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Competition Law in the Aviation Sector

Private Enforcement of Competition Law

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Private Enforcement of Competition Law

- Update on current cases and appeals
 - Air Cargo saga
- Distribution and private enforcement
- Impact of the Damages Directive on private enforcement landscape in Europe
- Likely implications of Brexit

Air Cargo litigation

European Commission decisions

- 2010 Commission Decision finding that 11 airlines coordinated on the level of surcharges to be applied to the carriage of air cargo
- Dec 2015 – General Court annulled the Decision against 10 airlines for procedural reasons; partially annulled against BA
- March 2017 – Commission issued new Decision; on appeal
- November 2017 – CJEU dismissed BA's appeal that the Decision should have been fully annulled against it despite it having only requested a partial annulment

Damages claims

- UK, Netherlands, Germany, Norway
- Over [1000] claimants; claims worth in the region of [€7bn] in total
- Including flower importers, electronics makers, car manufacturers

UK

- Claimants sued BA who brought contribution proceedings against the other addressee airlines (and some non-addressees)
- January 2019 - claims settled apart from La Gaitana (flower importer)

Legal issues decided in *Emerald/La Gaitana* proceedings (1)

Class action

- November 2010 – Court of Appeal upheld High Court ruling that two flower importer claimants could not represent all potential claimants who had suffered loss
- Proposed class of all “those who suffered damaged by virtue of the cartel” was too broad – multiple levels of different purchasers would not have the “same interest” required under CPR rules

Pergan – presumption of innocence

- October 2015 - Court of Appeal overturned a High Court order for disclosure of a version of the Commission decision containing material which the airlines claimed was covered by the presumption of innocence according to *Pergan*

Conspiracy claims

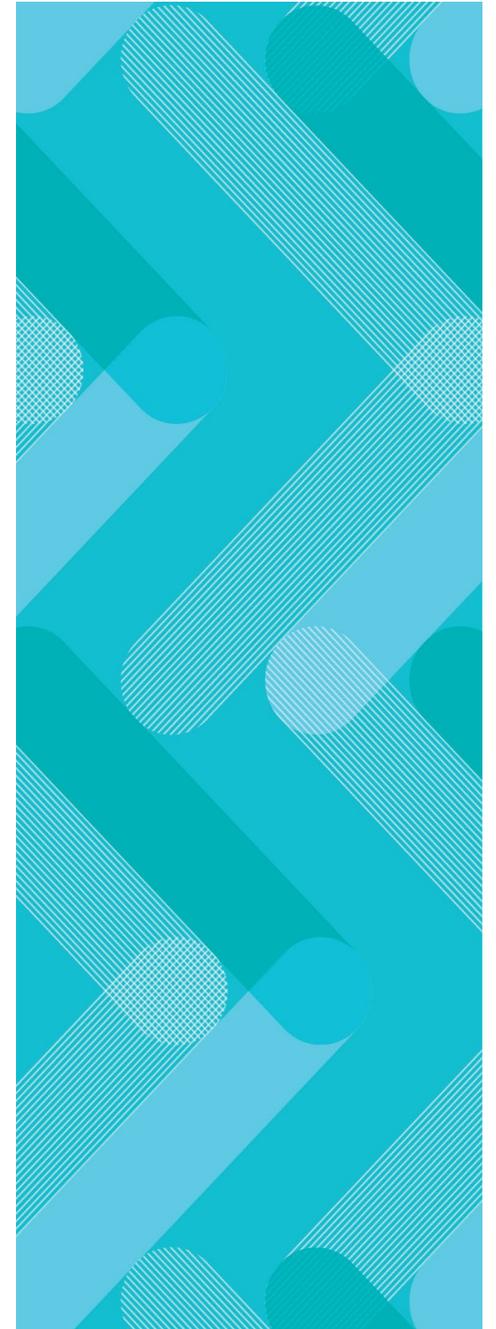
- October 2015 - Court of Appeal upheld High Court judgment which struck out claims based on the “economic” torts of unlawful means and conspiracy
- Abuse of process
- October 2015 – High Court struck out over 64,000 claims on the basis that Hausfeld did not have the requisite authority

Legal issues decided in *Emerald/La Gaitana* proceedings (2)

Temporal scope of claims (preliminary issue)

- October 2017– High Court did not have jurisdiction to award damages for an Article 101 infringement pre 1 May 2004 (the date on which air transport on routes between the EU and third countries was brought within the 1/2003 Brussels Regulation)
- Airlines' behaviour could not be deemed unlawful retroactively
- Significantly reduced the scope of claims
- Jan 2019 - Upheld by Court of Appeal. Rejected La Gaitana's request for reference to the CJEU (note most claims had settled by this point)

Distribution issues and private enforcement



What are the common Distribution issues?

