CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
April 2013 (1)

Towards a Class Action Regime for Competition Litigation in the United Kingdom: An Assessment of the Government's Proposals

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Towards a Class Action Regime for Competition Litigation in the United Kingdom: An Assessment of the Government's Proposals

Christopher Brown & Scott Campbell[1]

I. INTRODUCTION

In April 2012, the U.K. Government launched a consultation on possible reform of the U.K. regime for private redress in respect of breaches of competition law.[2] The consultation, which could be seen both as a belated response by the Government to the recommendations on private redress made to it by the Office of Fair Trading ("OFT") in 2007[3] and as an outflanking of the European Commission's White Paper on Damages Actions for Breach of the EC antitrust rules,[4] was wide-ranging and included several radical proposals designed to facilitate redress for victims of anticompetitive conduct—most notably, the introduction of an "opt-out" collective actions mechanism. It is fair to say that this proposal was the one that generated the most fevered reaction among respondents. While the majority of respondents agreed with the Government's assessment that the current system of collective redress had failed, there were sharp divisions as to what steps should be taken to cure the problem.

In January 2013, the U.K. Government issued its response to the consultation.[5] It is therefore possible to discern the concrete proposals that ought to make their way into draft legislation to be tabled during the present Parliament. Notably, the Government maintains the view that an opt-out mechanism should be introduced.

This article considers the Government's proposals on collective actions.[6] It starts with a short précis of the current position, before providing an overview of the Government's proposed reform. It then addresses two particular issues which, it is submitted, will be critical to the success or failure of the reform: first, the proposed certification rules; and second, the funding of such actions.

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[2] BIS, *Private actions in competition law: a consultation on options for reform* (April 2012).

[3] OFT, *Private actions in competition law: effective redress for consumers and business. Recommendations from the Office of Fair Trading* (November 2007, OFT916 resp).

[4] COM(2008) 165, 2 April 2008.

[5] BIS, *Private actions in competition law: a consultation on options for reform – government response* (January 2013).

[6] For an overview of the full panoply of potential reforms, *see* Brown & Campbell, *Reform of Private Enforcement of Competition Law in the UK: the Government's Proposals*, CHILLIN' COMPETITION, (February 6, 2013), *available at* http://chillingcompetition.com/2013/02/06/reform-of-private-enforcement-of-competition-law-in-the-uk-the-governments-proposals/.

II. WHERE WE ARE NOW

Presently, there are—at least on paper—a number of tools available to claimants and the courts for the purpose of bringing and managing numerous claims arising from the same or a similar cause of action.

First of all, the Civil Procedure Rules ("CPR") contain relatively long-standing tools applicable to civil law claims generally, in the form of "Group Litigation Orders" ("GLOs") under CPR r 19.11 and "representative actions" under CPR r 19.6 in the High Court:

- GLOs may be made so as to facilitate the case management of claims, which give rise to common or related issues of fact or law. Claims raising one or more of the "GLO issues" will generally be moved to the "management court" (i.e. the court specified as the court which will manage the claims on the GLO register and determine the GLO issues). Where a judgment or order is given or made in a claim on the group register in relation to one or more GLO issues, that judgment or order is binding on the parties to all other claims that are on the group register at the time the judgment is given or the order is made unless the court orders otherwise, and the court may give directions as to the extent to which that judgment or order is binding on the parties to any claim which is subsequently entered on the group register (CPR r 19.12). Crucially, however, the GLO regime is an opt-in mechanism: only claims (often brought forward as a result of the court's notification) which have already been commenced may be added to the GLO "register." To date, only 76 GLOs have been made, and not one of them has related to competition law.
- As for representative actions, this is a little-used mechanism that allows a party to bring proceedings as "representative" of a broader class of persons, provided that the representative has the "same interest" in the claim as those he claims to represent. To date, there has been just one (unsuccessful) attempt to bring such a claim in the context of a breach of competition law, namely in *Emerald Supplies v British Airways*.[7] In that case, the expression "same interest" was interpreted narrowly by the courts: The representative claim was struck out because the claimants and those they purported to represent—direct purchasers ("DPs") and indirect purchasers ("IPs") from alleged cartelists—did not have the same interest at the time the claim was issued (rather than, as the claimants had contended was sufficient, at the time judgment is given). Furthermore, there was an inherent tension between DPs and IPs, such that one could not be said to be a suitable representative of the other.

