

# Client Alert

Litigation and Antitrust Practice Groups

April 30, 2012

## Class Action-Style Redress for Competition Law Infringements: Should the UK 'Opt-In' for the 'Opt-Out' Proposal?

On April 24, the UK Government proposed measures to encourage private civil challenges to anticompetitive behaviour to complement the UK's existing public competition law regime. Comments by interested parties on the proposals are due by July 24, 2012. The Government believes these measures are in the interests of preserving competitive markets; protecting consumers from anticompetitive conduct; and promoting productivity, innovation and economic growth.

For more information, contact:

**Jane Player**

+44 20 7551 2130  
jplayer@kslaw.com

**Sarah Walker**

+44 20 7551 2132  
swalker@kslaw.com

**Suzanne Rab**

+44 20 7551 7581  
srab@kslaw.com

**Jeffrey S. Spigel**

+1 202 626 2626  
jspigel@kslaw.com

**Kevin R. Sullivan**

+1 202 626 2624  
krsullivan@kslaw.com

**Jeffrey S. Cashdan**

+1 404 572 4818  
jcashdan@kslaw.com

**Nilufar Anwar**

+44 20 7551 7567  
nanwar@kslaw.com

[www.kslaw.com](http://www.kslaw.com)

We examine the two main Government proposals of adopting a 'US-style' opt-out collective actions regime and facilitating access to justice for small to medium enterprises (SMEs).

### The Proposals

The UK's Department for Business, Innovation and Skills (BIS) has opened a public consultation on the following proposed measures:

- **Introduction of an opt-out collective actions regime** for competition law infringements to allow consumers and businesses to collectively bring a case to obtain redress for their losses due to alleged anticompetitive behaviour.
- **Establishment of the Competition Appeal Tribunal (CAT) as a major venue for competition-based actions in the UK**, to make it easier for businesses, especially SMEs, to challenge alleged anticompetitive behaviour.

The consultation also promotes Alternative Dispute Resolution to seek to ensure that the courts are the option of last resort. The proposals intend for private actions to complement the public enforcement regime, in particular by preserving the incentives provided for companies to disclose evidence of cartels in return for reduced penalties.

### Collective Redress for Competition Law Infringements

In matters involving alleged consumer harm resulting from competition law violations (such as price fixing), it often may not be cost-effective for consumer claims to be pursued individually because the individual harm is

# Client Alert

Litigation and Antitrust Practice Groups

small. The Government proposes that allowing such relatively low value/high volume actions to be brought collectively would address this concern, by allowing consumers and businesses to be compensated for their loss while acting as a deterrent against violations of competition laws.

The Government's proposals are not intended to replicate the current US class action regime. In its proposal, however, the Government does consider some of the perceived concerns stemming from the US procedure and how, by virtue of the divergences between the two regimes, it seeks to address such concerns in its proposals.

## *Current Opt-In Model*

The current UK representative action regime is an opt-in model as set out in the UK Competition Act 1998. Individual claimants must be identified, typically have to issue their own proceedings, and must actively elect to join a single collective action. Under this regime, because each claimant would be party to the proceedings, each claimant must provide evidence of its individual damages caused by the alleged anticompetitive behaviour and bear the costs and financial risks of the action.

There has been only one representative action to date under the current opt-in regime. In 2008, the UK's leading consumer association called "Which?", settled its case out of court against the retailer JJB Sports. This followed JJB being fined £6.7 million by the Office of Fair Trading (the UK's enforcement agency for consumer protection and competition law) for price fixing of replica football shirts. Which? is the only certified UK organisation to represent consumers in damages actions relating to competition law. Although the case received wide press coverage, only 130 claimants (*i.e.* less than 0.1% of those affected) signed up to the action. The settlement amount was the estimated unlawful mark-up value - £20 per claimant, which is a small fraction of the total fine.

