

Global Private Antitrust Litigation

Recent Trends and Developments

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Freshfields Bruckhaus Deringer

Today's presenters



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The background features a series of vertical panels of varying heights and widths, each displaying a different image. From left to right, the panels show: a blurred cityscape with light trails, a tall skyscraper (likely the Freedom Tower) at night, a dense cityscape with many lit windows, a blurred cityscape with light trails, a blurred cityscape with light trails, a blurred cityscape with light trails, and a blurred cityscape with light trails. A semi-transparent dark blue rectangular box is centered horizontally across the middle of the image, containing the title text in white.

**Important developments in litigation:
The US**

Class Certification Requirements

Can a class be certified if it contains some members who have suffered no injury?

- D.C. Circuit: “All” class members must be injured for class to be certified.
- Seventh Circuit: Class can be certified as long as a “great many” class members are not injured, and 2.4 percent is not too many.
- First Circuit: Class cannot be certified when “defendant will have no opportunity to press at trial genuine challenges to allegations of injury-in-fact,” and defendant will not have such an opportunity when 10 percent of class members are not injured.



Class Arbitration

Supreme Court continues trend of supporting bilateral arbitration

Earlier Decisions

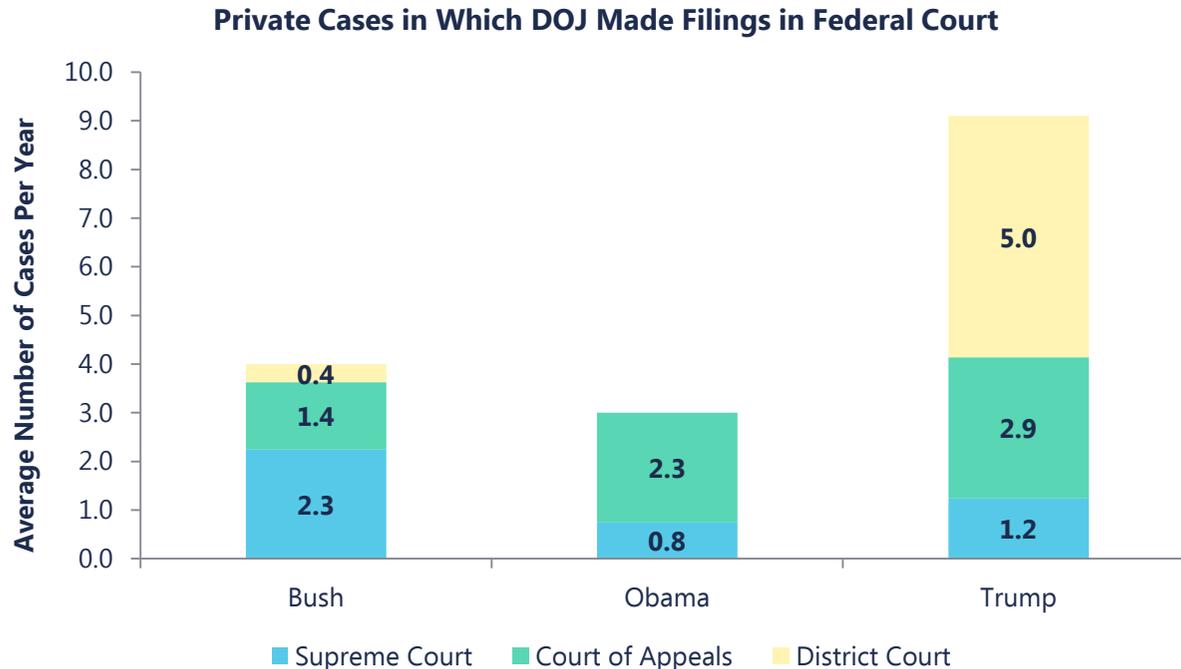
- Arbitration agreements will be enforced
- Class action waivers will be enforced
(*Concepcion, Italian Colors, Epic Systems*)
- Class arbitration is permissible when parties agree to it (*Bazzle*)
- Class arbitration cannot be compelled when arbitration agreement is silent (*Stolt-Nielsen*)

Lamps Plus v. Varela (2019)

- Question Presented: Can class arbitration be compelled when arbitration agreement is ambiguous?
- Holding: “Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis.”
- Significance: Reduces risk of class arbitration when agreement lacks an explicit waiver

