COLLECTIVE REDRESS FOR BREACH OF COMPETITION LAW – A CASE FOR REFORM?

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INTRODUCTION

In this article I will discuss an important aspect of private enforcement: the system for obtaining collective redress in the competition law field, and what if anything might be done to improve the position. This subject is currently being reviewed by the European Commission (the Commission) across all relevant policy areas: it is not a matter which is specific to competition law but applies equally to claimants in other areas, such as product liability, financial services and consumer law, although it might be said that it does manifest itself acutely in the competition law field. Whether this could justify creating solutions just for competition law litigation may be controversial.

This article will first consider the legal basis for claims for breach of the competition rules, the current scope of the damages recoverable in such actions, and the existing provision for collective redress. It will also consider how the Competition Appeal Tribunal (CAT) fits into the overall system for bringing private law claims of this kind. The second part of the article will consider various ways in which collective redress might be further facilitated.

THE EVOLUTION OF PRIVATE LAW CLAIMS

There has been a right of action for damages and other relief for breach of the EU competition rules prohibiting anti-competitive agreements and abuse of a dominant position ever since the
UK became a Member State in 1973. As is well known, the relevant Treaty provisions, now Arts 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), are directly effective, which means that those provisions create rights and obligations for individuals which national courts are bound to enforce through effective remedies. This was established by the then European Court of Justice (ECJ, now the Court of Justice) as long ago as 1974 in *Belgische Radio en Televisie and Société Belge des Auteurs, Compositeurs et Editeurs (BRT) v SV SABAM and NV Fonior*, this was confirmed from a UK perspective by the House of Lords in *Garden Cottage Foods Limited v Milk Marketing Board* in 1983, and elaborated upon much more recently by the ECJ in *Courage Ltd v Crehan*, and *Manfredi v Lloyd Adriatico Assicurazioni SpA, Cannito v Fondiaria Sai SpA, Tricarico and Murgolo v Assitalia SpA*. In the UK such a claim is in the nature of the tort of breach of statutory duty.

The precise categorisation of the relevant tort could conceivably have implications for the available remedies: as I explain below, damages may not be awarded on a restitutionary basis for this tort (for example, on the basis of the infringer’s unjust enrichment). An open question is whether this would necessarily be the case if the tort were to be regarded as a *sui generis* Euro-tort.

When the UK enacted equivalent prohibitions in national law in the Competition Act 1998 (the 1998 Act), rights of action were not expressly granted. However, the provisions of the 1998 Act make it reasonably clear that corresponding causes of action do exist. The result is that the victim, or anticipated victim, of an infringement of the EU or the domestic competition rules has a right of action for appropriate relief in the national court, including damages. Rules of Court provide that such claims must normally be brought in the Chancery Division of the High Court, although in certain cases they can be brought in the Commercial Court. In the case of so-called ‘follow-on’ actions there is the right to bring a claim in the CAT as well as the High Court: such actions are based on a finding of infringement of competition law which has been made by the Commission or one of the UK competition authorities.

Under s 47A of the 1998 Act a person who has suffered loss or damage as a result of the infringement of ‘a relevant prohibition’ may make a claim for damages or any other claim for a sum of money in proceedings before the CAT. There is general acknowledgment that the

3 (Case 127/73) [1974] ECR 51.
6 (Joined Cases C-295/04 to C-298/04) [2006] ECR I-6619.
7 See Norris v Government of the United States of America [2008] UKHL 16, [2008] 1 AC 920, at para [32]: ‘The practical effect, in summary terms, of those provisions was to create a new tort of breach of statutory duty in respect of cartel agreements which affected intra-Community trade’.
8 See, eg, s 58(1), which was included in the Competition Act 1998 as first enacted; on the application of that provision to the CAT, see Enron Coal Services Ltd (in liquidation) v English Welsh & Scottish Railway Ltd [2011] EWCA Civ 2, [2011] All ER (D) 116 (Jan), at paras [33]–[56].
9 See the Practice Direction – Competition Law – Claims Relating to the application of Articles 81 and 82 of the EC Treaty and Chapters I and II of Part I of the Competition Act 1998.
CAT’s jurisdiction over monetary claims is too limited in certain respects. In *Enron Coal Services Ltd (in liquidation) v English Welsh & Scottish Railway Ltd* Lloyd LJ very recently pointed out that:

'It seems somewhat anomalous that the specialist tribunal is entrusted with the decision as to infringement or no on an appeal from a regulator, but is not allowed to touch that question in a claim for damages.'  

