. This is a claim that may – confusingly – either be follow-on or stand-alone, where a class of claimant is represented by a class representative who brings the claims on behalf of that class, who either opt-in or opt-out. Collective proceedings – unlike individual claims – cannot be brought as of right, but require the permission of the CAT. I’m not going to go into the details of permission, save to say that both the claims and the representative who wants to bring the claims are scrutinised.

At the moment, we are inundated with private claims of all shapes and sizes. Many of these claims are collective proceedings.

Now, the primary aim of all these claims is to vindicate a delict and to hold those who have suffered loss harmless against it. This is, and will remain, the primary function of the CAT in the case of these actions. The general position must be that there is, *prima facie*, little inter-relationship between private and public enforcement.

The general position is only a prima facie position, and it goes too far in a number of respects. In short, it is subject to a number of important qualifications:

(1) Follow-on actions, by definition, follow on from a public enforcement decision. There is no point in commencing proceedings until you’ve got the decision. These are follow-on claims. So the nexus between public enforcement and private claim is clear on its face.

(2) Less so in the case of stand-alone actions. Here, it seems to me, that the claim should come to trial, and be determined, as swiftly as possible. There is provision for regulator involvement, but it seems to me that that involvement ought generally to be less rather than more. That said, if the CMA wanted to intervene, the answer would be “yes”, not “no”: but I would want to understand the basis of that interest.

(3) Collective actions are much more interesting, and I would welcome questions and comments from the floor on this subject. Almost by definition, collective actions are those actions that cannot efficiently be brought by the individual. The individual costs of enforcement dwarf the damages recoverable by the individual. Pool the claims, and pretty soon you are talking “real money” in terms of the claim, and only a marginal increase in the costs of bringing it. But the interest of the individual claimant is by definition less; and we all know that these claims are driven by class

representatives, funders and claimant-sided legal firms. That is not a criticism – it is a recognition of reality. And, to be clear, it is a reality that the CAT welcomes because there is a public interest in the private enforcement of competition law. It is important that the class be held harmless; but really collective actions are a statement that it is important that the wrongdoer pay compensatory damages – and that is not quite the same thing. And it is here that the public side of private enforcement comes in.

So, the interesting area is the collective proceeding. I'll leave you with a number of questions:

(1) What, exactly, is the relationship between this form of private enforcement and public enforcement? To what extent ought one to take account of the other?

(2) To what extent can or should a regulator intervene in such collective proceedings? Can a public regulator be a class representative?

(3) To what extent should an on-going or intended public investigation be affected by on-going collective proceedings?

(4) Should certification of collective proceedings be affected by the attitude of the regulator?

I don't have answers to these questions. Indeed, I am not sure that I should have, because the agency in these matters largely vests in others. Although even that, I suspect, might be a controversial point.