

UK Government's Response on Private Actions in Competition Law

In April 2012, the UK Government launched a public consultation on reforms to facilitate private actions in competition law.¹ The principal aims of the raft of proposals were to promote growth by empowering small businesses to tackle anti-competitive behaviour, and to promote fairness by enabling consumers and businesses to obtain redress. On January 29, 2013, the Government published the responses to the consultation and outlined its plans for reform in four main areas:

- Extending the remit of the Competition Appeal Tribunal (the “CAT”) to hear competition actions;
- Introduction of a limited “opt-out” regime for collective actions;
- Promotion of Alternative Dispute Resolution (“ADR”); and,
- Establishing private actions as a complement to the public enforcement regime.²

While most of these proposals have been well received by respondents, the Government's decision to implement “opt-out” collective actions, albeit subject to safeguards, has proved controversial.³

The Government has yet to confirm when the proposed reforms will be implemented. However, as many will require primary legislation, their implementation will be subject to Parliamentary timing and approval.⁴ The Government has hinted that the reforms could be

¹ The Government considers reform of private actions as complementary to the reform of public enforcement of competition law under the Enterprise and Regulatory Reform Bill. *See* BIS response paper, “Private actions in Competition Law: A consultation on options for reform – government response” January 2013, at: <https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform>

² *Ibid*, at pages 5-6.

³ *Ibid*, at page 26.

⁴ *Ibid*, at page 62. The Government has stated that it will work in parallel with competition authorities to implement those reforms which do not need Parliamentary approval.

introduced as early as April 2014, the date on which most of the reforms under the Enterprise and Regulatory Reform Bill come into effect. However, given the complexity of the current proposals, this seems ambitious.

Private enforcement in competition law continues to be an area of development within the EU.⁵ Several Member States have implemented provisions allowing for limited collective redress, with varying degrees of success.⁶ In 2011, the European Commission (the “Commission”) held a consultation on general principles for collective redress. The Commission has not, as yet, developed firm proposals, although an announcement is expected soon.

I. THE UK CONSULTATION

In March 2012, the Department for Business, Innovation and Skills (“BIS”) announced the Government’s intention to consult on reforms intended to make it easier for consumers and small businesses to bring private actions in competition law. The consultation ran for three months and received 129 responses. Overall, there was a strong consensus on the need for reform. Although responses indicated that the number of private actions being brought by large companies was in fact higher than the Government had estimated, the chief concern remained whether high legal costs and the complexity of competition cases remained an insuperable barrier for consumers and small or medium sized businesses (“SMEs”).

The Government’s proposals to reform the CAT were strongly supported. Many respondents also favoured the creation of a fast track for simpler cases before the CAT and the promotion of ADR.

The Government’s more controversial proposals included the introduction of a rebuttable presumption of loss in cartel cases,⁷ protection of whistle-blowers from joint and several liability, a proposal to legislate on use of the passing-on defence, and a proposal to introduce “opt-out” collective actions. Although the Government decided not to pursue most of these proposals, it has decided to implement “opt-out” collective actions, despite respondents being heavily divided over the issue.

⁵ See The OECD Policy Roundtable Report, “Private Remedies,” (2007) Chapter 4 at: <http://www.oecd.org/competition/abuse/39892177.pdf>

⁶ *Ibid.* For example, provisions in Germany only allow for opt-in actions in relation to follow-on claims, and representative actions can only be brought by industry associations, not consumer associations. In the Netherlands, Dutch legislation does not provide for collective actions whereby damages can be claimed. In Switzerland, collective actions may only be brought under general procedural and substantive rules, in the form of *litis consortia*, i.e., as a group of persons on the side of a plaintiff or defendant.

⁷ Such a presumption would likely have been based on a hypothesis that cartels increase prices by 20%.

II. THE GOVERNMENT'S DECISIONS

1. Extending the CAT's remit to hear competition actions

Reforms to the CAT were widely expected. Currently the CAT may only hear follow-on actions for damages,⁸ including claims by certain consumer bodies brought on behalf of consumers on an “opt-in” basis. However, these provisions have had a limited impact to date, with damages being awarded in only one case.⁹ As the CAT's jurisdiction in private actions is currently confined to an assessment of causation and damages in follow-on cases, it is also unable to apply its expertise to questions of infringement.¹⁰ Instead, stand-alone actions must currently be brought before the non-specialist civil courts.