In the same case Jacobs LJ stated that: ‘the “split” jurisdiction of regulator for infringement, tribunal for causation and assessment of damages also needs some reconsideration’.  

The inability of claimants to commence ‘stand-alone’ claims for damages in the CAT (ie claims for damages brought where there is no pre-existing infringement finding) deprives litigants of the choice of having their claim for damages, including the liability (ie infringement) element, determined in the specialist tribunal, where they consider it to be the appropriate forum for their case. This is perverse given that, as Lloyd LJ stated, the specialist tribunal is able to determine the identical issue of liability in the context of an appeal from a decision of the authority. Recent cases have only too well demonstrated the unsatisfactory nature of the current statutory restrictions on the CAT’s damages jurisdiction. The anomaly cannot really be cured by activating s 16 of the Enterprise Act 2002 as this would only permit the High Court to transfer claims involving alleged breach of the competition rules to the CAT. The real solution is to allow claimants the option of commencing stand-alone claims in the CAT, and I hope that this much-needed reform will come sooner than later.

More pertinently to the main theme of this article, s 47B of the 1998 Act provides that certain ‘specified bodies’ may bring a claim for damages before the CAT on behalf of a number of named, individual consumers. Only one claim has, however, been brought under s 47B to date. I will touch on this procedure again below.

**TYPES OF DAMAGES FOR A BREACH OF COMPETITION LAW**

In contrast to the position in the USA, UK law does not subscribe to the award of treble damages, although it is the Statute of Monopolies 1623 which, by allowing for the recovery of

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10 [2011] EWCA Civ 2, [2011] All ER (D) 116 (Jan), para [143].
11 Ibid, at para [150].
12 There is already power to transfer *follow-on* claims in either direction: see the Civil Procedure Rules 1998 (SI 1998/3132), CPR PD 30, paras 8.3 et seq.
13 It is noteworthy that while there is currently only one specified body for the purposes of making s 47B claims, eight bodies have been designated as ‘super complainants’ for the purpose of making super-complaints to the Office of Fair Trading (OFT) under s 11 of the Enterprise Act 2002. They are The Consumers’ Association, National Consumer Council, Citizens Advice, Energywatch, Watervoice, Postwatch, CAMRA and the General Consumer Council of Northern Ireland. An application from ‘What Car?’ was rejected.
‘three times so much as the damages’ sustained by a claimant, is said to have provided the inspiration for the treble damages provision laid down in the Sherman Act some 250 years later.

The ECJ, in Crehan,14 confirmed that a person who has suffered loss as a result of a breach of the EU competition rules must be entitled to rely on that breach to obtain relief in respect of loss suffered. In Manfredi,15 the court, while stating that in principle the determination of compensation is a matter for national law, set out a number of requirements. First, in accordance with the principle of equivalence, it must be possible to be awarded exemplary or punitive damages, pursuant to actions founded on the EU competition rules, if such damages may be awarded pursuant to similar actions founded on domestic law. Secondly, and in any event, pursuant to the EU law principle of effectiveness individuals should be able to seek compensation for loss of profit and interest (lucrum cessans), not just actual loss (damnum emergens). These cases may be relevant, not just when our courts are applying Arts 101 and 102 TFEU, but also, perhaps, in the light of s 60 of the 1998 Act, when applying the Chapter I and II prohibitions in that Act.

Further light was thrown on the scope of damages claims of this kind by the judgment of the Court of Appeal in Devenish Nutrition Ltd v Sanofi-Aventis SA (France) & Others,16 one of several cases spawned by the Commission’s Vitamins cartel decision.17 The Court of Appeal held that ‘Devenish is entitled to be compensated for any loss it has suffered as a result of the cartel, no more and no less’, thus removing the prospect of restitutionary damages in follow-on claims for damages in the High Court.18 The Commission has indicated that its work on developing a common framework for collective redress will proceed on the basis that private enforcement is about compensation.19

The position in England and Wales is that regardless of evidential difficulties or difficulties in calculating the losses caused by cartels (broadly, the overcharge on the cartelised product and/or the resultant lost sales if the overcharge is passed on wholly or in part), it ought to be possible, using a ‘broad axe’ to calculate and allocate compensatory damages. Many believe that

