Is the "Opt-Out" Proceeding an Effective Approach to Enhance Antitrust Collective Action in China? With comparative reference to UK's New Regime

Xue Gan*

China; Collective proceedings; Comparative law; Competition law; Private enforcement

Abstract

Various forms of collective litigation models have been developed in different jurisdictions, such as the US, the EU and its Member States, as efficient mechanisms for the bringing of antitrust litigation against large enterprises. However, in China, although the Civil Procedure Law provides several different models for the taking of collective action, in practice, however, the existing mechanisms for collective action have been rarely applied to antitrust damages litigation, due to inherent weaknesses and gaps in the different collective action models. In this article, the different China models of collective action shall be considered, whether joint action; "opt-in" representative action and "opt-out" action (the so-called consumers public interest collective action). In particular, the article seeks to enhance the use of collective proceedings in China in the field of antitrust damages litigation, by making comparative reference to the UK's recent application of limited opt-out collective proceedings, which is changing the landscape of collective antitrust damages action in the UK, and makes appropriate suggestions for reform of collective action in China, for example by considering whether litigation could be brought on the basis of opt-in proceedings, or public interest opt-out proceedings, according to criteria, such as the scale of claimants, commonality, suitability, the public interest test and the goal of full compensation.

Introduction

This article shall explore the potential of "opt-out" proceedings as a possible solution to enhance the potency of antitrust collective redress mechanisms in China so as to achieve full compensation for adversely affected consumers, with comparative reference to the EU and UK's experience. Before proceeding to examine two key questions, the article will describe the existing forms of collective action mechanism provided for by China's Civil Procedure Law and demonstrate their existing parameters and deficiencies. The focus shall then move on consider the two key questions: first, whether opt-out collective proceedings for competition law infringements could be a "good fit" with the current collective action system provided by China's Civil Procedure Law 2017[1]; and, second, consider what kind of balanced measures could provide consumers and SMEs with stronger incentives to bring collective actions, while at the same time not encouraging unmeritorious litigation. In order to answer these two questions, a comparative analysis will be undertaken between China's existing collective redress system, and the UK's "opt-in" and limited "opt-out" collective proceedings mechanisms.

Background

Anti-competitive behaviour affecting consumers' interests is difficult to litigate for a number of reasons: individual actions seeking antitrust damages may only realise limited rather than full compensation potential, plus there can be additional obstacles standing in the way of consumers seeking effective redress, such as the remoteness of the affected consumers to the actions of the anti-competitive actor,[2] or difficulties in demonstrating evidence of harm, or its quantification. Combined with the fact that frequently the amount of each individual consumer's loss will be low value, these aforementioned obstacles present a considerable range of barriers that inhibit consumers from mounting effective consumer-led litigation against anti-competitive actors, and frustrate their attempts to obtain full compensation in respect of anti-competitive infringements affecting their interests.

In China, consumers seeking redress for anti-competitive harm face additional difficulties. Although different forms of collective redress

* Max Planck Institute for Innovation and Competition, Munich, Germany.

[1] The Civil Procedure Law of China was enacted in 1992 and subsequently amended in 2012 and 2017. The Civil Procedure Law 2017 is currently effective law.

[2] By virtue of their remote position at the end of the distribution chain where they will not have a direct contractual relationship with the originator of the anti-competitive practice.

mechanisms are provided for via the civil litigation system by way of various forms of action, ranging from "joint action",[3] "representative action",[4] and the "consumers public interest collective action",[5] a major uncertainty arises as to whether these forms of action (originating in China's Civil Procedure Law 2017) can be used by consumers seeking compensation redress in the antitrust damages context. This is a significant issue for consumers seeking compensation for anti-competitive behaviour occasioned by anti-competitive activity by an upstream actor that has caused them harm as indirect purchasers of goods or services. This uncertainty arises because of a 2012 Supreme Court of the People's Judicial Interpretation (No.5 of 2012[6]), which adopted a non-comprehensive approach to collective action,[7] by simply specifying that "joint action" be the form of collective action mechanism that could be utilised by consumers seeking compensation for harm caused by anti-competitive behaviour.[8] The problem with the interpretation intimating that consumers are to use the "joint action" mechanism when seeking redress for anti-competitive harm, rather than also having resort to the other two forms of collective action mechanisms, is that "joint action" does not guarantee that the consumers will be compensated in full, and it is the court that decides whether it is appropriate to conflate individual actions into a joint action (or not), rather than the litigants themselves.

Although, in theory, the other forms of collective action provided for by the civil law could arguably be invoked by consumers in order to litigate antitrust damages claims,[9] even though it is not clear that this would be accepted, assuming this was the case, then two major questions thereby arise:

- first, whether the existing range of collective action mechanisms in China's civil litigation system could effectively deal with anti-competitive behaviour affecting a considerable number of victims, in order to achieve full compensation for them; and
- second, if full compensation cannot be provided by the existing range of remedies, what reforms will be necessary in order to enhance the existing range of collective action mechanisms in order to make them effective remedy vehicles to invoke in the antitrust mass harm claim context.

China is not the only major marketplace where collective redress reforms were needed: almost simultaneously with the 2012 amendment of Chinese Civil Procedure Law and its Judicial Interpretation was handed down. In Europe, the European Commission was attempting to identify common legal principles that could allow for a form of antitrust collective redress to fit well with the national legal systems of the EU Member States.[10] In 2012, a resolution was adopted by the European Parliament seeking a more coherent movement towards adoption of a collective redress mechanism that would allow European citizens to have access to more uniform access to justice within the EU.[11] Ultimately, arising from these efforts, the European Commission published a recommendation in 2013 elaborating a framework and setting the goal of ensuring that collective redress procedures in antitrust damages actions in the Member States would be "fair, equitable, timely and not prohibitively expensive".[12]

At Member State level there was considerable reform activity taking place as well. Against the background of the European Commission and Parliament's endeavours to bring about an EU-wide collective redress mechanism, individual Member States were also making progress: the UK's Consumer Rights Act (CRA) was amended in 2015 to bring about significant changes to the landscape of collective redress for competition law infringements occurring in the UK.[13] Among these changes, of particular relevance for this article is the discretion of the

[3] Article 52 of the Civil Procedure Law 2017 provides the "joint action", a procedure by which the competent court can decide that separate actions raise similar issues and therefore the court can order the combining of the proceedings whose subject matters are the same or similar, into one proceeding, with the consent of the parties.
[4] Article 53 of the Civil Procedure Law 2017 provides the "representative action", a procedure used where parties are numerous: the parties can choose to elect a representative to conduct the litigation on their behalf, with the conduct of the representative in the litigation binding all parties represented; however to modify or relinquish any claims, or reach a settlement, the representative must obtain the consent of the represented parties.
[5] Article 55 of the Civil Procedure Law 2017 provides for a procedure for the conduct of public interest collective action in matters pertaining to conduct that pollutes the environment or infringes upon the lawful rights and interests of consumers or otherwise damages the public interest. In this action, collective action can be brought by an authority or relevant organisation as prescribed by law.
[6] Judicial Interpretation of the Supreme People's Court on Certain Issues Concerning Hearing of Civil Disputes arising from Anti-Competitive Behaviour [2012] No.5 ("Judicial Interpretation [2012] No.5") was adopted by the Meeting of the Judicial Committee of the Supreme People's Court in January 2012 and came into force in June 2012.
[7] Collective action means the litigation collectively brought by more than two natural or legal persons to claim damages or cessation of illegal behaviour. The discussion in this article in this context is restricted to the collective damages action in antitrust proceedings.
[8] Article 6 of Judicial Interpretation of the Supreme People's Court on Certain Issues Concerning Hearing of Civil Disputes arising from Anti-Competitive Behaviour [2012] No.5.
[9] See the Preamble of Judicial Interpretation [2012] No.5.
[10] Commission Staff Working Document for public consultation: Towards a Coherent European Approach to Collective Redress, SEC (2011) 173 final: in 2011, the EU Commission initiated a public consultation in order to identify a collective redress mechanism that is compliant with art.67(1) TFEU, at the same time seeking to forge a European model of collective redress, so as to encourage small mass claims.
[11] European Parliament Resolution of 2 February 2012 "Towards a Coherent European Approach to Collective Redress" (2011/2089(INI)).
[12] Commission Recommendation 2013/396/EU of 11 June 2013 on Common Principles for Collective Redress Mechanisms in the Member States for injunctions against and claims on damages caused by violations of EU rights [2013] OJ L 201/26.
[13] Consumer Rights Act 2015 (as amended) consolidated several pieces of consumer protection legislation such as the Sale of Goods Act 1979, the Unfair Terms in Consumer Contracts Regulations 1999, and the Supply of Goods and Services Act 1982, and brought about changes to various consumer rights.

