

# UK: A New Dawn for Antitrust Class Actions

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## I. Introduction

The UK will shortly introduce a new collective redress mechanism in antitrust damages claims,<sup>1</sup> which will permit qualifying claims to be aggregated on an opt-out basis. This will be the first time that the UK has had an opt-out collective redress mechanism in any sector.

Where claims are individually low value, opt-in mechanisms have had limited success as potential class members have low incentive to take the proactive step of joining the class. Introduction of an opt-out system is significant as all potential class members are automatically included in the class until and unless they take the positive step of opting out of the class. Thus, opt-out mechanisms can be effective in combining claims of low individual value into class actions that can be of significant value once aggregated. To date, UK antitrust claims have typically been brought by businesses that have purchased sufficient cartelised goods or services to justify the expense of litigation. Often, such claimants are the direct purchasers of the relevant goods or services or are relatively high in the distribution chain. If the new UK opt-out mechanism proves effective, alleged antitrust infringers will not only face more claims but also, for the first time, face aggregated claims from consumers at the end of the distribution chain.

The new mechanism includes a certification stage, where the tribunal will decide whether the collective claim should proceed and, if so, whether it should proceed on an opt-in or on an opt-out basis. Only UK-domiciled claimants can be joined on an opt-out basis; other claimants must proactively opt in. The mechanism is aimed both at consumer and at SME claimants, although the claims will not be certified to proceed on an opt-out basis where individual claims are of sufficient

## Key Points

- The Consumer Rights Act 2015, which is due to come into force on 1 October 2014, will introduce a new opt-out mechanism for antitrust collective proceedings in the UK.
- Opt-out mechanisms are significant, in that potential class members are automatically included in the class unless they take the proactive step of opting out, and they are therefore more effective than opt-in systems at aggregating individually low-value claims, where there is low incentive for potential claimants to take the proactive step of opting in.
- The UK has no existing analogue to this new opt-out system, and, in deciding whether claims are suitable for collective proceedings, UK tribunals may look to how the US courts have approached disputes on class certification.

value (ie provide sufficient incentive) for collective proceedings to be practicable on an opt-in basis.

The mechanism is expected to come into force in October 2015.<sup>2</sup> This article examines the background to the new law and explains some of its key features. The certification stage will likely be very hard fought between claimants and defendants. There are significant questions on how certification will operate in practise, particularly as this is an entirely new system, with no analogues or precedents in UK procedural law. For this reason, we also consider how the US approach to certifying class actions<sup>3</sup> offers insight into how the UK courts<sup>4</sup> may approach certification.

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1 Consumer Rights Act 2015 (the 'CRA').

2 Department for Business, Innovation & Skill, Consumer Rights: Implementing the Consumer Rights Bill (BIS/14/1119, 2014) 2 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/361909/bis-14-1119-implementing-the-consumer-rights-bill.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/361909/bis-14-1119-implementing-the-consumer-rights-bill.pdf)> accessed 29 July 2015.

3 Under Rule 23 of the Federal Rules of Civil Procedure.

4 UK antitrust damages claims can be brought either in the High Court or in the Competition Appeals Tribunal (the 'CAT'), although, at present, the

CAT only has standing for 'follow-on claims', ie those claims that fall within the scope of an infringement decision of the European Commission or the UK's antitrust regulator [the Competition and Markets Authority, previously the Office of Fair Trading (the 'OFT')]. The CRA will extend the CAT's jurisdiction to also hear standalone claims. The CRA will introduce further changes that are not explored in detail in this article, including, for example, (a) the CAT will have authority to approve binding opt-out antitrust settlements; (b) the CAT will have jurisdiction to grant injunctions, eg to order that ongoing infringing activity should cease; and (c) introduction of a new 'fast-track' procedure for suitable antitrust damages claims in the CAT.