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Footnotes:

14 See n 5, above.
15 See n 6, above.
18 At an earlier stage in proceedings, the claimants had sought not just an ‘account of profits’ but also exemplary damages. That element of the claims was struck out by Lewison J at first instance, primarily on the basis of the EU law principle of ne bis in idem and its domestic counterpart, double jeopardy: see [2007] EWHC 2394 (Ch), [2008] UKCLR 28. For a recent consideration of the scope and effect of that judgment, see Albion Water Ltd v Dŵr Cymru Gwyfynedd (Case No 1166/5/7/10) [2010] CAT 30.
19 See paras 7 and 30 of the Commission’s consultation document op cit n 2, above; see also Commission, White paper on damages actions for breach of the EC antitrust rules, COM/2008/0165 final (April 2008), para 1.2.
there is nothing special about competition claims, and that the courts are well-equipped and well-used to determining such questions. Of course, the affirmation of the compensatory principle in *Devenish* was on the basis that the individual claimant or claimants were before the court. Should some of the suggested reforms relating to collective actions, discussed below, be introduced, that compensatory principle may need to be revisited – probably in primary legislation – in order to enable an aggregate award of damages to be made. In the case of the typical cartel, for example, such an award could be based on the cumulative overcharge made by the guilty party to its customers, rather than on the specific and proved losses of individuals.

**INTRODUCTION TO THE PROBLEM OF COLLECTIVE REDRESS**

As already noted, the private enforcement of competition law has received a great deal of attention, both at the national and European levels, and from enforcement bodies as well as private practitioners. There are concerns that many victims of infringements of the competition rules go uncompensated as a result of the procedural and evidential obstacles to private damages claims of this kind, and that infringers escape liability to a corresponding extent. Although it is fair to say that the concern is greater in relation to some other jurisdictions in the EU, the UK system is by no means immune from difficulties in litigating such claims. What is the perceived problem so far as collective redress is concerned?

It is helpful to consider a typical price-fixing cartel case: prices of blodgets are unlawfully agreed between manufacturers each of whom then makes sales to their direct purchasers at the cartel price which is higher than it would have been but for the cartel (commonly referred to as the overcharge). These purchasers sell the blodgets onwards, and there may well be a chain of such sales until the individual items reach the ultimate consumers. The direct purchaser may have absorbed the overcharge or passed it on wholly or in part to his own purchaser; insofar as he has passed it on he may well suffer a loss of sales volume and profit as a result of the higher price charged. The same considerations apply down the chain. There may be additional complications in the supply chain if the original sale is a raw material or component rather than the finished product supplied to the consumer.

Turning to the nature of the potential claims: the *direct* purchaser’s prima facie loss may not be too hard to assess in theory (the practice is obviously different): if he purchased a million blodgets, his damage amounts to a million times the overcharge, plus interest. But if he has passed on some or all of the overcharge it will be calculated differently: if part only is passed on, his claim amounts to a million times the balance not passed on, plus any profit on sales lost as a result of the overcharge, plus interest.

The *indirect* purchaser’s position is not so straightforward: whereas the direct purchaser has paid the infringer’s overcharge and can therefore easily show that element of his prima facie loss, the indirect purchaser has paid the price demanded by his own supplier, which may or
may not include the whole or part of that overcharge element. So there is an additional problem of proof for him to overcome in order to establish his loss.

Such cases are bracing enough when looked at individually, but further issues may well arise where the claimants in the same case comprise both direct and indirect purchasers. In such cases the direct purchaser will wish the court to conclude that the overcharge was not passed on to the next link in the chain, whereas the indirect purchaser will need to establish that it was. Such a situation is liable to put the claimants at each others’ throats, whereas the infringer/defendant is likely to be indifferent as to where the parcel was when the music stopped.

On the other hand, where all the claimants before the court are at the same level of supply, the infringer will be more concerned about the issue. If he is faced with a direct purchaser he will argue that passing on took place, resulting in no loss. If the claimant is an indirect purchaser the infringer will argue either that the overcharge was not passed on to the claimant by the purchaser earlier in the chain, or alternatively that the claimant himself passed it on.