Competition Appeals Tribunal (CAT) to join multiple claims; the introduction of limited[14] opt-out collective proceedings[15] for competition claims; and measures concerning the identity of class representatives. The aim of these changes was to facilitate small mass claims, so as to ensure that victims of competition law breaches, particularly individual consumers and SMEs, could be fully compensated for any damage suffered arising from anti-competitive infringements.[16]

The UK reform to the collective actions mechanism of the UK for competition law infringements was triggered by the ineffectiveness of the previous collective proceedings provided for by the original s.47B of the Competition Act 1998.[17] Under the old "opt-in" regime, an antitrust damages action fronted by an authorised body[18] could be brought before the CAT on behalf of consumers when claimants actively chose to join the proceedings. This proved unsuccessful, as demonstrated by the fact that only one representative action was brought under the old regime by the UK Consumers Association, which was the only representative body specified by the 1998 law.[19]

Coincidentally, the current collective action mechanism in China has been undergoing similar "systems failure" as the old UK regime, i.e. it has been ineffective, and little use has been made of it to litigate in respect of small mass claims for competition law breaches. Interestingly, lack of incentive on the part of consumers, which was identified as a reason for low participation in opt-in proceedings in the UK,[20] has also been identified as being a reason why the collective action mechanism in China has also suffered from the same problem. This article shall explore the potential of "opt-out" proceedings as a possible solution to enhance the potency of antitrust collective redress mechanisms in China so as to achieve full compensation for adversely affected consumers, with comparative reference to the EU and UK's experience.

Therefore, this article shall focus on two key questions: first, whether opt-out collective proceedings[21] for competition law infringements could be a good fit with the current collective action system provided by China's Civil Procedure Law 2017; and, second, the article shall assess what kind of balanced measures could provide consumers and SMEs with stronger incentives to bring collective actions, while at the same time not encouraging unmeritorious litigation. In order to answer these two questions, a comparative analysis will be undertaken between China's existing collective redress system, and the UK's "opt-in" and limited "opt-out" collective proceedings mechanisms.

A critical assessment of the relevant legislation in China

The AML and its 2012 judicial interpretation

The AML fails to provide any provision to specifically deal with collective mass harm claims.[22] The Judicial Interpretation 2012[23] takes a light-touch approach to collective action, providing that when two or more plaintiffs individually bring legal actions in the competent courts with respect to the same anti-competitive act, the court may consolidate the cases and hear them in a single proceeding.[24] It is worth noting that art.6 of the Judicial Interpretation 2012 made some changes to the original equivalent version of the article of its Consultation Paper 2011.[25] In the original version, the 2011 Consultation Paper made it clear that in an antitrust damages action plaintiffs may either file individual action or collective action.[26] However, when the Judicial Interpretation was formally issued in 2012 it dropped the reference to the

[14] The opt-out mechanism is limited in that it is at the discretion of the CAT and its availability is based on strict criteria.
[15] Under the opt-out collective proceeding, claimants with the same, similar or related issues of law and fact are automatically included in the relevant class and bound by the judgment unless they actively opt out of the class.
[16] Becket McGrath and Trupti Reddy, "The Consumer Rights Act 2015: Full Steam Ahead for Collective Proceedings?" (2016) 9(1) G.C.L.R. 15.
[17] The old s.47B of the Competition Act 1998 was added in 2002 by s.19 of the Enterprise Act 2002, which allows the follow-on opt-in representative antitrust damages claims to be brought to the CAT.
[18] Typically the national consumer association would be designated.
[19] *Consumers Association v JJB Sport plc* [2009] CAT 2; 2009 WL 364157.
[20] Under opt-in proceedings, the representative body has to obtain the consent of the individuals to pursue their claims. Due to the low-value harm, uncertainty of litigation, and difficulty in providing evidence, some of the victims may not have sufficient economic incentive to register their claim with the representative body: see Barry J. Rodger, "The Consumer Rights Act 2015 and Collective Redress for Compensation Law Infringements in the UK: A class act?" (2015) 3 J. Antitrust Enforcement 258; Mark Furse, "Follow-on Actions in the UK: Litigating Section 47A of the Competition Act 1998" (2003) 9 Euro C.J. 79. The follow-on action was introduced in the UK in 2002. Decisions of the UK competition authorities are binding as follows: where regulators find that companies have unlawfully engaged in anti-competitive collusion or have abused their dominant position, those who believe they have suffered as a result may sue, either before the Courts or the CAT, and in such action the unlawful behaviour is taken as a given, allowing the proceedings to advance straight to the questions of (1) whether the behaviour caused loss to the claimant, and (2) if so, quantification of the award.
[21] The opt-out proceeding refers to a procedure in which the claimants with the same, similar or related issues of law and fact are automatically included in the relevant class and bound by the judgment unless they actively opt out of the class.
[22] Article 50 of the AML simply proclaims that victims could seek damages arising from the anti-competitive behaviour of business operators.
[23] Judicial Interpretation of the Supreme People's Court on Certain Issues Concerning Hearing of Civil Disputes arising from Anti-Competitive Behaviour [2012] No.5.
[24] Article 6 of the Judicial Interpretation [2012] No.5 provides that if two or more plaintiffs individually institute legal actions in the same competent courts in respect of the same "monopolistic act" (i.e., anti-competitive act), the court may consolidate the cases and hear them together. If two or more plaintiffs individually institute legal action in different competent courts in respect of the same monopolistic act, the court that opened the case later shall, within seven days of learning of the relevant court opening the case first, rule to transfer the case to the court that opened the case first. The court that accepts the transfer may consolidate the cases and hear them together. The defendant shall take the initiative at the response stage, to provide to the court that accepted the case information as to its being involved in legal actions in other courts in respect of the same act.
[25] A consultation paper for judicial interpretation 2012 on antitrust damages action was issued in 2011 by the Supreme People's Court. The details of the consultation paper 2011 are available at: *http://www.china.com.cn/news/txt/2011–04/25/content_22435852.htm* [Accessed 26 May 2020].
[26] Article 5 of the consultation paper 2011, provided that the victims of the monopolistic act (i.e. anti-competitive act) may choose to file individual litigation or to file collective action. If more than two plaintiffs individually file litigation in the same competent court in respect of the same monopolistic act, the court may consolidate the cases and hear them together. If more than two plaintiffs individually institute legal action in different competent courts in respect of the same monopolistic act, the court that opened the case later shall, within seven days of learning of the relevant court opening the case first, rule to transfer the case to the court that opened the case first.

collective action option,[27] instead highlighting the consolidation of individual litigation actions, namely by way of the joint action. This is of interest because the provisions of Judicial Interpretation 2012 were formulated in accordance with the relevant provisions of the AML, the Civil Procedure Law, and other laws[28] (which demonstrates that the relevant provisions of the Civil Procedure Law should be applied as the legal basis of the antitrust collective litigation): therefore it was evident that while the collective action had *already been available* for the pursuit of antitrust damages claims in China prior to the Judicial Interpretation, the formal issuing of the Judicial Interpretation in 2012 saw the collective action option being omitted from the final version of the Judicial Interpretation, thereby only the joint action is allowed, due to the concern of the People's Court about whether the courts had the capacity to deal with such mass harm antitrust cases. While, conceivably, an attempt could still be made to initiate collective action based on the AML and Civil Procedure Law, however based on the current system as described above, it would be difficult for the claimant to initiate collective action due to the lack of a facilitating mechanism for such claims.

The collective action mechanism provided by the Civil Procedure Law of China 2017

The Civil Procedure Law 2017 ("CPL 2017") provides a basic framework for collective litigation, which allows litigation to be brought by multiple litigants, even by an uncertain number of litigants.[29] The CPL 2017 defines the requirements for bringing joint litigation, allowing individual litigation to be brought jointly when the actions have the same cause of action or when their causes of action are of the same category, subject to the consent of competent courts.[30] In addition to the joint action, the CPL 2017 also provides for the representative action, allowing claimants to choose a representative to sue on their behalf.[31] Before formulating a collective action mechanism particularly for competition law, it is necessary to examine types of collective action provided by the CPL 2017, including the joint action and the representative action.

