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Class & Group Actions 2013
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A practical cross-border insight into class and group actions work

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The International Comparative Legal Guide to: Class & Group Actions 2013

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Chapter 4

Competition Law Private Actions in England & Wales: Access to Collective Redress & Plans to Reform

Ashurst LLP

1. Introduction

The issue of accessibility of collective redress in respect of private claims for breaches of competition law has been a political hot potato at both a UK and EU level for the best part of a decade. This is understandable. Many competition law infringements, particularly those concerning illegal price-fixing cartels, ultimately affect large numbers of consumers and businesses, and the total loss suffered by victims of the infringement is often significant. However, when viewed on an individual basis, the damage suffered is often too small to warrant a single party incurring the costs, inconvenience and complication of bringing a private claim against the infringer. As such, the only effective way to achieve adequate redress is by way of a collective action. As Lord Justice Mummery stated in Emerald Supplies Limited and another v British Airways: "… forms of collective redress are now widely regarded as essential for breaches of competition law". [See Endnote 1]

In this chapter we look at the latest set of proposals for reform, as essential for breaches of competition law. In England and Wales, these sorts of claims may be brought in the CAT or the High Court. Which one applies depends on whether the CA 1998 or the CPR applies. Under the CPR, in theory, any number of claimants (or defendants) can be joined as parties to a single claim. The requirement is that the claim is brought in the CAT or the High Court. [See Endnote 8]

Finally, we consider what the new regime for collective redress in the CAT may look like and the potential implications for collective redress reform in England and Wales generally.

2. Private Actions For Breach Of Competition Law

Private competition damages actions concern claims brought in national courts or tribunals by or on behalf of private individuals or businesses alleging loss as a consequence of an infringement of competition law. In England and Wales, these sorts of claims may be brought in either the Chancery Division of the High Court or the CAT. These cases are generally predicated on the cartelists having breached the statutory duty imposed by Article 101 [see Endnote 3] of the Treaty on the Functioning of the European Union, [see Endnote 4] which prohibits anti-competitive agreements affecting markets in the European Economic Area (including price-fixing cartels). They can either be brought on a stand-alone or follow-on basis depending on whether or not a prior administrative decision exists. [See Endnote 5] If they are brought on a stand-alone basis, it will be up to the claimants to establish that an infringement actually occurred for which the relevant defendants are liable. On the other hand, follow-on actions rely on the relevant underlying infringement decision in order to establish liability. That being so, in follow-on actions the claimants are only concerned with proving the quantum of the damage that they have incurred. [See Endnote 6]

Where infringement activity concerns participation in an illegal price-fixing cartel, individuals or businesses that purchased products during the cartel period could have a claim for direct loss in the form of the unlawful price overcharge created as a result of the cartel. They may also argue that they suffered indirect losses if the effect of the illegal cartel was to inflate the prices of products sold by non-cartelists during the cartel period. [See Endnote 7]

3. The Existing Regime In England & Wales

There are a number of mechanisms that a group of claimants can use to bring a collective action for damages incurred as a result of a breach of competition law in England and Wales. These comprise:

(a) Under the CPR:
- Multiparty claims (CPR 19.1-19.5);
- Representative actions (CPR 19.6); and
- Group Litigation Orders ("GLO") (CPR 19.10-19.15).

(b) Under the CA 1998:
- Multiparty claims (section 47A); and
- Representative actions (section 47B).

Taken together, these represent the existing regime for collective redress in private competition damages actions in this jurisdiction. While the mechanisms contained in the CA 1998 are specific to competition law (and apply only to cases heard in the CAT), the same is not true of the CPR provisions, which can apply generally to any civil case heard in the High Court. Consequently, there are two separate regimes for collective redress in private competition damages actions in England and Wales. Which one applies depends on whether the claim is brought in the CAT or the High Court. [See Endnote 8]

4. Collective Redress In The High Court

Multiparty claims (CPR 19.1-19.5)