The problems relating to passing on are said to reduce the effectiveness of private enforcement of competition law, but they are not the primary subject of this article, which concerns the need for collective address. To continue with the above illustration: suppose the indirect purchaser is the ultimate consumer; he is unlikely to have purchased a million blodgets: in all probability he has bought one or two; so the consumer’s claim is likely to be very small – too small to make it worth the time, expense and effort in bringing an individual damages claim. But what is small fry to the consumer may of course be a very big fish indeed so far as the infringer is concerned: if thousands or millions of consumers have been affected, the infringer may well escape paying a very considerable sum in damages if no effective machinery exists for providing collective redress. In these circumstances there is concern not only that victims suffer an injustice (whether or not they are aware of it or even care), but also that the fear of fines alone may prove insufficient to deter would-be infringers who stand to make large profits.

CURRENT PROVISION FOR COLLECTIVE REDRESS

A 2004 study carried out for the Commission found that there was limited experience of representative or class actions throughout the Member States of the EU, with only Portugal and Spain, at that time, recognising a form of class action, and the UK and some other Member States having a more limited procedure in the form of representative actions.20 There have been some developments since that study was carried out; as discussed below, other Member States have brought in legislation to allow for class actions in fields other than

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competition law, notably including opt-outs. These developments, together with some suggestions which have been made for legislation at the EU level, are touched on below.

So far as the UK, and in particular England and Wales, is concerned, multiparty litigation can be carried out in the ordinary courts under five basic mechanisms: test case, consolidation of multiple actions, single trial of multiple actions, group litigation order, and representative action.

**Test case**

Test cases involve the selection and trial of an individual claim which gives rise to issues common to other actions, which are stayed to await the test case. (*Crehan* was such a case.) The judgment in the test case has precedent value for the stayed cases, but does not determine them. There is express power to stay cases on this basis under CPR r 3.1(2)(f).\(^{21}\)

**Consolidation**

Consolidation results in a single case with multiple parties. Again there is specific provision in CPR r 3.1(2)(g).

**Single trial of multiple actions**

Single trial of multiple actions is closely related to the previous mechanism, but there is no consolidation – the claims remain separate but are heard together.

**Group litigation orders**

Group litigation orders (GLOs) are governed by CPR r 19.10–15, and were introduced by the Woolf reforms in 1999. The GLO provides more structured case management than was practicable under the pre-existing mechanisms, although it has much in common with them. It includes provisions for a group register, stays of related claims, a managing judge, a lead solicitor, publicity, identification of issues, common disclosure, identification of test claims and binding judgments, among other matters. I am not aware of any GLO having been applied for in relation to competition law proceedings, although the Chancellor of the High Court suggested in *Emerald Supplies Ltd v British Airways plc*,\(^ {22}\) that a GLO might have been appropriate in that case. The GLO does not, however, provide a solution to the problem

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identified above of numerous identical small consumer claims: although GLO cases are centrally managed, the procedure is ‘opt-in’ in nature, so that all claimants must be identified and be parties to the proceedings.

**Representative actions**

Representative actions under CPR r 19.6 permit one named claimant or defendant to act on his own behalf and also on behalf of a class of individuals. The represented class are not parties to the action, nor are they automatically subject to disclosure or costs, but they are bound by the judgment. However, the procedure can only be used in accordance with certain fairly narrow criteria which have recently been examined in some detail by the Court of Appeal in the *Emerald Supplies* case.\(^23\) In that case the claimants, importers of cut flowers, contended that the defendant had agreed with other airlines to fix the price of air freight, in breach of EU and UK competition law. They claimed damages for the alleged overcharge as direct and/or indirect purchasers of the services in question. They sought a declaration on behalf of themselves and on behalf of all other direct or indirect purchasers that damages were recoverable in principle from the defendant for three identified heads of loss.

Having reviewed the case-law relating to CPR r 19.6 the Court of Appeal agreed with the conclusion reached by the Chancellor at first instance, that the conditions for the application of the rule were not satisfied. Indeed Mummery LJ considered ‘Emerald’s case for a representative action, whether as originally pleaded or as proposed to be amended, [was] fatally flawed’.\(^24\) A class sought to be represented must all have a common interest and a common grievance, and the relief sought must in its nature be beneficial to all of them. Here damages were an integral element in the cause of action pleaded, and it was impossible at the time the claim was issued to say of any individual whether he was a member of the class, as his inclusion in the class would depend upon the outcome of the action itself.\(^25\) Further, the relief sought would not be equally beneficial for all members of the class, as the extent of damage suffered would depend upon the amount of the overcharge actually passed on by each member of the class. This could give rise to conflicts between different members. Even if claimants who had passed on the overcharge were excluded from the class this would not help, as one would not even be able to identify such claimants on judgment – it would require further proceedings between purchasers at different levels in the supply chain.\(^26\) The Court of Appeal decided that since the case fell outside CPR r 19.6, it was unnecessary and undesirable to consider how the discretion would be exercised if the case fell within the rule.\(^27\)

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\(^{24}\) Ibid, para [62].