Joint action

Broadly speaking, *joint action*, as a basic form of collective action, is available in many jurisdictions.[32] In China, under joint action proceedings, two or more claims could be combined into a single proceeding and heard together on the grounds that claimants have the same interest or the same category of interest in the claim.[33] However, this requirement of "same interest" has meant that the joint action plays an insignificant role in dealing with mass harm claims for competition law breaches in China because, whether the act of one claimant has binding effect on other claimants in the proceedings, depends on them possessing the same interest in the claim.[34]

A good example of joint action in operation can be seen in litigation brought jointly by four tech companies in 2008 against the State General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), alleging that AQSIQ had required the four companies to use technology in which AQSIQ had a financial interest, thereby allegedly restricting competition and adversely affecting the potential development of the companies' technology.[35] Although this case was dismissed by Beijing Intermediate Court due to the expiry of the relevant limitation period under the Administrative Litigation Law,[36] it is worth noting that another four companies subsequently sued AQSIQ, alleging the same kind of behaviour with the same claim. In this case, joint action was possible because the claimants had the same interest in the claim.[37]

However, joint action has an inherent limitation in facilitating collective action for the reason that the claimant class in competition cases do not always have the same interest in the respective claims. The AML breaches usually take the form of anti-competitive agreements, administrative monopoly, abuse of dominant

[27] According to the Civil Procedure Law of China 2017, the collective action mainly includes two forms: joint action and representative action. Also see Xiaoye Wang and Jessica Su, *Competition Law in China*, 2nd edn (Wolters Kluwer Law & Business, 2014) 86.

[28] The preamble of the AML provides that to correctly try civil dispute cases arising from monopolistic conduct (i.e., anti-competitive conduct), prohibit monopolistic conduct, protect and promote fair market competition, and maintain the interests of consumers and public interest, these provisions are formulated in accordance with the relevant provisions of the Anti-Monopoly Law of the People's Republic of China, the Tort Law of the People's Republic of China, the Contract Law of the People's Republic of China, the Civil Procedure Law of the People's Republic of China, and other laws.

[29] Article 54 of the CPL 2012 of China provides that: "Where the object of action is of the same category and the persons comprising one of the parties is large but uncertain in number at the commencement of the action, the People's Court may issue a public notice, stating the particulars and claims of the case and informing those entitled to participate in the action to register their rights with the People's Court within a fixed period of time."

[30] Article 52 CPL 2017 of China provides that: "Where one party or both parties consist of two or more persons, their object of action being the same or of the same category and the People's Court considers that, with the consent of the parties, the action can be tried combined, it is a joint action."

[31] Article 53 CPL 2017.

[32] For example, the UK, Germany, and France. Also see Astrid Stadler, "Collective Action as an Efficient Means For the Enforcement of European Competition Law" in Jürgen Basedow (ed.), *Private Enforcement of EC Competition Law* (Kluwer Law International, 2007) 195–213.

[33] Article 52 of the CPL 2017.

[34] See fn.33..

[35] *Beijing Zhaoxin Information Technology Ltd, Eastern Huike Anti-Counterfeiting Technology Ltd, Zhongshe Wang Meng Information Security Technology Ltd and Heng Xin Digital Technology Ltd v State General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ)* [2008] Beijing No.1 Intermediate People's Court, No.1340. On 1 August 2008, the four technical companies filed litigation against the AQSIQ for administrative monopoly by forcing them to use the AQSIQ's digital supervision network. In September 2008, the court dismissed the case because the two-year statutory limitation period had expired, according to art.58 of the Administrative Litigation Law.

[36] Under art.41 of the Supreme People's Court Judicial Interpretation [2000] No.8 regarding Administration Litigation Law, the limitation period for first hearing in court is two years since the claimant knows the illegal administrative behaviour.

[37] Following the initial litigation jointly brought by the initial four companies, another four companies, Shanghai Zhongwang Network Ltd, Jiangsu Nanda Digital Technical Co, Shenzhen Beinuo Communication Technical Ltd and Guiyang Gaoxin Huameilong Technical Ltd, filed separate litigation against the AQSIQ based on similar facts and claim. These actions met the same fate as the first four companies' action, namely were dismissed by the court again on statute of limitation grounds.

position and illegal concentration of undertakings. These forms of illegal conduct, which restrict, prevent or distort competition, tend to undermine the interests of multiple groups of natural or legal persons, whether business operators or consumers.[38] In a price-fixing cartel, for example, victims can comprise not only direct purchasers, but also indirect purchasers, as often the price-fixing causes the passing on of overcharging.[39]

Similarly, concentration of undertakings (i.e. mergers), numbers of affected persons and businesses can be large in scale. Take an illegal concentration as an example: where a concentration of undertakings occurs in violation of the AML, the negative effect is not only to reduce the social welfare of society as a whole,[40] but also the merger may harm large groups of persons and businesses in a diverse range of ways.[41] Hence, in concentration cases, if a large number of diverse victims bring individual antitrust damages claims, which are then joined by order of the competent courts, the court will face complex and dysfunctional joint litigation because the victims will have different interests in the claim, so the effect of one victim's act in the course of the proceedings cannot be binding on the rest of victims. Therefore, although a single judgment may ultimately be delivered, all the plaintiffs' claims must be treated separately, and awards must be made individually.

The consolidation of multiple claims is also available in the UK,[42] which has confronted similar difficulties in dealing with competition law collective actions. In the *Emerald Supplies Ltd* case,[43] collective action was brought on behalf of Emerald Supplies Ltd and Southern Glasshouse Produce against British Airway's allegedly anti-competitive behaviour. However, the High Court rejected the collective element of the action, holding that the claimants, as direct and indirect purchasers from British Airways, did not have the same interests in the claim. Taking the same stance on this point as the High Court, the Court of Appeal dismissed the claimants' appeal seeking to bring a collective action before the court.

This case illustrates an inherent limitation of joint action in dealing with competition law mass harm claims: a "legal link" between the claimants is required by the court in order for the court to join a set of claims brought by several victims against the same defendant. Rule 19.6 of the Civil Procedure Rules of the UK (CPR) requires such legal link to be the same interest in the claim; and the CPL 2017 of China similarly requires that the legal link has to be either the same interest or fall within the same category of interest, and further provides that one claimant's act has binding effect on the other claimants only if they have same interest in the claim.[44] This set of requirements greatly reduces the chance to utilise joint action in competition law mass harm claims in China. As a result, the joint action has not proven attractive to litigants seeking to pursue competition law mass harm claims in China.

Representative action

Another type of collective proceedings provided by the CPL 2017 is the *representative action*, whereby "when the number of litigants seeking to bring collective action is more than 10 natural or legal persons, these litigants could nominate a representative from among themselves to take the action forward".[45]

Although representative action has been in place as a form of collective redress mechanism for more than two decades in China, it has hardly been used in competition law claims. Some attempts have been made by victims to bring representative action against some giant monopolies. In 2009, Tangshan Renren Information Service Co Ltd (Renren) brought a litigation against Baidu

[38] Articles 2 and 3 of the AML 2007.
[39] The direct purchasers could pass part or all of the overcharge on to their own consumers as downstream prices. In such a situation, the end consumer, as the indirect purchaser, also becomes victim to the price-fixing cartel.
[40] Article 27 of the AML 2007.
[41] For example, the merger may adversely affect the interests of many large groups such as shareholders; or discarded employees no longer required by the merging parties; or suppliers who now find themselves more reliant on the merged entity's business than was the case previously; or customers, who now have less choice of supply following the merger, etc. Looking at it purely from a market point of view, the first harmed group are the parties who contract with the concentrated undertaking, i.e. upstream inputs or services suppliers to the concentration, as well as downstream purchasers of the concentration's products or services: all may well be subject to unfair prices offered by the concentrated entity due to their reduced bargaining power following the concentration. The second group are the concentration's competitors in the relevant market: the increased market power arising from concentration can have the effect of squeezing competitors out of the market, resulting in either the closure of competitors or their withdrawal from the relevant market entirely. The third group are the concentration's potential competitors in the relevant market. Due to the enhanced market power of the concentrating undertakings, capital, technical and scale barriers can now arise to prevent potential competitors from entering the relevant market. The market power arising from the concentration may lead to high market entry barriers, which shall hinder potential operators from entering the market. Also see Qianlan Wu, "China's Merger Regulation: In Search of Theories of Harm" (2013) 34 (12) E.C.L.R. 634–641.
[42] UK Civil Procedure Rules 1998 r.19.6 provides that where more than one person has the same interest in a claim:
"(a) the claim may be begun; or
(b) the court may order that the claim be continued, by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest."
[43] *Emerald Supplies Ltd v British Airways Plc* [2009] EWHC 741 (Ch), [2010] EWCA Civ 1284.
[44] Article 52 of the CPL 2017.
[45] Article 53 of the CPL 2017; art.75 of the Judicial Interpretation of the Supreme People's Court on application of Civil Procedure Law of China [2015] No.5 which came into force in February 2015: "Where the litigants cannot reach agreement on the appointment of the representative, the People's Court may nominate a representative and then negotiate with the litigants concerned; if the negotiation fails, the court may appoint a representative from among the litigants who join the lawsuit, as provided by art.61 of Opinions of the Supreme People's Court on Some Issues Concerning the Application of the Civil Procedure Law which was issued in1992."