## II. Background

Reform of collective redress mechanisms has been under consideration for several years at both the EU and UK levels. The recent EU Antitrust Damages Directive<sup>5</sup> was introduced to ‘improve the conditions for consumers to exercise the rights that they derive from the internal market’,<sup>6</sup> including consumers’ right to pursue redress for losses caused by antitrust infringements (both for cartel and cartel-like infringements and for abuse of dominant position infringements). The Antitrust Damages Directive, which must be transposed into national law by December 2016, mandates a number of minimum standards that Member State courts must adhere to in antitrust claims, including a presumption of harm where there has been an antitrust infringement and a requirement for Member State courts to provide for disclosure of evidence from defendants and third parties.<sup>7</sup> Although there was much debate during the consultation period and legislation stage, the final form Antitrust Damages Directive does not provide for a European-level collective redress mechanism. In June 2013, the European Commission published a non-binding recommendation<sup>8</sup> that Member States should have collective redress mechanisms available to citizens to obtain compensation caused by violation ‘of rights granted under Union Law’,<sup>9</sup> including antitrust violations, but that collective redress mechanisms should operate on an opt-in, rather than an opt-out, basis.<sup>10</sup>

In the absence of EU-level legislation on collective redress, several Member States have introduced systems into their national law. The new UK opt-out system has been introduced at least in part on account of perceived shortcomings in the UK’s pre-existing mechanisms for collective redress. We briefly summarise these mechanisms below.

(i) An opt-in collective redress mechanism for antitrust claims has been available to ‘specified bodies’ in the UK since 2003, pursuant to section 47B of the Competition Act.

The Consumers Association (known as Which?) is the sole specified body, and has brought proceedings under this mechanism on a single occasion. In 2007, Which? brought a claim in the CAT against JJB Sport plc (‘JJB’), seeking damages in relation to price fixing of England and Manchester United football shirts during 2000 and 2001. This was a follow-on claim, following an infringement decision by the OFT in 2003 that imposed fines totalling £16 million on companies including JJB, Manchester United plc and Umbro Holdings plc. Despite the claim being well publicised, only around 550 individuals joined the claim, having purchased almost 1,000 shirts between them,<sup>11</sup> representing less than 0.1% of the estimated 1.2–1.5 million<sup>12</sup> shirts purchased.<sup>13</sup>

(ii) Another existing collective redress mechanism in the UK is the rarely used representative action,<sup>14</sup> which is available for persons with the ‘same interest’ in a claim. However, the English courts have interpreted the scope of ‘same interest’ narrowly, and attempts to use the representative action in an antitrust context failed both before the High Court and the Court of Appeal in *Emerald Supplies Ltd v British Airways*.<sup>15</sup> In *Emerald Supplies*, two flower importers, Emerald Supplies and Southern Glass House Produce attempted to bring a representative action for damages against British Airways for its involvement in a price-fixing cartel relating to air freight charges. The flower importers purported to act as the representatives of groups of consumers of freighted goods who were the direct or indirect purchasers of the cartelised air freight services. The Court of Appeal upheld the High Court’s decision to strike out the representative element of the claim, including because the representatives could not show that all members of the proposed class had the ‘same interest’ in the claim for the purposes of Rule 19.6.

The low uptake of the football shirt price-fixing case brought by JJB and the failed attempt to bring a representative action in *Emerald Supplies* contributed to the UK Government’s decision to introduce an opt-out collective redress mechanism through the CRA.<sup>16</sup>

5 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance [2014] OJ L349/1.

6 *Ibid.*, recital (9).

7 *Ibid.*, Art 5(1).

8 Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law OJ L 201/60.

9 *Ibid.*, Art. 1.

10 *Ibid.*, Art. 21.

11 Graeme Wearden, ‘JJB Sports settles football shirt overcharging case’ *The Guardian* (London, 9 January 2008) <[www.theguardian.com/business/2008/jan/09/jjbsports.retail](http://www.theguardian.com/business/2008/jan/09/jjbsports.retail)> accessed 29 July 2015.