\(^{25}\) Ibid, paras [62]–[63].

\(^{26}\) Ibid, para [64].

\(^{27}\) Ibid, paras [66]–[67].
In *Prudential Assurance Co Ltd v Newman Industries Ltd*\(^{28}\) Vinelott J appears to have adopted a pragmatic approach to what is now CPR r 19.6. He allowed a representative action to go ahead for the purposes of establishing a tort of conspiracy on behalf of a class of shareholders, with each claimant shareholder being then left to establish his own damages in a separate action relying upon the *res judicata* of the representative action as establishing the conspiracy tort. However the *Emerald* case appears to confirm the restricted scope of CPR r 19.6 and, subject to any appeal to the Supreme Court, this decision would appear to render the rule of doubtful assistance in a case where damages are an element in the cause of action.\(^{29}\) The Chancellor considered that the particular problem there, of 180 or so potential claimants waiting in the wings, to be better dealt with by using the GLO procedure than by stretching CPR r 19.6. Of course that case did not present the consumer claims conundrum we are now considering.

**Section 47B of the 1998 Act**

In addition to these five mechanisms, a statutory representative claim can be brought in the CAT under s 47B of the 1998 Act by a body which has been specified by the Secretary of State on the basis of published criteria. Only one such body, Which?, has been specified to date.\(^{30}\) A s 47B action may be brought only on behalf of consumers (ie businesses are excluded), only in the form of a follow-on action (ie a prior decision of a competition authority is required), and only on behalf of *named* individuals, rather than a ‘class’ of victims (ie opt-in only). Thus, there is a two-stage process involving, first, public enforcement resulting in an infringement decision by a competition authority and, second, an action under s 47B in the CAT. At the second stage consumers potentially affected by an established infringement of the competition rules have to be contacted and must individually consent to an action for damages being initiated by a designated body on their behalf.

Welcome though this innovative procedure undoubtedly is, these limitations are perceived by many people as likely to reduce its usefulness in providing compensation in those cases where the amount of loss per victim is very small and the number of victims is very large. In relation to the *Replica Football Kits* [AQ: do you have a judgment in mind, if so please supply the case citation] case\(^{31}\) brought by Which?, although it was estimated that some 2 million consumers had purchased the replica shirts in question, only about 130 people initially signed up for the action. Thereafter the case was settled on terms which gave £20 per shirt to those consumers who had signed up (it seems that by that stage some 600 may have been involved) and could produce proof of purchase and sign a statement of truth.

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29 See n 22, above, at para [37] and n 23, above, at para [64].
30 See n 6, above.
31 *Consumers Association v JJB Sports plc* (Case No 1078/7/9/07).
POSSIBLE REFORM OF COLLECTIVE REDRESS

According to the impact assessment study accompanying the Commission’s White Paper on damages actions, the lack of effective instruments for obtaining compensation may well cost European consumers and businesses more than €20 billion per year. There have therefore been suggestions that our domestic procedures for collective redress generally should be improved. Leaving aside the provision for representative actions under CPR r 19.6, which was at issue in the Emerald case, there is no mechanism in the English legal system equivalent to the US-style class action and some, including Which?, the Civil Justice Council and the OFT have called publicly for the adoption of an opt-out regime, not just in competition cases, but generally.

Others strongly oppose such a suggestion. A consultation undertaken by what is now known as the Department for Business, Innovation and Skills in March 2008 revealed that 42 out of 50 respondents favoured maintaining the status quo, i.e. that representative actions should only be brought on behalf of named individuals. Some commentators have claimed that to alter the current system and compel consumers to opt out could breach an individual’s rights under Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. Others suggest that such a system would run counter to the essentially compensatory nature of damages actions, as large claims on behalf of a body of consumers generally would push the boundaries of damages towards deterrent or punitive effects.

