

Opt-out collective actions in competition cases: some thoughts about the future

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A. Introduction

1. The issue of collective redress for consumers, in particular victims of large and well-organised cartels, has been under discussion for some time. Indeed, a very early form of collective redress for harm to consumer interests can be seen in an entry in the Anglo-Saxon chronicle for AD 1125. This reveals how Henry I sanctioned the mutilation of “mint men” who had caused base metal to be introduced to the monetary system which destabilised commerce. The Chronicle records, “And that was all in perfect justice, because that they had undone all the land with the great quantity of base coin that they all bought.”
2. There is no doubt that cartel activity imposes a significant economic burden on society. Claims brought by those legitimately seeking to recover this loss also generate additional costs. But they are ‘good costs’ from the point of view of society as a whole, in that they are likely to lead to a re-allocation of incentives for optimising market behaviour and act as a future deterrent to further anti-competitive behaviour. On the other hand, there is no doubt that those accused of cartel activity also face a cost for their business in defending what they may consider to be unmeritorious claims. Similarly, defendants based in other Member States may face additional costs of defending a claim in the UK compared to their home jurisdiction, or duplicated costs of defending claims brought on several fronts. These are ‘bad’ costs, in the sense that they are costs to be borne which bring little or no productive benefit for society as a whole.
3. It is also undoubtedly the case that concerns about the “under-enforcement” of EU competition law have been expressed for some time. Prior to the Modernisation Regulation (Regulation 1/2003), there was a degree of academic concern as to the absence of successful claims for damages for breach of Articles 101 and 102 TFEU. It

was expressed as ‘the mystery of the reluctant plaintiff.’¹ But the Modernisation programme was meant to change all that. Many commentators and at least one Judge of the General Court of the European Union predicted a significant increase in the enforcement of competition law by private litigants. This was reasonably expected as a result of the abolition of the notification system, comfort letters and discomfort letters. This should have led to a reduced level of legal certainty concerning existing or proposed agreements or practices; and therefore a greater scope for litigation.

4. But the “modern” era has not yet seen a dramatic increase in private litigation of competition disputes. The absence of decided cases finding infringements of competition law in the UK can only be as a result of two alternative factors. First, competitors in the UK are angelic in their adherence to the law found in Articles 101 and/or 102 TFEU and the prohibitions in Chapters I and II of the Competition Act 1998. Or, secondly, that domestic litigation between private parties has not proved to be an effective mechanism for regulating anti-competitive practices. One does not need to be a confirmed cynic to think the second explanation is more likely. Furthermore, the trend has been replicated in other Member States.
5. These trends have prompted DG COMP and the Department for Business, Innovation and Skills (‘DBIS’) (among others) to explore whether or not the competition regimes at a domestic level are providing effective enforcement of domestic and EU competition law. In this paper, I propose to consider what reforms have been suggested by DBIS; and what effect these reforms may have on some of the key tactical issues arising in relation to multi-jurisdictional damages actions.

¹ The “mystery of the reluctant plaintiff” was a reference by J. Maitland-Walker at a conference in London, 1982, cited in Enric Picañol, *Remedies in national law for breach of Articles 85 and 86 of the EEC Treaty - a Review*, Legal Issues of European Integration, Deventer No. 2 (1983) 1 at page 2. Comprehensive reasons why there were not more claims under the old competition regime is provided by John Temple Lang in *EEC Competition Actions in Member States' Courts - Claims for damages, declarations and injunctions for breach of Community Antitrust Law* (1983-4) vol. 7 Fordham Intl L.J. 389 at page 407. Reasons for the continued absence of litigation post-Modernisation were articulated in Beal, *Crehan and Post-Modern Malaise*, [2007] Comp Law 17.

B. The proposals for reform

6. The Commission Services paper accompanying the Commission's White Paper on damages² identified the main problems with damages actions as "the very complex factual and economic analysis required, the frequent inaccessibility and concealment of crucial evidence in the hands of defendants and the often unfavourable risk/reward balance for claimants." It nonetheless recognised that the harm done to markets and consumers by cartels could be very large. It cited two examples at [32]:

"For example, in France, courts recently confirmed the findings of the Competition Council that a market-sharing cartel of mobile phone operators had led to damages for consumers that were estimated to be in the range of €295 to 590 million during the period from 2000 to 2002. In another recent case, the UK competition authority estimated that collusion between large supermarkets and dairy processors to increase the prices of dairy products had cost consumers around £270 million (approximately €375 million) during a two-year period." (Endnotes omitted)

