British Institute of International and Comparative Law

COLLECTIVE REDRESS
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British Institute of International and Comparative Law

Mission Statement

The British Institute of International and Comparative Law exists to advance the understanding of international and comparative law, and to promote the rule of law in international affairs.

Vision

To be a leading research institute of international and comparative law and to promote its practical application by the dissemination of research through publications, conferences and discussion.

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II. General Collective Redress Mechanisms

1. Scope

Injunctive or Compensatory

In common with other common law countries, the more developed general collective redress mechanisms are used almost exclusively to claim compensation on behalf of a dispersed group of victims. The general mechanisms described under paras. (a) to (c) of this section are used to claim compensation (damages).

However, some non-compensatory mechanisms have been used to obtain redress – in particular for consumers:

- a declaratory judgment may be applied for in order to obtain a definitive ruling that a trading practice is unlawful. For example in *Office of Fair Trading v Abbey National plc* ([2009] UKSC 6) the main UK national consumer authority applied to the court for a declaration to determine the extent of its power to assess the fairness of bank fees on consumer accounts under EU consumer protection provisions
- designated public authorities may also apply for injunctions to protect the interests of consumers – (see section III B)
- a competition collective proceedings order for an injunction may be applied for under s 47A Competition Act 1998 (see III A below).

The generally available collective compensatory procedures are:

a. Group litigation orders

Group litigation orders (GLO) are made under CPR 19.11. A GLO may be made where there are a 'number' of claims 'giving rise to common or related' issues of law or fact. It follows that:

- no claimant or body has the right to commence a GLO proceeding: whether the order should be granted will be in the court's discretion;
- the minimum number of parties to a GLO appears to be two, although in practice a greater number is likely to be needed to justify the use of the procedure; and
- the degree of similarity of the issues to be tried under the GLO is fairly flexible — 'related' issues may be sufficient.

b. Representative actions

A representative action is a claim brought by one or more claimants, on their own behalf and on behalf of others under CPR 19.6. A representative claim may be begun in cases where more than one person has the same interest in the claim as the claimant, so;

- a representative has the right to bring a collective claim but the court may order that the representative element be discontinued or that another representative be appointed;
- the representative must have the same interest in the claim as each person represented: this has been restrictively interpreted[1] - it is not enough that the claims be similar or related.

c. Test cases

Apart from the use of the test case mechanism in GLOs, the English CPR does not make express provisions for the bringing of test cases on a general basis. However, test cases have been brought by agreement between claimants and defendants (as in the Office of Fair Trading's case on overdraft charges[2]) and/or by way of an application for a declaration by a typical claimant or a representative or government body.

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1 For example in Emerald Supplies [2009] EWHC 741 (Ch)
2 OFT v Abbey National [2009] UKSC 6

2. Procedural Framework

a. Competent Court

A GLO application may be made in any court able to hear the underlying civil claims. However, a group litigation order may not be made unless the senior judge in that court (the Head of Civil Justice, Chancellor or President) consents.

b. Standing

There are no special rules on standing to bring a compensatory collective redress action under general collective redress mechanisms in England — normal legal capacity is sufficient. A declaration will be given only where it is likely to have a practical effect for the future conduct of the (applicant) parties or of other concerned persons (*Roll Royce plc v Unite* [2009] EWCA Civ 387 — admitting an application by a trade union on behalf of its members on the scope of their employment terms).

c. Availability of Cross Border collective redress

There are no rules preventing claimants residing outside the UK from joining a GLO. However, for the most common types of GLO claims (mass injury, for example) foreign law may apply to non-UK residents' claims, which could make then unsuitable for inclusion in the GLO action. For example, in *Allen v Dupuy International*, ([2014] EWHC 753 and [2015] EWHC 926 (QB)) claims (pre-dating the Rome II Regulation) advanced in a GLO by New Zealand claimants were found to be time barred under applicable New Zealand limitation rules.

d. Opt In/ Opt Out

Principal availability of both options

The general compensatory collective redress mechanisms in the UK are opt-in only, with the exception of representative actions. Declarations and representative judgments bind all concerned persons, with no possibility of opt-out.

Conditions for either type (prescribed by law or discretion of the judge)

A GLO may only be ordered by a judge or senior master. Provided the claims included in the GLO give rise to common or related issues of fact or law, the discretion to make the order – on case management grounds – is a wide one (see below)

e. Main procedural rules

Admissibility and certification criteria

- **Group litigation orders (GLOs)**

The procedure for group litigation orders is contained in CPR 19.10-19.15 and Practice Direction 19B. Two or more claims will already have been commenced using the normal rules for commencing actions contained in the CPR (rule 7). A GLO may be applied for at any time, either before or after the relevant claims have been issued and the application may be made by any claimant or defendant. The court may also make a GLO of its own motion in certain circumstances.

- **Representative actions**

There are no special rules for bringing a representative action and any claimant may commence an action on his own behalf and on behalf of all others having the same interest in the claim. It is, however, open to the court, either on its own motion or on the application of any person with an interest, to direct either that the claim should not be continued as a representative claim at all, or that the representative should be replaced with an alternative.[3]

[3] CPR rule 19.6

In practice, the court has interpreted the requirement that the interest be 'the same' strictly. One of the reasons for this is that an order or judgment in a representative action is binding on all persons represented, even if they were not parties to the proceedings and even if they were unaware that the proceedings were underway.

