Department for Business, Energy & Industrial Strategy

Consultation: Reforming competition and consumer policy (the "Consultation").

1 October 2021

Response from CMS Cameron McKenna Nabarro Olswang LLP ("CMS")

Introductory Comments

We welcome the opportunity to comment on the Consultation. Our answers focus on two questions specifically Questions 72 and 73 which ask for views on proposals to introduce new measures and mechanisms for consumer collective redress (i.e., class actions). In our responses we focus on one discrete issue being: **if the Government was to propose new mechanisms for consumer collective redress, we strongly recommend that any such mechanisms should not operate on an "opt-out" basis**.

As is explained in more detail below, we think that opt-out mechanisms are unnecessary and potentially harmful. In summary, our key concerns are as follows:

1. Empirical data demonstrates that opt-out consumer class actions have very limited compensatory effect as the vast majority of any damages award of settlement sum is not distributed to the consumer class.

2. Absent compensatory effect, opt-out class actions are functionally similar to fines. Where fines are appropriate they should be implemented by public sector regulators, rather than the courts in civil litigation.

3. Given the potentially huge damages sums at stake (tens of £m, and sometimes £bn), opt-out class actions can impose settlement pressure that is out of proportion to the substantive merits of the claim. This can encourage nuisance/unmeritorious claims.

4. If the government was to introduce an opt-out class action device for consumer claims it is important that such mechanism have stringent procedural safeguards to reduce the risk of nuisance/unmeritorious claims.

Response

Consultation Question 72:

"To what extent do you consider it necessary to open up further routes to collective consumer redress in the UK to help consumers resolve disputes?"

Answer: As explained in our introductory comments, we are restricting our responses to the possibility that the Government may introduce an opt-out class action mechanism for consumer claims.

In our view, a mechanism to facilitate opt-out class actions for consumers should not be introduced. Empirical evidence demonstrates that opt-out class action mechanisms have limited compensatory effect in consumer claims.[1] The main effects of these mechanisms are: (a) to enrich litigation funders and law firms; and (b) to impose costs on business, but without effectively compensating class members.

Opt-out proceedings automatically coalesce class members within a group. Although individual losses can be low, overall claim values for the aggregated class can be extremely large.[2] Although these mechanisms have very limited compensatory effects, they can have other very significant consequences. They can be extremely profitable for litigation funders and claimant law firms, as is illustrated from the experience in the U.S.[3] They can be very expensive for corporate defendants, imposing significant costs even where facing unmeritorious claims. In addition to paying lawyers and damages awards, defendants may settle claims for sums that are disproportionate to the merits in order to avoid the risk of ruinous damages awards.[4]

In our view, any sort of collective proceedings or class action mechanism for claims on behalf of consumers should operate on an opt-in basis, i.e., the consumers must specifically elect to join the claim.

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[1] A recent study by the U.S. Federal Trade Commission reported that the median distribution rate for consumer claims is 9% (https://www.reuters.com/article/us-otc-claimsrate/ftcs-comprehensive-study-finds-median-consumer-class-action-claims-rate-is-9-idUSKCN1VV2QU, recovered on 15 September 2021.) On this basis, only a very small proportion of damages or settlement sums are typically paid out to class members. Put differently, opt-out mechanisms have no effective compensatory impact where distribution rates are low, such as in consumer claims. We acknowledge that the FTC study concerned U.S. consumer class actions but participation rates are driven by practical factors such as the value of individual claims, and so we have no reason to think that participation rates for UK consumer class actions would be any higher than in the U.S.

[2] It has been reported that the representative action filed against YouTube on behalf of 5 million UK children is seeking damages of $3.2 billion (https://www.tubefilter.com/2020/09/17/youtube-facing-3-billion-class-action-uk-lawsuit/, recovered on 26 September 2020). The opt-out claims filed and planned against Oracle and Salesforce in England and Holland are reported to be seeking $10 billion in damages (https://techcrunch.com/2020/08/14/oracle-and-salesforce-hit-with-gdpr-class-action-lawsuits-over-cookie-tracking-consent/, recovered on 26 September 2020).

[3] An empirical study from the U.S. concluded that, "*the vast majority of cases produced* ***no benefits to most members of the class*** *– even though in a number of those cases the lawyers who sought to represent the class often enriched themselves in the process (and the lawyers representing the defendants always did*", Do class actions benefit class members? An empirical analysis of class actions, Mayer Brown LLP https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf, recovered on 15 September 2021 (emphasis as original).

[4] The U.S. courts have repeatedly commented on this effect: Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978) ("*Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense*."); Eubank v. Pella Corp., 753 F.3d 718, 720 (7th Cir. 2014) ("*Aggregating a great many claims (sometimes tens or even hundreds of thousands—occasionally millions) often creates a potential liability so great that the defendant is unwilling to bear the risk, even if it is only a small probability, of an adverse judgment*."); CE Design Ltd. v. King Architectural Metals, Inc., 637 F.3d 721, 723, 79 Fed. R. Serv. 3d 244 (7th Cir. 2011) ("*Certification as a class action can coerce a defendant into settling on highly disadvantageous terms regardless of the merits of the suit*.").

If the Government decided to introduce an opt-out mechanism for consumer class actions then it would be important to have stringent protections to deter speculative or vexatious claims and also to protect the procedural rights of defendants.