7. The Commission staff working paper concluded (at [33] to [35]) that consumers in the Union were not securing – and were not able to secure – adequate redress for the harm done to them by competition infringements. The Commission described this as "a clear deficit in terms of corrective justice."³
8. This situation is compounded by the fact that a large number of cartels operate on a pan-European basis; or lead to effects which have an impact on a number of Member States. The Commission's Green Paper and the Impact Study conducted by the Centre for European Policy Studies (CEPS)⁴ found that very few victims of infringements received compensation. This was attributable to the following features (among others):

8.1. There was no common approach to damages' actions between the Member States. National rules on civil liability and civil procedure applied. But the traditional legal mechanisms were not working effectively in the specific context of antitrust damages claims;

² SEC 2008 (405) dated 2 April 2008 at [31].

³ *Ibid* at [37].

⁴ CEPS Report of 21 December 2007, "Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios."

- 8.2. The legal uncertainty and a range of legal obstacles and hurdles faced by the claimants. This included uncertainty generated about the availability of the ‘passing on’ defence;
 - 8.3. Difficulties in securing disclosure of key (often concealed) information;
 - 8.4. The high levels of costly factual and expert analysis required to prove a claim;
 - 8.5. Differences in the substantive laws of Member States concerning whether proof of fault is required;
 - 8.6. Differences in the procedural laws of Member States, particularly with regard to limitation periods;
 - 8.7. The absence of any follow-on claim in relation to decisions of national competition authorities (NCAs), or the ability to re-litigate the findings of fact made by a NCA;
 - 8.8. Difficulties in assessing quantum and the methods used to approximate the loss suffered;
 - 8.9. The risk of costs and uncertainty about the costs’ regime;
 - 8.10. Groups of consumers face particular difficulties in identifying and proving the harm they suffered (quantum and causation). They perceive the uncertainties, risks and costs of an action as disproportionate to potential benefits.
9. At [42], the Commission staff working paper identified the size of the harm done in relation to hardcore cartels with a pan EU impact as ranging from €13 billion to €37 billion.
10. Since the White Paper, the Commission has launched a series of consultations, including:
- 10.1. A public consultation following a workshop with a range of economists that led to a Draft Guidance Paper on quantifying harm in actions for damages based on breaches of the EU antitrust rules;
 - 10.2. A public consultation on proposals for improving mechanisms for collective redress within the EU;
 - 10.3. There have been no further consultations in relation to the policy options outlined in the Commission’s White Paper.

11. It appears that the Commission set about producing a draft directive to deal with the relevant issues. But publication of that draft Directive has been suspended pending a debate about subsidiarity and whether it was appropriate for the EU to seek to harmonise in this area.⁵
12. The UK's DBIS have stepped into the breach by publishing a consultation document of their own.⁶ This offers a potentially radical shake up to competition enforcement in the UK. It moots:
- 12.1. Bringing all competition actions within the CAT;
 - 12.2. Introducing an opt-out collective action regime for competition law;
 - 12.3. Promoting ADR;
 - 12.4. Encouraging private enforcement action alongside the public enforcement regime.
13. The DBIS paper has been strongly influenced by the perceived ineffectiveness of the domestic competition law regime to date. Between 2005 and 2008, there were only 41 competition cases of any kind that led to judgments from the UK courts.⁷ Anecdotal evidence suggests that the number of settlements has increased since 2005,⁸ but not to a substantial extent.

C. Impact on tactical considerations of the reform proposals

14. Those advising both claimants and defendants should be aware of these developments. They impact upon the strategic advice that needs to be given in cases involving legal claims for infringement of EU and domestic competition law. In terms of tactical considerations, it is worth highlighting two recent trends in private law competition enforcement in the UK:

⁵ 'The new frontier of antitrust: damages actions by indirect purchasers and the passing on defence in France and California', Utzschneider and Parmentier, [2011] ECLR 266, at p. 271.

⁶ 'Private actions in competition law: A consultation on options for reform', DBIS, April 2012.

⁷ DBIS Consultation Document, at [3.12], citing "Competition law litigation in the UK courts: a study of all cases 2005-2008, Part I and Part II", B. Rodger, 2009.

⁸ There were an estimated 43 out of court settlements between 2000 and 2005: 'Private Enforcement of Competition Law, the Hidden Story', B. Rodger, (2008) ECLR 96.