Under the CPR, in theory, any number of claimants (or defendants) can be joined as parties to a single claim. The requirement is that the claims can conveniently be disposed of in the same proceedings.
Representative actions (CPR 19.6)

Representative actions have been available in England and Wales for many years. The relevant provisions are set out in CPR 19.6. In short, where more than one person has the same interest in a claim, CPR 19.6 enables a claim to be brought by one (or more) representative on behalf of itself and the remaining claimants, provided that such representative has the “same interest” [see Endnote 12] in the proceedings as those parties it is representing. [See Endnote 13] Any judgment given by the court is binding on all parties, notwithstanding that those included in the underlying group are not technically parties to the action. [See Endnote 14] The issue of whether or not two or more parties have the “same interest” has to be determined in line with the “Overriding Objective” of the CPR. [See Endnote 15] Put simply, the Overriding Objective is aimed at enabling the courts to deal with cases justly in terms of cost, efficiency and equality. By way of illustration, a court would be minded to determine that a group of parties has the “same interest”, and can therefore bring its claim on a representative basis pursuant to CPR 19.6, if it could be demonstrated that to do so would enable the action to be dealt with expeditiously and would result in cost savings. [See Endnote 16] It is worth mentioning that it may be possible, should the relevant claimants fail the “same interest” test, to seek a GLO under CPR 19.10-19.15 in the alternative.

As regards collective actions for breaches of competition law, there is scope for a claimant to rely on CPR 19.6 in order to bring a representative action based on, for example, the existence of a price-fixing cartel (which has already been established by a previous administrative decision). The nature of single and continuous competition law infringements means that there are likely to be groups of claimants (such as purchasers of cartelised products in follow-on actions) that have the “same interest”.

However, there are limits to the scope of the representative action under CPR 19.6, as illustrated by the Court of Appeal’s decision in Emerald Supplies Limited and another -v- British Airways. [See Endnote 17] In that case, the claimants alleged that British Airways had entered into a cartel with other airlines to inflate the price of air freight services, which had caused damage to their business of importing flowers into the UK. The claim was a stand-alone claim because, although the competition authorities were investigating the alleged cartel, no decision had been reached at the time the damages claim was issued. The claim was structured so as to include both a claim on the claimants’ own behalf, and a representative action under CPR 19.6 on behalf of all other direct or indirect purchasers of air freight services that had suffered damage as a result of the alleged cartel.

The issue for the Court of Appeal was whether the claimants and those they sought to represent had the “same interest” in the claim. The Court of Appeal found that they did not. The court made it clear that it must be possible to identify at all stages during the proceedings which parties are included in the class in order to be able to assess whether those represented have the “same interest” in the claim. The court considered that, until the question of liability had been tried and judgment on liability given (which, at that stage, it had not been, as the competition authority’s investigation was ongoing), it was not possible to say of any person whether they would qualify as someone entitled to damages from British Airways. As such, it was not possible to say, at that stage, that Emerald Supplies Limited, and the other purchasers, had the “same interest” in the claim. In the light of this decision, it is generally agreed that it would be difficult for any stand-alone damages claim to be brought as a representative action under CPR 19.6.

Group Litigation Orders (CPR 19.10-19.15)

An alternative mechanism for collective redress in competition private damages actions is the GLO. GLOs were introduced in 2000 [see Endnote 18] by the inclusion of CPR 19.10-19.15. These provisions were designed to establish a collective framework for the case management of claims which give rise to common or related issues of fact or law. [See Endnote 19] The Practice Direction at PD19B provides further guidance.

In summary, if a number of claimants issue claims which give rise to similar or related issues – for example, if all of the claims relate to the same collective damage caused by a breach of competition law – the court has the power to issue a GLO. A GLO helps the court to manage and co-ordinate the claims. The GLO will also contain directions regarding the setting up and managing of a “group register”, [see Endnote 20] which is updated each time a party is added or removed from the GLO, or a judgment, order or direction is made by the court. Any judgment, order or direction is binding on all parties listed on the register to the extent that it relates to one of the GLO issues. As with representative actions under CPR 19.6, the court’s permission is needed to enforce any judgment.