## *Proposed Opt-Out Model*

The proposal of a pure opt-out system would result in all parties who fall within the remit of the represented group being bound by the outcome of the action unless they actively opt-out. This would provide greater certainty to defendants in relation to potential future actions and the ability to define losses and reduce parallel proceedings. Also, damages in the opt-out system would be determined on the estimated total size of the group and claimants would step forward to claim their share of damages after the amount has been quantified. In cases where the amount of damage per claimant is low, an opt-out action is likely to succeed in delivering redress to claimants because it is based on the total size of the group. Conversely, for businesses found to be acting in contravention of competition laws, this proposed system will magnify their financial exposure.

There are perceived concerns that this proposal will disproportionately increase the risk of vexatious or spurious claims. The proposal seeks to address such concerns by suggesting a preliminary process of certification. The consultation states that the certification may involve an assessment of the merits of the case; the suitability of a collective action to resolve the common issues; the suitability of the claimants' representative; and whether such representative has sufficient funds to cover the costs of the defendant if they are unsuccessful in their claim. The proposal also states that the absence of the US system of treble damages will avoid claims being brought simply to force the defendant into an unwarranted settlement. In the US, a defendant with a strong and potentially successful case may nevertheless settle to avoid the risk of treble damages; in contrast, the UK regime only allows for claims for damage actually suffered. The proposals keep intact the traditional English principle of 'loser pays' where the unsuccessful party to the action pays the

# Client Alert

Litigation and Antitrust Practice Groups

opposing party's legal fees and may discourage claimants initiating proceedings for which there is not a reasonable chance of success. By contrast, the US operates on the basis that an unsuccessful claimant typically is responsible only for its own legal fees, and thus the risk of bringing a borderline action is less substantial.

## Assisting SMEs Facing Anticompetitive Behaviour

The Government also is considering expanding the role of CAT to make it easier, simpler and quicker for SMEs to bring private actions relating to competition law. SMEs are reported to struggle to access recourse from the courts for anticompetitive behaviour. They are less able than large companies to devote the time and funding to pursue a private civil action, especially given the 'loser pays' risk. Moreover, they have limited access to legal support such as in-house counsel, to facilitate access and understanding of the current system.

At present, the UK options available for a company seeking redress for competition law issues are (i) to bring a private action on a stand-alone basis or (ii) to persuade the OFT to investigate the issue, and on a finding of infringement, bring a follow-on private action. Currently, all stand-alone claims concerning infringement of EU or UK competition law must be issued in or transferred to the High Court, and follow-on claims (where a competition authority has made a prior finding of infringement) can be issued in the CAT.

The Government's proposal provides that where competition law is the only issue, claimants should have direct "fast track" access to CAT to file stand-alone claims as an alternative to the ordinary courts. The Government suggests that the CAT's expertise in competition law and active case management means that it may be well suited to handle complex competition litigation. Under this proposal, SMEs could file all types of civil competition claims (stand-alone or follow-on) with the CAT, enabling them to challenge anticompetitive behaviour rapidly and effectively.

## Next Steps

The consultation will run for three months. Any interested party is invited to provide BIS with views on the issues raised by close of consultation on July 24, 2012. Following the close of the consultation period, the Government will publish comments received (unless respondents request their comments to be kept confidential) and, within three months of close of the consultation, will publish the consultation response. The response will set out decisions made in light of the consultation, a summary of the views expressed, and the rationale for the final decisions taken.

The proposals express the Government's view of measures that will encourage private civil challenges to anticompetitive behaviour and there remains significant political will to see them enacted subject to comments from stakeholders. If these proposed measures are accepted in or close to their current form, companies that are found to have infringed competition law may be subject to increased financial exposure. London, also, is likely to attract increased interest as a forum for damages claims.

*Celebrating more than 125 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 800 lawyers in 17 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality and dedication to understanding the business and culture of its clients. More information is available at [www.kslaw.com](http://www.kslaw.com).*

*This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice.*