One reason why UK competition litigation has gravitated towards the High Court in the past, even in follow-on actions, is because the High Court has interpreted its jurisdiction widely. By contrast, the CAT's jurisdiction has been interpreted narrowly, limiting its attractiveness to claimants. In *Enron v EWS*, the CAT and the Court of Appeal considered the extent to which an infringement decision was binding on the CAT in a follow-on claim. It was held that under section 47A of the Competition Act 1998, a claimant could rely only on an express finding of infringement; any findings of fact which arguably could amount to an infringement had no binding effect.¹¹ In *Emerson Electric v Morgan Crucible*, it was found that the CAT only had jurisdiction to hear a follow-on action against an addressee of the original decision and not a subsidiary of that addressee, regardless of whether the subsidiary was named in the infringement decision.¹² In *BCL Old Co. v BASF*, the limitation period for bringing an action was held to be two years from the date on which the decision on infringement was finalised – not the finalisation of any appeals on penalty, limiting the period for bringing claims.¹³ The UK Supreme Court later upheld the Court of Appeal's ruling that the CAT had no jurisdiction to extend this time limit.¹⁴

⁸ A follow on action is a claim brought where the alleged breach of competition law is already the subject of an infringement decision by a competition authority. In a stand-alone action, there is no prior infringement decision.

⁹ Although several actions have been brought under section 47A of the Competition Act 1998, damages have been awarded in only one case: Case 1178/5/7/11, *2 Travel Group PLC (in liquidation) v Cardiff City Transport Services Limited* [2010] CAT 19. The only action brought under section 47B was Case 1078/7/9/07, *Consumers Association v JJB Sports*, which was settled.

¹⁰ See cases *Devenish Nutrition v Sanofi-Aventis and others* [2008] EWCA Civ 1086 at paragraph 7 and *BCL Old Co and others v BASF and others* [2008] CAT 24 at paragraph 31.

¹¹ See *EWS v Enron* [2009] EWCA Civ 647 at paragraph 60.

¹² See *Emerson Electric Co and others v Morgan Crucible and others* [2011] CAT 4 at paragraph 58.

¹³ See *BCL v BASF* [2009] EWCA Civ 434, at paragraph 22-23.

¹⁴ See *BCL v BASF* [2012] UKSC 45 at paragraphs 4 and 41.

The Government's proposals seek to concentrate competition cases at the CAT. The CAT will be empowered to adjudicate stand-alone actions in addition to follow-on claims, to transfer cases to the civil courts (and the courts to transfer cases to the CAT)¹⁵ and to award injunctions, including interim injunctions.¹⁶ The CAT will also be given consequential powers to accompany its new power to grant interim injunctions. These will include the ability to require cross-undertakings of damages and to ensure that injunctions are obeyed.¹⁷ It is intended that these reforms will shape the CAT into the main forum for competition actions in the UK.

In line with respondents' views, the Government has decided to harmonise the limitation periods for the CAT and the courts.¹⁸ A standard six year limitation period will apply to all private action cases, whether stand-alone or follow-on, if brought in England, Wales or Northern Ireland. In Scotland, the limitation period will be five years, in line with the Scottish Court of Session. The Limitation Act 1980 provides that the six-year period begins to run from the date on which the cause of action first arose, *i.e.*, when the loss was suffered. This is subject to section 32(1)(b) which provides for suspension of time where there is deliberate concealment, which is likely to be the case in a secret cartel. Under *Cave v Robinson*,¹⁹ it is arguable that the relevant limitation period may only be postponed in "hard-core" cartels where there has been intentional concealment of anti-competitive activities or deliberate wrongdoing.²⁰

¹⁵ Either through section 16 of the Enterprise Act 2002, or by other means.

¹⁶ The CAT will not be able to issue interdicts which would undermine the primacy of the Scottish Court of Session. The CAT's power to issue injunctions in England and Wales did not raise similar concerns, given that the CAT's decisions are appealable to the Court of Appeal and as its chairs are High Court Judges or equivalent. See BIS response paper, "Private actions in Competition Law: Options for reform," at: <https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform>

¹⁷ It should be noted that the CAT will also be allowed to award pro bono costs, although the Government has stated that this will not be as high a priority as other changes.

¹⁸ The current shorter limitation period in the CAT has led to uncertainty among applicants and spawned satellite litigation. See *BCL Old Co and others v BASF AG and others* and *Deutsche Bahn and others v Morgan Crucible and others*, which have been delayed for several years pending resolution of jurisdictional issues.

¹⁹ See *Cave v Robinson* [2002] UKHL 18.