- **Test cases**

A managing court in a group litigation case may order that one or more of the claims to proceed as test cases. There is no definition of test case and nor are there any criteria given in the rule for how a test case should be selected.

Single or Multi-stage

GLO cases proceed on a multi-stage basis, with the GLO being made and then the common issues being decided (if not first settled). Any individual issues will also need to be decided in a potential third phase of the relevant claims.

Representative actions and declarations are single stage procedures.

Case-Management and deadlines

- **Group litigation orders**

The GLO must include:

• a specification of the GLO issues which will be managed together as a group under the order;

• directions on establishing a group register of the parties to be bound by the findings made under the GLO;

• nomination of a management court.

The GLO may also include an order that all existing claims, which give rise to GLO common issues, should be transferred to the management court be managed under the GLO (and therefore be entered on the GLO register).

Before a claim can be entered on the group register it must be issued (commenced) as an individual claim.

The effect of entry on the group register is that judgment given in respect of any of the group issues will be binding (*res iudicata*) for that issue for all claims on the register at the time the judgment is given. It is however possible for a claim which raises both group issues (e.g. as to liability) and individual issues (e.g. as to quantification) to be entered on the group register for the group issues only and for the individual issues to be tried separately (usually after the finding on the group issues).

The court may provide for one or more of the claims entered on the group register to be used as test claims which are treated as typical of the claims relating to each GLO issue.

The GLO issues will all be tried in the management court designated in the order (although individual issues may be tried elsewhere) and the court may designate the solicitor to one of the claimants to manage the group in relation to the common issues.

- **Representative actions and declarations**

No specific case management rules are provided for either of these types of action: the courts' general case management powers are used.

Expediency (particularly in injunctive cases)

The general CPR (rule 25) allows the court to make an interim injunctive or declaratory order at any time – even before a claim has been commenced – in cases of urgency or where it would be in the interests of justice to do so. This rule applies to collective proceedings as well as to bi-lateral proceedings. The application for interim relief may be made without giving notice to the other party if this can be justified.

Evidence/discovery rules

Disclosure of documents in England and Wales is provided for in CPR 31. The rule requires 'automatic' disclosure by list of all relevant documents which may either support or undermine the disclosing party's case. The disclosing party is required to carry out a reasonable search for all documents which are or have been under his control, list them (if appropriate by category) and — if they are not available for inspection — state why. Evidence from individuals is given by way of a sworn witness statement setting out what the individual would say if he were called to give evidence in person. Disputed issues in witness statements are resolved by examination at trial.

The position is different in Scotland where disclosure of documents is not 'automatic' but must be requested by the party seeking disclosure.

Court directed settlement option during procedure

There is no rule giving the courts in England the power to require parties to engage in ADR during the collective (or other) proceedings – unless the dispute falls within a valid arbitration clause. However, the court is entitled to 'encourage' parties to use ADR (CPR rule 1.4(2)(e)) and may impose sanctions on them in costs if they unreasonably fail to do so.

3. Available Remedies

a. Damages

Damages are the most frequently claimed remedy under GLO proceedings and are a common remedy for many other collective redress claims (e.g. representative actions). The claimant must show both that the defendant caused the group loss and the amount of that loss. Exemplary (punitive) damages in addition to compensatory damages are a possibility, but an award of exemplary damages is very rare.

Under the GLO procedure, it is open to individual claimants in the group to assert additional claims outside the group issues on the basis of facts which are specific to them: additional claims need not be heard by the GLO management court. Claimants therefore have the ability to establish the liability of the defendant using the GLO procedure and to claim additional damages in a related but separate action if so desired.

In practice a similar outcome applies to test cases for damages - a claimant may or may not choose to bring his own separate claim.

In a representative action by contrast, those represented, who have the 'same' interest in the claim as the representative claimant, are bound fully by the judgment. However as they are not parties the action the judgment may only be enforced against them with the permission of the court. Enforcement of an award of damages against the defendant will be carried out by the representative claimant, not the represented non-parties.

b. Injunctions

Injunctive relief on behalf of a group or a general interest are well established in certain areas of collective redress in England - especially consumer law (see below) where designated bodies have standing to make/apply for 'stop now' orders under specific legislation.

Since injunctions prohibit specific actions by the respondent they will normally also provide a remedy for other potential applicants in a similar situation to the main applicant - akin to a 'test' case approach. An order of a mandatory (positive) injunction - requiring the respondent to do something - is rare.

c. Declarations

The High Court may make a declaration of the law as it applies in a particular novel factual and legal situation - for example, whether 'administrative' overdraft charges by clearing banks operate as an unlawful penalty. A declaration will be binding in relation to those issues not only on the High Court itself but also on all other first instance courts and tribunals.