Network Technology Co Ltd (Baidu), an internet search engine giant in China, for its anti-competitive bid ranking system.[46]

The case is not a collective action. However, more importantly, the response from the other website operators was overwhelming since they alleged that Baidu's bid ranking behaviour also harmed their interests. In response to Baidu's bid ranking system, the Internet Antitrust Union, consisting of more than 30 lawyers, was organised by Fengchang Wang, the CEO of Fayi.com.cn, which alleged it had been blocked by Baidu's bid ranking system.[47] The Union assembled about 50 website operators alleging harm arising from Baidu's bid ranking system, aiming to file a representative collective litigation.

However, ultimately the Union did not take further action to bring any collective proceedings as Baidu removed the blockage on the websites, and made significant improvements to its bid ranking system. Baidu closed its old bid ranking system, replacing it with a new system to tackle the problem of mingling natural search results with paid research results.[48] The website operators accepted Baidu's corrective behaviour.

Although Baidu corrected its anti-competitive behaviour, the alleged damage caused to website operators was not compensated through an effective mechanism. Therefore, a reflection on the institutional reasons for the lack of representative action in the field of competition law is helpful to enhance the collective action mechanism in China so as to achieve full compensation.

It is accepted that representative action can provide an efficient means for consumers and SMEs seeking to obtain compensation in many jurisdictions, for example in the UK, Australia and the US.[49] But in China the current representative action mechanism has failed to provide enough incentives for small-claim consumers and SMEs to bring litigation against major monopolies that proliferate in China. It is observed that, in addition to low success rates, time-consuming and expensive litigation costs are major concerns when considering litigation.[50] In particular, for SMEs, obstacles that have discouraged SMEs from suing giant companies include, for example, fear of losing a business partner; the potential application of the passing-on defence by defendants[51]; and limited human and financial resources.[52] This has led to very few representative actions being brought by claimants for competition law infringements in China.

Despite being a more efficient way to litigate a mass claim than a joined action in general, the representative action provided by art.53 of the CPL 2017 has proved not effective in dealing with competition law small mass claims. This is partly due to the underdevelopment of Chinese legislation with respect to the antitrust collective action. The representative action was originally designed to enhance litigation economy by consolidating individual litigation, and to reduce litigation costs and avoid disparity of judgments.[53] At the early stage of its application, the representative action involved not so many claimants, and also did not present the level of complexity that the recent antitrust mass harm claims have presented.

In practice, the use of representative action has not lived up to expectations in China. Even in a simple representative action, where victims could be identified, the courts still tend to deal with the cases separately. Even in some courts, in order to avoid the trouble arising from collective actions, representative actions have not been welcomed by the courts in antitrust cases, with the court finding other reasons for dismissing the collective actions.[54]

Moreover, administration of the courts practices and resource issues, such as the pursuit of concluded cases and unreasonable distribution of resources, has resulted in the courts preferring to hear cases separately, despite the representative action having been available for many years in China.

The opt-in proceedings

In addition to the general representative action, the CPL 2017 also provides opt-in representative proceedings,[55] which deal with the situation where the number of

[46] *Tangshan Renren Information Service Co Ltd v Beijing Baidu Network Technology Co Ltd* [2009] Beijing Intermediate People's Court No.1, Yi Zhong Min Chu Zi No.845, 18 December 2009. In 2010 the appeal to Beijing High Court was upheld by Beijing High People's Court in *Tangshan Renren Information Service Co Ltd v Beijing Baidu Network Technology Co Ltd* [2010] Gao Min Zhong Zi No.489, 9 July 2010. In this case, Baidu provides search engines for internet users to use to search for information on the internet. The findings of any search would contain the links to the websites relevant to the search information. Baidu gave rankings of the websites providing the relevant information, and charged the websites for better rankings in the search results. Baidu displayed its search results through two separate systems: (1) a natural search, which ranks the search results based on search terms and web content; and (2) a bidding search, which charges the companies that want to move their websites up to the top of the search results. To increase click-through rates of its website, Renren entered into a bid ranking agreement with Baidu between March 2008 to September 2008. Initially, Renren paid significant sums to Baidu. Then in May 2008, Renren spent less on the bid ranking, subsequently finding that the ranking of its websites had dramatically reduced, and fewer webpages could be found through Baidu. In contrast, Renren could find 6,690 pages of its website through Google, but only four of its website pages via Baidu.

[47] It was reported that the Internet Antitrust Union would file collective litigation against Baidu: *http://www.ampoc.org/Info/Article2908.html* [Accessed 26 May 2020].

[48] Xiaohong Cui, "One Hundred of Website Operators Gave Up Filing Collective Action Against Baidu" (2009) No.12 New Finance: *http://finance.ifeng.com/news/tech/20091202/1533432.shtml* [Accessed 26 May 2020].

[49] Rachel Burgess, "SMEs and Private Enforcement of Competition Law: Achieving Redress"(2016) 3 G.C.L.R. 77–81.

[50] See above; see also Barry J. Rodger, "The Consumer Rights Act 2015 and Collective Redress for Competition Law Infringements in the UK: A class act?" (2015) 3 *Journal of Antitrust Enforcement* 258–286.

[51] Where SMEs, as the direct customers of the large company, passed on full or part of an illegal overcharge to their own customers, the large company may invoke the passing-on of overcharges as a defence against the SME's antitrust damages claim.

[52] Pranvera Kellezi, Bruce Kilpatrick and Pierre Kobel (eds), *Antitrust for Small and Medium Size Undertakings and Image Protection from Non-Competitors* (Springer, 2014) 24.

[53] Fan Yu, *The Research of the Issues of Class Action in China* (1st edn, Beijing University Press, 2005).

[54] For example, in the *AQSIQ* case, the multiple claims against AQSIQ were dismissed by the court on statute of limitation grounds.

[55] Article 54 of CPL 2017 provides that where the object of action is of the same category and the persons comprising one of the parties is large but uncertain in number at the commencement of the action, the People's Court may issue a public notice, stating the particulars and claims of the case and informing those entitled to participate in the action to register their rights with the People's Court within a fixed period of time. Those who have registered their rights with the court may elect representatives from

plaintiffs or defendants is more than 10 persons[56] and not all are identified at the beginning of litigation. In such a scenario, the competent court may issue a notice to the public, specifying the circumstances of the suit and instructing all persons whose interests are similarly affected to inform those qualified victims to participate in the litigation and to invite them to register their rights in the court within the specified period.[57] Potential participants who seek to register with the court will be required to demonstrate to the court that their interests are similarly affected and that they have suffered damage as a result.[58]

Under the opt-in proceedings, litigants are identifiable, but the number of litigants is not fixed at the time of the action being initiated.[59] The litigants may opt in by two means: first by bringing a separate suit[60] and, secondly, by registering their claims with the court before the deadline for opting-in specified in the court's notice.[61] The legislative dilemma of opt-in/opt-out proceedings only arises from this type of representative action where litigants are identifiable, but the number is not fixed at the beginning of the litigation.