²⁰ It is also likely that a claimant will not be able to rely on the deliberate concealment doctrine after a cartel investigation is publicly announced. See The CPI Antitrust Journal, "Deliberate Concealment in Cartel Claims," 2010, article by Romano Subiotto QC and Ruchit Patel (Cleary Gottlieb), at: <https://www.competitionpolicyinternational.com/deliberate-concealment-in-cartel-claims/>

A fast track regime for certain cases before the CAT

A new fast track regime for competition cases will be introduced in the CAT, which will focus on granting injunctive relief. The CAT Rules of Procedure²¹ (the “CAT Rules”) will set out when a case may be allocated to the fast track. Although the fast track will not be limited to SME claimants, it will be principally for their benefit and there will be a presumption that cases brought by SMEs will be considered for the fast track.²²

During the consultation, respondents expressed concerns over the suitability of a fast track regime given the complexity of competition cases. There were also concerns that the proposed costs caps and six month time limit would result in low quality judgments.²³ In its response, the Government clarified that the fast track procedure will not be available for “novel” cases which require longer judicial consideration, or for collective actions. The Government has also accepted the need for greater flexibility: although all cases allocated to the fast track must be “cost-capped”,²⁴ there will be no pre-set limits. The appropriate cap will be set by the CAT on a case-by-case basis, and at an early stage in proceedings, in order to give SMEs confidence to proceed. The cost cap may help separate complex cases that are unsuitable for the fast track procedure from those which could be dealt with in a shorter time.

2. An “opt-out” collective actions regime

Respondents were most divided over proposals for a collective actions regime. Many were concerned that such a regime would encourage frivolous cases and argued that ADR offered a cheaper and quicker form of redress for class litigants.

Having considered the responses, the Government decided that an “opt-out” collective actions regime could nevertheless offer many claimants their best chance of bringing a viable claim. Under such a regime, claimant representatives may bring actions on behalf of a whole class, such as cartel victims. Members of such a class will be included in the assessment of damages unless they volunteer themselves out of the proceedings. “Opt-out” collective actions will be available in relation to both follow-on and stand-alone claims,

²¹ The Competition Appeal Tribunal Rules 2003 (SI 2003 No.1372).

²² See BIS response paper, “Private actions in Competition Law: Options for reform,” at page 21-22: <https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform>

²³ *Ibid*, at page 20.

²⁴ Any cross-undertakings for damages awarded for an interim injunction must also be capped.

and may be brought on behalf of either consumers or businesses, or a combination of the two.²⁵

However, the regime will be implemented with certain safeguards to moderate its possible effects. “Opt-out” collective actions may be brought only by UK-domiciled claimants²⁶ or “genuine representatives” of such claimants, such as trade or consumer associations.²⁷ Law firms, third-party funders or special purpose vehicles with no connection to the underlying case will not be able to bring collective actions. Collective actions may only be heard in the CAT, which will be required to certify whether a collective action should be allowed to proceed on its merits, whether a collective action is indeed the best way of bringing the case and whether it should be brought on an “opt-out” or “opt-in” basis.

In relation to costs, the “loser-pays” rule will be maintained. This will be expressly clarified in the CAT Rules as the starting point for the assessment of costs and expenses. No treble or exemplary damages will be awarded in collective actions and contingency fees (including damages-based agreements) for lawyers acting in “opt-out” collective actions will be prohibited.²⁸ However, conditional fee agreements and after-the-event insurance will be permitted.

The Government has stated that any unclaimed funds in “opt-out” collective damages actions will be allocated to the Access to Justice Foundation. However, defendants will be free to settle on other bases, including *cy-près*²⁹ or reversion to the defendant, subject to approval by the CAT.³⁰

²⁵ See BIS response paper, “Private actions in Competition Law: Options for reform,” at page 29: <https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform>

²⁶ *Ibid*, at page 26. Non-UK claimants may opt-in to a claim.

²⁷ Following *Emerald Supplies British Airways Plc* [2009] EWHC 741 (Ch)BA, it is very difficult for claimants to bring representative group actions in competition cases.

²⁸ This requires an amendment to the Legal Aid, Sentencing and Punishment of Offenders Act 2012. See BIS response paper, “Private actions in Competition Law: Options for reform,” at page 29: <https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform>

²⁹ Under a *cy-près* scheme, the court has a discretionary power to apply unclaimed monies following a settlement or judgment of an “opt-out” class action for a designated purpose which may, or may not, be related to the harm for which they were originally paid.

³⁰ In its response, the Government states that it may legislate for an order making power which would allow the destination of unclaimed sums to be altered at a future date, in response to evidence as to how the system is working.

3. Promotion of Alternative Dispute Resolution (“ADR”)

In its response, the Government emphasised that wherever possible, disputes should be resolved without resorting to litigation. Although it declined to make ADR mandatory, a new “opt-out” collective settlement regime, similar to the Dutch Mass Settlement Act 2005, will give businesses the flexibility to settle cases on a voluntary basis. Under this proposal, a potential defendant and a representative of any would-be claimants, may apply to the CAT to approve a mutually agreed settlement agreement on an “opt-out” basis.³¹ The CAT may approve any proposed settlement which it considers “fair, just and reasonable.” The CAT may also elect to hold a hearing and appoint an expert to assist it in making its decision. Although the Government also considered promoting ADR through new pre-action protocols, given the complexity of the issue, it declined to implement any such proposals until the core reforms had been established.