As with injunctions, a declaration can affect the legal position of non-parties, although that effect will be confined to those in a sufficiently similar factual position to the original defendant. Declarations are not available in relation to purely hypothetical issues — there must be a real dispute to be resolved — and nor are they available if an award of damages would be the appropriate remedy.

d. Allocation of damages between claimants for compensatory claims

There are no specific rules on the allocation of damages under a GLO to claims registered on the group register. Where test claim(s) are nominated, then group cases falling within the scope of the test cases are likely to receive an equivalent amount of damages, although even these claimants may have additional heads of claim which are outside the scope of the GLO common issues altogether and where damages will have to be assessed separately.

Similarly there are no specific provisions in the rules on representative actions regarding the allocation of damages awarded, but the requirement that each represented party has an identical interest in the claim strongly suggests that any damages awarded must be divided equally between the represented parties.

There are no express powers in the CPR permitting the court to estimate or to aggregate damages in GLOs or in a representative claim.

e. Availability of punitive or extra-compensatory damages and their conditions

Punitive (exemplary) damages are only available in England and Wales in very rare circumstances. In essence, the defendant must have known he was acting unlawfully and continued with the conduct in the expectation that his gain from the unlawful act would exceed any compensation which could be awarded to the claimants. Exemplary damages have not been awarded in collective redress actions.

4. Costs

a. Basic rules

The basic rules governing costs in England and Wales (CPR 44.2) are that:

- the starting point is that the loser pays all of the winning party's costs; but
- the court may make a different order if the loser was partly successful, the conduct of one or the other of the parties was unreasonable or where an offer to settle was made which was rejected but could have dealt with the claim earlier.

The general costs rules apply to collective redress actions (in particular representative actions and GLOs), although they have given rise to difficulties in the case of GLOs. To attempt to keep costs predictable and proportionate in GLO cases, courts have sometimes applied costs caps to the amount parties may recover in costs if they win.

There are special additional rules for costs in GLO cases (CPR 46.6):

- costs are separated into the costs relating to the common issues being tried under the GLO ('common costs') and the individual costs for group members with individual claims;
- the starting point for a costs order in a GLO where the group loses is that each group member is liable for an equal share of the common costs plus the costs relating to his individual issues.

There is however, no joint liability for these costs, so that a group claimant is not liable for another claimant's share of the common costs if the other fails to pay.

In a representative action, since the persons represented are not parties to the claim, costs are not payable by them under the 'costs shifting rule', although the court does retain the power to make costs orders against non-parties, which is available where the particular circumstances of a case appear to require it.

b. Loser Pays Principle

The starting point for costs awards in general collective redress claims is that the loser pays all of the wining party's costs: the court may, however, make a different order.

5. Lawyers' Fees

In England, contingency fees (damages based agreements: DBAs) have been legal since 2013 for most kinds of claims, but subject to some limitations. For most claims, a DBA may provide for a percentage of compensation recovered to be paid to the legal representative for lawyers' costs — subject to a cap of 50% of recoveries. However, the legal representative must also pay over to his client any costs recovered in the litigation from the losing defendant. This DBA agreement must be in writing and there are ethical rules for lawyers requiring them to explain carefully to their clients the effect of the DBA agreement before the client enters into it.

6. Funding

a. Availability of funding

Private litigation funding (money advanced on a non-recourse basis in return for a share of any recoveries) is widely available for many types of claims — including most forms of collective redress — in England. It is often combined with a DBA from the legal representatives to create a 'package' for the claimant group, covering all of the costs of a claim in return for a percentage of proceeds.

b. Origins of funding (public, private, third party)

Funding for collective redress claims comes from private sources — either litigation funders or the law firms which are representing the claimants. Civil legal aid from government sources has all but disappeared in the UK in recent years.

c. Conditions and frequency of resort to third party funding

Funding agreements are not normally disclosed so it is difficult to estimate the frequency and conditions of litigation funding of claims — although for the larger collective claims, anecdotally most are funded by a third party and/or law firm in some way. The conditions available to victims depend on the strength of their claims and the size of the expected recovery as well as the complexity (and thus cost) of the claim in question.

d. Control of funders (Courts/Legislators/Self-regulation)

There is no legislative or public administrative control of funders in the UK. However, through the common law torts of maintenance and champerty, anyone who improperly funds the litigation of another may be found liable for all of the (adverse) costs of that litigation if the case is lost. This possibility has been relaxed for *bona fide* commercial litigation funders though the practice of the English courts: funders now are normally able to limit their liability to a specific amount. However, the courts retain a reserve power to waive this protection if the funders act improperly.

In addition, a self-regulatory group, the Association of Litigation Funders (ALF) has produced a Code of Practice which is used as a guide by the courts (and others) as to acceptable funding practices. This combination of self-regulation with court oversight has to date proven sufficient to control the litigation funding sector.

e. Claimant-Funder relationship

Both the case-law based practice on maintenance and champerty and the ALF code of practice emphasise that the funder should not influence the course of the litigation — which should be left to the client (group) as advised by their legal representative. It is, however, common for funding agreements to require the funder to be kept informed — for example of offers to settle – during the course of the litigation.