- 14.1. First, the tendency of claimants to select the UK as their forum of choice, joining defendants from a number of different Member States on the basis of an ‘anchor’ defendant; and
- 14.2. Secondly, a distinct absence of a large number of claims proceeding to trial, but with a higher incidence of complex interlocutory skirmishes fought by the parties on jurisdictional and other procedural issues.
15. DBIS suggests that the existing legal mechanisms to provide redress in competition law disputes are inadequate. Their reasons for doing so are interesting, since they show the successful tactics of certain defendants to date:
- 15.1. Consumer’s Association v. JJB Sports: DBIS asserts that only 130 claimants signed up to this, representing fewer than 0.1% of the potential pool of claimants. DBIS does not mention the astute tactic JJB adopted in response to the claim, namely offering a free football shirt to cartel victims who took their old shirt in to their local JJB store for replacement;
- 15.2. Emerald Supplies v. British Airways [2010] EWCA Civ 1284, CA. DBIS notes that the Court of Appeal dismissed a representative claim for damages, following a clever decision by the defendants to challenge the legal basis for the claim asserted, thus increasing the up-front costs to be incurred by claimants in seeking a group or class action. While this did not necessarily dispose of the case altogether, on one view it would have made the prospects of a better settlement for the defendants more achievable;⁹
- 15.3. Enron v. EWS [2011] EWCA Civ 2, CA and other related cases. A series of successful interlocutory challenges have made the jurisdiction of the CAT under section 47A of the Competition Act 1998 something of a minefield for advisers. This no doubt has a deterrent effect, since claimants’ advisers have to advise clients and their funders of the risk of interlocutory challenge. There will be a general chilling effect, particularly on weaker claims.

⁹ It should be noted that collective and/or representative actions have not fared any better in other jurisdictions. The judgment of the French Cour de Cassation in UFC-Que Choisir v. Bouygues Telecom dated 26 May 2011 has been summarised by Jocelyn Delatre in [2012] ECLR 263 as a case comment. The Court sanctioned the use of consumer canvassing techniques that the claimant had introduced in order to drum up support for the group claim. This makes a joint representative claim very difficult for French consumer associations to bring.

16. DBIS has recognised that the OFT and other concurrent regulators discharge a public enforcement regime, whose primary aim is deterrence of anti-competitive behaviour. It is not intended to provide redress for consumers. But it also recognises that the provision of redress for consumers does two things: (i) it provides a further degree of deterrence; and (ii) it provides redress for individuals where none has previously been given. It also recognises, however, that a genuine burden would be placed on business if there were a tendency for consumers to bring a host of unmeritorious claims.

17. From a series of four different options, DBIS's preferred choice for reform at the moment is as follows:¹⁰

17.1. Reform the UK courts' jurisdiction, so as to facilitate the initiation of all competition claims (both follow-on and 'stand alone') in the CAT. The proposals currently include:

17.1.1. The potential activation of section 16 of the Enterprise Act 2002 to permit the Courts to transfer competition law cases to the CAT. This will include the possibility of transferring actions brought under Group Litigation Orders ('GLOs') to the CAT;

17.1.2. To amend the Competition Act 1998 so as to permit stand alone claims to be brought there as well. This would remove the somewhat arbitrary and narrow jurisdictional focus on the CAT in section 47A follow-on actions. The *quid pro quo* will likely be that all representative or class actions must be brought before the CAT;

17.1.3. Permitting the CAT to grant injunctions;

17.1.4. Introducing a fast-track procedure for SMEs, to resolve cases at lower cost. This appears to be designed to circumscribe the current practice certain defendants have of "throwing money" at a competition claim brought by a claimant with shallow pockets, in an effort to grind out a more favourable settlement. The proposal is for something akin to the procedure adopted in the Patents County Court, founded upon active case management from the CAT, with a costs' cap on liability for a defendant's costs at £25,000;

¹⁰ DBIS Consultation Paper at [3.21].