The opt-in proceedings have been used in very few AML claims in China due to its inherent disadvantages. First, the lack of litigation culture in Chinese legal tradition, combined with the fact that each victim tends to suffer from low-value damage in competition cases, make victims reluctant to file individual litigation or to actively register with the court. In some cases, since victims are not well informed about the claim, and even have no idea about the claim, they are not able to make the decision as to whether they would like to join the class.

Secondly, allowing victims who did not register their rights with the court to unconditionally gain from the court's decision would lead to a "free rider" problem.[62] The unregistered victims could benefit from the decision without bearing litigation costs, which would give rise to negative effects on the registered victim, and further discourage potential victims from filing representative actions for anti-competitive behaviour.

Thirdly, the logic underlying the opt-in proceedings is not compatible with the achievement of full compensation pursued by the AML damages mechanism. For hundreds and thousands of consumers and SMEs harmed by anti-competitive behaviour, each suffering small amounts of damage, it is difficult to imagine that the victims are fully and properly compensated through an action in which everyone has to actively opt in.

Despite its limitations, opt-in proceedings are the mainstream mechanism that most countries have adopted in their collective action mechanisms,[63] and the EU Commission also strongly recommended opt-in proceedings in its 2008 white paper.[64] The Commission, in its Staff Working Paper, clearly identified the limitations for opt-out proceedings' attractiveness in EU Member States, as follows:

> "However, the analysis in the fields of competition suggests that an opt-in collective action should be preferred to an opt-out collective action in which a person can bring an action on behalf of a class of unidentified persons. Combined with other features such opt-out actions have in other jurisdictions been perceived to lead to excesses. In particular, the agent seeks his own interests in pursuing the claim (principal/agent problem). Opt-in mechanisms are more similar to traditional litigation and would therefore be more easily implemented at national level."[65]

It has been 10 years since the publication of the 2008 white paper. The Commission still prefers opt-in proceedings in its recently published recommendation (2013) relating to European mechanism for collective redress.[66] In addition to the reason expressed in the 2008 white paper, the EU Commission has always struggled with the acceptability of the US-style class action, which is assumed to lead to excessive unmeritorious litigation. It is recognised by the Commission that the opt-out

among themselves to proceed with the litigation. If the election fails its purpose, such representatives may be determined by the court through consultation with those who have registered their rights with the court. The judgments or written orders rendered by the court shall be valid for all those who have registered their rights with the court. Such judgment or written orders shall apply to those who have not registered their rights but have instituted legal proceeding during the period of limitation of the action.

[56] Article 59 of Supreme People's Court Opinion [1992] No.22.

[57] Article 54 of CPL 2017 provides that: "Where the object of action is of the same category and the persons comprising one of the parties is large but uncertain in number at the commencement of the action, the Court may issue a public notice, stating the particulars claims of the case and informing those entitled to participate in the action to register their rights with the court within a fixed period of time. Those who have registered their rights with the Court may select representatives from among themselves to proceed with the litigation."

[58] Article 64 of Supreme People's Court Opinion [1992] No.22, adopted by the 528th Judicial Committee of the Supreme People's Court on 14 July 1992.

[59] Article 54 of the CPL 2017, see fn.57.

[60] If a victim, who has not been registered as party of the representative action, files a lawsuit within the limitation of action period, then the court shall affirm his claim and rule to apply to that judgment it has already rendered in the representative action.

[61] The claimants who already registered their claims in the court have the right to select their representative, and the acts of the representative are binding on the registered litigants. The judgment of the court shall be enforced within the scope of registered claimants.

[62] Yang Hongjuan, "Discussion on the Perfection of the System of Antitrust Class Action", (2011), available at: *http://sjk15.e-library.com.cn/D/Thesis_Y1992779.aspx* [accessed on 26 May 2020].

[63] Zygimantas Juska, "Obstacles in European Competition Law Enforcement: A Potential Solution from Collective Redress", (2014) 7(1) *European Journal of Legal Studies* 125, points out that only few countries (the UK, Portugal, Denmark and the Netherlands) have adopted opt-out proceedings. In the UK, even though the opt-out proceeding has been adopted in recent cases, the opt-in proceeding, as the traditional collective procedure, is still available and is widely used for mass harm claims.

[64] Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules COM (2008) Final SEC (2008) 404–406. In the white paper, the Commission proposes two mechanisms for collective actions: one is representative actions, another is the opt-in collective actions.

[65] Commission Staff Working Paper accompanying the White Paper on Damages Actions for Breach of EC Antitrust Rules COM (2008) 165 Final SEC (2008) 405, para.21.

[66] Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for Collective Redress Mechanisms in the Member States for injunctions against and claims on damages caused by violations of EU rights [2013] OJ L 201/26, para.21.

proceeding is open to abuse in antitrust litigation, and wishes to avoid moving towards the US's aggressive litigation culture.[67]

Under the opt-in model, victims have to expressly choose to join in the collective litigation to claim their damages. The freedom and rights of the parties could be guaranteed by the opt-in model. On the one hand, it enables the court to manage the case in a more efficient manner, and to easily evaluate the admissibility of the case and its merits. On the other hand, the rights of defendants could be protected, as the defendant gets to know who his opponents are.[68] More importantly, the opt-in model is proposed by the Commission in order to avoid the risk of unmeritorious actions,[69] which is an overwhelmingly criticised aspect of the US-style class action.[70]

However, despite these positive aspects, disadvantages of the opt-in model have arisen in the context of the encouragement of the collective antitrust actions in EU jurisdictions. It is worth noting that the application of opt-out proceedings is exceptionally allowed by the Commission, under the condition that there is sufficient supervision by the court and that the use of such a model is justifiable in line with the sound administration of justice.[71]

Since opt-in proceedings require the express consent of victims to take part in the litigation, considering the time and costs spent on the litigation, victims suffering low value damages lack incentive to participate in the litigation: this almost inevitably leads to a low participation rate.[72] Thus, the goal of full compensation and deterrence effect are not effectively achieved. This limitation has been demonstrated in the previous opt-in representative case in the UK, the *JJB Sport* case.[73] In this case, the UK Consumer Association brought opt-in litigation on behalf of consumers who overpaid for football shirts due to price-fixing. Although the Consumer Association made every effort to collect claims, only 130 consumers expressly consented to join the litigation, which was a very low participation rate compared with the number of consumers who were harmed by the price-fixing behaviour. The Consumer Association, after this case, declared that they would not, initiate further collective actions based on the opt-in proceedings.[74]

Under the opt-in proceedings, because of the low participation rate, in such a large-scale and low-value antitrust damages claim, representative bodies, like consumer associations, tend to confront the deficiency of financial resources,[75] which can contribute to the eventual failure of collective action.

Since there is less of a litigation culture in China than most European countries (for example, the UK), victims are more reluctant to actively bring antitrust damages claims before the courts. Therefore, the opt-in model is not an effective proceeding to enhance access to justice, nor to achieve full compensation in small mass claims arising from anti-competitive behaviour in China.

The public interest related representative action

Among the amendments in 2012 to the Civil Procedure Law of China, the most remarkable change was the introduction of the public interest representative action to cater for damage caused by environmental pollution and mass consumers damage. The authorities or organisations prescribed by law may bring litigation[76] where victims are unidentifiable.