Second, the Enterprise Act 2002 amended the Competition Act 1998 ("the 1998 Act") to introduce, in the form of section 47B of the 1998 Act, a collective action regime specific to "follow-on" damages actions (i.e. those which follow on from findings of infringement of the U.K. or EU competition rules by a relevant competition authority, principally the OFT or European Commission). A number of observations may be made on the procedure provided for by section 47B:

[7] [2009] EWHC 741 (Ch), [2010] Ch 48; upheld on appeal [2010] EWCA Civ 1284, [2011] Ch 345.

- The mechanism extends only to consumer claims—businesses, including small and medium-sized enterprises, may not benefit from it.
- Section 47B provides for an "opt-in," rather than "opt-out," mechanism. The consumer body bringing the action must identify two or more individuals on whose behalf the claim is to be made.
- Only "specified bodies" may bring claims. To date, just one body, the Consumers' Association ("CA"), has been so specified by Government. It will be apparent, therefore, that the scope for bringing claims under it is tightly circumscribed.

In the 10 years or so since section 47B came into force, only one such case has ever been brought, *Consumers' Association v JJB Sports plc*, which arose out of a consumer-facing cartel concerning the retail supply of football replica kits. The claim was widely perceived to have been a failure, not least by the CA itself: Despite being widely advertised, very few consumers came forward to take part in the claim, and the ultimate settlement did not justify the costs incurred by the CA in preparing and bringing the claim in the first place.

No doubt there were various reasons for consumers' reluctance to come forward: some will have been unsure whether they were victims (the events having taken place some time before); others will have been worried that they did not have any evidence to support a claim (in the form, for example, of receipts); and yet others will have taken the view that the amounts at stake (approximately £20) were not worth the hassle or perceived risk.

Since then, the CA has expressed its reluctance to embark on further consumer claims under section 47B, which are undoubtedly complex to prosecute and inevitably represent a significant risk in terms of the CA's own resources. The representative action mechanism contained in section 47B of the Competition Act 1998 is, therefore, to all intents and purposes a dead letter.

III. THE REFORM PROPOSALS

The undeniable paucity of collective claims in the competition law sphere, under either CPR Rule 19 or section 47B of the 1998 Act, clearly indicated the need for reform, at least for those who see the viability of collective actions both for consumers and businesses as desirable. The OFT's *Recommendations to Government* in November 2007 marked the first time that a public authority in the United Kingdom actively made the case for reform, in particular the introduction of an opt-out collective actions regime, but it took until 2012 for the Government to consult on such possible reform.

Arguably, the greatest obstacle to collectivizing similar claims arising from a single mass tort is the need for claimants positively to opt in to an action in circumstances where they may not even be aware of their potential to make a claim. In particular, where a mass tort (such as cartel conduct) has caused the loss of a relatively small amount to each of a large number of people, the "opt-in"' model is unlikely to provide a realistic prospect of meaningful collective redress, as the *JJB Sports* case illustrates. Given this experience, where unlawful activity has affected, for example, all of an economic market (as is often the case for a cartel) then an "opt-out" mechanism for bringing proceedings on behalf of all buyers in the market appears, at least in principle, to be an effective and efficient means for collective action. However, the appearance

of excess in the U.S. class action model, where allegedly unmeritorious claims have led to large settlements, has generated an aversion to this device in Europe, and the Government has been at pains to point out that it does not wish to create a U.S.-style "litigation culture."

These various considerations have led the Government to propose the following system for collective redress:

- Collective actions may be brought in the CAT, which will be required to certify whether they should proceed on an opt-in or opt-out basis.
- Such actions may, in principle, be brought on behalf of consumers, businesses, or a combination of the two.
- Claims may be brought only by the claimants themselves or by genuine representatives of them, such as trade associations or consumer bodies. The Government has specifically ruled out the ability of law firms, third party funders, or special purpose vehicles to bring such actions.
- The CAT's certification role will also require it to conduct a "preliminary merits" test, to carry out an assessment of the adequacy of the representative and to satisfy itself that a collective action is the "best way of bringing the case."
- Only U.K.-domiciled consumers and businesses will be covered by an opt-out claim, although non-U.K. parties will be free to join on an opt-in basis.
- It will not be possible to claim exemplary damages (or "treble" damages).
- The usual "loser pays" costs rule will apply, such that representative claimants will be at risk of an adverse costs order requiring them to pay the defendant's costs in the event that they are unsuccessful (subject, in exceptional circumstances, to the possibility of cost-capping by the CAT).
- Contingency fees (also known as "damages-based agreements" or "DBAs") will be prohibited, although conditional fee agreements ("CFAs") and after-the-event ("ATE") insurance will remain available.
- Any sums left unclaimed following an award of damages by the CAT must be paid to the Access to Justice Foundation, a charity that supports access to justice by way of pro bono legal assistance, rather than distributed on a *cy-près* basis. That said, other options may be included in any settlement agreement between the parties, including reversion to the defendant(s): this will preserve or increase the incentive on the part of defendants to settle claims rather than go to trial.
- Settlements must, however, be judicially approved, so as to "ensure fairness to the underlying claimants." Such approval must include consideration of the reasonableness of fees being paid to lawyers, and the represented parties must be given the opportunity to opt out of the settlement if they wish to do so.