Redress Schemes

The Government consulted on whether competition authorities should be empowered to order a company to implement a redress scheme. While most respondents supported redress schemes in principle, they voiced concerns that such a pro-active obligation on the Office of Fair Trading (the “OFT”) would breach the boundaries between public and private enforcement, and divert the OFT’s finite resources from its primary role of enforcement.

Therefore, the OFT or, in due course, the Competition and Markets Authority (the “CMA”) will have a discretionary power to certify a voluntary redress scheme, provided the business in question operates within the UK.³² Certification would render a scheme legally binding, enabling the OFT or CMA, and beneficiaries to take statutory enforcement action against any business that failed to comply with the terms of a certified scheme. By way of incentive, businesses offering a voluntary redress scheme could also qualify for a reduction in fines, according to the OFT’s current guidance.³³ Finally, the CAT Rules governing formal settlement offers will be aligned with those that apply to High Court actions under the Civil Procedure Rules.

³¹ The Government’s response states that it would in principle be possible for a defendant to settle with multiple representatives, each representing different categories of claimants (e.g. direct and indirect purchasers) simultaneously. Given the opt-out nature of any such collective settlement, it would only apply to UK-domiciled claimants, with claimants outside the UK able to opt-in.

³² Certification would essentially confirm that the scheme had been created in accordance with a reasonable process, not whether the amount of compensation was reasonable.

³³ See BIS response paper, “Private actions in Competition Law: Options for reform,” at page 54: <https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform>

4. Establishing private actions as a complement to the public enforcement regime

The Government acknowledges that greater exposure to private actions may deter leniency applicants from coming forward. Given the highly secret nature of cartels, any reduction to the incentives to report such behaviour could be damaging to the enforcement regime as a whole. The majority of respondents therefore supported the protection of leniency documents from disclosure in private actions, regardless of whether the documents were associated with full leniency or simply a reduction in fine. Proposals to exclude immunity applicants from joint and several liability however, raised issues of fairness and proportionality. This was a concern especially where the leniency applicant was the largest supplier. In light of anticipated proposals from the Commission on leniency and disclosure, the Government decided not to take domestic action in this area. Should the Commission's proposals be significantly delayed, the Government has stated that it will then revisit these issues.

However, in order to maintain consistency between the OFT or CMA and the CAT in the wake of these reforms, the Government has decided to:

- Amend the CAT Rules to require the CAT to notify the CMA when private action cases are initiated (currently parties are required to serve copies of their statements of case on the OFT in civil court actions);
- Amend the CAT Rules to provide an explicit power for the OFT or CMA to act as an intervener, where appropriate, in private actions cases; and
- Grant the CAT the power to stay cases being investigated by a competition authority.

III. COMMENT

The Government's clear intention in introducing these reforms is to encourage more competition actions. Although the Government has moved away from some of its more radical proposals, the reforms may nevertheless have a significant impact on the attractiveness of bringing private actions in the UK.

By extending the jurisdiction of the CAT, it is likely that more claims will in future be brought before a specialist tribunal, rather than in the High Court. In this respect, the reforms will arguably endow the CAT with powers it should always have had.

By introducing an "opt-out" collective redress system, the Government has sought to adjust the cost dynamics for claims brought by (or on behalf of) consumers. Where consumers have suffered loss as a result of cartel behaviour, it is unlikely that individual

losses will be high enough to justify, or motivate, claims on an “opt-in” basis. By contrast, under an “opt-out” system, consumer claims (brought on behalf of all affected consumers) are more likely to be viable. The proposal to pay unclaimed damages in a collective action to the Access to Justice Foundation is nevertheless controversial, effectively acting as a punitive measure against infringers, rather than a means of compensating claimants. It remains to be seen whether these changes will result in a wave of class actions being brought before the UK courts. The Government has been careful to build in safeguards, intended to discourage frivolous or purely speculative litigation. In particular, the proposed merits test as part of the certification process by the CAT could create a high bar for potential class-action claimants. Much will depend on how prescriptively the CAT interprets and exercises its new powers.

* * *

If you have any questions, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed on our website at <http://www.clearygottlieb.com>.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

NEW YORK

One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS

12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS

Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON

City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW

Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE

Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME

Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN

Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG

Cleary Gottlieb Steen & Hamilton (Hong Kong)
Bank of China Tower, 39th Floor
One Garden Road
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING

Twin Towers – West (23rd Floor)
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES

CGSH International Legal Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO

Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299

ABU DHABI

Al Sila Tower, 27th Floor
Sowwah Square, PO Box 29920
Abu Dhabi, United Arab Emirates
T: +971 2 412 1700
F: +971 2 412 1899

SEOUL

Cleary Gottlieb Steen & Hamilton LLP
Foreign Legal Consultant Office
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210, Korea
T: +82 2 6353 8000
F: +82 2 6353 8099