

Competition Litigation Unit

London

BAKER & MCKENZIE



Competition Litigation

Private enforcement of competition law is an increasingly prominent feature of the European legal landscape, mirroring the trend in the US. The UK's Enterprise Act 2002 facilitates competition law claims in the UK by expressly recognising a right to damages for breach of competition law and through the creation of a specialist tribunal to hear and decide on private competition law claims.

With the heightened awareness of competition law, both at EC and UK level, growth in private enforcement and increasing numbers of follow-on claims resulting from enforcement action taken by the UK and EC competition authorities, competition litigation in the UK is here to stay.

In response, Baker & McKenzie, London has brought together expertise from two of its long-established and renowned Departments, Competition and Dispute Resolution, to form the *Competition Litigation Unit*, a specialist unit designed to provide expert advice on all types of competition litigation.

The *Competition Litigation Unit* can help you to define a strategy to bring an action, to minimise the risk or consequences of litigation, or to resolve disputes in a way that achieves business objectives. We advise clients at every stage of a contentious matter, adding value by helping firms achieve commercial and strategic goals and finding effective and cost-saving solutions.

A Key Tool for Business

Private enforcement - Direct claims (i.e. where no infringement decision has been taken by the competition regulators) may be brought in the English High Court by parties seeking damages for loss suffered as a result of anti-competitive conduct (e.g. an alleged price-fixing cartel inflating the cost of goods purchased) or as a result of the abuse of market power by a dominant firm (e.g. predatory pricing). Whichever side of the fence you are on, claimant or defendant, the amounts involved are likely to be significant.

Follow-on litigation - Just as important is litigation brought about by an earlier infringement decision of the UK's Office of Fair Trading (OFT) or a European Commission following any appeal. A company in breach of competition law may find itself needing to defend, either in the English High Court or before the specialist Competition Appeal Tribunal (CAT), numerous damages actions commenced by competitors and customers claiming they have suffered loss as a result of the infringement. Alternatively, if a business was the victim of a cartel or other breach of competition law, the decision of the competition authority provides an opportunity to bring an action to recover the loss suffered. Damages awarded can be as significant as, if not greater, than any fine imposed by a regulator.

Appeals from regulator decisions - A company may have been found to have infringed EC or UK competition law by the European Commission, the OFT or another UK Sectoral Regulator (e.g. Ofcom, Ofgem or Ofwat). That company may want to appeal the finding of infringement and/or the level of the fine imposed. Conversely, a third party may want to appeal a non-infringement decision by a regulator. Actions can also be brought against a regulator's decision to approve or prohibit a merger by an affected party, including a third party.



Private Enforcement and Follow-on Litigation

Who can sue? - A claimant can bring an action for damages if it has suffered loss as a result of a defendant's conduct that infringes the UK or EC competition rules. For example, if the defendant has entered into an anti-competitive agreement (e.g. a price fixing cartel) or has abused its dominant position (e.g. discriminatory or predatory pricing). Most cases will be brought by the defendant's customers or competitors. Class actions and consumer body actions may also be commenced on behalf of a number of claimants.

Where to commence the action - Civil Courts or Competition Appeal Tribunal (CAT)? - A claimant can bring an action for damages in the UK either before the specialist CAT or the civil courts (primarily the High Court). For private damages claims before the CAT, there must already be a prior competition law infringement decision from the OFT, a Sectoral Regulator, the CAT or the European Commission. If no such prior infringement decision exists, actions must be brought before the High Court - the claimant having to establish a breach of competition law. Claims can be transferred from the civil courts to the CAT and vice versa.

Limitation periods - A claimant will generally have two years from the date on which the relevant infringement decision of the OFT, CAT or European Commission becomes final (i.e. not appealable) within which to bring its claim before the CAT. In contrast, in the High Court, a claimant will have six years from the date on which its cause of action arose.

Remedies - A claimant can claim damages or seek interim relief. Damages are likely to be assessed according to the amount of money needed to restore the claimant to the position it would have been in had the breach not been committed (e.g. in the case of price-fixing, a customer may be awarded the difference between the price actually paid and the price it would have paid in a competitive market). A claimant can also seek an injunction to prevent a defendant from continuing to infringe the competition rules.

