Collective response

Litigation Funding summarises key points from submissions to the government's collective actions review

On 6 August the Department for Business and Trade (DBT) launched a review of the collective actions regime in the Competition Appeal Tribunal (CAT), with a call for evidence that closed on 14 October. Here, *Litigation Funding* summarises some key points emerging from consultation responses given by various organisations.

CLASS REPRESENTATIVES NETWORK

The Class Representatives Network (CRN)'s submission to the DBT argued that reform of the opt-out collective actions regime should prioritise closer monitoring of defendants' costs.

The CRN, which is chaired by Walter Merricks CBE and acts as a voice for those acting as class representatives in group claims, noted that the CAT rules require class representatives to show they have enough funding to bring the claim and also to meet the defendant's recoverable costs if the claim does not succeed, effectively by purchasing adequate after-the-event (ATE) insurance. However, while class representatives are subject to 'careful costs constraints and scrutiny', defendants often have deeper pockets and, until the case management hearing in *Bulk Mail Claim v IDS*, defendant-side costs had not been subject to any monitoring in the Competition Appeal Tribunal.

One class representative told the network that high defendant costs had required ATE cover of £15m for the claim to continue.

The CRN's response said: 'Defendants are therefore subject to a perverse incentive to deliberately challenge the claim at every stage and delay settlement in the hope of running down the claimant's funds to a point where either (a) the claim fails due to lack of funds); or (b) the class representative is forced to settle for an amount which may be far lower than the defendant's true level of liability.

> Revoking the regime could see substantial competition infringements go unchecked

'Aggressive defendant strategies might include arguing and seeking to appeal unmeritorious points, delaying tactics, and excessive spending (for example, when dealing with disclosure) as a means of running down the claimant's budget,' it continued. 'Improved monitoring of defendants' costs should be the priority; it would bring the CAT in line with other civil jurisdictions in the UK.'

When it announced its review of the competition collective actions regime in August, the DBT said the opt-out caseload had grown 'significantly' since the regime's introduction in 2015. It pointed out that 'tens of billions of pounds in damages' had been claimed – far higher than the £30.8m per annum estimated in the coalition government's 2013 impact assessment.

Responding to this, the CRN highlighted unforeseen factors affecting the regime since the 'somewhat naïve' 2013 impact assessment. These included the 'underenforcement' of competition law by the Competition and Markets Authority; the scale of anti-competitive behaviour by 'big tech' companies; and the effect of Brexit, which means European Commission investigations no longer cover the UK effects of anticompetitive conduct or agreements, increasing the need for more expensive 'standalone' private competition proceedings.

BAR COUNCIL

In its public response to the DBT's call for evidence, the Bar Council warned of potential detriment to UK small businesses and consumers if the collective actions regime were revoked.

The representative body acknowledged that the number of opt-out claims has grown, with some very large. However, it pointed out that very few claims are brought without the support of regulatory decisions or judicial precedent, while the certification process in the CAT is 'rigorous'.

It said: 'In our experience, many claims have been brought on the back of decisions or investigations undertaken by the EU Commission or the Competition and Markets Authority (CMA), claims brought by the Department of Justice or States Attorneys in the United States, or by regulators in the UK or other [EU] Member States… The number of entirely unheralded claims is very small (the *Gutmann v Govia* boundary fares case being one of the rare exceptions)…

'Any suggestions by large businesses that the UK should revoke the CPO regime needs to be seen in this context. It would put the UK, uniquely among most developed economies, back in the position of seeing substantial competition infringements going unchecked, with small businesses and consumers going uncompensated for their loss.

'It would drastically reduce the deterrent effect of competition law on large multi-national businesses operating in the UK. The reason that large multi-national companies have been subjected to claims is typically because they have been found by courts and regulatory authorities to have acted in breach of competition laws.'

The Bar Council's detailed response also addressed a government question on whether businesses should ever be protected from liability under the collective actions regime, for example because they had co-operated with a CMA investigation. The Bar Council noted that the UK already has an immunity and leniency regime in place in relation to administrative penalties, but reforming the regime to give immunity against private claims would be 'problematic'. It noted: 'While a more modest extension of immunity from claims conferred on the first whistleblower in relation to cartel activity would still enable claims to be brought against other cartelists, we still think it sends a strange message to would-be cartelists to have a regime which visits no consequences at all on a business that engages in naked anti-competitive conduct, such as price-fixing, bid-rigging or market sharing.

'Indeed, in an extreme case, it might prompt Machiavellian businesses to initiate cartel activity with a less sophisticated rival with a view to then blowing the whistle and landing their competitive rivals with an unmatched liability to fines and damages claims.'

COLLECTIVE REDRESS LAWYERS ASSOCIATION

The Collective Redress Lawyers Association (CORLA) used its consultation response to argue for an extension of the collective actions regime.

It said: 'For the UK economy to thrive, SMEs must be able to compete, and such competition is guaranteed and safeguarded by an effective competition enforcement regime, of which the opt-out regime is now an essential pillar, to address and deter infringements.

'That does beg the question why the opt-out regime remains limited to competition enforcement. UK consumers and businesses may suffer the exact same harms and face difficulties in competing effectively against competitors that flout environmental and consumer protection laws, but lack the equivalent recourse to an opt-out mechanism.

'Extending the scope of the regime would remedy that enforcement gap, to the benefit of the rule of law and the UK economy; and bring the UK in line with other jurisdictions where collective redress is not limited to competition but extended across practice areas.'

FAIR CIVIL JUSTICE

Business lobby group Fair Civil Justice (FCJ) welcomed the DBT's review of the collective actions regime, describing the call for evidence as 'a real opportunity to restore balance to the UK's legal landscape'.

The FCJ said: 'The rise in predatory litigation is no longer just a legal issue. It has become a growing business and investment risk.'

The organisation said regulatory reform of litigation funding could protect the right to redress and maintain the UK's attractiveness as a place to do business. It supported proposals by the Civil Justice Council to introduce statutory regulation of litigation funding to improve transparency, financial safeguards and 'basic protection for claimants'.

INTERNATIONAL LEGAL FINANCE ASSOCIATION

The International Legal Finance Association (ILFA) argued that a review of the collective actions regime was 'premature', with the regime 'still at an early stage of development'.

It said: 'The majority of the 59 opt-out cases issued since 2015 haven't progressed past the collective proceedings order stage. Just one has gone to a judgment and three have reached settlements. There is not enough evidence yet for the government to draw reliable conclusions, and as this is a precedent-based system, the regime needs time to bed in.'

ILFA added that there was no 'principled justification' for not expanding the regime beyond competition law, to encompass other claims and causes of action.

HAUSFELD

Claimant firm Hausfeld called on the DBT to reinforce, rather than roll back, the existing opt-out structure that makes large-scale redress possible.

It said the government should codify the CAT's case-by-case scrutiny of funding and settlements, permit damages-based agreements in opt-out claims, and explore an Access to Justice fund to provide capital where commercial funding is unavailable.

The law firm highlighted that out of the 28 claims certified by the CAT to proceed to trial, more than half involve a business or mixed class; showing the regime benefits not only consumers, but also SMEs and responsible businesses.