

Insight: Competition

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UK Government opts in to Class Actions

As widely expected, earlier this week the Government announced proposals for reform of the private competition damages regime in the UK, proposing to increase the Competition Appeal Tribunal's (CAT) power and introduce an opt-out "collective action" scheme before the CAT (see [here](#)). The proposed changes are unlikely to come into force until 2015, at the earliest. Do the proposals herald a US-style class action culture in the UK, as some commentators predict, or will the safeguards proposed by the Government lead to more moderate results?

Government proposals in brief

The Government's proposals are contained in its response to the consultation on options for reform of private competition actions in the UK. The proposals seek to establish the CAT as the major venue for competition actions in the UK. Most notably, they would give the CAT the power to hear "opt-out collective actions"; that is, any claim for damages for breach of applicable competition laws brought on behalf of a class of claimants on an opt-out basis. Although the Government's response is silent on the point, it is to be presumed that claims for damages breach of the UK Competition Act and/or for breach of Article 101 or 102 TFEU could be brought before the CAT on a collective basis.

The proposals would also put the CAT on an equal procedural footing with the High Court, by enabling standalone claims (i.e. claims brought where there is no prior infringement decision) to be brought before the CAT, rather than only follow-on claims as currently. The proposals would also give the CAT the power to grant injunctions, and enable the transfer of cases between the High Court and CAT, save for collective actions which would be heard exclusively by the CAT.

Unquestionably, the introduction of an opt-out collective action regime is the most novel of the areas addressed by the Government's proposals, with potentially the most far-reaching consequences. The regime would, however, be subject to a range of safeguards including:

- a. Judicial controls to ensure only meritorious cases are taken forward;
- b. No treble or exemplary damages;
- c. No Damages Based Awards (i.e. contingency fees) in the CAT;
- d. Maintenance of the 'loser pays' costs rules; and
- e. An attempt to limit 'claimant farming' by preventing claims from being brought directly by third-party funders, law firms or SPVs.

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Scope of Opt-out Collective Actions

Under the current law, representative bodies may bring follow-on damages actions in the UK on behalf of consumers on an 'opt-in' basis (i.e. claimants must sign up to the action in order to qualify to recover any damages). Although this form of collective redress was introduced over a decade ago, it has been a notable failure.

Under the Government's proposals, claimants would be able to bring collective actions in the CAT on an 'opt-out' basis. Claims could be brought by a group of claimants (whether individuals or businesses) or by a representative body on behalf of a class of UK-domiciled claimants, with the class certified by the CAT. Once certified, UK-domiciled claimants would then explicitly have to opt-out of the proceedings if they wished to pursue their claims independently.

Significantly, the Government envisages that non-UK domiciled claimants would also be able to opt-in to collective actions before the CAT. This gives rise to the prospect of claims being brought on behalf of all UK-domiciled claimants, with the publicity generated encouraging large numbers of additional claimants in other jurisdictions to join the action before the CAT. Thus, although the European Parliament and Commission's collective redress initiatives may have stalled, this move is likely to cement the UK's position as the forum of choice for claimants in competition cases, exposing businesses to the risk of facing a collective action before the CAT on the basis of alleged infringement of UK or EU competition laws.

Safeguards

To protect defendants against vexatious class actions, the Government does envisage a number of safeguards, including:

- **Funding:** The Government's desire is to foster class actions and promote the CAT as the forum of choice for competition damages claims. However, mindful of ensuring that the opt-out collective action regime does not further encourage the development of a 'litigation culture' in the UK, the Government has emphatically rejected the use of contingency fee arrangements (i.e. Damages Based Awards, or DBAs) for collective actions in the CAT.

Paradoxically, DBAs will soon be available to claimants in the High Court, upon the implementation of the Jackson civil litigation costs reforms. Potentially, these fee arrangements could be used in follow-on or stand-alone claims brought by multiple claimants in the High Court. So, while the Government should be praised for introducing this safeguard in the CAT, it should be wary of neglecting the High Court and allowing the same litigation culture to flourish there instead.

- **Liability for litigation costs:** The Government has maintained the general 'loser-pays' costs rules (whereby unsuccessful litigants pay their opponent's costs). This is important in enabling successful defendants to recover their costs from claimants. However, the Government's response does explicitly note that there may be circumstances where **cost-capping** may be appropriate in the interests of access to justice or to reflect the conduct of one of the parties. Further clarity is needed as to the circumstances in which an otherwise successful defendant may potentially have its recoverable costs capped.

- **Filtering of claims:** In its proposals, the Government has suggested introducing strict judicial certification of collective actions by the CAT, in order to filter out unmeritorious claims. However, the Government has given scant details on the criteria to be applied in this judicial certification, or who would be consulted at the certification stage. Most obviously, the response is silent as to whether prospective defendants would have any opportunity to review or object to the certification of a given class.
- **No exemplary or treble damages:** The Government has also made it clear that it does not consider that exemplary or treble damages should be recoverable in collective actions before the CAT. However, the CAT is still likely to have discretion as to the amount of interest payable on any damages awarded. Depending upon the precise rate of interest and the period over which it is compounded, this may nevertheless have a significant impact on the overall quantum awarded, albeit in a less overt manner than an award of exemplary or treble damages.

Conclusion

Evidently, there is much work still to be done on the precise details of the proposed collective action regime. Nevertheless, one thing is clear: the introduction of even a limited opt-out collective action regime subject to the safeguards identified above will increase the scope for competition damages claims to be brought in the UK. This reinforces the need for businesses strictly to observe competition rules, and further increases the risk of civil exposure for those that do not.