LEXOLOGY
Getting The Deal Through

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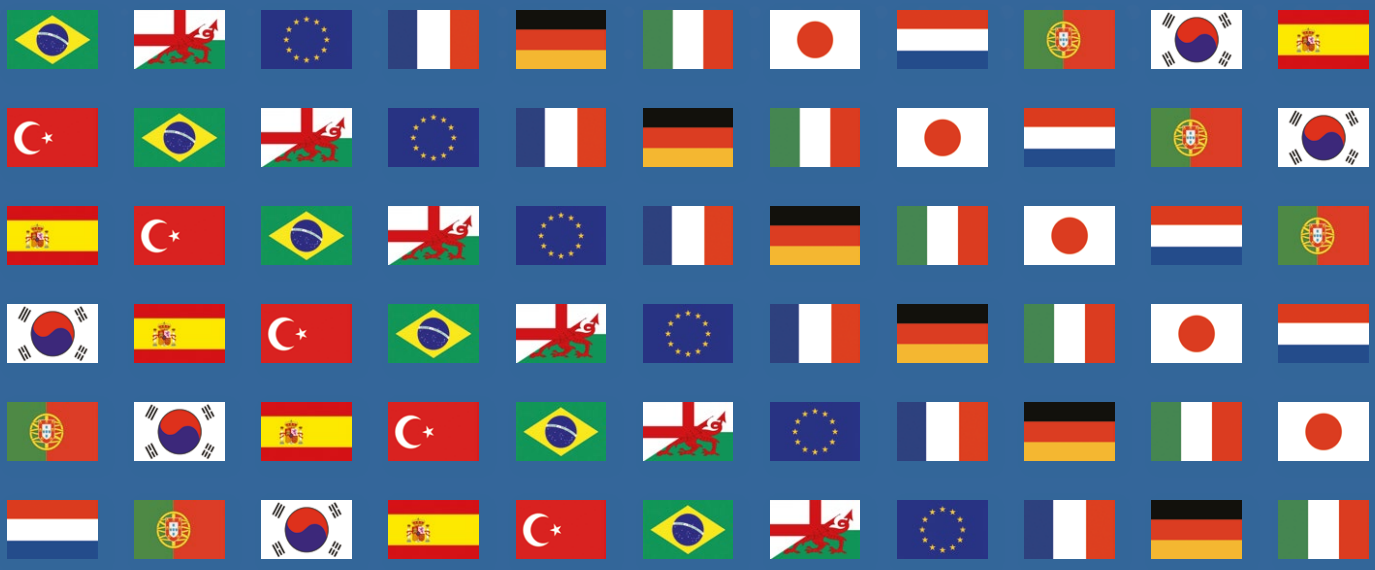

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Cartel damages claims are now widespread across Europe, the United States and beyond. In Europe, England and Wales, Germany and the Netherlands continue to see the vast majority of European wide damages claims issued in their jurisdictions. Post-Brexit and as European member states continue to get to grips with the impact of the Damages Directive in their jurisdictions – not least the introduction of disclosure for competition damages claims – European wide claims will gradually move away from the English courts in the longer term, but it will be a slow process. In Asia, the relatively recent introduction of substantive competition law is now leading to the first examples of private enforcement in many Asian jurisdictions, particularly in Japan which is seeing a marked increase in the number of competition damages claims.

There are some common themes running through a number of jurisdictions.

In Europe, competition collective (or class) actions are increasingly common in England and Wales and in the Netherlands. In England and Wales, the Competition Appeal Tribunal (the CAT) has certified 10 collective proceedings orders (CPOs) at the time of writing including in trains, trucks, and standalone claims against Apple and Google relating to their respective app stores. The judgment of the Supreme Court in *Mastercard v Merricks* has effectively lowered the bar to certification. In the Netherlands, the introduction of the Collective Settlement of Mass Damages Act in 2020 is also likely to increase the number of collective actions in the short term. Collective actions are not available by statute in Germany, although claims by multiple parties have been brought by assigning the claims to a third-party claims vehicle.

