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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)

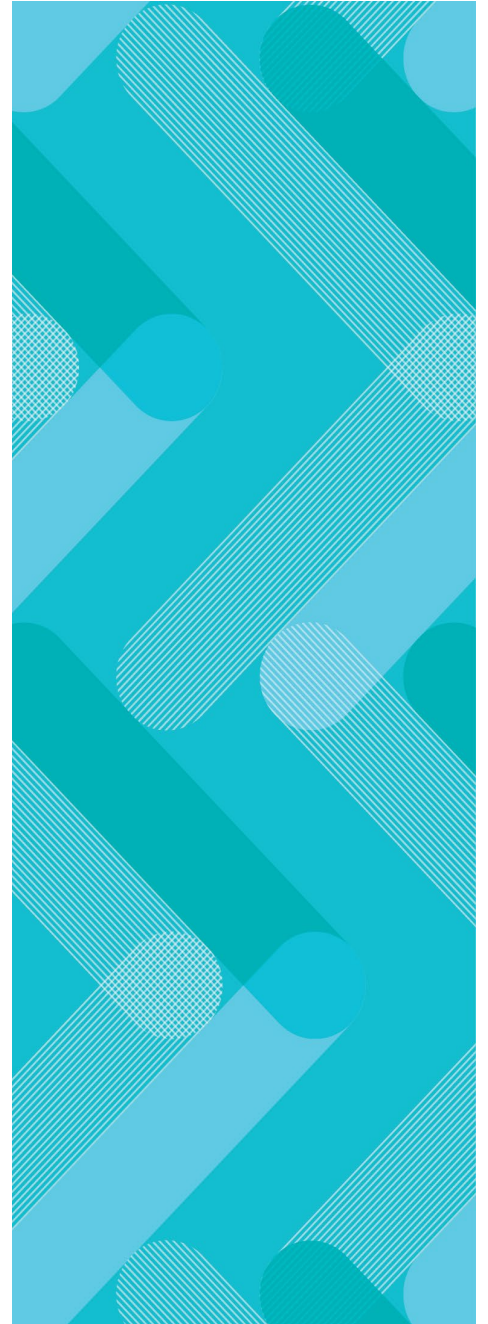
- European Directive 2014/104/EU on antitrust damages actions issued on 26 November 2014; duty for rules to be transposed by 27 December 2016
  - Came into force in the UK on 9 March 2017; Portugal mid 2018
- Aim: remove the main obstacles throughout Member States to enforce private damages claims for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