12 <[www.ucl.ac.uk/laws/judicial-institute/files/Improving\\_Access\\_to\\_Justice\\_through\\_Collective\\_Actions\\_-\\_final\\_report.pdf](http://www.ucl.ac.uk/laws/judicial-institute/files/Improving_Access_to_Justice_through_Collective_Actions_-_final_report.pdf)> accessed 29 July 2015, paragraph 22.

13 In its response to the Government’s consultation on the CRA, Which? pointed to its experience in the JJB case, arguing that the ‘existing opt-in basis for actions led to low levels of consumer taken [sic] up . . .’, and that any new system should be on an ‘opt-out’ basis, Which?, ‘Consultation Response: Private Actions in Competition Law: A consultation on Options for Reform’ (July 2012) 4 <<http://www.staticwhich.co.uk/documents/pdf/which-response-private-actions-in-competition-law-july-12-293109.pdf>> accessed 29 July 2015.

14 Civil Procedure Rules SI 1998/3132 (as amended), Rule 19.6.

15 [2010] EWCA Civ 1284.

16 ‘. . . [I]t is very clear that the current system of collective redress does not work. Consumers are not currently getting redress for breaches of competition law. It appears unlikely that simply tinkering with the opt-in system would deliver the desired access to justice . . .’, Department for Business, Innovation & Skill, ‘Private actions in competition law: a consultation on options for

In its consultation on the CRA, the UK Government was keen to distinguish the new opt-out mechanism from US class action litigation. It is correct that the CRA system will not import certain significant features from the USA. In particular, punitive/exemplary damages and US-style treble damages will not be available in collective redress claims,<sup>17</sup> and damages will continue to be calculated on the compensatory basis; jury trials will not be introduced; and damages-based agreements<sup>18</sup> (contingency fees) will not be permissible in opt-out proceedings. Furthermore, the usual English litigation approach to cost-shifting will be retained, whereby the losing party is ordinarily ordered to pay the majority of the winner's legal costs, which significantly disincentives weak claims from being brought.

Nevertheless, the introduction of an opt-out system, and the automatic aggregation of qualifying claims, is a significant move towards US-style class action litigation.

### III. Certifying claims

This section gives an overview of the process by which the CAT will 'certify' a claim or, in the language of the CRA, grant a collective proceedings order ('CPO'). Before examining certification, we briefly consider whether the collective redress mechanism in the CRA might apply retrospectively.

The collective redress mechanism introduced by the CRA arguably has retrospective application. The language of the CRA provides that the collective redress mechanism applies to claims arising before the commencement of the CRA as it applies to claims arising after the time.<sup>19</sup> English law operates a presumption against retrospective statutory application, but the presumption can be discharged, including where the language of the act plainly gives retrospective effect.<sup>20</sup> In the consultation period prior to the CRA becoming law, the UK Government signalled its intent that the collective redress mechanism would have retrospective effect, and pointed out that the changes were procedural and did not proscribe previously legal conduct.<sup>21</sup>

Even if the collective redress mechanism applies retrospectively, there is significant doubt over how retrospective application will operate in practice, as the legislation's approach to limitation periods is confused. Claims brought in the High Court, including antitrust claims, are subject to the Limitation Act 1980, which, in broad terms, applies a 6-year limitation period starting from when the cause of action accrues (although the start time is delayed where wrongdoing is deliberately concealed). Prior to the CRA coming into force, the CAT applied its own distinct limitation rules, requiring that claims be brought by 2 years from the later of (a) exhaustion of the defendant's right to appeal against the relevant regulator's infringement decision, or (b) when the cause of action accrued.<sup>22</sup> Prior to the CRA coming into force, the CAT's jurisdiction for damages claims is restricted to follow-on claims; hence, the reason why its distinct limitation regime referenced the relevant antitrust infringement decision relied on by the claimant in its damages claim. However, when in force, the CRA will apply the Limitation Act 1980 to damages claims in the CAT, bringing its limitation regime into line with that in the High Court.<sup>23</sup> A complication arises in that the CAT will apply its old limitation rules to claims actionable prior to when the CRA came into force.<sup>24</sup> The effect of this is that while the CAT might arguably have retrospective standing for standalone claims, including collective proceedings, it would apply its old limitation rules to these claims. How the CAT would apply its prior regime, which caters only for follow-on claims, to claims that are at least in part standalone, is entirely unclear.