As regards access to collective redress in relation to private competition damages claims, GLOs are helpful in that they provide a fall-back position when a collective action fails to satisfy the “same interest” test under the representative action (the GLO test of “common or related issues of fact or law” is comparatively easier to satisfy).

5. Collective Redress In The CAT

In addition to the above, the CA 1998 provides some alternative options for collective redress, although these only apply to competition law private damages actions and these actions can only be brought in the CAT.

Multiparty claims (section 47A of CA 1998)

In the same way that parties are able to join together to bring multiparty actions in respect of competition law breaches in the
High Court (pursuant to CPR 19.1-19.5), so too are they able to do so in the CAT in relation to follow-on actions.

Rule 17 of the CAT Rules [see Endnote 21] grants the CAT the power to consolidate actions should it consider it a necessary step, and the CAT’s active case management powers enable it to keep a handle on such collective claims. However, this power is restricted to claims brought under section 47A of CA 1998. A recent example of a section 47A multiparty claim is the damages action brought in the CAT (although recently transferred to the High Court) in respect of the Copper Plumbing Tubes Cartel, [see Endnote 22] which involves 21 claimants that have joined together for the purposes of bringing the claim. [See Endnote 23]

Representative actions brought by designated bodies (section 47B of CA 1998)

Under section 47B of CA 1998, collective actions may be brought in the CAT by a representative body on behalf of two or more claimants that have suffered damage as a consequence of a single infringement of competition law. [See Endnote 24] The representative body must be “specified” by an order of the Secretary of State. [See Endnote 25] At present, the only designated representative body is the Consumers’ Association, also known as “Which?”. Claimants are required to “opt-in” to a representative action brought under section 47B. [See Endnote 26] Any judgment of the CAT is binding on all such claimants and any damages award is distributed between them. [See Endnote 27]

Section 47B is designed specifically to deal with cases where large numbers of consumers have suffered damage as a result of a widespread competition law infringement, such as an illegal price-fixing cartel concerning common consumer goods. In such cases, the aggregate damage incurred by consumers is likely to be significant, but when viewed on an individual basis, the sums involved are unlikely to be large enough to justify the costs, inconvenience and complication of an individual damages action. Importantly, Section 47B is currently limited to follow-on private damages actions and it cannot be used in respect of stand-alone competition actions. [See Endnote 28] In addition, it can only be used for the benefit of consumers and it does not extend to businesses (this includes even very small businesses). [See Endnote 29]

There has been one case brought using the representative action under section 47B of CA 1998 since its introduction 10 years ago, viz, Consumers’ Association v JJB Sports PLC. [See Endnote 30] The case concerned a follow-on damages action against JJB Sports, which had been found to have participated in an illegal price-fixing cartel concerning the sale of replica England and Manchester United football shirts. Only 130 claimants signed up to the claim, representing less than 0.1% of the total estimated number of affected consumers. [See Endnote 31] The case was ultimately settled, with each claimant receiving approximately £20 compensation. This was not regarded as a successful outcome and, in the aftermath, Which? pledged never to bring another action under section 47B of CA 1998 in its current form. [See Endnote 32]

In the light of the perceived difficulties of the current regime, BIS has proposed a number of potentially wide-ranging reforms to the collective actions regime under section 47B of CA 1998. These are discussed in more detail below.

6. An “Opt-In” Regime

As can be seen from the sections above, there are a number of ways in which collective private actions for breaches of competition law can be brought under the present regime in England and Wales.

One feature which is common to all of them is the fact that they operate solely on an “opt-in” basis. So, for example, if Which? wanted to pursue a claim under section 47B of CA 1998 on behalf of a group of claimants, it would first have to advertise its intention to bring the claim and thereby encourage potential claimants (e.g., all consumers that purchased a specific product from a specific retailer during the relevant infringement period) to come forward. Any willing consumers would then have formally to “opt-in”, in order to participate in the collective action and receive their share of any damages award. In practice, the number of claimants that “opt-in” tends to be relatively low compared to the total number of potential claimants. Indeed, as noted above in relation to Consumers’ Association v JJB Sports PLC. [see Endnote 33] only 130 consumers “opted-in”, which represented a tiny fraction (less than 0.1%) of the estimated total size of the affected group.

