Disputes 2018: UK’s first “opt-out” class action

After the failure of the first two applications for Collective Proceedings Orders in the Competition Appeal Tribunal, 2018 is likely to be the breakthrough year.

In brief

- An opt-out class action regime was introduced into English law for the first time in 2015 for damages arising from breaches of competition law.

- The first stage of an opt-out claim requires the class and its representative to be certified.

- Two opt-out cases have been brought to date, but both have failed at the certification stage.

- Despite this, we consider there is still life within the opt-out regime and predict that the first case will be certified in 2018.

How did we get here?

The Consumer Rights Act 2015 heralded the start of a new era for collective redress in the UK for competition infringements, introducing an opt-out class action regime for competition damages claims. Although opt-out actions have been around in the US for many years, this was the first of its kind within the UK and is a rare example of this procedure in Europe.

The new regime, which marked a major step forward from what had gone before, permits a claimant representative to bring an opt-out collective action on behalf of a class of individuals. A key element of such claims is that claimants who fall within the defined class (and who are domiciled within the UK) are automatically included in the claim unless they opt out. This circumvents the problem of locating suitable claimants and convincing them to join an action at its inception, which had been one of the major problems faced by the previous (unsuccessful) opt-in regime.

Jurisdiction to hear such cases was given exclusively to the UK’s Competition Appeal Tribunal (CAT), a specialist competition forum. A claim must be commenced by the proposed class representative in the CAT. The first stage is for the CAT to authorise the representative to bring the collective proceedings by making a Collective Proceedings Order (CPO). Only once a CPO is granted can the substantive claim proceed.
What happened in the first two cases?

All eyes were watching the first actions to be launched and particularly how the CAT would approach class certification (which in the US has become akin to a mini-trial).

The first such claimant was Dorothy Perkins, General Secretary of the National Pensioners Convention, who brought an action against Pride Mobility Scooters on behalf of all purchasers of mobility scooters for damages arising from a breach of competition law. The quantum was relatively low: between £40 and £195 per scooter purchased (depending on model) with total losses between £2.7m and £3.2m. The CAT objected to the proposed class and methodology used to form it.

The second claim was at the other end of the financial scale. Walter Merricks, a former Financial Services Ombudsman, commenced opt-out proceedings against Mastercard in September 2016, claiming damages arising from Mastercard’s alleged breach of competition law in respect of the level of fees charged to retailers for using its cards, which were allegedly anticompetitive and passed on to end consumers. The proposed class was about as wide as could possibly be imagined, including almost all consumers who had made purchases in the UK over a 16 year period. Damages were valued at £14bn.

The CAT refused to grant a CPO in July 2017, principally on the basis that the expert evidence adduced at the certification stage did not show a suitable methodology for calculating damages (including in respect of pass-on and how damages could be attributed to each consumer). Merricks is appealing that decision.

Third time lucky?

The first two opt-out cases represented a rather ignominious start for the new regime. That said, several points emerge which are cause for claimant optimism:

- **CAT keen to help where it can:** In Mobility Scooters, the CAT did not dismiss the claim outright but instead adjourned and allowed the representative an opportunity to reformulate her case. Although the claimant ultimately considered the economics of a reformulated claim did not justify continuing, this sort of procedural step is unusual and potentially indicates a willingness from the CAT to lend a helping hand to get claims off the blocks.

- **Green light for litigation funding:** In the Merricks claim (which was a funded claim), the funder proposed that in the event the claim succeeded it would look to recover the greater of £135m or 30% of undistributed damages up to £1bn and a further 20% of any undistributed sums thereafter (it is common, based on US experience, for there to be sizeable sums of unclaimed damages). To the surprise of some, the CAT did not baulk at these large amounts. Funders will be encouraged that, if the right claim can be selected, there are decent returns to be made. That keeps the prospect of further claims alive.

Funding issues

In order for a claim to be certified, it is clear that the CAT is expecting to see a detailed level of economic evidence upfront. It follows that claimants will need to undertake significant work (including with experts) before launching such claims. Self-evidently a reasonable degree of cost will need to be incurred. Litigation funding is, therefore, likely to be key if the opt-out regime is to succeed. However, as the rewards for funders are potentially very high if a claim succeeds or settles, it is no surprise that litigation funders are actively searching for the next suitable claim.

The difficulty they face is picking a viable candidate; the “perfect case” needs to strike a balance between having a
sufficiently high level of potential damages to make it worthwhile for a funder to invest (which is where Mobility Scooters ultimately fell down), whilst not being so complex as to run into the factual and expert difficulties that Merricks faced. At the same time, the case needs to have sufficiently high prospects of success to be worth the financial risk of bringing it.

What it means for you

We predict that a suitable case will be found and certified in 2018. That will open the door for further cases against defendants who find themselves on the wrong side of competition law and greatly increase the risks associated with anti-competitive practices, pushing this up companies’ compliance agendas.

Finally, it is worth noting that the Merricks appeal will likely be heard in 2018. If that appeal is successful, this will also help pave the way for further opt-out claims. The potential scale and novel procedures of these claims will introduce new challenges for companies that find themselves accused of competition law breaches.

For more on class actions and collective redress across 11 key jurisdictions, see our microsite.