Further uncertainty over the CRA's approach to limitation is caused by the requirement that, '[f]or the purpose of identifying claims which may be made in civil proceedings, any limitation rule or rules relating to prescription that would apply in such proceedings must be disregarded'.<sup>25</sup> Rather than entirely disapplying limitation law, as its literal meaning suggests, it is likely that this language was included in the CRA erroneously. In the pre-CRA regime, the CAT's distinct 2-year limitation period was set out in

reform – government response' (BIS/13/50, 2013) 5.12 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf)> accessed 29 July 2015.

17 CRA, sch. 8, para. 6, 47C(1).

18 Where the attorney's fees are calculated by reference to damages awarded/settlement amount, rather than to hourly rates.

19 CRA, sch. 8, para. 5(2).

20 *Chebaro v. Chabaro* [1987] Fam. 127.

21 Department for Business, Innovation & Skill, 'Consumer rights bill: statement on policy reform and responses to pre-legislative scrutiny' (Cm 8796, 2014) 37 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/274912/bis-14-566-consumer-rights-bill-statement-on-policy-reform-and-responses-to-pre-legislative-scrutiny.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274912/bis-14-566-consumer-rights-bill-statement-on-policy-reform-and-responses-to-pre-legislative-scrutiny.pdf)> accessed 29 July 2015: 'The Government accepts that on face value sections 47A and 47B may appear retrospective. However, the changes are of a procedural nature and they do not change the underlying competition law prior to commencement. They are not creating new competition law obligations, such as new categories of competition law infringement. Nor do they change how damages are calculated in respect of infringement. They are simply extending the jurisdiction of the Competition Appeal Tribunal. Defendants will only face damages for matters which already constituted competition law infringements.'

pdf> accessed 29 July 2015: 'The Government accepts that on face value sections 47A and 47B may appear retrospective. However, the changes are of a procedural nature and they do not change the underlying competition law prior to commencement. They are not creating new competition law obligations, such as new categories of competition law infringement. Nor do they change how damages are calculated in respect of infringement. They are simply extending the jurisdiction of the Competition Appeal Tribunal. Defendants will only face damages for matters which already constituted competition law infringements.'

22 CAT Rules, SI 2003/1372, Rule 31.

23 CRA, sch. 8, para. 8(1).

24 CRA, sch. 8, para. 8(2).

25 CRA, sch. 8, para. 4(1), 47A(4).

the CAT Rules, so this language arguably served to dis-apply the Limitation Act 1980. Under the new regime, the Limitation Act 1980 does apply, and it appears that this language serves no purpose.

## A. Granting a collective proceedings order

The circumstances in which collective proceedings can be brought are set out in the CRA and supplemented by the CAT's procedural rules. The UK Government has published and consulted on the draft CAT procedural rules (the 'Draft CAT Rules').<sup>26</sup> In this section, we consider the certification process, as provided for in the CRA and the Draft CAT Rules. In short, there are three stages to certification: first, whether the proposed class representative is suitable; second, whether the claims are suitable for collective redress; and third, if suitable for collective redress, whether the claim should proceed on an opt-in or on an opt-out basis.