The alternative to an “opt-in” regime is an “opt-out” regime, where an action is brought on the basis of an estimation of the total size of the affected group (or class). There is no obligation on potential claimants to come forward before the action has commenced: if they satisfy the definition of the relevant “class”, they would automatically be included and, unless they actively “opt-out” of the action, they would be bound by any decision (or collective settlement) and would be entitled to their share of any damages award (subject to being able to prove that they suffered loss and quantifying that loss – for example, by producing a receipt).

At present, “opt-out” actions are not permitted under English law, whether in relation to competition private damages actions or any other type of damages actions. [See Endnote 34] The issue as to whether collective redress in England and Wales should be reformed in order to introduce a version of “opt-out” specifically in relation to private competition damages actions is a very current and hotly debated topic. The latest reform proposals in this regard are discussed below.

The views of leading stakeholders on this issue are highly polarised. Arguments in favour of “opt-out” refer to, inter alia, the poor participation rates in “opt-in” cases, [see Endnote 35] which necessarily impacts upon the ultimate level of redress to victims of competition law infringements. This, it is said, reduces the effectiveness of the private competition regime as a whole and weakens the deterrence effect, which is bad for UK business. [See Endnote 36] Arguments against an “opt-out” regime refer to, inter alia, the lack of empirical evidence demonstrating its effectiveness, the risk of introducing a regime akin to that of the US-style class action, [see Endnote 37] the danger of promoting vexatious and unmeritorious claims, and the fact that “opt-out” could be viewed as “profoundly business-unfriendly ... wholly disproportionate to the benefits gained ... and damaging to the interests of defendants”. [See Endnote 38]

7. Plans To Reform

Collective redress, both in a competition context and in general, has frequently been the subject of proposals for reform. This is true both at an EU and national level. [See Endnote 39]

In the UK, BIS (or the “DTI” as it then was) looked into the issue of collective redress in the context of consumer protection in 2005. [See Endnote 40] The Office of Fair Trading also looked at the issue of representative actions and effective consumer and business redress within the scope of competition law back in 2007. [See Endnote 41] Nothing further happened until the Civil Justice Council (the “CJC”) published its final report on collective redress reform in 2008. [See Endnote 42]

In particular, the CJC recommended:
the introduction of a generic collective action, together with discrete collective actions in specialist tribunals, e.g. the CAT;

the broadening of the nature of representative bodies (to encompass individual representative claimants or defendants, designated bodies and ad hoc bodies);

the introduction of collective claims on an “opt-out” basis – the issue of “opt-in” or “opt-out” to be decided by the court at a certification stage; and

that full costs shifting, i.e. the “loser pays” principle, should be retained.

The Government rejected the idea of a generic right of action, concluding that collective actions would best be taken forward on a sector-by-sector basis. The sector approach was first attempted in relation to the financial services industry via the Financial Services Bill in 2009 (the “Bill”). [See Endnote 43] As originally drafted, the Bill would have given the courts the power to permit a collective action against financial institutions in respect of financial services claims on either an “opt-in” or an “opt-out” basis. The action would be brought by a representative claimant, which could be one of the claimants or another party (such as a consumer lobby group or a regulator) on behalf of a class of customers or other claimants. However, the proposals proved to be too controversial, with much of the detail being left to subsequent secondary legislation. Consequently, the collective redress provisions were removed.

Progress at the EU level has been equally slow. While the European Parliament has formally supported the concept of collective redress, the next step is for it to issue a set of general principles in relation to collective actions and to decide what legislative action, if any, is required. Until it does so, DG COMP [see Endnote 44] will be hampered in its efforts to progress collective redress for private competition damages actions.

