

Competition Litigation in the UK

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FOREWORD

By Sir Christopher Bellamy QC

It is with some diffidence that I agreed to write this foreword, since some of the subject matter of this excellent new work inevitably touches on the role of the Competition Appeal Tribunal, under the Competition Act 1998, as amended, and the Enterprise Act 2002. However, the scope of this book ranges much wider than that, and its appearance is, in my respectful view, timely indeed.

The landscape for competition litigation in the United Kingdom has changed out of all recognition in the last few years. Some of us still remember the difficulties and frustrations of the 1970s and 1980s, when the domestic competition scene consisted of the largely moribund restrictive trade practices legislation, on the one hand, and administrative intervention, on public interest grounds, on the other hand. At European level, there was no Court of First Instance, and the European Commission did not seem overly enthusiastic about complaints, preoccupied as it still was with clearing the backlog of notifications. Apart from the occasional “Euro-defence”, there was virtually no “competition litigation” in the conventional sense. Indeed, there was hardly any procedural framework in which such litigation could take place.

Today, the situation is transformed. The establishment of the Court of First Instance in 1989 marked the beginning of more focused litigation in the competition law field. Domestically, the 1998 Act has brought competition policy within a framework of legal principles and procedural norms, to be gradually established on a case by case basis. That process has been taken further under the Enterprise Act 2002 with decisions by the OFT and Competition Commission on mergers and market investigations being largely removed from Ministers and brought within the ambit of judicial review before the CAT. The new cartel offence, introduced by that Act, also brings the criminal law explicitly into the picture, for the first time.

In addition, from May 1, 2004 the national authorities and courts of the European Union have been given the power directly to apply Articles 81 and 82 of the EC Treaty, including Article 81(3). The last redoubt of

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administrative discretion, the monopoly of the European Commission to grant exemption under Article 81(3), has thus fallen, sweeping away with it the notification system that had stood for 40 years.

In those circumstances, a new book on competition litigation is to be warmly welcomed. Covering briefly the substantive provisions, *Competition Litigation in the UK* concentrates mainly on the role of the OFT, the practice and procedure of the CAT, the cartel offence, judicial review in competition causes, actions for damages, litigation concerning state aid, practice and procedure in Europe, EC competition law in UK courts, and arbitration proceedings. A final chapter usefully sketches out key concepts regarding economic evidence in competition cases.

The developments over the last few years have brought together law and economics in a single procedural framework. At long last there is a real chance that those two great disciplines, law and economics, will flow coherently in a single stream. I am sure this book will greatly assist that process.

Christopher Bellamy

February 14, 2005

PREFACE

Ten years ago, a book on competition litigation in the UK would have been a slim volume. But a series of important changes in the law, both domestically and at European level, have fundamentally changed the landscape. The Competition Act 1998 and the Enterprise Act 2002 introduced powerful new mechanisms for competition law enforcement into domestic law for the first time, as well as a specialist tribunal to hear the disputes which its application has generated. Community competition law has also undergone recent fundamental reform, or “modernisation”. The practical effect has been to shift the emphasis of competition law enforcement from the Community institutions to the national authorities and courts. Moreover, the European Court of Justice has recently recognised the possibility that private competition law enforcement through the courts may yield an award of damages. As a result of these changes, competition litigation is becoming ever more important in practice.

This book aims to provide a comprehensive overview of practice and procedure in domestic competition litigation, whether in the Competition Appeal Tribunal, the courts or in arbitration. The regime it describes (derived from Community law, the Competition Act 1998 and the Enterprise Act 2002) applies across the UK. Thus, it is hoped it will be of value to practitioners throughout the UK, even though it does not comprehensively address the rules of domestic law which are particular to Scotland or Northern Ireland.

The book is the product of the expertise of ten of our colleagues at Monckton Chambers, all of whom are competition litigators. It also benefits from the specialist contributions of Clair Dobbin, a barrister who practices criminal law and Paul Reynolds, a professional economist. We have sought to ensure that the chapters retain the individual stamp of their authors. Nevertheless we have also aimed to provide a complete survey of the field.

