

ANTITRUST; LITIGATION | 11 March 2016

Launch of First UK Opt-Out Class Action

October 1, 2015, marked the entry into force of the Consumer Rights Act 2015 (“CRA”), bringing with it an opt-out class action regime for the private enforcement of infringements in competition law. Now, in March 2016, the first UK opt-out class action has been launched; but is this a suitable ‘test case’?

The New Regime

The previous regime allowed collective claims of competition infringement to be brought by The Consumer Association on an opt-in basis. Only one collective proceeding has ever been brought under the old regime, the case of *The Consumers' Association v JJB Sports*, where only 130 claimants (0.1% of the estimated affected) opted in, each receiving compensation of less than £20, an award which was far outweighed by the legal costs.

In response to the failings identified by *The Consumers' Association v JJB Sports*, the CRA introduced significant reforms which aimed to change the competition litigation landscape. In particular, the introduction of the new class action regime, which allows an opt-out collective procedure, is expected to boost private enforcement. Collective proceedings can now be brought either on an opt-in or opt-out basis.

Opt-out collective actions introduced by the CRA mean that it is now possible to apply to the Competition Appeal Tribunal (“CAT”) to seek collective redress for a competition law infringement on behalf of class members in a defined group, without the need to identify each individual member or their respective losses. In contrast to the previous opt-in only regime, any class member domiciled in the UK affected by an infringement of competition can now be automatically included in the claim unless they specifically opt-out.

Under the new regime, a collective action may be commenced on two potential grounds:

1. a stand-alone case, whereby claimants must prove an infringement of competition law; or
2. a follow-on case, whereby an infringement decision of the Competition and Markets Authority (“CMA”), the CAT, or the European Commission already establishes the defendant’s liability.

Although the latter route is significantly more straightforward for claimants, experience suggests some follow-on claims will stray beyond the boundaries of an infringement decision (for example as to length of the infringement or its geographic or product scope). The ability under the new regime, to bring a stand-alone collective action under the forum of the CAT, will permit these hybrid claims without defendants being able to raise an objection on the basis that the claim is not a pure follow-on claim.

The Mechanics

A collective action can be brought by a person proposing to be a representative, regardless of whether they are a class member or not. Where a representative is not a class member, it is at the CAT’s discretion to determine whether it is just and reasonable for that person to act as representative.

Collective Proceedings Order

Crucially, for a collective claim to proceed as opt-out it must first pass the certification phase; the representative must make a submission to the CAT for a collective proceedings order, and the CAT must then consider a number of factors in its evaluation.

In particular, the CAT will consider whether claims of individuals raise the same, similar or related issues of fact or law in order to be considered 'collective.' The CAT must also be satisfied the claim is suitable to be brought as either opt-out or opt-in; this can involve a cost-benefit analysis and an examination of the potential class, including a consideration of the CAT's ability to define a class and its members. The CAT will also weigh the practicability of pursuing the collective proceedings as opt-in or opt-out, having regard to all the circumstances, including the estimated amount of damages the individual class members may recover.

Once granted, the collective proceedings order must include:

- authorisation of the person who brought the proceedings to act as representative;
- a description of a class of persons whose claims are eligible for inclusion in the proceedings; and
- specification of the collective proceedings as opt-in or opt-out.

Damages

Damages are awarded to the representative (or such other person as the CAT thinks fit), along with directions on how each claim of a class member should be assessed and their respective damages distributed. Unlike in the US, these damages are granted on a compensatory basis; there are no triple damages or any other form of exemplary or punitive damages in antitrust cases.

In opt-out proceedings, any unclaimed damages must be paid to the charity prescribed by order of the Lord Chancellor (presently the Access to Justice Foundation). The CAT may also order that part or all of unclaimed damages are paid towards the representative's costs and expenses in the proceedings.

Funding

Again, unlike the US, the regime prohibits the use of damages-based agreements in collective proceedings. Therefore funding for collective proceedings will likely rely on third-party litigation funders and insurance policies.

The First Case Launched in March 2016

The National Pensioners Convention ("NPC") has launched the first collective action since the new regime came into force. The NPC purports to represent class members who claim to have been overcharged for mobility scooters by Pride Mobility Products ("Pride"). In 2014, the (then) Office of Fair Trading ("OFT") found that, between 2010 and 2012, Pride had entered into various anti-competitive arrangements preventing online retailers from displaying advertising prices below Pride's recommended retail price ("RRP"). The OFT had found that these practices limited consumers' ability to compare prices and get value for money.

The NPC estimates a collective claim worth up to £7.7 million, with a class size of around 34,000 claimants—still subject to CAT's discretion as regards class certification and membership.

There is, however, significant doubt whether the CAT will grant a collective proceedings order on an opt-out basis, given that:

- the infringement was not a horizontal cartel but involved vertical online sales restrictions that fell short of resale price maintenance. Specifically online retailers were restrained from displaying a price below the RRP, but instead they instructed consumers to ‘call for the best price.’ The retailers could then sell to them below the RRP;
- the OFT decision did not include any finding that consumers suffered a financial loss; and
- anti-competitive effects on consumers in vertical agreements—between Pride and its online retailers—are harder to prove. Many of the assumptions used to estimate the amount of overcharge in a traditional horizontal cartel arrangement do not apply.

In addition, even if these challenges can be overcome, funding may be an issue. The CAT, in assessing whether to grant a collective proceedings order in favour of the NPC, will need to consider the likely costs and funding difficulties the NPC will have. The case could easily cost over £1 million to fund, in return for total potential damages, even on the NPC’s estimation, of just £7.7 million. Before obtaining class certification, the CAT’s rules require that the class representative demonstrate sufficient funding, such that it could meet the defendants’ costs were it to lose the case. This is likely to be a formidable challenge in this case.

While this is far from an obvious or easy case with which to kick off the UK’s new collective redress regime, its novelty means that it is guaranteed to be watched closely.

CONTACTS

James Webber
London
+44.20.7655.5691
james.webber@shearman.com

Susanna Charlwood
London
+44.20.7655.5907
susanna.charlwood@shearman.com

Collette Rawnsley
London
+44.20.7655.5063
collette.rawnsley@shearman.com

ABU DHABI | BEIJING | BRUSSELS | DUBAI | FRANKFURT | HONG KONG | LONDON | MENLO PARK | MILAN | NEW YORK
PARIS | ROME | SAN FRANCISCO | SÃO PAULO | SAUDI ARABIA* | SHANGHAI | SINGAPORE | TOKYO | TORONTO | WASHINGTON, DC

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

9 Appold Street | London | UK | EC2A 2AP

Copyright © 2016 Shearman & Sterling LLP. Shearman & Sterling LLP is a limited liability partnership organized under the laws of the State of Delaware, with an affiliated limited liability partnership organized for the practice of law in the United Kingdom and Italy and an affiliated partnership organized for the practice of law in Hong Kong.

*Dr. Sultan Almasoud & Partners in association with Shearman & Sterling LLP