IV. COMMENTS ON THE PROPOSED OPT-OUT MECHANISM

We would offer the following tentative comments on the mechanism. We say "tentative" because the Government's proposals are in various respects rather light on detail. For instance, there is no elucidation of what sort of preliminary merits test should be carried out and what the standard should be, or—critically—of how the CAT should determine whether a collective action is the best way of bringing the case. Will the representative need to show, for example, that those whom it is representing all have a common interest in the outcome, or merely that there are common issues to be resolved? Some insight can be gleaned from the initial consultation, which in Annex A suggested that the certification process "could include some or all" of the following:

- A preliminary merits test along the lines of whether there is a reasonable possibility that material issues of fact and law common to the class will be resolved in the claimants' favor.
- A "minimum numerosity" test (although no minimum number of victims is suggested).
- Ensuring that there is sufficient commonality of issues among the claimants.
- Ensuring that the individual or body bringing the action is an adequate representative, in terms of absence of conflicts of interest, adequacy, and typicality (if an individual consumer or business).
- Ensuring that the representative has sufficient funds to cover the costs of the defendant, should the litigation be unsuccessful.

None of this appears in the concrete proposals, and so it is an open question as to what will appear in the anticipated draft legislation. Experience from other jurisdictions, however, suggests that the certification stage will be a major litigation battleground and that in many cases there will be a real question as to whether an opt-out collective action is an appropriate way of the case proceeding.

Take Canada where, in a number of cases attempted on behalf of indirect purchasers, class certification has been denied. This is because, in many of these cases, the amount of the overcharge actually passed on to IPs varied considerably from one IP to another, and it was difficult, if not impossible, to show that the class would have suffered the same or similar loss.[8]

Meanwhile, in the United States, DP actions have been known to fail at the certification stage. For example, the Court of Appeals for the Third Circuit quashed the class certification order granted in *In Re Hydrogen Peroxide* on the basis the fact of damage could not be established for every class member through proof common to the class, such that the "predominance" rule in Rule 23(b)(3) of the Federal Rules was not satisfied.[9] In that case there were a number of reasons why the impact of the cartel could not be proved on a class-wide basis: the products were not fungible and had different supply and demand characteristics, prices to individual customers had not changed in step with changes to the industry over the lifetime of

[8] *See* e.g. *Chadha v Bayer Inc* [2003] O.J. No. 27, 63 O.R. (sd) 22 (Court of Appeal for Ontario).

[9] 532 F.3d.

the cartel, actual prices charged to customers did not always reflect the price lists, and various contracts were individually negotiated.

In other words, even in DP claims, it will often be necessary to consider the position of the individual claimants when seeking to establish the fact of loss. Here in the United Kingdom, where defendants are at liberty to argue that loss has been passed on, there is likely to be even greater scope for arguments about "predominance."

Jones has identified a number of factors that individually or collectively may make class actions here in the United Kingdom more likely to fail.[10] They include:

- where the cartelized product is sold through multiple distribution channels;
- where the cartelized product is incorporated into another product, especially where the price of the end product is affected by many variables and/or the cost of the cartelized product is a small part of the cost of the end product; the problem is *a fortiori* where the cartelized product is incorporated into various other products;
- where the evidence suggests that purchasing power varies between customers of the cartelist or that prices were subject to individual negotiation; and
- where the conditions on the market(s) in question have changed over time.

As Jones says, few cartels will fall neatly into the ideal scenario where the cartelists are active at retail level and impose the same overcharge on all their customers. Looking at the OFT's cartel decisional practice since the Competition Act 1998 came into force, only two cartels—*Football Replica Kit*[11] (which led to the *Consumers' Association v JJB Sports* case) and *Toys and Games*[12]—even arguably fall into that bracket.

This is not to say that ways cannot be devised for addressing any issues in more complex cases (for example, through sub-classing or the certification of a class for dealing with particular issues, such as liability), but it does suggest that defendants will not be short of arguments to deploy if they wish to oppose certification. The scale of the task potentially facing opt-out representatives is highlighted by empirical research that suggests that, as of 2008, there had been only one class action in Canada in which the representative claimant had won a *contested* certification.[13]

Finally, we offer some observations about funding. The Government's decision not to allow law firms or funders to bring claims as representatives is perhaps understandable as a way of assuaging concerns on the part of those who consider that an opt-out regime is in itself a radical innovation; but, together with the proposed prohibition on DBAs, it does seriously call

[10] Jones, *Collective Actions: Loss in complex* cases, COMPETITION L.J. (forthcoming 2013).