### 1. The representative

The proposed representative need not be a member of the class,<sup>27</sup> but the CAT must be satisfied that it is 'just and reasonable'<sup>28</sup> that they be the representative for the proceedings. The Draft CAT Rules provide that, in determining whether it is just and reasonable to authorise the proposed class representative, the CAT should consider whether the nominee:<sup>29</sup>

- (i) would fairly and adequately act in the interests of the class members;
- (ii) has, in relation to the common issues for the class members, a material conflict of interest with the class members;
- (iii) in circumstances where more than one proposed representative is seeking approval, is the most suitable representative;
- (iv) will be able to pay the defendant's recoverable costs if so ordered;
- (v) in circumstances where the claimants are seeking an interim injunction, would be able to satisfy any necessary cross-undertaking in damages.

As to the first criterion of whether the proposed representative would act fairly and adequately in the interests of the class members, the Draft CAT Rules require

that the CAT should 'take into account all the circumstances'. The Draft CAT Rules provide<sup>30</sup> a non-exhaustive list of criteria to consider in making this assessment, including whether the proposed representative has adequate arrangements for communicating and consulting with members of the class.

The criterion of whether the nominee will be able to pay the defendant's recoverable costs if so ordered will likely be an important battleground where a CPO is sought. Rule 26 of the Draft CAT Rules provides that for opt-out proceedings, any adverse costs award (eg should the defendant prevail at trial) will ordinarily be made against the class representative rather than against members of the class.<sup>31</sup> To offset their cost risk, class representatives will likely seek assistance from third-party claims funders. The CAT will consider these arrangements when deciding whether or not the proposed representative is suitable.

### 2. Suitability for collective redress proceedings

Rule 78(1) of the Draft CAT Rules provides that the CAT may certify a claim as eligible for collective proceedings where the proceedings (i) are brought on behalf of an identifiable class of persons, (ii) raise common issues, and (iii) are suitable to be brought in collective proceedings. When considering 'suitability', draft Rule 78(2) provides that the CAT should consider factors such as 'the costs and benefits of continuing the collective proceedings', the 'size and nature of the class', and 'whether it is possible to determine for any person whether he is or is not a member of the class'.

### 3. Whether collective proceedings should be on an opt-in or on an opt-out basis

Rule 78(3) of the Draft CAT Rules provides that in determining whether collective proceedings should proceed on an opt-in or on an opt-out basis, the CAT will 'take into account all matters it thinks fit', including 'the strength of the claims' and 'whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover'. The requirement to consider whether it is practicable to bring claims on an opt-in basis arguably suggests a presumption in favour of opt-in proceedings,

<sup>26</sup> The results of the consultation are due to be published in August 2015.

<sup>27</sup> CRA, sch. 8, para. 5(1), 47B8(a). There is no express restriction on who can act as a representative, which is a marked change from the previous regime where claims had to be brought by a 'specified body'. In its consultation, the Government indicated that there should be a restriction on law firms, third-party funders, or special purpose vehicles acting as representatives, although this prohibition is not included in the Draft CAT Rules.

<sup>28</sup> CRA, sch. 8, para. 5(1), 47B8(b) and Draft CAT Rules, Rule 77(1) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/401972/bis-15-76-draft-competition-appeal-tribunal-rules-2015.pdf)

401972/bis-15-76-draft-competition-appeal-tribunal-rules-2015.pdf> accessed 29 July 2015.

<sup>29</sup> Ibid., Rule 77(2).

<sup>30</sup> Ibid., Rule 77(3).

<sup>31</sup> There are exceptions, including where an individual class member, rather than the representative, makes an application to the court.

ie it will be for the claimants or representative to argue that a claim should proceed on an opt-out basis on account of there being insufficient financial incentive for individual putative class members to proactively opt in.

#### IV. Similar mechanisms in other EU jurisdictions

The UK is not the only EU jurisdiction to introduce an opt-out mechanism. Belgium passed a law on collective actions that came into force in September 2014.<sup>32</sup> Collective actions are available in relation to consumer disputes including competition law claims. Like the UK mechanism, the opt-out element of the Belgian law is only available to Belgian-domiciled claimants.