7. Enforcement of collective actions/settlements

a. Framework for enforcement

The general enforcement provisions of the CPR (rule 70) apply to orders and judgments made following the general collective redress procedures described there. There are no special rules for executing judgments against participants in a GLO action. In a representative action, however, no order or judgment may be enforced by or against a person being represented (who is not a party) without the consent of the court (CPR 19.6(4)(b)).

b. Efficient enforcement of compensatory/ injunctive order

See above. Refusal to comply with an injunction or similar order — which is endorsed with a 'penal notice' (a warning that non-compliance is a criminal offence) — may be enforced through contempt of court proceedings. A court may make an order committing the defaulter to prison or may impose a lesser sanction – a fine or sequestration of goods, for example.

c. Cross border enforcement

CPR 74 provides detailed rules for the enforcement of orders under the Brussels Regulation (1215/12) and of European Enforcement Orders (EC 805/2004). These apply to the enforcement of judgments in collective redress claims as they do to other claims.

8. Number and types of cases brought/pending

In the period 2000 – January 2017, 98 GLOs were made in all kinds of claims.[4] There are no reliable statistics for representative or test claims for collective redress since these mechanisms are not restricted to collective redress cases.

9. Impact of the Recommendation/Problems and Critiques, including

a. No collective redress mechanism

The general collective redress mechanisms identified above were introduced before the Recommendation was made in June 2013 and so the general impact of the Recommendation is difficult to establish. The competition collective proceedings order — introduced from October 2015 — follows closely the provisions of the Recommendation. In particular, the requirements under the collective proceedings rules (see below), for the Competition Appeal Tribunal to decide whether to make an 'opt-in' or 'opt-out' CPO, appear to implement the requirements of paragraph 21 of the Recommendation — opt-in should be the starting point with opt-out being made available if necessary in the interests of justice.

b. Impact of the collective mechanism (or lack of) on behaviour/ policy of stakeholders (direct/ indirect, economic/social impact)

As noted, the general collective redress mechanisms in the UK were not made as a consequence of the Recommendation and therefore any assessment of the Recommendation's impact at a general policy level is necessarily anecdotal. However, the public debate on the merits (or otherwise) of various forms of collective dress through the courts continues to be a lively one.

The competition collective proceedings mechanism introduced in late 2015 is at present too new to have had a substantial impact on behaviour. This situation is likely to change as the practice of the CAT in making CPOs (in particular on an opt-out basis) becomes clearer through its decisional practice.

c. Incompatibilities with the Recommendation's principles

The UK civil procedure rules are broadly in conformity with the Recommendation. The UK has an opt-in collective redress mechanism (the GLO) generally available for victims of a mass harm to claim compensation. The use of declaratory relief has an equivalent effect as a general 'collective injunction'. There are also more developed forms of collective redress in the competition and consumer law fields.

d. Short summary of all identified incompatibilities

(1) The UK courts do not have

(1.1) a generally available opt-out compensatory collective redress mechanism for use where it is in the interests of the sound administration of justice for collective redress actions to proceed in that way; nor

(1.2) a generally available representative compensatory collective redress procedure for groups of victims of a mass harm event where the victims' claims are similar or related, but not the "same" (identical), to each other.

The mechanisms available for these types of situation only apply to competition law claims.

(2) There is no requirement that the representative in the current English representative proceedings (CPR 19.6) should have a non-profit motive. Indeed, the requirement that he has the same interest in the claim as the persons represented implies that he too must have a pecuniary interest.

(3) There is no legislative nor public administrative supervision of private litigation funding in the UK. Lawyers' remuneration (which may in practice fulfil the same function) are however regulated by legislation as well as by the courts.

(4) There is no express provision for the court to approve settlements of claims raising common issues under the GLO procedure. However, since the GLO proceedings are 'opt-in' only, any claimant who does not wish to be bound by the settlement may continue his action individually. If sufficient claimants reject the settlement

[4] They are listed at https://www.gov.uk/guidance/group-litigation-orders

and continue their claims, it is probable that the GLO proceedings will also continue without the settling claimants. Settlements of competition collective proceedings must be approved by the CAT.

(5) There is no express legislative provision for a representative entity recognised by the authorities of another Member State automatically to have standing in collective redress actions in the courts in the UK. However, the English courts have wide case management powers such that they would (where necessary) be able to admit a collective claim as a GLO organised by a foreign authorised body if it is in the interests of justice to do so.

Problems relating to access of justice/fairness of proceedings

The extent of any problems relating to access to civil justice in the UK varies according both to the type of claimant and the type of claim. For business – including most SMEs – it is likely that existing mechanisms (the GLO for example) are sufficient to enable them to bring or participate in a collective redress action if they have suffered loss as a result of a mass harm event caused by a breach of directly effective EU law.

For individuals and micro businesses, it appears that the situation is more complex and depends on the type of claim: for example

- consumers who have claims against financial services providers may make claims to the Financial Services Ombudsman who has statutory powers to require financial institutions to compensate for breaches of (among others) EU financial services law – an effective form of non-contentious collective redress;
- individuals harmed by mass product defects (e.g. in breast implants) have used the GLO procedure ([ref the PIP case])
- certain sectors offer consumer ombudsmen schemes to resolve disputes. Traders in these sectors may either belong to an ombudsman scheme voluntarily (e.g. the Property Ombudsman Scheme for estate agents) or be required to participate by legislation (e.g. the Legal Ombudsman for solicitors and other legal services providers);
- most straightforward claims for money compensation may now be made on-line and, for small claims (maximum £10,000) the 'loser pays' rule does not apply. As legal advice is not mandatory, consumers are able to make individual claims relatively quickly and economically.

