Collective redress takes another step forward

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More than two years on since English law introduced opt-out collective actions for infringements of competition law, we are still waiting for a case to be certified by the Competition Appeal Tribunal (CAT) as 'suitable' so that the new collective redress regime can be properly tested and precedents established. Two cases have been brought to date but both have failed to pass the certification stage.

As we wait patiently for the first case to pass the 'suitability' hurdle, we should feel comfort that there has not been a floodgate of meritless class actions coming before the CAT or suggestions of litigation abuse by claimants and claims companies incentivised by financial rewards.

The UK's collective action regime

The Consumer Rights Act 2015 introduced an opt-out collective redress regime for competition claims. This permits a claimant representative to bring an action on behalf of a group of individuals where this follows-on from an 'infringement decision' or 'an alleged infringement' of anti-competitive behaviour prohibited by the Competition Act 1998 or EU law.

The opt-out nature means that claimants are included in the group unless they expressly opt-out. However, claims can only proceed if they are certified as suitable to do so by the CAT and this requires a formal hearing to determine (i) whether the claims raise the same, similar or related issues of fact or law and (ii) it is 'just and reasonable' that the person representing the class is a suitable representative. If certified, a collective proceedings order (CPO) is issued and the claim may continue.

Mobility Scooters

The first application before the CAT for a CPO on an opt-out basis was by Dorothy Gibson, General Secretary of the National Pensions Convention, on behalf of purchasers of mobility scooters against Pride Mobility Scooters. Her claim was a follow-on claim for damages after the Office of Fair Trading found that eight retailers of mobility scooters had infringed competition law in relation to online pricing.

The "class" was defined as 'any person who purchased a new Pride mobility scooter other than in the course of business in the UK between 1 February 2010 and 29 February 2012', and this comprised around 27,000 to 32,000 people seeking damages estimated at £2.7m to £3.2m.

The CAT held that Gibson's defined class was wider than the eight retailers covered by the OFT decision, making no distinction between customers who purchased from the eight retailers and other Pride retailers. The follow-on action had to relate to the actual infringements found in the OFT decision (i.e. be brought against the eight retailers named in that decision) and could not be a market-wide claim concerning some 250 to 300 retailers. The CAT permitted an adjournment so that Gibson could reformulate her claim (indicating that it considered the class was suitable, with amendment, for certification), but she subsequently decided to withdraw it.

Merricks

The second application for a CPO was by Mr Merricks, a lawyer and former Chief Financial Services Ombudsman, on behalf of all UK consumers who purchased goods and services sold by businesses accepting Mastercard between 22 May 1992 and 21 June 2008. This was a follow-on claim for damages after the EU Commission held that interchange fees charged by Mastercard were in breach of EU legislation. The class of end-users included approximately 46.2m people seeking damages estimated at £14bn.

The CAT rejected the application finding that the case was unsuitable for an aggregate damages award. The large scale and size of the class meant it would be unworkable to calculate an individual's actual purchases and the different levels of pass through of the interchange fee of the various retailers in the UK over a 16 year period. The CAT was unwilling to adjourn to allow the claim to be amended.

In a hearing set for 31 October 2018, the Court of Appeal will determine whether Mr Merricks has the right to appeal the CAT's refusal to certify the claim and whether he should be given permission to bring that appeal. If it is found there is no right of appeal, the court will decide whether he should be granted permission to bring a judicial review of the CAT's refusal to certify the collective action.

EU's collective redress proposal

While we wait for the right case to test the regime in the UK, the EU is proposing to introduce a collective redress mechanism for its consumers. Recognising the difficulties that many EU citizens had enforcing their rights in the Dieselgate scandal, the European Commission's proposal (announced April 2018 http://europa.eu/rapid/press-release_IP-18-3041_en.htm) would improve the ability for consumers affected by unfair commercial practices to launch collective representative actions and obtain compensation where there has been a final decision by a Member State court or regulatory authority establishing a legal breach or infringement. If adopted, this will be a significant step forward, particularly as the legal systems of many countries in Europe do not currently recognise the concept of class or collective actions.

The new mechanism would be different to US-style class actions and the UK's opt-out regime for competition claims. Its main features are:

- Cases would be pursued on behalf of consumer groups by qualified entities (not law firms or profit making entities) such as consumer organisations or independent public bodies. These entities would need to fulfil strict criteria monitored by a public authority.
- There would be transparency over the source of funding of the action.
- The scheme would apply to a wide range of EU laws, such as product liability, healthcare, data protection, financial services, environment, food safety and beyond.
- In low value claims where many consumers are affected by a small loss, any recovery would go to a public fund to benefit consumers.
- The EU could issue fines of up to 4% of a company's annual turnover where they are found to have engaged in widespread consumer violations in several Member States simultaneously.

D&O Liability

As the pace quickens across the globe to incorporate legal mechanisms which allow collective consumer redress actions to be brought, inevitably there are concerns that there will be a surge in claims against companies which may implicate their directors and officers. D&O underwriters will need to monitor this risk in the different jurisdictions where they write business.

In the UK, we have not seen a rapid hike in collective actions since the opt-out regime was introduced for competition claims in 2015, and the impact on D&O insurers has been limited. Whilst a broader consumer redress regime in the EU (if adopted) may lead to further changes in the UK, including the possible extension of the opt-out procedure to infringements of a wide range of laws beyond competition law, we expect the UK courts will apply 'suitability' safeguards (as it is doing for competition claims now) which should filter out meritless class actions and deter litigation abuse.

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