- 17.1.5. The introduction of a rebuttable presumption of loss in cartel cases. The DBIS paper considers the possible introduction of a rebuttable presumption that cartel behaviour leads to a 20% overcharge¹¹;
- 17.1.6. Legislating to settle the vexed issue of the “passing on” defence.¹² The Government is not, in fact, convinced that legislation would be appropriate, but recognises that some form of allocation of damages between direct and indirect purchasers will be necessary in the context of class actions.
- 17.2. Encourage ADR and the protection of public enforcements. The Government is considering a potential scheme for reducing the penalty an infringer might pay if it has agreed to a compensation scheme for victims;
- 17.3. Allow private opt-out collective actions in competition law. This will extend both to follow-on actions and to ‘stand-alone’ actions. It is also considering introducing collective claims for businesses as well as consumers. Finally, the Government appears minded to permit collective actions to be brought by representative, private bodies, not simply by designated authorities (currently Which?). However, it appears that it will attempt to filter out claims brought directly by law firms or litigation funders.¹³
18. These changes all build on the existing structure, but tilt the balance in litigation in competition actions in favour of the claimants. That is, after all, predominantly the point of the exercise. The existence of an opt-out collective action will doubtless exacerbate the current trend for victims of large cartels to choose the United Kingdom as their forum. To the best of my knowledge, the existence of such a mechanism for collective redress will be largely unparalleled in the EU.

¹¹ This figure is based on “current economic literature”, which is a reference to *Quantifying Antitrust Damages*, a study prepared by Oxera for the EU Commission in December 2009, at pp. 89-91, which draws heavily on a study conducted by Professors Connor and Lande in 2008.

¹² This was recently the subject of a judgment by the German Federal Supreme Court (the Bundesgerichtshof, KZR 75/10), which ruled on 28 June 2011 that anyone who suffers loss from a competition infringement may bring a claim to recover damages, including indirect purchasers. This necessitated the recognition of the passing-on defence. See ‘Private antitrust damage claims in Germany – legal foundation and recent trends’, Rother and Staebe, [2012] GCLR 14. The French *Cour de Cassation* has recognised the standing of an indirect purchaser in *Doux Aliments Bretagne SARL v. Ajinomoto Eurolyne* (15 June 2010): see ‘The new frontier of antitrust: damages actions by indirect purchasers and the passing on defence in France and California’, Utzschneider and Parmentier, [2011] ECLR 266.

¹³ DBIS Consultation Paper at p. 39.

19. This, in turn, places a significantly greater emphasis on the interlocutory skirmishes determining jurisdiction.¹⁴ The scope of Article 5(3) of the Judgments Regulation is not clear in the context of multi-jurisdictional cartels which are implemented and take effect in more than one jurisdiction. The case law is not easy to reconcile, with the recent judgment of the ECJ in Case C-509/09 eDate Advertising Services GmbH [2011] ECR I-0000 potentially permitting national courts to circumvent the more impractical consequences of a strict application of a defamation case, Case C-68/93 Shevill and Others [1995] ECR I-415, in competition law claims. The practice of using an anchor Defendant¹⁵ will come under greater scrutiny, with an increasing likelihood of a reference to the ECJ on the issue. This will be interesting, particularly if collective actions seek to establish redress for the consumers in one jurisdiction only. Why, it will be argued, should a French Defendant be joined to a UK class action when it may well be facing its own class action back home? Surely better for the French Courts to impose damages on a French Defendant and make provision for redress in respect of other EU (and third country) consumers at the same time?
20. The other possibility is that consumers become better organised and seek to initiate multiple actions in multiple jurisdictions against multiple Defendants.¹⁶ There is scope for the EU Council and Commission to consider these issues. If it becomes a real practical issue, legislation will be needed to provide better rules on the allocation of jurisdiction between competing jurisdictions, just as Regulation 1/2003 has done for competing NCAs and their interrelationship with the EU Commission.
21. In terms of other significant practical issues, the most obvious will be in relation to costs. The possibility of collective opt-out actions will produce a fillip for the developing litigation funding market, even if litigation funders are precluded from bringing claims directly or indirectly. It is not understood that the Government would preclude the sort of funding arrangements now being put in place, although judgment on this issue will have

¹⁴ See 'More haste less speed: the evolving practice in competition damages actions in the UK', Balmain and Coughlan, [2011] (4(40) GCLR 147; and an examination of "forum shopping" in 'Forum Shopping and 'Italian torpedoes' in competition litigation in the English Courts', Stothers, Gardner and Hinchcliffe, [2011] (4(2)) GCLR, 67.

¹⁵ See Provimi Ltd v. Aventis [2003] EWHC 961 (Comm), Aikens J; Cooper Tire [2010] EWCA Civ 864, CA and Toshiba Carrier UK Ltd [2011] EWHC 2665 (Ch), the Chancellor.