The BIS consultation

Nevertheless, the issue of collective redress in the competition sector is back on the political agenda in this jurisdiction, in the context of wider reforms to private enforcement of competition law. A consultation paper was published by BIS in April 2012, [see Endnote 45] which included consideration of whether wider collective actions should be introduced and the different collective redress models available.

Notwithstanding the mechanisms already available in both the High Court and the CAT (as outlined in detail above), the Government’s view is that the current regime is insufficient and fails to provide consumers and small businesses with adequate recourse to collective redress. The Government is therefore looking to strengthen the regime both by extending the types of cases that can be brought and by making it easier to bring such cases.

The deadline for responding to the BIS consultation was 24 July 2012. Since then, there has been the opportunity to consider the reactions of various key stakeholders, as well as obtaining informal feedback from the Government as to what the likely next steps might be.

In preparing the paper, BIS acknowledged the work previously carried out by others, including the CJJC. [See Endnote 46] It is no surprise, therefore, to see that several of the CJJC recommendations feature in BIS’ thinking. The key proposals for reform in relation to collective redress for private competition damages actions were as follows:

(a) Extending the jurisdiction of the CAT to allow it to hear collective actions for breaches of competition law brought on behalf of businesses (this already exists in the High Court). Currently, as explained above, section 47B of CA 1998 only permits the CAT to hear representative actions on behalf of consumers.

(b) Further extending the jurisdiction of the CAT to allow it to hear collective actions for breaches of competition law in relation to stand-alone claims (again, as explained above, this already exists in the High Court). Currently, section 47A of CA 1998 provides that the CAT may only hear follow-on cases. This extension would be a general one and would not apply specifically to collective actions.

(c) The introduction of some form of “opt-out” action in the CAT (not available in the High Court) in relation to representative actions, subject to certain safeguards and limitations. The proposals include introducing a “certification stage” [see Endnote 47] in the CAT at which it would be decided whether a collective action is the most suitable way of taking forward the case in the particular circumstances. [See Endnote 48] They also suggest expanding the definition of who is permitted to bring “opt-out” actions in the CAT to, inter alia, private bodies (including consumers and small businesses). [See Endnote 49] The proposed representative would have to be sanctioned at the certification stage and deemed “suitably representative” of the class of claimants. [See Endnote 50]

BIS has also proposed a number of additional reforms, which represent part of the “opt-out” proposal package. In summary, it recommends that damages based agreements, due to come into effect in England and Wales on 1 April 2013, [see Endnote 51] ought not to apply in the CAT. There is a fear that a move to, what are in essence, contingency fees would distort lawyers’ incentives to bring large “opt-out” cases (particularly in view of the fact that the size of the contingency fee would be linked directly to the number of claimants) and could encourage spurious litigation. Instead, BIS has proposed that conditional fee agreements should continue to be permitted in relation to competition collective actions (via some sort of carve-out from the Jackson Reforms), [see Endnote 52] notwithstanding that they will no longer be permitted in civil cases generally.

BIS also considers that the traditional rule on costs shifting (i.e., the “loser pays” principle) should remain, but it acknowledges that there may be cause to introduce some limited form of cost-capping of defendants’ fees (at the discretion of the judge). To explain, although costs shifting encourages claimants to bring only meritorious claims (an important safeguard in an “opt-out” regime), the fact that a small claimant could become liable for an unlimited bill for legal fees (and bearing in mind that defendants are usually the better funded of the parties) may operate to discourage genuine, meritorious “opt-out” claims (which is exactly what the proposed reforms are intended to prevent).

In addition, BIS has recommended that damages should continue to be paid on a compensatory basis (i.e., exemplary or penal damages [see Endnote 53] should remain extremely exceptional). [See Endnote 54] This would also be an important safeguard in an “opt-out” regime, in view of the risk, if coupled with access to punitive damages, that claimants may seek to initiate unmeritorious and speculative cases in the knowledge that defendants may feel forced to settle them, notwithstanding that they have a good case.