As with the CRA, the process has judicial oversight, as the court must decide whether a collective action would be more appropriate than an individual action and whether an opt-in or opt-out claim is more appropriate. Unlike the UK law (at least based on the current version of the Draft CAT Rules), there is a restriction on who can act as the representative (eg specific consumer organisations or the ombudsman). The Belgian law also provides for a specific three-part procedure that must be followed in each case: first, the court must rule on the admissibility of the claim; second, there is a mandatory negotiation stage; and finally, if negotiations are unsuccessful, the court will rule on the merits. Although there are some similarities between the Belgian law and the new UK law, the fact that claims may only be brought by specified representatives means the Belgian law may have more limited impact. Furthermore, the Belgian law is restricted to consumer claims, and so, unlike the UK mechanism, may not be available to SMEs. Finally, the geographical restriction that only Belgian-domiciled claimants can be included in the class on an opt-out basis will likely limit the impact of the Belgian system relative to the UK system, on account of the former being a smaller economy with a smaller population.

In Portugal, opt-out claims have been possible since the mid-1990s.<sup>33</sup> A collective action may be brought by any citizen, association, and/or foundation that promotes the protection of the general interests described in the Portuguese Constitution to claim compensation for the infringement of those interests. The list of protected interests is not exhaustive, meaning that a claim on the

basis of breaches of competition law is possible. An opt-out mechanism is the default position for such claims. Despite having been in force for nearly 20 years, the law has been relatively rarely used, especially in relation to competition claims.

In recent years, other European jurisdictions, such as France and Italy, have introduced collective redress mechanisms available for use in antitrust damages claims, although they are in line with the EC's recommendations that such claims may only be brought on an opt-in basis.

#### V. Considerations from the US experience

As mentioned, there is no UK analogue or existing equivalent to the opt-out mechanism introduced by the CRA; so, it is useful to examine how class certification has been approached in the USA, to help identify the key issues that may arise in certification proceedings under the CRA.

The test in the Draft CAT Rules for CPOs substantially overlaps with the test applied by the US courts under Rule 23 of the Federal Rules of Civil Procedure ('FRCP') for class actions. FRCP 23(a) requires (1) that the class is so numerous that joinder is impracticable, (2) that there are questions of law or fact common to the class, (3) that the claims or defences of the representative parties are typical of the class, and (4) that the representative parties will fairly and adequately represent the class. In addition, FRCP 23(b)(3), a common type of class action in the antitrust damages context, requires that the common issues of the class predominate over individual issues and that the class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Given the overarching similarity between the CAT test and the FRCP 23 test, the arguments that have been considered in the USA may be instructive to the CAT and to the parties in UK collective proceedings on the question of whether to grant a CPO. Indeed, the US antitrust defence bar has recently made significant strides in reigning in the excesses of private antitrust actions, particularly in the class action context, and arguments and strategies deployed in the USA may prove quite useful for defendants to UK claims.<sup>34</sup>

It bears noting, however, that depending on how the CAT applies the standards outlined in the Draft CAT

32 Code of Economic Law, Book XVII, Title II (Wetboek Economisch Recht, Boek XVII Titel 2).

33 Law 83/1995 of 31 August 1995 (*Lei n° 83/95, de 31 de Agosto 1998*).

34 In multiple recent decisions, the Supreme Court has reaffirmed that the class mechanism should be the exception to the usual rule that litigation is conducted by individuals. See eg *Comcast Corp. v. Behrend*, 133 S. Ct. 1426,

1432 (2013), '[t]he class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only"'; *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013), '[Rule 23] imposes stringent requirements for certification that in practice exclude most claims.'

Rules, claimants may argue that the CAT test is slightly more permissive in certain aspects than the FRCP 23 test.