Clear examples of 'abusive litigation' on a collective basis, based on directly effective EU law, are rare and depend on the definition of 'abusive' used. As a recent example, in the competition law claims against various air cargo carriers following on from the Commission decision of December 2010 finding a cartel in air freight surcharges, a law firm was censured by the court for having brought a claim on behalf of 60,000 Chinese claimants who, it later emerged, had not properly consented to being claimants (ref [Baoziang]). However, as most collective claims are brought for personal injury caused by mass harm events (so outside the scope of EU law), cases of abuse in litigation linked to the Recommendation are currently unlikely.

III. Competition and consumer collective redress

A. Competition collective proceedings orders

1. Scope

The Competition Act 1998 s 47B-E provides an alternative means of collective redress (in addition to the general procedures - above) for claimants to bring collective claims in competition cases. These provisions were inserted in the Competition Act by Schedule 8 of the Consumer Rights Act 2015 and came into force on 1 October 2015.[5]

The 'collective proceedings' mechanism permits a proposed representative claimant to make an application to the UK Competition Appeal Tribunal (CAT) for a collective proceedings order. The representative's application must allege a breach of either EU competition law (Articles 101 or 102 TFEU) or of the UK equivalents (in chapters I and II of the Competition Act 1998).

The remedy applied for in the CPO application may be either compensation and/or an injunction requiring the infringing activity to cease.

It is not a pre-requisite for a CPO application that a public authority should have first made an infringement decision, although both of the applications made (to mid 2017) have followed on from a competition authority decision.

The CPO may be made either on an opt-in basis — so that the proceedings will bind all persons who adhere to it — or on an opt-out basis — the proceedings bind all person resident in the UK who are within the class unless they choose not to be part of the proceedings.

In addition to making a collective proceedings order the CAT also has the power to make a collective settlement order (under section 49A-B of the Competition Act 1998) if a settlement between one or more defendants and a proposed representative claimant has already been reached. The order can approve the settlement both where there are on-going collective proceedings and where collective proceedings have yet to be begun. In addition to the requirements for a collective proceedings order, the CAT must also consider that the terms of the settlement are just and reasonable before approving it. An approved settlement is binding on all members of the class in the UK unless they opt-out within the time limit set by the CAT.

The new procedures replace the section 47B representative action originally provided in the 1998 Act, which allowed designated bodies to bring claims for damages on behalf of consumers against an infringing undertaking following an infringement finding by a competition authority. Only one action was brought under the previous s 47B procedure — following on from the OFT's decision in 'replica football kit' — and it was not generally viewed as a success.

2. Procedural Framework

The procedural framework for competition collective proceedings is set out in the Competition Act 1998 (as amended by the Consumer Rights Act 2015), the CAT Rules (made in the form of delegated legislation) and the CAT 'Guide to Proceedings' dating also from 2015.

a. Competent Court

Although competition actions may be commenced in any civil court in UK, only the CAT is able to make a collective proceedings order (CPO) or collective settlement order (CSO). There is provision for competition cases to be transferred to the CAT from other court if the parties apply for this.

b. Standing

Paragraph 78 of the CAT Rules 2015 sets out a number of requirements regarding the standing of the class representative. The class representative may — but need not— be a member of the class. This leaves open the

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commencement order SI 2015/1630 at: http://www.legislation.gov.uk/uksi/2015/1630/pdfs/uksi_20151630_en.pdf)

possibility of an 'ideological' claimant (a consumer body for example) being authorised to act as the class representative.

In all cases, it must be "just and reasonable" for the applicant to act as a class representative in the collective proceedings. The purpose of this assessment is to ensure that class members are fairly and adequately represented. This is particularly important in the case of opt-out proceedings where there may not be as much contact between the class representative, its lawyers and the members of the class.

The CAT must consider whether the proposed representative would in all the circumstances fairly and adequately act in the interests of class members, and in particular

- is he a member of the class and, if so, is he suitable to manage the proceedings?
- if not a member of the class, is the proposed representative a pre-existing body (and what are its nature and functions)?
- is there a satisfactory plan for conducting the collective proceedings which includes
  - a method of notifying the class members of progress,
  - a governance and consultation procedure for the class; and
  - a budget or estimate of the costs and fees of pursuing the proceedings?

Where there are class members whose claims raise certain common issues not shared by the whole class, the CAT may authorise a person to act as the class representative for a sub-class in relation to those separate common issues.

c. Availability of Cross Border collective redress

Any victim of a competition law infringement may opt-in to a UK collective competition proceeding regardless of nationality or residence. However, an opt-out CPO order will only bind those class members who have not opted out and who are domiciled in the UK at the time set out in the order. However, even in an opt-out proceeding, non-UK residents may nevertheless decide to opt in.

d. Opt In/ Opt Out

Principal availability of both options

The CAT has the power to make a CPO on either an opt-in or an opt-out basis. In contrast, a CSO can only be made on an opt-out basis — that is, it will bind all persons domiciled in the UK unless they opt-out within the time set by the CAT in its CSO decision.