Problems may also, it is said, arise over what to do with surplus funds. Alternative solutions have been suggested, one of which is to harness the machinery in the Legislative and Regulatory Reform Act 2007, based on the Macrory Report on penalties policy, in order to enable compensation to be provided to individuals directly through public enforcement.

Nevertheless, there appears to be general agreement that more can and should be done at both EU and UK level to encourage private actions as a means of enforcing competition rules, but that it is important to do so without unleashing the much feared ‘litigation culture’ and other specific abuses of class actions which are perceived to exist in the USA. Protecting what the Commission has described as ‘Europe’s legal traditions’ while encouraging private actions as a complement to public enforcement are seen as paramount in the drive to reform this area of the law.

32 ‘Improving access to justice through collective actions – developing a more efficient and effective procedure for collective actions’ (July 2008), available at www.civiljusticecouncil.gov.uk.
33 OFT, Private actions in competition law: effective redress for consumers and business recommendations from the Office of Fair Trading, OFT 916resp (November 2007), available at www.of.t.gov.uk.
36 Some sources of perceived abuses relate to aspects of the US legal system which are not present in England and Wales, such as the involvement of juries in relation to both liability and damages, a general absence of the ‘loser pays’ principle in relation to costs, and punitive damages (including triple damages in antitrust claims).
The Commission’s White Paper on *Damages actions for breach of the EC antitrust rules* was a little vague on the topic of collective redress, stating that representative actions should be brought ‘on behalf of identified or, in rather restricted cases, identifiable victims’. The Staff Working Paper only slightly elaborated on the concept of ‘identifiable victims’ and described its exceptional application as suitable ‘where the damages awarded to the representative entity are distributed to related entities or used for related purposes’. However, Neelie Kroes, the former EU Commissioner for competition, was of the view that introducing an EU-wide opt-out system would be ‘simply not compatible with our European traditions’. Despite her comments, and the tentative proposals in the White Paper, in April 2009 a draft Directive, said to have been produced by DG Competition, emerged for discussion within the Commission itself. The (now defunct) draft would have been rather more radical than the White Paper seemed to anticipate. It would have given full weight to the EU law requirement of effectiveness, basing itself on the perceived procedural deficit in relation to competition infringements whose victims comprise a multitude of consumers or small businesses, each sustaining a loss which is very small as compared with the complexity and expense of establishing a claim against the perpetrator. The draft expected Member States to make available not only a group action procedure, pursuant to which multiple claimants can join in a single action for damages in the national court for competition law breaches, but also a full-blown opt-out class action which could be brought by ‘qualified entities’ on behalf of all injured parties who suffered harm caused by the same infringement of Art 101 or Art 102 TFEU. The draft also appeared to contemplate the award of aggregate damages which would be distributed as far as possible among the victims, and could also cover the qualified entity’s costs.

The draft appears to have been shelved pending the appointment of the new Commission in 2009/2010; this may be a reflection of its ambitious scope. Since then, however, the Commission has launched a public consultation: Towards a Coherent European Approach on Collective Redress. As discussed further in the next section of this article, the Commission is seeking better and more up-to-date information before it identifies common legal principles on collective redress and puts forward a proposal for facilitating collective actions for a breach of the EU antitrust rules.

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39 Op cit n 2, above.
40 A useful overview of the background to the consultation can be found in the speech by Commissioner Almunia, ‘Common standards for group claims across the EU’, University of Valladolid, 15 October 2010, available at http://ec.europa.eu/competition/speeches/.
It is interesting to note that the draft EU Directive chimed with the recommendations of the OFT and the Civil Justice Council (CJC) in the UK. Both these bodies have come down in favour of allowing opt-out claims, albeit under judicial supervision. The CJC’s December 2008 recommendations include the introduction of a collective action for all civil claims affecting multiple claimants, either on an ‘opt-in’ or ‘opt-out’ basis, and subject to a certification procedure and enhanced case management by the courts. There would also be provision for discrete versions of such collective actions in specialist tribunals such as the CAT. Representative entities, both claimants and defendants, should comprise both generally designated bodies and ad hoc bodies. Any settlement should be subject to approval by the court in accordance with stringent criteria before it can bind the class. The availability of aggregate damages is also recommended. This would involve the court being enabled to give judgment in an aggregate sum, without proof by individual class members of their loss, if the defendant’s aggregate liability to all or some of the members of the class can reasonably be determined. As a concomitant to this, unallocated damages from a composite award would be distributed by a trustee of the award according to trust law principles, such as cy-pres. This has been said to work well in certain Commonwealth countries and elsewhere.41