Specifically, in so far as conduct causing harm to large group of consumers is concerned, the amendment of the Consumer Protection Law 2013 provided that the Consumers Association of China and the consumers associations of each province, autonomous region and directly-controlled municipality, may bring claims as representative actions before the court.[77] In addition, a recent judicial interpretation (No.10 of 2016) concerning consumer public interest representation action, further provided that agencies and organisations designated by law could bring representative actions on behalf of consumers.[78]

As mentioned above, anti-competitive behaviour tends to harm vast numbers of consumers, and sometimes even harms the public interest. Against such anti-competitive behaviour, representative action could be brought by

[67] EU Commission Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region, Towards a European Horizontal Framework for Collective Redress (COM 2013 401/12), para.3.4.
[68] Elisabetta Silvestri, "Towards a Common Framework of Collective Redress in European?: An Update on the Latest Initiatives of the European Commission" (2013) 1(1) *Russian Law Journal* 46–56.
[69] EU Commission Communication, Towards a European Horizontal Framework for Collective Redress (COM 2013 401/12), para.3.4.
[70] For the criticism on the US class action, see Barry J. Rodger, "The Consumer Rights Act 2015 and Collective Redress for Competition Law Infringements in the UK: A class act?" (2015) 3 *Journal of Antitrust Enforcement* 258–286; Philipp Eckel, "A Common Approach to Collective Redress in Antitrust and Unfair Competition—A Comparison of the EU, Germany and the UK" (2015) 46(8) IIC 920–939; Zygimantas Juska, "The Future of Collective Antitrust Redress: Is Something New under the Sun?" (2015) 8(1) G.C.L.R. 14–24.
[71] Commission Recommendation 2013/396/EU of 11 June 2013 on Common Principles for Collective Redress Mechanisms in the Member States for injunctions against and claims on damages caused by violations of EU rights [2013] OJ L 201/26, para.21.
[72] Barry J. Rodger, "The Consumer Rights Act 2015 and Collective Redress for Competition Law Infringements in the UK: A class act?" (2015) 3 *Journal of Antitrust Enforcement* 258–286; also see M. Hviid and J. Peysner, "Comparing Economic Incentives Across EU Member States" in Rodger (ed.) (2014) ch.6.
[73] *Consumers Association v JJB Sports Plc* [2009] CAT, Case No.1078/7/9/07.
[74] Zygimantas Juska, "Obstacles in European Competition Law Enforcement: A Potential Solution from Collective Redress" (2014) 7(1) *European Journal of Legal Studies* 125–153.
[75] For example, in *JJB Sports* case, the Consumers' Association confronted difficulties in recovering their costs.
[76] Article 55 of the CPL 2017; Judicial Interpretation of the Supreme People's Court on Certain Issues Concerning Consumer Public Interest Litigation [2016] No.10. Such organisations could be, for example, the consumers' association, or the People's Procuratorate, etc.
[77] Article 47 Consumers Protection Law of China 2013, which added that for litigating in respect of behaviour harming large numbers of consumers, the Consumer Association could bring litigation before the courts.
[78] Article 1 of Judicial Interpretation of the Supreme People's Court on Certain Issues Concerning Consumer Public Interest Litigation [2016] no.10.

consumer associations. However, as to SME victims, the law[79] remains silent as to which entity could bring claims as representative on behalf of SMEs harmed by competition law infringements.

The public interest test

It is worth noting that there exists a public interest test in the public interest representative action that is brought under art.55 CPL 2017.[80] In other words, damage to the public interest is a necessary condition for bringing representative action on behalf of consumers under this action.

Judicial Interpretation [2016] No.10[81] further clarified the public interest test for the purpose of representative action on behalf of consumers. It regards harm to the public interest as a necessary condition for bringing a public interest consumers representative action. Behaviour harming the public interest in this context is defined to include harming unspecified number of consumers, or threatening the safety, lives and property of consumers.

In the context of competition law breaches, where unspecified number of consumers have been harmed by anti-competitive behaviour, the public interest test has been triggered. In such a situation, the consumer association is the only representative entity designated by law to bring this consumer public interest action before the court. Although, in practice, the consumer association has not brought any representative action against anti-competitive behaviour to date, Judicial Interpretation [2016] No.10 would provide an institutional foundation for such future consumer associations' action to be taken on behalf of direct and indirect consumers harmed by anti-competitive behaviour. Therefore, the public interest test has implicitly provided an underlying link to enable the taking of collective representative action in the name of the public interest to protect consumers against competition infringements.

Limited reliefs

However, the public interest action suffers an important limitation: the public interest consumer representative action lacks a damages remedy: under Judicial Interpretation [2016] No.10, the China Consumers Association can only seek the cessation of illegal behaviour and elimination of risk, but *not* compensation for damage. This represents a major weakness in this action. Whereas it is assumed that the goal of an antitrust damages claim is to fully compensate the harm caused to victims, and the purpose of introducing collective redress into the antitrust damages system was to further facilitate the antitrust damages action in mass harm situations, so as to achieve *full compensation*,[82] the absence of damages relief from this consumer public interest representative action mechanism has made achieving the goal of full compensation difficult to realise. Therefore, the public interest consumer representative action's omission to grant consumers the right to antitrust damages, needs to be further enhanced in order to achieve *full compensation* in these antitrust actions, by recognising the *right to antitrust damages* in the context of public interest consumer representative actions.

The UK's recent developments in antitrust collective redress

Background: the EU's recommendation on collective redress

Since 2005, the EU Commission has attempted to initiate a collective redress framework in the field of competition and consumer law, to harmonise the national rules concerning collective action mechanisms in the 2005 Green Paper, by simply raising a question as to whether and how a special procedure should be formulated to facilitate consumer collective actions.[83] In the 2008 white paper, recognising the necessity of collective redress in the field of competition law, the EU Commission further suggested two types of collective mechanisms that are complementary: the representative action and the opt-in collective action.[84]

Despite attempts in the Green Paper 2005 and the 2008 white paper, the development of collective redress in the field of competition law within the EU has not lived up to the expectation. The two documents failed to provide for specific measures to facilitate collective redress, so the Commission further carried out a consultation specifically for collective redress in 2011, which was "Towards a coherent Approach to Collective Redress".[85] The consultation took a horizontal approach to dealing with collective redress, covering a wide range of industries, and was not just limited to antitrust claims as initiatives of the Commission had been.

In 2012, the European Parliament also made significant contribution to collective redress, by adopting a resolution titled "Towards a Coherent European Approach to Collective Redress",[86] which supported the main views expressed in the public consultation of the Commission.

[79] Article 55 of the CPL 2017.
[80] Article 55 of the CPL 2017.
[81] Judicial Interpretation of the Supreme People's Court on Certain Issues Concerning Consumer Public Interest Litigation [2016] No.10.
[82] The full compensation principle requires not only all victims, including direct and indirect purchasers, obtain compensation, but also all the losses, including at least actual loss, loss of profit and interest, be recovered to put the victim in the situation as if the infringement had not occurred.
[83] Green Paper on Damages Actions for Breach of the EC Antitrust Rules COM (2005) 672. A simple question has been raised on the collective redress in the green paper, and the question is whether special procedures should be available for bringing collective actions and protecting consumer interests? If so, how could such procedures be framed?
[84] White Paper on Damages Actions for Breach of the EC Antitrust Rules COM (2008) 165 final, 4.
[85] Commission staff working paper—Public Consultation: Towards a Coherent European Approach to Collective Redress SEC (2011) 173.
[86] European Parliament Resolution 'Towards a Coherent European Approach to Collective Redress' of 2 February 2012 (2011/2089(INI)).

In 2013, the long-awaited recommendation on collective redress was ultimately published by the Commission.[87] The main purpose of the recommendation was to ensure the access to justice and full compensation in mass harm situations, while seeking to avoid the abuse of litigation by adopting certain safeguards.[88] The recommendation put forward some common basic and specific principles that the Member States are encouraged to apply in their national rules concerning collective redress. Moreover, it further clarified the definition of the important terms, and application scope.[89] Guidance on key issues, for example, on litigation funding, representative entities and admissibility,[90] was provided by the recommendation.

In the development of collective redress at the EU level, a noteworthy issue is the Commission's attitude towards opt-out collective actions. In its 2008 white paper, in addition to representative action, the Commission only recognised the opt-in[91]collective action, excluding the opt-out collective action.[92] Whereas, in the 2013 recommendation,[93] the Commission exceptionally allows the opt-out[94] collective action to be adopted under the condition of sound administration of justice. It is observed that the Commission has always taken a cautious approach to opt-out collective actions, partly due to its aversion to US-style abusive class action.

Importantly, it is noted that the Commission's recommendation on collective redress reform was not included in the directive[95] on antitrust damages adopted in 2014. Instead, the Commission has taken the soft law approach to collective address reform, which does not legally require the Member States to implement. This is partly due to significant differences among the Member States in terms of key principles governing collective redress.[96] Therefore, the Member States could choose a collective redress mechanism that fit well into their own legal culture and traditions, particularly on the issue of opt-in/opt-out options. For example, the reforms in the UK, although generally complying with the Commission, has rendered the UK a leader in adopting the limited opt-out collective action in Europe.

The Assessment of the UK's limited opt-out collective action

A brief introduction of the CRA 2015 reforms in terms of collective redress

In response to the 2013 EU recommendation[97] on collective redress, the UK has made significant changes to its collective redress mechanism, particularly for competition law claims, by amending the CRA in 2015.[98] The changes introduced by the CRA 2015 were intended to sweepingly reform the private enforcement of competition law in the UK,[99] which is specifically reflected in the changes to collective action mechanism for competition infringements.