As the number of applications for collective actions increases, the CAT is now dealing with its first carriage disputes. In *O'Higgins v Barclays Bank* and others, two class representatives (and two claimants' firms) battled it out for carriage of the opt-out collective proceedings relating to the foreign exchange cartels in Europe. The CAT commented on the weakness of the claims and the appropriateness of an opt-out collective action (in circumstances where parallel litigation with named claimants was ongoing), and stayed both claims pending submission of claims on an opt-in basis. In *Pollack v Alphabet Inc* and others in 2023, the CAT ordered that a hearing on the carriage dispute as a preliminary issue should take place before any hearing on certification, in the interest of costs, and suggested that this would be the usual approach.

Funding – often in the context of class actions – is another hot topic in circumstances in which antitrust damages claims are often seen as an opportunity for investment. Third party funding is available for proceedings in England and Wales, Germany and the Netherlands and is fuelling antitrust claims, particularly collective actions in England & Wales and the Netherlands. In *Merricks v Mastercard*, the CAT rejected objections that Mr Merricks should

not be authorised as a class representative on the basis of an agreement he had with a third-party funder. The CAT accepted that third-party funding required the class representative to incur a conditional liability for the funder's costs, which could be discharged through recovery out of the unclaimed damages.

The increased focus of competition authorities on technology companies is leading to a greater volume of abuse of dominance investigations in Europe and elsewhere and will inevitably result in an increase in damages claims for loss caused by abuse of dominance. *Infederation Ltd v Google Inc* and *Streetmap Ltd v Google Inc* are recent examples of those claims in the English courts. There are numerous standalone claims being brought against Apple and Google in the United States, Australia and the United Kingdom to challenge the dominance of the Apple and Google app stores, including collective (class) actions, and investigations into the same conduct are being conducted by competition authorities across numerous jurisdictions.

In large part because of the growth in abuse of dominance investigations and related litigation, there has been an increase in the volume of injunction applications (or, more commonly, threatened injunction applications) designed to prevent continued abuse. It is still not unknown for a company in a dominant position to refuse to supply a third party, and, in the absence of an objective justification (most obviously non-payment) the mere threat of proceedings may prove effective in terminating the abuse. However, applicants should be realistic about their chances of success and aware of the cost-related consequences of an unsuccessful application.

The covid-19 pandemic and the global lockdown appear not to have had a significant impact on competition enforcement activity and related litigation, although the volume of cartel investigations and cartel fines worldwide has reduced in recent years and competition authorities are considering a variety of steps, including changes to leniency regimes, with a view to encouraging more leniency applications and more cartel enforcement – which, in turn, will then lead to more antitrust damages claims.

The impact of Brexit on antitrust litigation in England and Wales is minimal in the short term. Numerous other European jurisdictions are lining up to take the place of the English courts as the lead jurisdiction for European wide damages claims, particularly Germany and the Netherlands. There is no doubt that there has been a significant increase in claims across European member states (including collective actions in some EU jurisdictions) and in those jurisdictions in particular. However, the advantages of the English courts remain (even after the Damages Directive), and it will take some years for the pre-eminence of the English courts in Europe to be challenged as they will continue to hear claims relating to European Commission cartel decisions that predate the end of the transition period (31 December 2020) for many years yet.

In Japan, it is increasingly the norm for follow-on cartel damages claims to be brought after decisions by the competition regulator the Japanese Fair Trade Commission, and a number of damages awards have been made. Applications for injunctions to prevent anti-competitive conduct are increasingly popular. Japan has also seen derivative claims against the directors of companies guilty of cartel behaviour, alleging that damages were caused by the company choosing not to apply for leniency.

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In the United States, antitrust litigation is an inevitable consequence of an enforcement action by a competition regulator, whether it relates to a cartel decision or a finding of monopolistic conduct in breach of the Sherman Act. Class actions and funding arrangements (including contingency fees) are common, although the courts have increased scrutiny of class actions in recent years. The Department of Justice Antitrust Division announced significant updates to its Leniency Policy in April 2022, which provides the opportunity for reduced civil damages to the first company (or individual) to self-report their role in a criminal antitrust violation and cooperate with the government.

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