DOJ Participation in Private Antitrust Cases

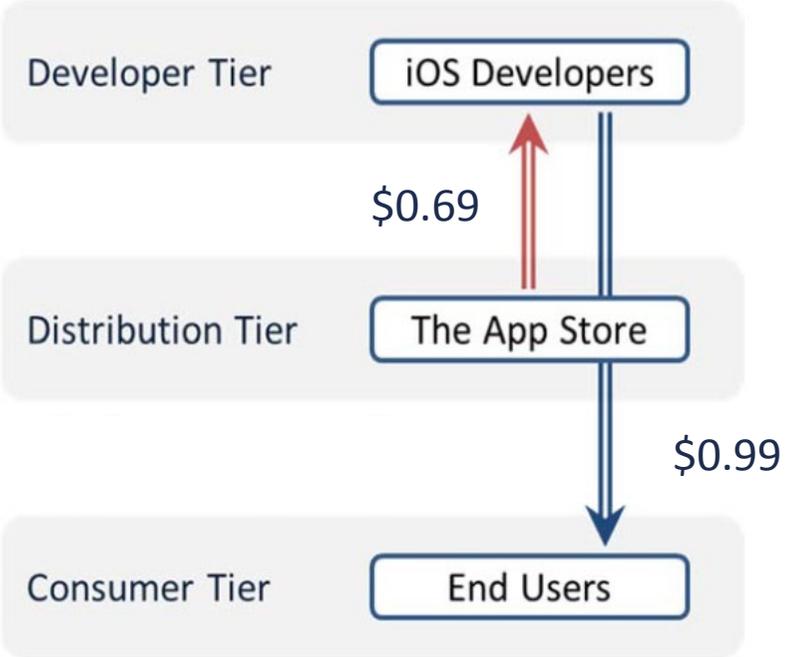
Under President Trump, DOJ is participating more often and earlier in private antitrust cases



- Filings in several cases involving no-poach Agreements
- DOJ criticized for substantive positions and for use of resources
- But no signs of DOJ changing course
- Increased opportunity to win DOJ's public backing for particular outcomes

Apple v. Pepper

Allocating damages through the distribution chain



Apple Inc. v. Pepper (2019)



Illinois Brick Co. v. Illinois (1977)



**Important developments in litigation:
The UK**

BritNed v ABB



In October 2018, the High Court delivered judgment in the first follow-on cartel damages case in the English Courts rejecting BritNed's claim for over €180 million and awarding only €13 million on two narrow grounds. The case stems from a 2014 European Commission decision alleging that eleven companies, to varying degrees, shared markets, allocated and rigged bids, and exchanged competitively sensitive information.

 **Overcharge** – Importantly, the High Court found that ABB did not deliberately overcharge BritNed for a cable purchased during the infringement period. However, an overcharge did arise in the form of (i) baked-in inefficiencies and (ii) cartel savings.

 **Lost profits** – The judge rejected BritNed's lost profit claim and found that, on the balance of probabilities, BritNed would have made the same choice as to capacity absent the cartel.

 **Interest** – BritNed's claim in respect of compound interest was '*unarguable*' because it had not incurred any capital costs as a result of the project. BritNed was awarded simple interest at a rate of EURIBOR +1% from the date of the contract award.

 **Regulatory Cap** – The judge initially asked BritNed to give an undertaking that any profits in excess of the IRR cap would be used to increase the capacity of the cable, fund the UK and the Netherlands regulated transmission networks or return excess profits to ABB. BritNed refused to issue this undertaking. As a result the judge issued a Supplemental Judgment reducing the damages award by 10% to avoid the risk of over-recovery by BritNed.

 **Appeal** – Both parties lodged appeals with the Court of Appeal last year. BritNed filed a wide-ranging appeal arguing that the judge erred in his approach to assessing a counterfactual price. ABB seeks to appeal the finding on cartel savings on the basis that they are a saving to ABB and not a loss suffered by customers such as BritNed. The Court of Appeal will hear the appeal over three days in July 2019.

Merricks v Mastercard



Litigation of the Year

*Non-cartel Defence Category
Global Competition Review Awards 2018*



Merricks sought to launch the first major opt-out action under the new collective proceedings regime introduced by the UK Consumer Rights Act 2015 following a 2007 European Commission decision against Mastercard. Merricks claimed damages of £14 billion on behalf of 46.2 million consumers.



In July 2017, the Competition Appeal Tribunal (the **CAT**) refused to certify the claim, accepting Mastercard's arguments that the claims were not suitable to be brought collectively. In particular, there was no way to ensure that the damages received by any one class member would match the class member's actual loss suffered.



In April 2019, the Court of Appeal allowed an appeal against the CAT's decision. The Court found that: (i) the CAT misdirected itself as to the correct legal test as to suitability for an aggregate award of damages; and (ii) it was premature and wrong to refuse certification by reference to the proposed method of distribution. Mastercard has sought permission to appeal the judgment to the Supreme Court.



16
years

claims period
(1992 to 2008)



46.2
million

relevant
customers*



£14
billion

damages
claimed

*UK residents (3+ months) over
the age of 16



Trucks

Complex multi-jurisdictional litigation following on from Commission Decision



European truck manufacturers found to have infringed EU competition law over a 14 year period through conduct focused on information exchange. Hybrid case where Scania is pursuing an appeal to the CJEU of the Commission Decision.



Damages claims spread across several jurisdictions in Europe of varying nature and size. Two applications for class certification brought in the UK – by RHA and UKTC - alongside a number of individual actions.



Class actions at early stage. Funding hearing has taken place but certification hearing delayed pending Mastercard permission decision. First case where competing claimants and parallel individual actions.



Complex issues relating to e.g. funding, applicable law and binding nature of decision.