We consider that necessary safeguards should include the following:

1. Adverse costs The "loser pays" cost shifting regime that is already generally applicable in the civil courts should also be applied to any new regime. The requirement to pay the winner's costs is an essential measure in deterring unmeritorious claims. Unmeritorious claims can impose settlement pressure that is disproportionate to the merits given the risk of a very large damages award, but the adverse costs rule helps to reduce the number of nuisance claims filed in the first instance.

2. Standing We consider that standing should be restricted to independent organisations that have a track record of protecting consumer interests. Although not perfect, this would reduce the scope for claimant law firms and litigation funders to be the sole drivers behind such class actions. Any regime should mandate the following qualifying criteria for standing: (a) a minimum track record (12 months) of operating in a field relevant to the protecting of the proposed consumer class; (b) independence of any person holding an economic interest in the claim (such as a litigation funder); (c) public disclosure of compliance with the qualifying criteria and the source of the representative's funding; and (d) absence of any conflicts with class members.[5]

3. Certification A certification process serves to dismiss claims that are unsuitable for the procedural mechanism at an early stage, saving both judicial resources and costs for the defendant. We consider that the certification stage under any new regime should be modelled on the Collective Proceedings Order mechanism set out in sections 47B-C of the Competition Act 1998 (the "**CPO Regime**"). That regime is helpful in that it has regard to the characteristics of the proposed representative, such as its ability to pay adverse costs,[6] its plan for the claim,[7] and whether the claim itself is suitable for collective proceedings, which includes considering whether the claim raises common issues[8] and it is suitable for an award of aggregate damages.[9] Any new mechanism should have certification criteria modelled on U.S.-style requirements, such as: (1) there must be common answers to common questions across the class, which can be proven by common evidence across the class; (2) common, rather than individual, issues of fact or law must predominate; and (3) the class-action procedure must be an effective, superior mechanism to resolve the claims. We propose that the certification criteria for any new mechanism should be proposed on the newer, stringent U.S. model that requires a rigorous analysis because in December 2020 the UK Supreme Court applied a very low certification threshold for the CPO Regime (*Merricks v Mastercard*). The dissenting judgment of Lords Sales and Leggatt expressed concern at the low threshold to certification, noting that it could "*very significantly diminish the role and utility of the certification*

[5] Similar qualifying criteria are provided for in the Representative Action Directive (2020/1828), Article 4(2). See https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2020:409:FULL&from=FR, retrieved on 27 September 2021.

[6] The Competition Appeals Tribunal Rules 2015 (SI 2015 No. 1648) (the "CAT Rules), Rule 78(2)(d).

[7] CAT Rules, Rule 78(3)(c).

[8] CAT Rules, Rule 79(1)(b).

[9] CAT Rules, Rule 79(2)(f).

threshold." We agree, hence why we think the stringent U.S. test for certification should be applied if the Government were to decide to introduce and opt-out class action mechanism for consumer class actions.

4. Destination of unclaimed sums As noted above,[10] it is questionable whether opt-out class actions serve an effective compensatory effect for class members. This then raises the question of where undistributed funds should be paid to.

5. In the U.S., undistributed damages are sometimes paid into a cy-près trust. Under the CPO Regime, undistributed damages are paid to a charity; currently the Access to Justice Foundation. With both of these approaches, undistributed damages do not revert to the defendant. The CPO Regime countenances that unclaimed sums following a settlement may revert to defendants.[11] This risks putting undue settlement pressure on defendants. Those defendants know that at trial they risk losing all damages awarded even if there is very low class participation at the distribution stage. Accordingly, a defendant may accept a settlement offer that permits undistributed funds to revert to it. It may even select this option where the merits of the claim are relatively weak because the certainty of retaining a significant amount of undistributed funds (because only a small amount is likely to be distributed to class members) is more attractive than the risk of losing the entire sum if the claim went to trial. This dynamic would impose undue settlement pressure on defendants that is disproportionate to the merits of the case and should be avoided.

6. In light of the above points, we propose that undistributed funds should revert to the defendant both on settlement and following a damages award.

7. Exemplary damages These should be prohibited under any new mechanism that the government introduces, similar to under the CPO Regime.[12]

Consultation Question 73:

"*What impact would allowing private organisations and consumer organisations to bring collective redress cases in addition to public enforcers have on (a) consumers, and (b) businesses?*"

Answer: Enabling opt-out class actions for consumers – whether standing was granted to private organisations or consumer organisations – would offer limited benefit to consumers and would impose potentially harmful costs on businesses.

- In relation to consumers, and as explained in our response to question 72 of the Consultation, empirical evidence demonstrates that distribution for consumer class actions is very low. Self evidently this means that these mechanisms offer very limited benefits for consumers.

- In relation to businesses, and as is also explained in our response to question 72 of the Consultation, opt-out class actions can impose settlement pressure that is disproportionate

[10] See our response to Consultation Question 12.

[11] CAT Rules, Rules 94(8) and 94(9)(g).

[12] S47C(1) CA 1998 and Schedule 2, paragraph 4(1) of The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (S.I. 2017/385).

to the merits of the case. This is unappealing from a public policy perspective and it is also contrary to procedural rights of defendants. Furthermore, and as already noted, a damages award that has limited compensatory effect is functionally similar to a fine. This raises two discrete points. First, fining should be within the sole competency of public enforcers and should not be a function of the civil courts adjudicating between private parties. Second, for numerous behaviours that would be the subject of class actions, the defendant will already have faced regulatory action and potentially fines from a public enforcer, thus an opt-out class action that is functionally equivalent to the imposition of a fine (owing to low compensatory effect) would be duplicative of any fine already imposed.