- Surcharges on tickets purchased through a GDS
 - Lufthansa actions
 - See also Amadeus/Sabre investigation – Case AT.40617/18
- Denying access to an airlines flight database
- Article 101 Issues
(eg Spanish *IAG eDreams Odigeo* case re pricing clauses and website branding)
- Articles 102 Issues
(eg *ITR Handling v SEA (Milan Airport Manager)* unfair charges for ground handling services, Feb 2018 Milan District Court)



Impact of damages directive on the private enforcement landscape in Europe



What is the Damages Directive? (1)

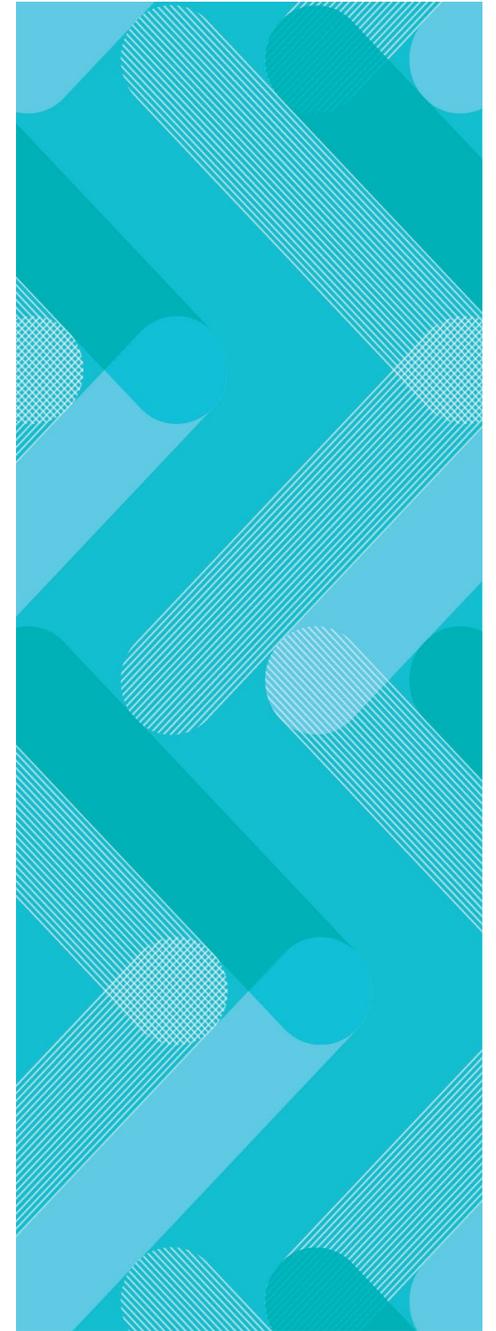
- European Directive 2014/104/EU on antitrust damages actions issued on 26 November 2014; duty for rules to be transposed by 27 December 2016
 - Came into force in the UK on 9 March 2017; Portugal mid 2018
- Aim: remove the main obstacles throughout Member States to enforce private damages claims for breaches of competition

Damages Directive (2)

- Key aspects
 - Disclosure
 - Extended Limitation Period (at least 5 years; interrupted / suspended by investigation – at least 1 year from final decision)
 - Rebuttable presumption that cartels cause harm
 - Pass on – rebuttable presumption that indirect purchasers suffered loss – risk of overcompensation
 - Joint and several liability of infringers; potential exception for immunity recipient



Private enforcement and no deal Brexit



Private enforcement and no-deal Brexit (1)

Relevant Legislation: Competition (Amendment etc.) (EU Exit) Regulation 2019

Follow on Damages Claims

- EU Commission decisions adopted after exit day (even if they relate to pre-exit facts) no longer binding on UK courts in follow-on damages claims (S47A and 58A Competition Act 1998 amended)
- EU Commission decisions adopted before exit day will continue to be binding, even where they only become final after exit day
- Decisions by NCAs no longer prima facie evidence breach of Articles 101 and 102
- Decisions by NCAs reached before exit day retain their status of prima facie evidence
- Infringement decisions by CMA and concurrent regulators – no change

Private enforcement and no-deal Brexit (2)

Standalone Actions

- In relation to infringements of Articles 101 and 102 where infringements occurred before exit day
- In relation to infringements of Chapter I and II – no change

The Future

- English courts expected to remain attractive forum for private damages claims
- Disclosure rules
- Collective proceedings (opt-in and opt-out)

Conclusion

Some answers, more questions:

- The end of an era – Air Cargo in the UK
- Damages Directive bedding down?
- Brexit?

Any questions?

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