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Consumer opt-outs: a damp squib?

Anthony Maton (Hausfeld, United Kingdom) · Tuesday, February 26th, 2013

BIS Reform: Opt–out Collective Actions Regime

On the 21st of January the Department for Business, Innovation and Skills ("BIS") released the results of its consultation on competition law private litigation, confirming the introduction of a limited opt-out collective actions regime for consumer competition claims. The UK has traditionally opposed the introduction of an 'opt out' procedure on the grounds that it is too close to the US-style model with its perceived excesses. The existing opt-in regime requires that affected claimants affirmatively express they want to be part of a law suit at the beginning of the action. The government has accepted that the current system has been highly ineffective for the conduct of mass low value claims and has proposed the opt-out model, which would allow for affected claimants to automatically be part of a claim unless they expressly choose not to do so.

The proposed opt-out regime, which aims to reduce the barriers consumers face in pursuing private competition actions, will include both follow-on and stand-alone claims, with cases to be heard only in the Competition Appeal Tribunal (CAT). The claims may be brought on behalf of claimants only by 'genuinely representative bodies', such as trade and consumer associations. It is still unclear whether law firms may bring claims on behalf of directly affected consumers but it seems third party funders or special purpose vehicles will be excluded from bringing such claims.

Safeguards

Since the beginning of the consultation process the government has placed particular emphasis on its wish to avoid the perceived excesses of the US class actions system (hence its preference for 'collective actions' over the US term 'class actions'). In order to address repeatedly expressed concerns that an opt-out regime might open the floodgates to 'frivolous and unmeritorious' claims, the proposals incorporate a number of safeguards:

• A strong process of certification will be in place. After assessing the merits of the case, the adequacy of the proposed representative and the appropriateness of collective action, the CAT will be required to certify whether a collective action brought under the new regime is suitable for collective action and whether it should proceed under an opt-in or opt-out basis.

• If the case goes to trial no treble or exemplary damages will be available and any opt-out settlement must be judicially approved, with the approval including a consideration of the reasonableness of the lawyers' fees and with claimants given the opportunity to opt out of the settlement if they wish.

• In relation to costs, the ‘loser-pays’ principle will be maintained but contingency fees, despite being introduced to UK civil litigation under the Jackson reforms, will not be available to opt-out actions in the CAT. Conditional fee agreements (CFAs) will remain available in these cases, but will not be recoverable from the losing party, in accordance with the current changes in the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012.

Conclusion

The introduction of opt-out collective actions may have a significant impact on consumers and smaller businesses, which under the existing regime have no realistic way of challenging breaches of competition law or gaining redress. The proposed reform will give them the opportunity to bring their own actions, rather than having to rely on public enforcement. Moreover each claimant will be able to join group litigation without the need to substantiate and evidence the individual damage caused by the infringers, as individual damage will be of low value. From a case management point of view the proposals render it more attractive to run opt-out claims.

However, there is a risk that some of the safeguards to the opt-out mechanism – such as the prohibition on contingency fees – may limit its usefulness. Exposure to adverse costs in the CAT alone is a major consideration for claimants’ lawyers and thus sufficient screening filter for ‘unmeritorious claims’. Further, the prohibition of contingency fees as well as the non-recoverability of CFAs and insurance premiums leaves the question of funding, which is of key concern for collective actions, unanswered. In conclusion, the government’s intention to insert innovation to the law by introducing an opt-out collective actions regime is welcome, but without a viable funding model it may well remain unworkable.

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