

# Class Actions for Antitrust Damages Claims Now Available in the UK

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Antitrust Class Action Litigation

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The UK has introduced a class action mechanism that could lead to an increase in antitrust litigation. Most significantly, the new mechanism will enable opt-out class actions, which are potentially effective in aggregating individually low value claims, into a single high value, and economically viable, claim.

The new mechanism is without precedent in the UK. Battles on class certification, injury and damages sustained by class members will be hard fought, and the UK courts may look to how the U.S. courts have approached class certification for guidance.

## The Consumer Rights Act 2015

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The Consumer Rights Act 2015 (“**CRA**”), today introduces a number of important changes to how claimants can seek redress in antitrust damages claims in the UK. The most significant of these changes is the introduction of a new opt-out class action mechanism for claims before the UK’s specialist competition court, the Competition Appeal Tribunal (the “**CAT**”).

UK competition damages claims have to-date generally been brought by large companies higher up the distribution chain, who have made sufficient purchases of the cartelized product, and therefore arguably suffered sufficient losses to make a claim economically viable.

Claims from individual consumers or from small businesses lower down the distribution chain are not economically viable, because the maximum sum recoverable is typically low. Prior to today, collective actions could only be brought before the CAT by designated representatives on an opt-in basis, requiring claimants to proactively opt in to be included in the claim. The existing opt-in mechanism has proven ineffective; only one claim has been attempted under the old mechanism, and claimant opt-in rates were so low that the designated representative announced it would not attempt future claims.

Opt-out class action mechanisms, such as the U.S. model, are far more effective at aggregating claims, since putative class members are automatically included as claimants, unless they actively choose to opt out.

### Class certification

As with the U.S. system, there will be a class certification process. Certification will be a key battleground as individual class members are unlikely to proceed with claims on their own. Certification will comprise three stages:

- *Suitability of the Proposed Class Representative:* The proposed representative need not be a member of the class (for example, it could be a trade or consumer organisation), but the CAT must be satisfied it is “*just and reasonable*” for such person to be the representative.
- *Eligibility for inclusion in collective proceedings:* The CAT will consider whether 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. Suitability is assessed by factors including the size and nature of the class and whether it is possible to determine whether a person is or is not a member of the class.
- *Whether the collective proceedings should be brought on an opt-in or an opt-out basis:* The CAT will consider factors including “*the strength of the claims*” and “*whether it is practicable for the proceedings to be brought as opt-in*” proceedings. The wording of the latter arguably suggests a presumption that opt-out proceedings should be certified only where opt-in proceedings are impracticable. Only UK-domiciled claimants can be included on an opt-out basis, but other claimants can opt-in.

There are important differences between the new mechanism and U.S. class actions mechanism. In particular, under the UK model, claimants will recover on a compensatory basis — that is, damages awards should reflect the losses caused to the claimants — and punitive damages are prohibited. By contrast, treble damages are available in the U.S. in antitrust claims. Also, in the UK (unlike in the U.S.), contingency fee arrangements — where the law firm takes a portion of any damages award/settlement — are prohibited for opt-out claims.

Notwithstanding those differences, there is sufficient (purposeful) similarity between the U.S. and UK systems that the CAT will likely look to the U.S. experience and its well-developed case law on difficult issues.

The CRA makes a number of further changes that will impact on antitrust litigation, including the introduction of a new fast-track procedure for smaller claims brought in the CAT and a new opt-out collective settlement scheme.

### **Comment**

The new mechanism will likely establish England as a European destination of choice for antitrust damages claims. The initial claims — and battles on certification — will be hard fought.

Antitrust litigation frequently follows from an investigation and infringement decision by an antitrust regulator, whether the European Commission or the UK Competition and Markets Authority. In these situations, the claimants need not prove the antitrust infringement — as the UK court must not deviate from the regulator’s decision — and the main question for the court is causation and damages. Thus, parties under investigation or the subject of a regulator’s infringement decision are at significantly greater risk of litigation. This risk will further increase, with the possibility such parties are now also facing class actions.

## Antitrust Class Action Litigation

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Antitrust Class Action Litigation practice group:

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