For example, the Draft CAT Rules require that the claims of the class raise ‘*common issues*’, which are defined as the ‘*same, similar or related issues of fact or law*’.<sup>35</sup> By contrast, Rule 23(b)(3) of the FRCP requires that ‘*the questions of law or fact common to class members predominate over any questions affecting only individual members*’ (emphasis added). Thus, in the USA, common issues must not only exist, there must be more ‘*commonality*’ than not between the class members’ claims. Whether common issues predominate within a class, especially on the issues of injury and damages, is typically a hard-fought battle in the USA at the class certification stage.<sup>36</sup>

Similarly, under FRCP 23(a)(3), the claims or defences of the representative party in a US class action must be typical of the claims or defences of the class. The fact that the claims of the named representative must be ‘*typical*’ of the class has important implications in the USA on the defence of class actions. If a defendant can show that the named representative’s claim is faulty, then a defendant may be able to knock out the claims of the rest of the class (given that the named representative’s claims are assertedly typical of the class’ claims). The CRA and the current Draft CAT Rules contain no such similar requirement.

Likewise, whereas Rule 78(1)(c) of the Draft CAT Rules requires that the proposed claims are ‘*suitable to be brought in collective proceedings*’, Rule 23(a)(1) of the FRCP requires that the proposed class action be ‘*superior to other available methods*’ (emphasis added).

Thus, a literal reading of these rules may lead claimants to argue that the threshold for certification in the UK is slightly lower than in the USA. However, several points bear noting. First, the Draft CAT Rules are broadly drafted and give the CAT some discretion as to how it applies them, and the CAT may impose a test in practice that is more in exact alignment with FRCP 23 than the CRA and the Draft CAT Rules arguably suggest. Second, the CAT retains the option to certify a class on an opt-in basis. Thus, as noted previously, it may be the case that the CAT utilises the opt-out mechanism more sparingly than the opt-in mechanism. Thus, defendants may be well served to develop arguments early on in the proceedings as to why the claim is more appropriate for

opt-in consideration. Third, Rule 78 of the Draft CAT Rules provides that at the hearing of the application for a CPO, the Tribunal may hear an application by the defendant for summary judgment. In the USA, it is more customary for summary judgment to be decided after class certification. Thus, defendants may have an opportunity to get rid of unmeritorious cases, including on the basis of lack of evidence, at an earlier stage in the UK than in the USA.

## VI. Potential impact of the new opt-out mechanism in the UK

The CRA and its new collective redress mechanism are likely to cement the UK’s position as a key jurisdiction for bringing competition damages claims in Europe. In the past, addressees of EC decisions have predominantly faced claims brought by major-volume claimants who had purchased sufficient goods/services to make a claim economical. For the first time, consumers and SMEs may have an effective means of aggregating their small individual claims into a single viable claim, which is likely to lead to an increase in the number of claims being brought before the English courts.

Defendants have previously sought to reduce their exposure by arguing the pass-on defence, positing that the claimant passed any overcharge down the supply chain. This issue, and defendants’ economic theories, will become much more nuanced and complicated for defendants if availability of collective proceedings leads to claims from different levels of the distribution chain.

Questions remain on how the certification process will work in practice and how the CAT will approach this challenge. In the absence of any UK precedent, the CAT may look at how similar issues and arguments have been approached in the USA, given that many of the issues the CAT will face have been fully vetted in the USA.

Development of the new UK system will be watched closely. If the system is considered a success, it could lead to opt-out collective redress mechanisms in other types of claims, such as securities litigation, or to renewed impetus for a standardised European antitrust damages collective redress mechanism, possibly on an opt-out basis.

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<sup>35</sup> Draft CAT Rules (n 33), rr 78(1)(b) and 72(2)(f).

<sup>36</sup> The importance of the predominance requirement in class certification consideration was recently reaffirmed by the U.S. Supreme Court in

*Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (noting ‘the court’s duty to take a “close look” at whether common questions predominate over individual ones’).