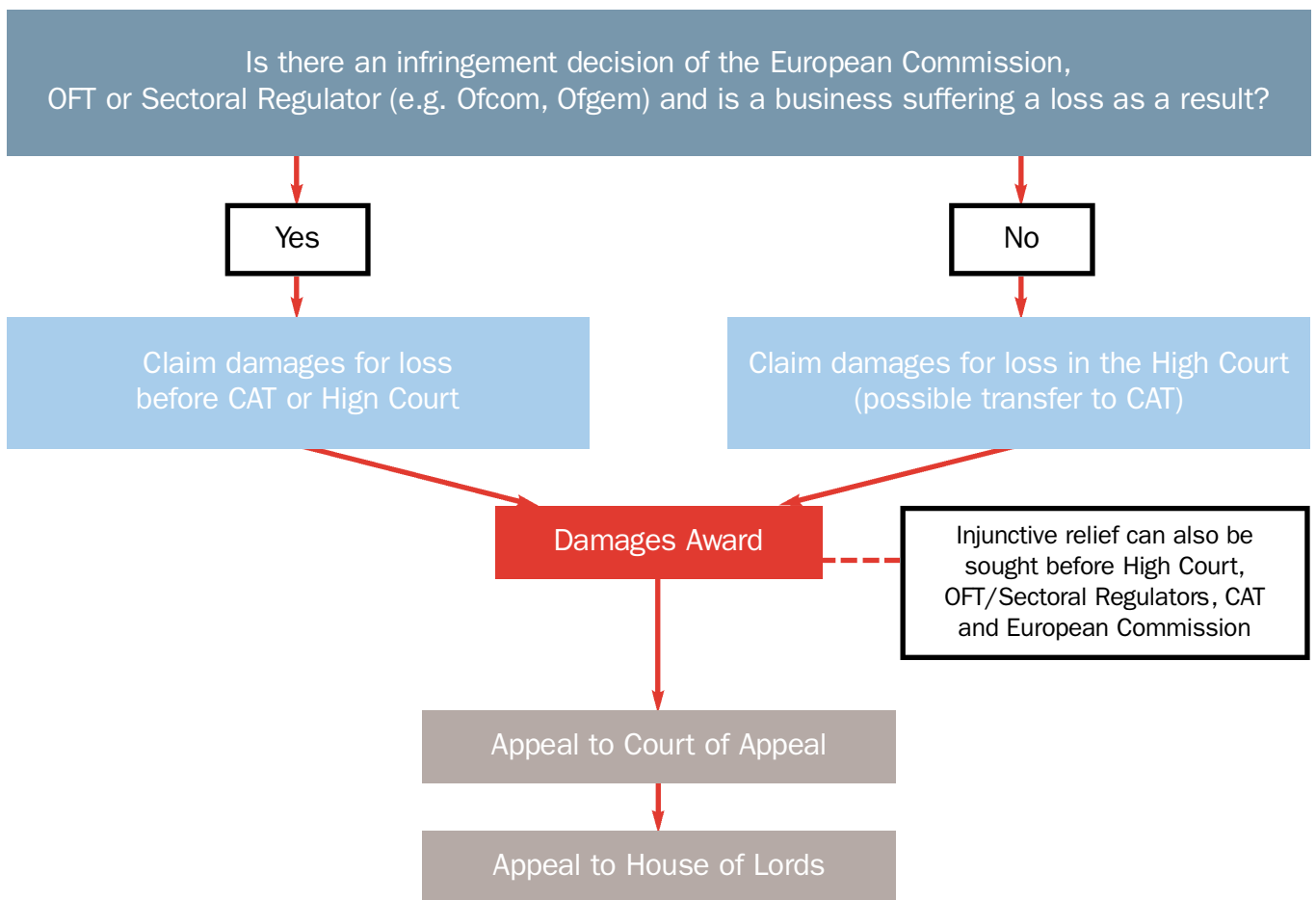
Appeals from Regulator Decisions

Appeals - It is possible to appeal a judgment awarding/refusing damages and the amount of any damages awarded. Appeals from the CAT and the civil courts initially lie to the Court of Appeal and ultimately to the House of Lords.