Specifically, Sch.8 and s.81 of the CRA 2015[100] amended s.47B of the Competition Act 1998 (CA 1998)[101] and Enterprise Act 2001 in terms of collective proceedings. Among these changes,[102] of particular relevance to this article are the expansion of the CAT's power to hearing not only follow-on, but also, stand-alone collective actions, and opt-in/opt-out collective actions. Moreover, the CAT has been granted a wide range of discretion over the decisions as to whether the action can be heard in collective proceedings, and further whether a proceeding is suitable for opt-in or opt-out.

It is noteworthy that, in order to avoid unmeritorious litigation, a series of safeguards have been introduced to limit the application of new collective action mechanisms, especially the opt-out proceedings. These limitations have been demonstrated in the discretion of the CAT as to class certification, which involves the assessment by the CAT, for example, as to whether the antitrust damages claim is suitable to be brought in collective proceedings, and whether the class representative is qualified under certain criteria.

In order to better implement the CRA 2015, the CAT has issued its own complementary rules, including the Competition Appeal Tribunal Rules 2015 (2015 CAT Rules) and the Competition Appeal Tribunal Guide to Proceedings 2015 (the Guidance). Importantly, these two documents have provided specific criteria for CAT's

[87] Commission Recommendation 2013/396/EU of 11 June 2013 on Common Principles for Collective Redress Mechanisms in the Member States for injunctions against and claims on damages caused by violations of EU rights [2013] OJ L 201/26.
[88] See Commission Recommendation 2013/396/EU, para.1.
[89] See Commission Recommendation 2013/396/EU, Part. II.
[90] See Commission Recommendation 2013/396/EU, paras 4, 5, 6, 7, 8, 9, 14, 15 and 16.
[91] The opt-in mechanism allows the victims to actively choose to join in the represented class. In such a situation, the claimant party is a closed and identified group, and the judgment is only binding on those who opt in, while the others who do not opt in could choose, if they wish, to file individual damages actions.
[92] White Paper on Damages Actions for Breach of the EC Antitrust Rules COM (2008) 165 Final, para.2.1.
[93] Commission Recommendation 2013/396/EU of 11 June 2013 on Common Principles for Collective Redress Mechanisms in the Member States for injunctions against and claims on damages caused by violations of EU rights [2013] OJ L 201/26, para.21.
[94] The opt-out mechanism allows those harmed by the same or similar infringement to join in the group and to be bound by the judgment, unless they actively choose to opt out of the group.
[95] Directive 2014/104, OJ L 349/1.
[96] The differences among the Member States concerning collective redress mechanisms exist in the areas of the choice of opt-in/opt-out procedures; litigation funding mechanisms; legal standing in the collective proceedings; types of available remedies; and identification of class. See also Roger Gamble, "Not a Class Act (yet): European Moves to Softly Towards Collective Redress" (2016) 37(1) E.C.L.R. 14–24.
[97] Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for collective redress mechanisms in the Member States for injunctions against and claims on damages caused by violations of EU rights [2013] OJ L 201/26.
[98] The Consumer Rights Act 2015 came into force on 1 October 2015. It has made a number of changes to the legal mechanisms on consumer protection.
[99] Becket McGrath and Trupti Reddy, "The Consumer Rights Act 2015: Full Steam Ahead for Collective Proceedings?" (2016) 9(1) G.C.L.R. 15–24.
[100] s.81 and Sch.8 of the CRA 2015 are provided specifically for the competition law provisions.
[101] The old s.47B of the CA 1998 was introduced by the Enterprise Act 2002. It was only limited to the follow-on and opt-in collective actions.
[102] For example, the CPO to be issued by the CAT on funding litigation, the qualification of the class action representative, and the fast-track procedure.

assessment as to the certification process,[103] for example the suitability of collective proceedings,[104] and the choice about opt-in or opt-out proceedings.[105]

In theory, the new collective redress mechanism introduced by the CRA 2015, implemented under the 2015 CAT Rules and the Guidance, could ensure that those who suffered scattered and low-value damages as a result of competition law infringements—in particular, individual consumers and SMEs, were fully and properly compensated for the damage suffered.[106]

However, although it is almost three years since the coming into force of the CRA 2015, it remains unclear as to the practical impacts of the new collective action mechanism on antitrust damages claims in the UK. The following part will examine the impact of the UK's limited opt-out proceedings based on relevant cases, so as to provide some lessons for the improvement of representative action for competition claims under the AML.

The assessment of application of limited opt-out collective proceedings in the UK

Prior to the reform of CRA 2015 in terms of collective redress for competition claims, the opt-in was the only procedural option for representative action, under s.47B of the CA 1998. Under the old s.47B of the CA 1998, consumer representative action was allowed to be brought before the CAT, by a specified representative entity, on behalf of two or more harmed consumers who expressly consented to join the litigation class,[107] which was obviously an opt-in proceeding.

There has been only one such representative action brought before the CAT under s.47B of the CA 1998, which is the infamous *JJB Sports* case.[108] The UK Consumer Association was the only designated specified representative entity under old s.47B. This case has been criticised for its limited number of claimants joining the class, only 130 consumers as the party of claimants. This low number of claimants means that the full compensation pursued by antitrust damages action is far from being achieved. It is observed that the low participation rate has arisen partly from the low incentive provided by opt-in proceedings.[109]

The negative side of this case triggered the advancement of the case to adopt opt-out collective proceedings by the Office of Fair Trading (OFT),[110] and the Department for Business, Innovation and Skills[111] in the UK. Ultimately, the proposal of opt-out proceeding was codified into the CRA 2015 by adding para.11 into s.47 B of the CA 1998.[112]

Although the CRA 2015 provides for an opt-out proceedings option, in addition to opt-in proceedings, and the class representative could choose between these two options when initiating collective proceedings, the decision as to whether the litigation is processed under opt-in or opt-out proceedings is made by the CAT, and subject to a strict verification process in which the CAT has laid down stringent requirements[113] for the application of opt-out proceedings. It is assumed that the opt-in proceedings are still the CAT's preferred option,[114] probably because the opt-out proceeding is a new regime the effect of which remains unclear.

The CAT has been granted a wide range of discretion in determining the issue of opt-in/opt-out option. It is generally set out by the CAT Rule 2015 that the CAT needs to take into account all matters it thinks fit.[115] Furthermore, the CAT Rules 2015 stressed some factors that the CAT needs to consider, for example, the strength of the claims, the estimated amount of the damages that the individual claimants may recover, the size and nature of the class, the possibility of determining whether any person is eligible as the member of class, and the suitability of aggregate award of antitrust damages.[116]

Since the coming into force of the CRA 2015, there have been two cases in which the opt-out collective proceedings have been applied. The first opt-out collective proceeding was filed by Dorothy Gibson, as the representative of harmed consumers, against Pride Mobility Products, for its resale price maintenance behaviour, which has been proved as anti-competitive by the OFT decision. The scope of the class is the potentially overcharged customers. The claimant applied for a collective proceeding order (CPO) on the opt-out basis.[117]

Assessing the suitability of opt-out proceedings in this case, the CAT further clarified regarding the criteria provided in r.79(3) of the CAT Rules 2015. It stressed that taking into account the strength of claims does not require a full merits assessment, but rather a high-level

[103] rr.76–78 of the CAT Rules 2015.
[104] r.78(1) of the CAT Rules 2015.
[105] r.78(2) of the CAT Rules 2015.
[106] Becket McGrath and Trupti Reddy, "The Consumer Rights Act 2015: Full Steam Ahead for Collective Proceedings?" (2016) 9(1) G.C.L.R. 15–24.
[107] The old s.47B (1) and (4) of the CA 1998.
[108] *Consumers Association v JJB Sport plc* [2009] CAT 2; 2009 WL 364157.
[109] Barry J. Rodger, "The Consumer Rights Act 2015 and Collective Redress for Competition Law Infringements in the UK: A class act?" (2015) 3 *Journal of Antitrust Enforcement* 258–286.
[110] In 2007, the OFT recommended the introduction of opt-out proceedings especially for competition claims.
[111] In 2012, the BIS has proposed to adopt opt-out representative collective action for consumers and businesses.
[112] Sch.8 of the Consumer Rights Act 2015.
[113] r.79(3) of the CAT Rules 2015.
[114] Becket McGrath and Trupti Reddy, "The Consumer Rights Act 2015: Full Steam Ahead for Collective Proceedings?" (2016) 9(1) G.C.L.R. 15–24.
[115] r.79(3) of the CAT Rules 2015.
[116] r.79(2)(3) of the CAT Rules 2015.
[117] *Gibson v Pride Mobility Products Ltd* [2017] CAT 9, [2017] 4 C.M.L.R. 33.