The law is stated as at February 1, 2005, although references to later authorities have been included so far as possible.

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February 2005

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Daniel Beard is a barrister at Monckton Chambers specialising in EU, competition and public law/human rights law. He acts for a wide variety of private clients, regulators and government departments in all areas of competition work and has appeared before a variety of courts ranging from the Court of First Instance in Luxembourg to the Haverfordwest County Court. He is a standing counsel to the OFT.

Michael Bowsher

Michael Bowsher has been a member of Monckton Chambers since 2001. He has been practising in London since returning in 1992 from a period with Cleary Gottlieb in Brussels. He is also called to the Bar of Northern Ireland and is a Chartered Arbitrator and Accredited Mediator.

Clair Dobbin

Clair Dobbin is a criminal practitioner at 3 Raymond Buildings who specialises in international criminal law, public law and regulatory offences. She is a member of the Treasury C Panel. Recent cases include *Attorney-General's Reference (No.2 of 2001)* [2004] 2 A.C. 72, HL; *R. (Guisto) v Governor of Brixton Prison* [2004] 1 A.C. 101, HL; *Government of the United States of America v Montgomery* [2004] 1 W.L.R. 1909, HL.

Julian Gregory

Julian Gregory is a barrister at Monckton Chambers specialising in competition, public and regulatory law. He has appeared in both competition litigation in the CAT and judicial review applications in the High Court. He is a Committee member of the Administrative and Constitutional Law Bar Association (ALBA).

Josh Holmes

Josh Holmes is a barrister at Monckton Chambers, specialising in EC, competition law and regulation. He is also a visiting lecturer at Kings College London. From 1998 to 2001, he held a fellowship in law at New College Oxford and from 2002 to 2004 worked as référendaire in the cabinet of Advocate General Jacobs at the European Court of Justice in Luxembourg.

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Formerly a solicitor at Freshfields and référendaire to Judge David Edward at the European Court of Justice, Anneli Howard is a barrister at Monckton Chambers, specialising in EU and competition law. Anneli represents private parties and regulators in appeals before the CAT, the European Commission, the CFI, the ECJ and the ECHR.

George Peretz

George Peretz is a barrister specialising in competition law at Monckton Chambers. He has wide experience of representing clients before the OFT and the CAT in cases including *Replica Football Kit*, *Lladro Comercial*, and *BCL Old v Aventis*. He also represented the OFT in *Claymore Dairies* and *OFT v X*.

Meredith Pickford

A former professional economist, Meredith Pickford is a barrister at Monckton Chambers specialising in competition, regulatory and public law. He is on the Attorney General's panel of Crown Counsel and acts for a wide variety of private and public sector clients. Cases include *Wanadoo v Ofcom*, *P&O v European Commission*, *R. (T-Mobile) v Competition Commission*, *FA Premier League* and *MasterCard*.

Ben Rayment

Ben Rayment is a barrister at Monckton Chambers. He specialises in all areas of European and UK competition law representing private and public sector clients in a wide range of sectors. For three-and-a-half years he was legal secretary (référendaire) to Sir Christopher Bellamy QC, President of the UK Competition Appeal Tribunal. He also specialises in public and administrative law.

Paul Reynolds

Paul Reynolds is a Principal with the economics consulting firm, Charles River Associates. He has consulted extensively on competition and regulatory issues and was previously a senior economist with the Australian Competition and Consumer Commission. Paul has a Masters Degree in economics with first class honours from the University of Melbourne.

Valentina Sloane

Valentina Sloane is a member of Monckton Chambers practising in EU and competition law. Her cases before the CAT include *Aquavitae v Director General of Water Services*, *ABI v OFT* and *Albion Water v Director General of Water Services*.

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Christopher Vajda is a member of the Bar of England and Wales as well as the Bar of Northern Ireland. He practises from Monckton Chambers in London. He has acted in many competition cases before the UK courts as well as before the ECJ and CFI in Luxembourg. He is the author of the State Aids chapter in Bellamy & Child, *European Community Law of Competition* (5th ed.). He is a bencher of Gray's Inn.

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