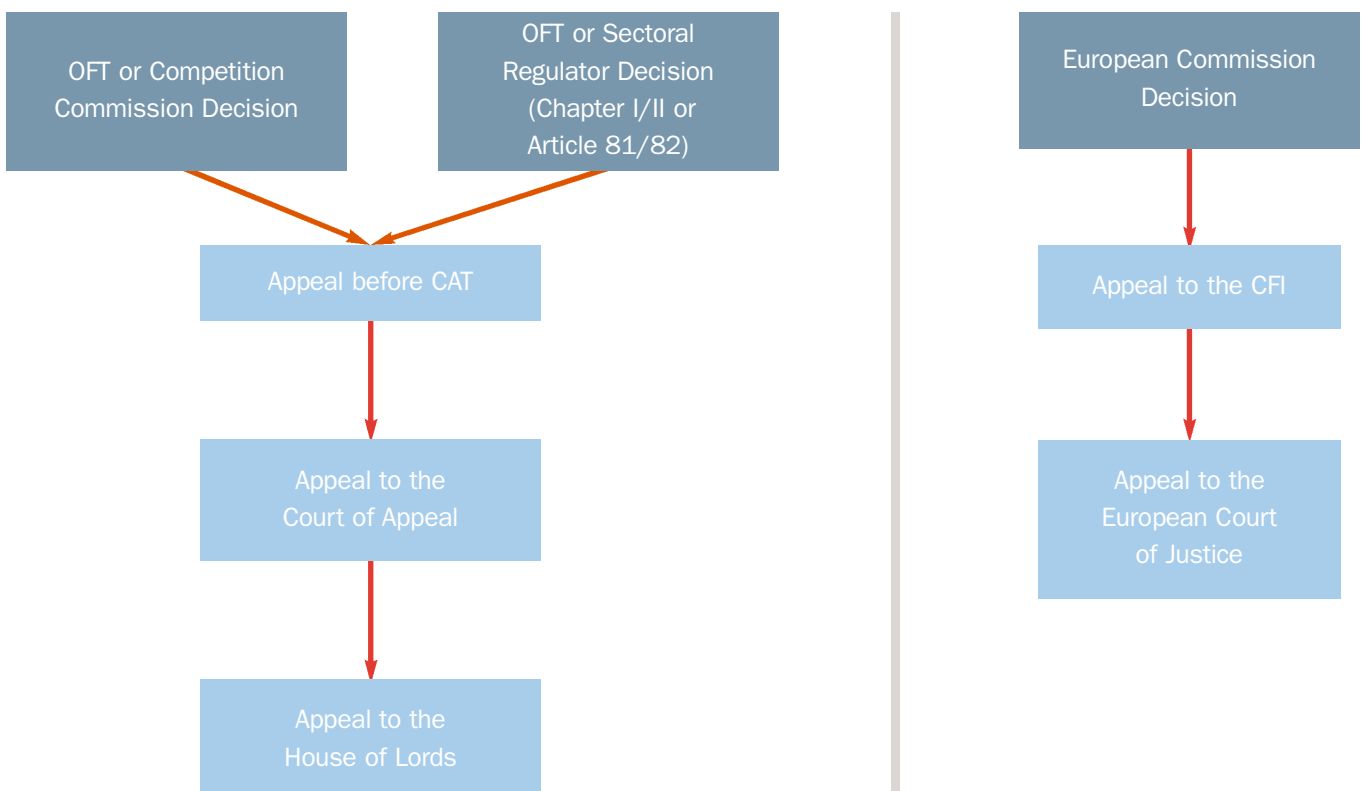
OFT (or Sectoral Regulator) decision - Appeals against an OFT infringement decision are brought by an interested party before the CAT within two months from being notified of the decision. The CAT can confirm or set aside the decision on the merits, remit the decision to the OFT or make any decision the OFT could have made. It can also grant injunctions and interim relief. Appeals to the CAT from merger decisions (including the OFT's decision as to whether to refer the matter to the Competition Commission) are judged according to judicial review standards. Appeals from the CAT are to the Court of Appeal and ultimately to the House of Lords.

European Commission Decision - Decisions adopted by the European Commission (whether merger or antitrust) are subject to review by the European Court of First Instance (CFI) and an interested party must lodge the appeal at the CFI within two months. The CFI may annul in part or in full a decision, and may also grant interim relief. The CFI judgment is ultimately appealable to the European Court of Justice.

How to Bring a Damages Action?



How to Appeal a Regulator's Decisions?



Baker & McKenzie's Competition Litigation Unit

The London *Competition Litigation Unit* has significant experience in handling private competition disputes and cases involving appeals from or judicial review of regulatory decisions before the CAT, High Court and European Community Courts. We have been involved in high profile and complex cases, including the successful judicial review of the UK authorities in the *Interbrew/Bass* merger and the first successful appeal from the decision of a sectoral regulator under the Competition Act 1998 in the *Freeserve.com plc v Director General of Telecommunications* case. We also regularly appear before the CFI and European Court of Justice. We represent *Archer Daniels Midland Company* in the lysine, citric acid and sodium gluconate cartels appeals.

The *Competition Litigation Unit* comprises leading practitioners with an in-depth understanding of the issues related to enforcement of EC and UK competition law and the litigation of competition law issues. The *Competition Litigation Unit* has drawn upon the invaluable and extensive expertise of its Dispute Resolution and Competition Departments which have specialist in-depth knowledge in an array of contentious matters, the primary aim being to add value in the most effective and efficient way to resolving the issues faced by our clients. The *Competition Litigation Unit* works in close association with leading economists and other specialists to offer clients high quality, strategic advice on competition litigation matters.

Baker & McKenzie's *Competition Litigation Unit* in London is uniquely placed to advise clients in relation to competition litigation, given its ability to draw upon the invaluable and unique competition litigation experience of their Baker & McKenzie locations across the world, in particular those in the US. This assists us in providing you with a service of the highest calibre.

Further details of the members and experience of the *Competition Litigation Unit* are set out in the information enclosed in the back pocket of this brochure.

Contact us

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