Contrary to the impression given by some commentators, the concept of ‘opt out’ is not somehow foreign to European eyes. Certain European Member States are already experimenting with an opt out mechanism. Since 2005 the Netherlands has allowed opt-out class settlements for damage claims. As the procedure only applies to settlements, opt-out class actions as such are not available. This law has already produced settlements in enormous sums for direct distribution to many thousands of victims in all kinds of cases ranging from injury caused by drugs to unborn children, to losses suffered by investors as a result of misleading statements. In the Royal Dutch Shell case42 there are thought to be about 500,000 class members from the EU and elsewhere. Any settlement under this procedure must be approved by the court and class members are given time after such approval to opt-out.

Since 2008 Norwegian civil procedure allows for both opt-in and opt-out class actions, subject to the certification of the court, which also exercises control over the representative claimant’s conduct of the case. Excessive remuneration of lawyers is not permitted, and the opt-out mechanism can only be used for low value individual claims. In Denmark, also since 2008, opt-out actions may be pursued by public authorities in respect of small claims. Use of opt-out and opt-in class actions must be approved by the court.

41 A working group of the CJC has developed a set of generic draft court rules which could be used for any model of collective proceedings that might be permitted by primary legislation. The draft rules set out criteria for an action to be certified as suitable for collective proceedings and for the approval of a class representative. The draft rules are accompanied by a background note prepared by the CJC working group and a draft practice direction, see further http://www.civiljusticecouncil.gov.uk/files/CJC_Draft_Rules_for_Collective_Actions_Feb_2010.pdf.

The UK Government’s response to the CJC paper, published in July 2009, paints a more cautious picture. The government does not advocate the introduction of a general right of collective action, preferring instead that any action should be taken on a sector-based approach. Competition authorities could be given powers to act on behalf of consumers and order compensation to be paid in addition or instead of a financial penalty. The government notes, however, that some authorities have expressed concerns that assisting in the delivery of compensation could distract from their core role as competition authority. The government is also of the view that the method for designating representative bodies should be determined by the individual department responsible for the relevant sector.

TOWARDS A COHERENT EUROPEAN APPROACH TO COLLECTIVE REDRESS

On 4 February 2011 the Commission issued a consultation document seeking to identify common legal principles relating to collective redress in order to develop a coherent European approach. The Commission has provisionally identified six ‘common core’ principles that may guide possible future EU initiatives on collective redress.

Establish an effective and efficient system of collective redress

The Commission considers, first of all, that an effective and efficient collective redress system is one that is capable of delivering legally certain and fair outcomes within a reasonable time frame, while respecting the rights of all parties involved.

Informing victims of EU infringements about bringing a collective claim and the role of representative bodies

The information available to victims is a second aspect of any collective redress system. The Commission has asked for views on how, when and by whom victims of EU law infringements should be informed about the possibilities of bringing a collective claim. Separately, the Commission has also asked for views on what role representative associations should have in the context of litigation on multiple claims, in particular, in a cross-border context.

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Need to take account of collective consensual resolution

Thirdly, mechanisms of collective consensual dispute resolution play an important complementary role to judicial redress and can often provide parties with a faster and cheaper resolution of their claims. The Commission notes that it is considering separately a proposal to introduce individual and collective alternative dispute resolution (ADR) in consumer matters. It is to be noted that ADR is already a well-established of pre-action protocols in domestic litigation.

Safeguards to avoid abusive litigation

Fourthly, the Commission states that there should be strong safeguards to avoid abusive litigation and the excesses of US ‘class actions’.

Establish appropriate financing mechanisms

A fifth principle identified by the Commission is that individuals and small and medium-sized enterprises should not be excluded from access to justice because of limited financial resources. The Commission is therefore consulting on how to ensure adequate funding exists for collective redress cases.

Ensure effective enforcement across the EU

Sixthly, the rules on European civil procedural law and on applicable law should work efficiently in practice for collective actions, and judgments should be enforceable throughout the EU. This principle concerns the rules on jurisdiction, recognition and enforcement of judgments and applicable law.