8. Looking To The Future - Some Conclusions

As mentioned above, the BIS proposals are not the first attempts to reform collective redress in the competition sector. However, while other attempts may have floundered, the momentum surrounding the recent BIS proposals would suggest that the existing regime for collective redress in private competition damages actions in England and Wales is going to change. However, considering the clear lack of consensus between interested parties, experts and academics alike, it remains to be seen whether such changes will be for the better or for the worse, and it is difficult to predict with any
real degree of accuracy when such changes might be implemented. No decisions have yet been taken and, although the Government’s response to the BIS consultation is due before the end of 2012, it seems that the earliest point in time at which any legislation implementing the reforms could be brought before Parliament would be during the third UK Parliamentary session (May 2012-April 2014). [See Endnote 55] Progress on this may also be affected by the recent Parliamentary reshuffle, while the new minister responsible for competition in the UK, Jo Swinson MP, [see Endnote 56] brings herself up to speed on the various issues. What is clear, however, is that BIS is strongly of the view that some sort of reform is needed. It seems likely, therefore, that the Government will conclude that the most workable compromise position would be to introduce some form of “opt-out” regime, while ensuring that the process is subject to: (i) a rigorous certification process in the CAT, and (ii) other safeguards, such as the costs shifting rule, aimed at protecting the regime from abuse. In addition, given widespread support for extending the role of the CAT, it also seems likely that there will be a broadening of the collective actions regime in order to encompass both businesses (as well as consumers) and stand-alone (as well as follow-on) actions in the CAT.

If the proposals are adopted as contemplated above, this would undoubtedly represent a pivotal development in relation to English collective redress, both in a competition context and beyond. It would be the first of the “sector” based approaches, as encouraged by the Government, and would represent the first introduction of an “opt-out” regime, not just in England and Wales, but in the UK (as the CAT’s jurisdiction extends to Scotland and Northern Ireland). [See Endnote 57]

We are not, however, quite there yet. As originally contemplated, the “sector” approach was supposed to have been accompanied by a policy framework document [See Endnote 58] and flexible generic procedural rules within which a collective action regime could operate. Neither has been published. It will therefore be interesting, once policy decisions on how to take BIS’ proposals have been made, to see what shape the new CAT Rules on collective redress will take. The devil, as they say, will be in the detail.

9. At A Glance: A Comparison Of The Collective Redress Regimes

Table: A comparison of the differences between the current collective redress regime for competition actions in England & Wales and the UK Government’s proposed reforms

<table>
<thead>
<tr>
<th>Key Feature</th>
<th>Current Regime</th>
<th>Proposed Reform</th>
</tr>
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<tbody>
<tr>
<td>Opt-in or opt-out</td>
<td>Opt-in (both High Court and CAT).</td>
<td>Possible introduction of opt-out regime in the CAT, although stakeholder opinions are highly polarised. Collective actions in the High Court would remain opt-in.</td>
</tr>
<tr>
<td>Collective redress for businesses</td>
<td>Yes, but only in the High Court pursuant to the CPR mechanisms. Not available in the CAT.</td>
<td>Yes – proposed extension to enable collective actions to be brought by businesses in the CAT. Also, possible introduction of mechanism to enable the High Court to transfer cases to the CAT – would allow collective actions brought under the CPR by businesses to be transferred to the CAT.</td>
</tr>
</tbody>
</table>

| Permitted representatives | Bodies designated by the Secretary of State (only Which?). | Both public and private bodies, including consumers and small businesses. Must be suitably representative of the claimants - either a claimant or a representative body that could reasonably be considered to represent the claimants (i.e., trade association or consumer group). To be sanctioned at certification stage. Legal firms and third party funders may be prohibited. |
| Damages based agreements | Yes (as from 1 April 2013 when section 45 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 comes into force). | No – damages based agreements in the CAT remain prohibited but conditional fee agreements permitted. Damages based agreements would apply to collective actions in the High Court. |
| Costs                      | Traditional costs shifting (i.e., loser pays the costs for both sides). No cost-capping. | Traditional costs shifting (i.e., loser pays the costs for both sides) in the CAT and the High Court. Possible introduction of some form of limited cost-capping in the CAT. |
| Damages                    | Compensatory (in respect of actual loss only). | Compensatory (in respect of actual loss only). |