Conditions for either type (prescribed by law or discretion of the judge)

The CAT will primarily consider two criteria in determining whether the proceedings should be opt-in or opt-out (Rule 79(3)):

Strength of the claims

The CAT will require the strength of an opt-out claim to be more immediately perceptible than an opt-in case since, in opt-in claims, group members may conduct their own individual assessments as to the strength of the claim before joining. However, this criterion does not require the CAT to conduct a full merits assessment nor does it expect parties to make detailed submissions on their claim at the time of application for the CPO.

The practicality of the proceedings being brought as opt-in proceedings:

In determining the practicalities of an opt-in proceeding, the Tribunal will consider all the circumstances, including the estimated amount of damages that individual class members may recover. The Tribunal has a general preference for proceedings to be opt-in where practicable, since the class is usually smaller and the members are easier to identify and contact.

Opt-Out restricted to In-jurisdiction claimants?

If the CAT makes an opt-out CPO or a CSO, the 'opt-out' effect will only preclude further action by class members domiciled in the UK on the date given for this purpose in the CAT's order.

Opt-out justified by the sound administration of justice?

Before the CAT makes an opt-out CPO, the CAT must consider that the claims are *prima facie* both sufficiently robust to proceed as opt-out proceedings and that an opt-in order would not be adequate to manage the case properly.

e. Main procedural rules

Admissibility and certification criteria

A representative may bring a collective proceedings application where the class comprises two or more competition claims raising the same, similar or related issues of fact or law and which are suitable for inclusion in collective proceedings (Competition Act 1998, s. 47B(6)).

Where a representative makes an application to the CAT for a collective proceedings order, the CAT must consider whether the proposed representative should be authorised (see above). The CAT Rules require that CAT must also satisfy itself that the claims for which collective treatment is requested are eligible for inclusion in collective proceedings.

There are three requirements in determining the eligibility of the claims (as set out in Rule 79(1)):

1. the claims must be brought on behalf of an identifiable class of persons;
2. the claims to be included in the proceedings must raise "common issues"; and
3. the claims must be "suitable" to be brought in collective proceedings.

When it considers the 'suitability' criterion, the CAT will take into account (Rule 79(2)):

- whether collective proceedings are appropriate for the fair and efficient resolution of the common issues;
- the costs and the benefits of commencing and continuing the collective proceedings;
- if any similar claims by class members have already been commenced;
- the size and composition of the class
- how easy it is to decide who is and is not in the class;
- if the claims can be compensated by an aggregate award of damages;
- whether the proceedings could be better dealt with through ADR.

Single or Multi-stage process

Making a CPO is a multi-stage process. In contrast, making a CSO is a single stage process.

At the first stage of the CPO procedure, the CAT has discretion to grant a collective proceedings order on the basis of the criteria set out above: if it does so, the order must include

- authorisation of the person who bought the proceedings to act as the representative in those proceedings;
- description of the class of persons whose claims are eligible for inclusion in the proceedings, and
- specification of the proceedings as opt-in collective proceedings or opt-out collective proceedings (see subsections (10) and (1))

Case-Management and deadlines

The CAT rules — which are similar but not identical to the CPR — contain a set of special additional rules for collective proceedings cases (part 6). In particular:

- the Tribunal will hold a case management conference as soon as possible after an application for a CPO has been made — and therefore before the statement of case or defence have been filed. At this CMC, the CAT will (if it considers the requirements are met) authorise the representative and certify the class;
- the initial case timetable will also be set at the first CMC;
- the CAT will also need to consider whether the proceedings should be opt-in or opt-out at this time;

- a further CMC will be held after the CPO has been made to deal with management issues such as the timetable for filing the defence(s), disclosure of documents (including, if necessary documents held by non-parties) and whether the case should be 'fast-tracked'.

Expediency (particularly in injunctive cases)

The CAT is able to make interim injunctions in a comparable way to the High Court (see above).

Evidence/discovery rules

- Unlike in normal civil proceedings, the CAT rules do not allow for 'automatic' discovery by list of documents. The CAT will consider what orders for discovery should be made at the first CMC (after the CPO has been made) and how discovery should be organised — for example through keyword searches in electronic data;
- Findings of fact in decisions made by the UK Competition and Markets Authority (CMA) and all infringement decisions of the CMA or the European Commission are — after the expiry of any relevant appeal period — binding on the CAT (or the court) if a claim is brought following on from the infringement decision or where other decisions are relevant to the claims being made.
- Final infringement decisions of other competition authorities in the EU are prima facie evidence that the infringement described in them has taken place.

Court directed settlement option during procedure

The CAT may refuse to make a CPO if it thinks that the dispute could better be resolved using a form of ADR. This includes the possibility of applying to the CMA for the approval of a voluntary redress scheme instead of litigating in the CAT under a CPO.