Public consultation

The Commission has invited all interested parties to make submissions by the end of April 2011. The Commission expects to publish a Communication on the results of its consultation. Commissioner Alumnia has previously indicated that the Commission would first try to identify a general legal framework for collective redress across the EU and then consider making a specific proposal on antitrust damages actions in about the second half of 2011. That proposal is expected to set common standards and minimum requirements for national systems of antitrust damages actions. If the proposal were to be along the same lines as the leaked draft Directive, it is likely to prove highly controversial in a good many Member States, including quite possibly in our own. However in the UK there would not appear to be the same constitutional obstacle to introducing a procedural mechanism limited to some (ie competition claims) rather than all civil claims, which apparently exists in some other countries.
TOWARDS AN ‘OPT-OUT’ MODEL OF COLLECTIVE REDRESS?

In my view there are a number of benefits that may flow from introducing an opt-out regime, at least in the UK. First, such a procedure would, of course, remove the often significant hurdle of enticing a sufficient number of consumers to sign up to a claim where its value to each claimant may be no greater than a few pounds; it would thus be possible for compensation to be made available for a wrong suffered, perhaps by millions. It is ironic that the underlying purpose of competition law is said to be to protect the consumer, yet in this as in other areas the ultimate consumer is normally unable or unlikely to seek recompense, even where an unlawful cartel somewhere in the chain of supply has been exposed and punished.

Secondly, the aggregation of damages implicit in an opt-out class action would in many cases make the process of quantification easier, as much of the data required would be likely to be in the hands of the defendant/infringer. One example would be an award based on the amount overcharged. The existing purely compensatory basis on which damages are now quantified, as explained in Devenish, would of course need to be modified.

Thirdly, anything which renders private enforcement more effective could be said to further the aims of public enforcement, at no extra cost to the public purse. In the USA it has been said that some 95% of antitrust enforcement activity comes through private rather than public lawsuits.

Fourthly, subject to the possibility (remote in consumer cases) of claimants exercising the right to opt-out, the defendant may achieve closure more completely than at present.

Fifthly, the existence of a global fund of damages to be distributed to class members may assist in solving the ever present dilemma of how to fund such cases.

Finally, so far as the UK is concerned there may be a selfish reason to support the introduction of an opt-out procedure. It can be assumed that potential class representatives will seek to litigate aggregate claims in whatever jurisdiction provides the most flexible and effective machinery. It would be a pity if the UK were to lose out to another jurisdiction.

It is of course true that not every case would be suitable for an opt-out approach. Given that each and every claim of this nature is likely to raise different issues, many of them complex, there would seem to be merit in leaving the court to determine whether a particular case is suitable for the opt-out procedure or not. Criteria to assist in that determination could be laid down. Such criteria might focus on issues such as access to evidence, the number of victims, and the likely extent of their individual loss. In Denmark, too, the question whether a particular action should be brought on an opt-in or opt-out basis is determined case-by-case, subject to the application of an upper threshold for damages in the event of an opt-out action.

Judicial discretion could also extend to a related issue: the designation of representative bodies. Of course it is true that, as noted by the OFT in its discussion paper, ‘[a] representative action
system will only operate successfully if the bodies permitted to bring those actions are credible, reputable, and committed to acting in the interests of those they represent.45

However one can see merit in a system that favours a case-by-case approach to the designation of representative body status (subject, naturally, to appropriate statutory safeguards to protect the interests of consumers), as advocated by the CJC paper. It may well be that certain bodies or trade groups (whether private or public) would be closer to consumer victims purchasing products in a particular sector than, for example, generalist bodies such as Which?, although such sectoral bodies may only wish to bring isolated cases. Judicial discretion in this area could perhaps represent a flexible and cost-effective approach to designation.

CONCLUSION

While the overall level of private enforcement in the UK seems to be reasonably healthy, with the courts apparently occupied with competition cases on a fairly regular basis, there exist areas in which the availability and effectiveness of redress could be enhanced. It may be the case that the UK will be in the vanguard in improving procedures for collective redress. My own view is that there would be a benefit in making available a genuine opt-out claim, to be used only where the court certifies it to be appropriate, and progressed under judicial supervision. The main gain would be the removal of the often significant hurdle of enticing a sufficient number of consumers to sign up to a claim where its financial value to each claimant is relatively small, but where the collective loss is enormous.