¹⁶ Unlike in intellectual property litigation, there is no requirement for such a *seriatim* approach under the Brussels Regulation.

to await the detailed implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The possibility of securing damages in relation to a defined class of consumers enables costs to be deducted from a much larger potential pot. The expected marginal cost of legal expenditure will decrease, making litigation investment more attractive. All other things being equal, the risk/reward analysis is adjusted strongly in favour of litigation. It is possible to predict an increase in the number of competition actions brought before the domestic Courts and tribunals.¹⁷ From a defendant's perspective, the associated risk is that costs of litigation will increase.¹⁸ Again all other things being equal, the number of claims that are settled through ADR should increase.¹⁹

22. But the nature and extent of the proposed reforms, in particular a collective-opt out, brings with it a series of legal issues, which will need to be resolved. The resolution of these issues is complicated under purely domestic English law operating solely within the jurisdiction of the UK. Imagine then, the added complexity in a cartel situation involving four different Member States and as many potentially applicable laws of tort:

22.1. How is a class claim to be compensated?²⁰ What is or are the applicable laws? Claimants and defendants will inevitably contend for an applicable law based on their most favourable (respectively) outcomes based on the limitation period that will apply.

¹⁷ The CEPS Impact Study found that in the US, the number of cases initiated by the DoJ and the FTC remained rather stable between 1961 and the early 1980s indicating that public enforcement has not been restricted nor replaced by private enforcement. At the same time, the ratio of private to public-initiated cases grew from 7:1 to 25:1 in the same period.

¹⁸ The CEPS Impact Study indicates in [2.4] that US tort litigation costs have increased nearly three times faster than its GDP since 1950 – to a 2005 total of \$261 billion or \$880 per US citizen per year, and the increase is particularly pronounced in the most expensive types of litigation, such as antitrust litigation.

¹⁹ This was also the US experience. The CEPS Impact Study uses the above data to explain why settlements are so prominent in US antitrust litigation. As reported by Salop and White (1986), in the 28% of private antitrust suits that proceeded to a final judgment in the plaintiff's favour between 1973 and 1983, the average award was \$456,000. In the US, generally claimants bear their own costs. The average costs' figures reported in US antitrust litigation revealed that the average costs were €91,200 per claimant. So an expenditure of roughly 20% of the likely reward generated a 28% chance of that reward being conveyed to the claimant. In the United Kingdom, a defendant would face a 28% risk of paying the average award, coupled with the additional burden of paying the costs on top. So such a defendant would have a 28% risk of paying €547,200 plus its own costs (say €100,000). Depending on the point at which negotiations took place and the level of costs already incurred by each side, a settlement of anything less than €181,216 (less any costs already incurred by the defendant) would be economically rational for such a defendant since it would represent a lower figure than the risk presently faced by it.

²⁰ Page 33 of the DBIS Paper recounts the interesting example of the settlement reached between a Portuguese consumer association, DECO, and Portugal Telecom following a finding from the Portuguese Supreme Court in 2003 that Portugal Telecom had abused its dominant position. The Court ordered the refund of £120 million worth of connection charges. The company gave its customers free calls on Sundays for a three month period.

- 22.2. What happens if a passing on defence is not available under some of the applicable laws governing the claims?
- 22.3. Do different measures of damages apply to different sub-groups of claimants?²¹ How is the quantification of different loss for different groups to be managed? Is it appropriate to separate out claims brought by direct and indirect purchasers?
- 22.4. What jurisdiction do the UK courts have to consider class actions brought on behalf of consumers who are not resident in the UK? Conversely, it is directly or indirectly discriminatory under EU law to exclude consumers resident in other Member States from the benefit of the process?
- 22.5. What happens to the money recovered by the claim which is not allocated to any given cartel victim? Is there a *cy-près* doctrine? Do the laws of other Member States recognise a *cy-près* doctrine?²²
- 22.6. What measures are in place to prevent double-recovery in the event that a class action is brought on behalf of consumers from more than one Member State?
23. While some may see this as the start of the “Shermanisation” of EU competition law, it must be recalled that the detriment to consumers from anti-competitive behaviour is substantial. It is worth a degree of legal uncertainty in the short-term in order to arrive at a system that provides a better level of restorative justice and greater deterrence against anti-competitive conduct. Those are “good costs.”

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²¹ This may raise issues concerning the applicable law of the tort and the *lex fori*, depending on the circumstances. See ‘Competition law violations and private enforcement: forum shopping strategies’, Krauskopf and Tkacikova, [2011] (4(1)) GLCR 26-38.

²² The DBIS Consultation Paper names the US, Canada and Portugal as operating such a scheme. The alternative contenders are “escheat to the Treasury”, reversion to the Defendant, distribution to a named scheme and sharing among the existing Claimants.