[11] Decision CA98/06/2003 *Price-fixing of Replica Football Kit*, *available at* http://www.oft.gov.uk/shared_oft/ca98_public_register/decisions/replicakits.pdf.

[12] Decision CA98/8/2003 *Agreements between Hasbro U.K. Ltd, Argos Ltd and Littlewoods Ltd fixing the price of Hasbro toys and games, available at* http://www.oft.gov.uk/shared_oft/ca98_public_register/decisions/hasbro3.pdf.

[13] Mulheron, *Competition Law Cases under the Opt-out Regimes of Australia, Canada and Portugal*, Research Paper for the Department of Business, Enterprise and Regulatory Reform, 23 (2008).

into question whether opt-out actions will be a reality. It is obvious that representatives need to have an incentive to bring such claims, and the serious costs of litigating claims based on competition law can be enormous. In particular, it might be considered anomalous to exclude the option of DBAs in this area alone, just as they are being explicitly provided for in civil ligation in England and Wales generally.[14]

Further, the Government's stated objective in this respect is already catered for elsewhere: The proposals contain other safeguards against the risk of abuse, most notably the maintenance of the normal costs rule that the loser pays. It is worth noting that the OFT specifically opposed the Government's approach in its response to the consultation,[15] saying that it "unnecessarily restricts the funding arrangements available to potential claimants" and adding:

> More specifically, we note that there are already significant issues with funding competition cases owing to the complex nature of [such] cases and the relatively high risk associated with many such claims. We consider that taking a stricter approach than is permissible in civil cases more generally would be inappropriate. In our view, the concerns highlighted in the Consultation Document can be addressed by appropriate safeguards, such as strong court certification and supervision.

While it is true that, in an opt-out situation, a DBA would not be entered into with all (or even many) of the actual victims, but rather with one or more representatives, the interests of the underlying claimants could be protected by making DBAs subject to certification by the CAT of their reasonableness.[16] The interests of the defendant ought to be protected by virtue of the facts that, first, only appropriate opt-out claims would be certified by the CAT and, second, only the ordinary legal fees would be recoverable from the defendant, so the defendant would be no worse off in financial terms than if the claimant lawyers were acting on a standard basis.

The negative impact of a prohibition on DBAs is arguably compounded by the changes brought about as a result of the Jackson review of civil litigation costs[17] to the CFA system (the success fee "uplift" will no longer be claimable from the losing party) and to the recoverability of ATE premiums (these will likewise not be recoverable but will instead have to come out of the award of damages). There is no suggestion in the Government's proposals that it intends to make a special exception in this respect for competition litigation.

We should say that we do not view the proposals in a wholly negative light. Far from it: the emphasis on regime flexibility, with plenty of discretion in the hands of the CAT to do justice in individual cases, is in our view the right approach. The proposals to allow collective actions in

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[14] *See* section 45 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the S.I. 2013 No. 609 Damages-Based Agreements Regulations 2013.

[15] OFT1434resp, July 2012, *available at* http://www.oft.gov.uk/shared_oft/reports/oft_response_to_consultations/OFT1434resp.pdf.

[16] *See* further p. 35 of the response by Professor Rachel Mulheron and Vincent Smith to the consultation, *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69136/private-actions-in-competition-law-a-consultation-on-options-for-reform-responses-o-to-z.pdf.

[17] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009), *available at* http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf.

both "standalone" and "follow-on" claims, and on behalf of both consumers and business, are also welcome. But funding will in our view be *the* critical issue in determining the success of this mechanism, and there is a real risk that the Government's caution will substantially stifle the regime at birth.

V. CONCLUSION

While the general tenor of the proposed reforms is to be welcomed, there is a risk that some of the safeguards to the opt-out mechanism that are proposed may render it impractical and unattractive to run opt-out claims. While collectivizing claims goes some way to generating costs savings and efficiencies, the burden of both the cost associated with pursuing claims as well as exposure to adverse costs in the CAT will by no means be a minor consideration for genuine representatives of victims of anticompetitive conduct.

This, taken in conjunction with the proposed carve-out to the Jackson Reforms that would otherwise allow the claimants' lawyers to offer their clients a contingent fee structure, may well deter trade associations and consumer groups from pursuing claims. It would be an unfortunate missed opportunity if, for want of a viable means of funding opt-out claims, genuine representatives of claimants failed to come forward.