The use of settlement offers also differs slightly in the CAT from general civil procedure rules. CAT Rule 45 allows both defendants and claimants (including representative claimants) to make pre-trial offers to settle the claim. Where the offer is not accepted, it is not disclosed to the CAT. If, after trial, the judgment given is not more advantageous than the offer made, the party refusing to accept the offer suffers consequences in costs.

If it is the claimant who refuses the defendant's offer, the claimants must pay the defendant's costs, even though the defendant may be liable to pay damages to the claimants. If the defendant has refused to accept a claimant offer, not only will the claimants receive an enhanced amount of interest on the compensation awarded (to a maximum of base rate + 10%) but also an automatic uplift of 5-10% of the damages awarded. These provisions are clearly intended to incentivise parties to accept reasonable offers to settle.

3. Available Remedies

a. Type of damages

Damages (to put the claimants in the position they would have been in had the event causing mass harm not occurred) are the main remedy available to the CAT in CPPO proceedings. In contrast to general forms of collective redress the CAT may not make an award of exemplary (punitive) damages under a CPO. However, if it has made a CPO, the CAT is not required to asses individually the damages for each class members: it is entitled to make an aggregate assessment.

b. Allocation of damages between claimants for compensatory claims

The CAT requires the applicant for a CPO to have a plan for managing the collective proceedings before it makes a CPO. One of the requirements for such a plan to be acceptable is that is should set out how any aggregated damages awarded to the class will be distributed among the class members.

c. Availability of punitive or extra-compensatory damages and their conditions

None

4. Costs

a. Basic rules governing costs and scope of the rules

Although the CAT in practice tends to follow the general rules on costs in the CPR, it is not required to do so. Its rules give it a wide discretion as to how to allocate costs of any collective proceeding as between the parties.

b. Loser Pays Principle

In general the CAT has followed the basic principle that the 'loser pays' the costs of litigation. However, it is not required to do so, and, as noted above, the effect of a settlement offer may also differ from the standard CPR rules — encouraging parties to settle competition claims early.

5. Lawyers' Fees

In contrast to general civil litigation (including non CPO competition claims), DBAs (contingency fees) are not available in opt-out CPO proceedings. However, there would appear to be nothing to prevent them being used either in opt-in CPO proceedings nor in a settlement leading to a CSO (although clearly the CAT will need to be persuaded that the fee arrangements are just and reasonable).

6. Funding

Funding for collective proceedings in the CAT may be funded by litigation funders – the comments above at section II apply.

7. Enforcement of collective actions/settlements

Judgements of the CAT are treated as if they were judgments of the High Court for enforcement purposes.

8. Number and types of cases brought/pending

Two applications have been made for a CPO to date (mid 2017): both applications related to follow-on claims form decisions of (respectively) the OFT (now CMA) and the European Commission. In the first, damages were claimed on behalf of a class of persons said to be harmed by an infringement of the Competition Act restricting retailers' resale pricing of mobility scooters. This application has now been withdrawn (25 May 2017). The second application is a collective claim on behalf of a class of consumers said to have been harmed by overcharging from Mastercard following on from the European Commission's decision of December 2007. The application for the CPO has been heard, but not yet decided.

9. Impact of the Recommendation/Problems and Critiques

See comments at section II above

B. Consumer enforcement orders

1. Scope

The general methods of collective redress described above have been used extensively in a consumer law context - with the exception of the general representative action (CPR 19.6), which is not suitable for this kind of claim due to the narrowness of its scope of application.

In addition, Part 8 of the Enterprise Act 2002 gives designated enforcers the power to apply to the court for orders preventing breaches of both domestic and Community consumer legislation in the UK. The scope of the order that the court may make is not specified on the face of the statute, although it must relate to the 'conduct' of the business, but orders appear generally to be limited to requiring the business against whom the order is made to cease the unlawful conduct described in the order.

The Consumer Rights Act came into force on 1 October 2015. All consumer purchases from this date onwards will be governed by this legislation. It amends the powers of some consumer enforcement bodies and gives greater rights to consumers.

Schedule 7 CRA amends Part 8 of the Enterprise Act in order to broaden the scope of redress available to consumer enforcers to include compensation and not solely injunctive relief. This is part of the "enhanced consumer measures" (ECMs) introduced by CRA 2015. ECMs are designed to allow enforcers to achieve the best outcomes for consumers. Guidance provided by BIS states that the measures must aim to achieve one or more of the following outcomes:

a) Redress for consumers

b) Information — enabling consumer choice

c) Compliance — reduction in reoffending.

2. Procedural Framework

a. Competent Court

An application under Part 8 must be brought in the High Court.

b. Standing

Only those public bodies either set out in the Enterprise Act itself (the OFT, Trading Standards Offices - run by local authorities - and certain public consumer protection or regulatory bodies) or a private body designated by the minister may apply for a Part 8 order. To date the only non-public body to be designated is the Consumers' Association (Which?). Previously, other private bodies were not entitled to make orders, however Sch 7 para 4 has specifically introduced a new category of private body under the Communications Act 2003 in order to regulate premium rate callers. Sch 7 does not contain a specific list of designated private bodies but it is likely that as cases are brought under the amendment new bodies will apply to the Secretary of State to become designated.

