



A new collective action, English-style?

The Civil Justice Council has this week published its recommendations to the Lord Chancellor for a more efficient and effective procedure for collective actions in England and Wales. The central proposal is for a new generic collective action (including a possible 'opt-out' methodology) that, if adopted, would radically change the landscape for English litigation.

We set out below our initial thoughts and will of course happily respond to any questions.

We analysed the rapid developments in class actions and third party funding across Europe in our client guide of June 2007 and our update in February of this year. As foreshadowed, the Civil Justice Council (CJC) has, this week, published its recommendations to the Lord Chancellor for a more efficient and effective procedure for collective actions in England and Wales. They include some very significant proposals – specifically, a new generic collective action (including a possible 'opt-out' methodology) that, if adopted, would radically change the landscape for English litigation.

These developments need to be seen in the context of both the encouragement of third party funding in England and Wales to assist with 'access to justice' and to facilitate the bringing of litigation, and the overt positioning of some law firms as 'plaintiff litigators' seeking to exploit these opportunities. They are also consistent with, although arguably go further than, developments elsewhere in Europe.

The key assumptions or findings underlying the recommendations include:

- ombudsman or regulatory systems are not well suited to the resolution of the wide range of possible detriment that can give rise to the need for large-scale remedial action;
- private enforcement is to be preferred to state-funded regulatory intervention;
- the current system does not provide sufficient or effective access to justice for consumers, small businesses or employees wishing to bring multi-party claims; and

- there is overwhelming evidence that meritorious claims that could be brought are currently not being pursued.

The key recommendation is for a generic collective action, going far beyond current procedural measures including the specific arrangements in the competition field (although something similar was proposed in the Woolf Report in 1996). There would be no presumption that collective claims would be brought on an opt-in or opt-out basis. The report indicates that certain types of claims are more likely to favour opt-out (classically those for very large classes with very similar claims) but there is no in-built bias. The issue would be decided at a certification stage, when the court would decide whether a collective action was appropriate and which mechanism, including traditional mechanisms such as a group litigation order, would be the most appropriate, taking into account a range of relevant circumstances. There could also be mixed-certification (opt-out for aspects that were similar and opt-in to sub classes for those parts that were less uniform). This is, in essence, a 'superiority' analysis, as mooted in the papers supporting the proposals, and involves the consideration of other sensible criteria (merits, commonality of interest, numbers of parties, suitable representative etc). However, the detailed processes will be complex. Claimants would often push for the US-style opt-out regime to increase their bargaining power.

Unlike the common European approach, such an action would not only be brought by designated bodies (eg consumer protection agencies), but also by individual

representative parties or ad hoc bodies. This could permit third party funders to be heavily involved in creating the infrastructure for collective claims, although they would still have to satisfy a suitability test (namely that they are capable of acting in the best interests of the individual claimants as a representative party).

Other major recommendations include:

- expanding the role of specialist collective actions (eg before the Competition Appeals Tribunal or the Employment Tribunal) to complement the generic action;
- piloting the generic scheme with a discrete scheme for consumer claims for competition law breaches to test the implementation of the generic concept;
- enhanced case management of collective cases, reflecting the current Commercial Court Pilot;
- new methods of damages calculation in opt-out cases. This could mean assessing damages by reference to the collective global damage suffered by the entire class rather than summing the class members' actual losses and damage (although the Lord Chancellor is advised to conduct a wider policy consultation on such a potentially far-reaching reform);
- settlements to be approved by the court following a 'fairness hearing' before they can bind the class of claimants. This has echoes of US practice. It raises issues of notification to absent class members and complex questions over equity between different classes bringing the collective action and between claimant and defendant. However, the possibility of settling multi-party claims in an efficient manner could be a real benefit to defendants, who can be left litigating cases that they would rather settle because of the current procedural difficulties of reaching an effective settlement;
- the principle of full costs shifting would remain (the loser would continue to pay as a disincentive to unmeritorious claims), but recent techniques such as cost capping may well be more extensively deployed;
- a controversial mechanism whereby unallocated damages would be distributed by a trustee of the award to achieve a looser form of remedy in place of direct compensation; and
- responsibility would be vested in the court to ensure that any new collective procedure is fairly balanced as between claimants and defendants, the latter of whom

should be properly protected from unmeritorious, vexatious or spurious claims.

There will have to be extensive consultation (including primary legislation to deal, among other things, with extending limitation periods for class members). It is currently unclear what the level of government support would be or how long it would take for the consultation and legislative process to proceed. Given the potentially far-reaching effect of the proposals, participation in the consultation could be very important.

Some important policy issues that will arise include: will there be any exemption for government bodies; how does dividing any unclaimed aggregated damages fit with the core English principle that damages are primarily compensatory; what will be the jurisdictional implications for international classes of claimants and defendants; and what detailed rules and jurisprudence will be 'borrowed' from other jurisdictions with more developed class action regimes, for instance in relation to class certification, superiority and the assessment of the 'fairness' of a settlement?

For further information please contact Paul Lomas
T +44 20 7832 7059
E paul.lomas@freshfields.com

Mira Raja
T +44 20 7785 5615
E mira.raja@freshfields.com

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