Endnotes

3) They can also, for example, be brought on the basis of a breach of Article 102 of the Treaty on the Functioning of the European Union (previously Article 82 of the EC Treaty).
4) Previously Article 81 of the EC Treaty.
5) Administrative decisions are issued by competition authorities (for example, the Office of Fair Trading or the European Commission) following full-scale public investigations. They usually describe the relevant infringement activity (thereby establishing liability) and set out the penalty fines to be applied to each of the infringing parties.
6) Econometric evidence plays a significant part in private competition damages actions. Usual legal principles apply.
meaning that it is up to the claimants to prove on the balance of probabilities that they have suffered a loss and, if so, to quantify it. Given the data limitation difficulties inherent in competition infringement cases, this is often not easy to do.

7) This is generally referred to as the “umbrella effect”.

8) It is currently possible to transfer private competition damages actions from the CAT to the High Court although, at present, this is limited to actions brought under section 47A of CA 1998.

9) Pursuant to CPR 19.1, a claim may be commenced by two or more claimants, rendering it a multiparty claim from the outset, or become a multiparty claim by the joining in of additional claimants subsequent to commencement. Depending on the timing, the court’s permission may be required.

10) The addressee would be entitled to seek contribution from the remaining addressees.

11) CPR 19.5 will apply in circumstances where the relevant limitation period expired before additional purchasers were added to the proceedings.

12) CPR 19.6(1).

13) The court does, however, have the power to direct that a particular party may not act as a representative (CPR 19.6(2)).

14) It should, however, be noted that such parties may only be entitled to enforce a relevant judgment with the permission of the court (CPR 19.6(4)(b)).

15) CPR 1.

16) See, for example, National Bank of Greece SA -v- Outhwaite [2001] CP Rep 69 where such an assessment was carried out by the court.

17) [2010] EWCA Civ 1284 (CA).


19) CPR 19.10.

20) CPR 19.11(2)(a).


23) W.H. Newson Holding Limited & Ors -v- IML Plc & Ors (Case No. 1194/5/7/12): the claim was lodged at the CAT on 17 May 2012 and transferred to the Chancery Division of the High Court by way of an Order dated 24 July 2012.


27) Section 47B(6), CA 1998.

28) As things currently stand, the CAT is not entitled to hear any form of stand-alone private competition damages action (whether collectively or on an individual basis). Its jurisdiction is limited to follow-on actions where an administrative infringement decision already exists. If a claimant wishes to bring a stand-alone action in order to establish that a competition law infringement actually occurred, it must do so in the High Court. The reform proposals recently put forward by BIS recommend that the CAT should be granted jurisdiction to hear stand-alone cases (both collectively and on an individual basis) and also that all competition cases should be heard in the CAT (rather than in the High Court). These reforms are considered in more detail below.

29) Again, the limitations inherent in section 47B could in theory be circumvented by relying on the collective redress provisions in CPR 19, which apply equally to consumers and businesses (although, note, there are still difficulties in using CPR 19 for stand-alone competition damages claims, as discussed above in relation to the Emerald Supplies Limited and another -v- British Airways case). In any event, BIS has recommended in its consultation that collective actions in the CAT ought to be extended to include businesses, as well as consumers.

30) Case 1078/7/9/07.

31) See further comments below discussing the offer of redress that was made by JJB Sports to all affected consumers prior to the initiation of the claim, which could have contributed to the low participation levels in the Which? action.

32) Which? stated in its response to an ODT discussion paper on private actions in competition law that “the single biggest hurdle to the effectiveness of the current statutory representation procedure is the requirement to name claimants on the claim form” (Private Actions in competition law: effective redress for consumers and businesses, (April 2007), as quoted in BIS’ Consultation Paper: Private Actions in Competition Law: A Consultation on Options for Reform (23 July 2012), p.31).