While both public and private bodies are able to bring a claim forward under Part 8 EA 2002, individual consumers are not able to do so. They must refer their complaints to one of the designated bodies.

c. Availability of Cross Border collective redress

Foreign claimants have no standing to bring an application under Part 8 as they are not specified in the Act, nor have any non-UK bodies been designated by the Minister.

d. Court directed settlement option during procedure

The general civil procedure rules apply to applications for consumer measures under Pt 8 Enterprise Act (as amended)

The Part 8 procedure used to be a purely injunctive procedure. However, since the enactment of Sch 7 CRA 2015, enforcers are now able to claim compensation under “enhanced consumer measures”

Part 8 sets out the steps to be followed before an application may be made: the enforcer must first consult both the business thought to be infringing consumer law and the OFT.

The business also has the opportunity to offer undertakings to address the enforcer's concerns. If an undertaking is given, an application for an order may not then be made, but breach of the undertaking will allow an enforcer to make a court application for an order sanctioning the breach.

In urgent cases, than enforcer may apply to the court for an interim order under part 8 even without giving notice to the business concerned - although the business may apply to the court to have the interim order set aside once it has been brought to its attention.

Prior to the amendments made by Sch 7 the only actions that could be taken against infringers were criminal prosecution or civil action to stop the infringing behaviour. How far ECMs are used is the decision of the enforcer, but generally they can only be used where consumers have suffered loss. There is no minimum or maximum level of individual loss that precludes the use of the measures. They can also be used in conjunction with either a criminal or other civil action.

The process by which ECMs are enforced begin with an attempt to settle by agreement with the infringer. An undertaking is sought from the trader that the measures will be put in place. However, if the infringer refuses to implement the measures, then the case will go to court as a civil action for the courts to decide if the measures are just, reasonable and proportionate.

The enforcer’s job continues after the ECMs are implemented, they must ensure on-going compliance and that the consumers are receiving redress.

ECMs can be used to seek measures in the “collective interest of consumers”. This is a situation where the business has caused loss but is unable to identify some/all of the consumers affected. Enforcers in these circumstances can require that the business pay the equivalent of the loss suffered to a consumer charity, for example Citizens Advice Service.

3. Available Remedies

Remedies under a Part 8 order were limited to requiring the business subject to the order not to continue or repeat the conduct or connive in such conduct when carried on by others (an injunction) There is now statutory power to require an award of compensation under 'enhanced consumer measures'. Sch 7 of CRA 2015 introduced some key changes as to the remedies available to claimants. While the legislation itself does not contain a list of possible measures, several were included in the preceding government consultation. Below is a summary of potential remedies included in the later BIS (UK government) Guidance on ECMs:

- setting up a redress scheme and notifying it to customers
- appointing a compliance officer
- signing up to a certified ADR or similar scheme and committing to be bound by its decisions
- detailing their breach and what they are doing to put it right — on their website or through a press release

Money redress may be ordered where consumers have suffered loss. An enforcement order may include enhanced consumer measures in the redress category only in a "loss case" and only if the court/enforcer is satisfied that the costs of enforcement are unlikely to be more than the sum of losses suffered by consumers as a result of the conduct. Measures in the redress category are:

- measures offering compensation or other redress to consumers who have suffered a loss as a result of the conduct which has given rise to the enforcement order or undertaking,
- offering consumers the option to terminate (but not vary) the purchase contract,
- where such consumers cannot be identified (or cannot be identified without disproportionate cost), measures intended to be in the collective interest of consumers

Here it is clear that the variety of remedies available under an enforcement order (brought by public bodies) go above and beyond previous injunctive relief not only to benefit potential claimants but to improve compliance with consumer law and discourage the repetition of conduct specified in the order.

Where private bodies apply for ECMs, two additional conditions need to be satisfied:

- the enforcer is specified for the purpose by order made by the Secretary of State.; and
- the ECMs do not directly benefit the enforcer or an associated undertaking.

4. Costs

a. Basic rules governing costs and scope of the rules

b. Loser Pays Principle

The rules on costs in the CPR will apply to Part 8 applications.

5. Lawyers' Fees

DBAs are available to both the enforcer and the defendant, although it is unlikely that public enforcers will make substantial use of them.

6. Funding

See section II above

7. Enforcement of collective actions/settlements

See section II above

8. Number and types of cases brought/pending

9. Impact of the Recommendation/Problems and Critiques, including

See section II above

IV. Information on Collective Redress

1. National Registry

The national GLO list can be accessed at https://www.gov.uk/guidance/group-litigation-orders

Information in applications for competition CPOs is on the CAT website: http://www.catribunal.org.uk although CPO applications are not at present listed separately.

2. Channels for dissemination of information on collective claims

Various privately run websites offer information on collective redress.

V. Case summaries

The current GLO list is available at the address noted above. The two CPO applications made to date are at a very early stage — and one has been withdrawn — see section III A 8. No CPO disputes have resulted in compensation paid nor have the disputes been resolved.

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