**Important developments in litigation:
Continental Europe**

Prima facie evidence

German Federal Court of Justice rejects prima facie evidence regarding harm and affectedness



Rail track cartel: FCJ rejects prima facie evidence regarding causation of harm and affectedness of a specific transaction by the cartel due to lack of “very high likelihood” and “typicality”; there is (only) a “presumption” that has to be considered as a “strong indication” within the required comprehensive assessment of all circumstances of the individual case



Lower courts divided over interpretation of FCJ’s decision



FCJ’s decision related to case under “old law”; “new law” provides for statutory presumption of harm

Statute of limitation

German Federal Court of Justice confirms applicability of suspension provision to “old” cases

“Grey cement cartel II”:

- FCJ confirms applicability of suspension provision under “old law” to cases in which claims have arisen before entering into force of that provision (July 2005)
- Tendency among courts to assume early start of suspension period



Result

- Potential claims may not be time-barred even if infringement occurred a long time ago

Bundling of claims

In the absence of class actions, activities of special purpose vehicles continue, but are challenged

- New type of action (model declaratory action, “Musterfeststellungsklage”) introduced in Germany in November 2018, but likely of limited significance to antitrust litigation as only individual consumers can join
- Activities of special purpose vehicles, based on assignment of claims, continue
- Model of SPVs challenged based on Legal Services Act (“Rechtsdienstleistungsgesetz”)

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**Important developments in litigation:
What's next?**

Brexit

The impact of Brexit on antitrust litigation

- There is no sign of a slow-down in the UK – continued investment by claimants and funders in antitrust litigation
- No deal Brexit would likely lead to increased litigation linked to parallel enforcement by UK and the EU
- Even in no deal scenario Commission decisions likely to be persuasive evidence of infringement
- UK intends to remain a party to the Hague and Lugano conventions



Questions

& answers



Host: Jenn Mellott



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Jenn is Counsel in our US antitrust, competition, and trade group, jointly based in Brussels and the United States. She represents clients in the US and EU in connection with merger control, antitrust compliance, cartel investigations, and civil antitrust litigation.

Jenn has particular experience representing clients with respect multi-jurisdictional merger control processes and international cartel investigations, and is uniquely placed to advise European clients on US antitrust issues and US clients on European antitrust issues from our Brussels office. Jenn has experience in a wide variety of industries, including mobility, automotive, industrial products, cement natural gas gathering and processing, nutritional products, online advertising, and telecommunications.

Jenn has authored and contributed to several recent antitrust publications including the American Bar Association Transportation Antitrust Handbook, Getting the Deal Through, and Concurrences.

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Andy is a partner in our antitrust, competition and trade and dispute resolution practices, based in Washington, DC. Andy focuses on US antitrust litigation, including both civil and criminal matters.

Before joining Freshfields, Andy served for more than a decade at the antitrust division of the US Department of Justice, gaining significant experience investigating and litigating civil and criminal antitrust matters involving a wide variety of industries. As counsel to the director of litigation from 2016 to 2018, he worked closely with DOJ leadership in supervising the division's civil litigation program during a period of unparalleled activity and success. He also prosecuted criminal cases as a special assistant US attorney for the Eastern District of Virginia from 2010 to 2011.

Earlier in his career, Andy worked in the Washington, DC office of another law firm, where he defended clients in private antitrust litigation and in matters initiated by the Federal Trade Commission and the antitrust division.

He began his career as a clerk for the Honorable Stewart Dalzell of the US District Court for the Eastern District of Pennsylvania.

Nicholas Frey



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Nicholas advises on competition law and commercial disputes.

He has particular experience of competition litigation, such as cases involving trucks, rail, gas-insulated switchgear, power cables, marine hoses and credit-card charges.

Nicholas has also: co-ordinated global competition investigations, including investigations into global benchmark rates such as Libor, and abuse of dominance; and led on complex domestic and multijurisdictional commercial disputes, including litigation before the UK and European courts (at both General Court and European Court of Justice levels) and arbitration.

Clients typically come from the TMT, general industry and financial services sectors, but Nicholas has also worked for energy, aviation, mining and publishing clients.

He is a native Swedish speaker, and also has French, Russian, Danish and Norwegian language skills.

Juliane Ziebarth



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Juliane advises clients on all aspects of German and European competition law with a special focus on merger control and antitrust litigation. Her practice also covers antitrust compliance advice including distribution law matters.

In the merger control area, she has represented clients in (phase 1 and 2) merger control proceedings both before the German Federal Cartel Office and the European Commission, including cases involving commitments. In the litigation area, Juliane's practice covers follow-on damages litigation as well as antitrust law-related aspects of patent litigation. Juliane is a member of the steering committee of the firm's Global Antitrust Litigation Group (GALG), which serves to coordinate both multi-jurisdictional investigations and accompanying civil litigation worldwide as well as providing an internal forum for sharing knowledge and experience.

Juliane was seconded to the firm's London office during 2011. She speaks English and German.

Thank you

We welcome suggestions for future webinars.

Please send your suggestions to [**jennifer.mellott@freshfields.com**](mailto:jennifer.mellott@freshfields.com)

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