33) Case 1078/7/9/07.

34) “Opt-out” regimes already exist in the US, Australia, Spain, Portugal, Norway and the Netherlands.

35) In this regard, reference is often made to the Consumers’ Association -v- JJB Sports case (Case 1078/7/9/07) and the fact that less than 0.1% of the estimated class “opted-in”. It is important, however, to put this case into its proper context. First, this represents just one case (the only case ever brought under section 47B of CA 1998). Second, prior to proceedings being issued by Which?, an open offer was made by JJB Sports to give anyone who could prove that they had purchased a relevant product a free England football shirt and a mug. In practice, it seems likely that, rather than signing up to the Which? collective action and seeking compensation through the courts, many potential claimants may have opted for the JJB Sports offer, which was probably perceived to be simpler and easier and possibly the more financially attractive option of the two.

36) “[P]rivate actions can contribute to maintaining a highly competitive economy, supporting growth and innovation”: Department for Business, Innovation and Skills, “Private actions in competition law: a consultation on options for reform” (April 2012), p. 9.

37) The US class actions system is often disparagingly referred to as having created a litigation culture and as encouraging spurious claims. It should be noted, however, that there are a number of features of the US-style class action which are not proposed in the BIS consultation and which are unlikely ever to be a feature of English law (for example, jury trials and treble (i.e., punitive) damages).


42) Financial Services Bill, 19 November 2009.

43) The Directorate-General for Competition within the European Commission.


45) This was originally proposed by the Civil Justice Council as one of its 11 recommendations in its report: Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions: Final Report (12 December 2008).

46) This could involve consideration of the following: (i) a preliminary merits test; (ii) establishing that the minimum number of claimants is satisfied; (iii) ascertaining whether there is sufficient commonality of issues amongst claimants; (iv) whether a collective action is the most suitable means of resolving the common issues; (v) whether the claimants have an appropriate representative bringing the claim on their behalves (check conflicts of interest, adequacy, etc.); (vi) check claimants have sufficient funds to cover the defendants’ costs if they lose (see Annex A: Design Details of an Opt-Out Collective Action Regime - Department for Business, Innovation and Skills: Private actions in competition law: a consultation on options for reform (April 2012), p. 55).

47) As mentioned above, section 47B of CA 1998 currently provides that only Which? is permitted to bring representative actions on behalf of consumers.

48) Such as either a claimant or a representative body that could reasonably be considered to represent the claimants, such as a trade association or consumer group. It seems likely that legal firms and third party funders would be prohibited.

49) Section 45 of Legal Aid, Sentencing and Punishment of Offenders Act 2012.

50) Lord Justice Jackson’s report on the English civil litigation costs system (8 May 2009) gained governmental support and the consequent reforms are included in the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which received Royal Assent on 1 May 2012 (it is due to come into force in April 2013).

51) These are a feature of US class actions (referred to as “treble damages”).

52) Devenish Nutrition Ltd -v- Sanofi-Aventis SA (France) & Ors [2008] EWCA Civ 1086 (although note the recent CAT decision in 2 Travel Group PLC (in liquidation) -v- Cardiff City Transport Services Limited [2012] CAT 19 (July 2012) where the claimant was awarded exemplary (as well as compensatory) damages).

53) It should be noted that some of the reforms do not require primary legislation, in which case they would not need to go through the whole Parliamentary process in order to be implemented (for example, amending the CAT Rules (SI 2003 No.1372)).

54) Minister for Employment Relations and Consumer Affairs.

55) The CAT has jurisdiction to hear any action for damages or other monetary claims under the CA 1998, and the CA 1998 extends to England, Wales, Scotland and Northern Ireland.

56) This would provide guidance on issues such as: regulatory and other alternative options; options and criteria for designating or authorising representative bodies; funding options; issues surrounding “opt-in”, “opt-out” and hybrid models, and the associated issues around damages and limitation periods; and enforcement.
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