review of the strength of claims. In this case, the CAT noted that since this case is a follow-on case, the earlier OFT decision[118] has proved that the breach has an anti-competitive effect on prices. Thus, it assumed that the claim for antitrust damages in this case cannot be regarded as weak.[119]

In addition, in order to justify opt-out proceedings, the CAT took into account such factors as the size of class, the fact that the class members are individual consumers and the estimated amount that each represented member could recover.[120]

Based on these considerations, as well as others, such as the suitability of collective action,[121] and the eligibility of class representative,[122] the CAT decided to adjourn the CPO application, because this is a follow-on case but the OFT decision is only binding eight retailers, rather than all affected potential purchasers as alleged by Gibson. The CAT did not dismiss the CPO application altogether; instead, it allowed Gibson to reformulate the claim.[123] Finally, Ms Gibson decided to withdraw the CPO application. Despite this outcome, the CAT's attitude in this case has shown some willingness to encourage opt-out proceedings.

However, in another recent high-profile case, *Mastercard*,[124] the CAT's attitude became harsher and more direct towards the verification of opt-out collective proceedings.

Based on the decision of the EU Commission that Mastercard had abused its dominant position in the consumer credit card market to overcharge fees from its customers under its multilateral interchange fee system,[125] Walter Hugh Merricks, as class representative, instituted antitrust damages claims against Mastercard on the opt-out basis before the CAT, on behalf of 46.2 million UK residents who have used the Mastercard for purchase transactions between 22 May 1992 and 21 June 2008. The claimant applied for the CPO to the CAT under the new s.47B of the CA 1998, in order to continue the opt-out collection proceedings.[126] However, based on a comprehensive and detailed analysis, the CAT dismissed the application for the CPO.

Unlike the *Gibson* case, the CAT conducted a very extensive and fact-specific analysis in this case. Assessing the suitability of opt-out proceedings, the CAT questioned the method proposed by the applicant as to how to calculate the aggregate damages and further the individual customer damages. It held that the applicant

> "has no plausible way of reaching very rough and ready approximation of the loss suffered by each individual claimant from the aggregate loss calculated according to the applicant's proposed method".[127]

The CAT further reasoned that, for one thing, the applicant's method of calculating the loss was based on a top-down, aggregate basis, which would lead to everyone in the class getting more or less money out of the total pot where there are some victims who did not opt out of the class, because the proposed calculation is not based on the losses of each individual of the class.[128] Also, under the method proposed by the applicant, it was impossible in the eyes of the CAT to see how the payment to individuals could be determined on any reasonable basis.[129]

Meanwhile, according to the full compensation principle of antitrust damages, which is the restoration of claimants to the position they would have been in without the breach, the CAT assumed that this application of over 46 million claims pursued by collective proceedings, would not result in antitrust damages being paid to the claimants at all under this principle.[130] Under antitrust damages quantification theory, any method and technique of quantification would only lead to an estimated amount of damages. The absence of such method of estimating the antitrust damages of each member of class from the aggregate damages award would not be in compliance with the fundamental purpose of collective redress, which is to facilitate the initiation of mass harm claims so as to achieve full compensation. Accordingly, the CAT ruled that these claims are not suitable to be brought under opt-out collective proceedings, even though it was noted that it would be impractical to bring claims on an individual basis.

It is observed that *Mastercard* case is a setback for new collective proceedings, and will have a discouraging effect on enthusiasm for initiating opt-out collective proceedings for competition claims in the UK.[131]

From this case, it can be seen that the CAT has been good at using its discretion over verification of opt-out collective proceedings. The approach of the CAT to

[118] The OFT decision was made in 2014, which was concerned about the agreements between Pride and eight of its retailers, prohibiting them from advertising certain models of scooter online at the price below the recommended retail price.
[119] *Gibson v Pride Mobility Products Ltd* [2017] CAT 9, [2017] 4 C.M.L.R. 33, para.123.
[120] See *Gibson v Pride Mobility Products Ltd* [2017] CAT 9, [2017] 4 C.M.L.R. 33, para.124.
[121] See *Gibson v Pride Mobility Products Ltd* [2017] CAT 9, [2017] 4 C.M.L.R. 33, paras 121 and 122.
[122] See *Gibson v Pride Mobility Products Ltd* [2017] CAT 9, [2017] 4 C.M.L.R. 33, paras 125–139.
[123] *Gibson v Pride Mobility Products Ltd* [2017] CAT 9, [2017] 4 C.M.L.R. 33, para.146.
[124] *Walter Hugh Merricks CBE v Mastercard Incorporated, Mastercard International Incorporated, Mastercard Europe S.P.R.L.*, [2017] CAT 16, 2017 WL 03128998.
[125] The EU Commission Decision of 19 December 2007, COMP 34,579 *MasterCard*: *http://ec.europa.eu/competition/antitrust/cases/dec_docs/34579/34579_1889_2.pdf* [Accessed 26 May 2020].
[126] *Walter Hugh Merricks CBE v Mastercard Incorporated, Mastercard International Incorporated, Mastercard Europe S.P.R.L.*, [2017] CAT 16, 2017 WL 03128998, paras 1–15.
[127] [2017] CAT 16, 2017 WL 03128998, para.84.
[128] [2017] CAT 16, 2017 WL 03128998, para.87.
[129] [2017] CAT 16, 2017 WL 03128998, para.88.
[130] See fn. 129.
[131] Kevin La Croix, "U.K. Court Halts Effort to Use New Opt-Out Class Action Procedures": *http://www.dandodiary.com/2017/07/articles/class-action-litigation-2/u-k-court-halts-effort-use-new-opt-class-action-procedures/* [Accessed 26 May 2020].

opt-out proceedings has been more cautious than that in the *Gibson* case, despite the global rise of collective action. The analysis of the CAT is not only strictly compliant with the criteria set by the new s.47 B of the CA 1998, but also is very specific and based on a case-by-case evaluation.

Recommendation: the need for mixed opt-in/opt-out collective proceedings in China

The representative action provided in art.54 of CPL 2017 is essentially for opt-in proceedings.[132] The opt-in mechanism has not worked effectively in China because there have been a considerable number of mass low value claims arising from anti-competitive behaviour, such as in the *Baidu* case.[133]

Similarly, in the UK, the *JJB Sport* case[134] demonstrated the limitations of the opt-in collective proceedings in dealing with consumers' "scattered" and low-value damage arising from anti-competitive behaviour. Since consumers lacked incentive to choose to opt in to the proceedings, a very small number of the harmed consumers actually participated in the litigation, which thereby led to the failure to achieve the goal of *full compensation*.

Since the first amendment of the CPL in China in 2012, intense debate has taken place among scholars as to whether the CPL should be amended to allow for US-style class action. Some scholars were of the view that art.54 CPL 2017 should be amended by replacing the existing opt-in with an opt-out mechanism.[135] Subsequently, a 2016 judicial interpretation[136] further clarified the consumers public interest collective action (art.55 CPL 2017), which cautiously came closer to opt-out collective proceedings, though there also exist quite a number of differences.

The consumer public interest collective action provided by art.55 CPL 2012 and its judicial interpretation in 2016 has brought about a public interest mechanism in China that is somewhat similar to the UK's opt-out proceedings in several respects. First, it only applies to mass consumer claims; second, a designated representative can bring the public interest litigation before the court on behalf of the harmed consumers; and third, the represented consumers are mass and unspecified, which means that the scope of the represented consumers is the group of the consumers *potentially* harmed by the same alleged illegal behaviour.

However, significant differences remain between China's CPL 2017 art.55 public interest collective action and the UK's opt-out collective proceedings. The most significant distinction is that the consumers public interest collective action mechanism fails to provide consumers with the option of opting out of the collective litigation: instead consumers have the freedom to "free ride", which allows consumers who bring individual damages claims for the same illegal behaviour to be bound by the judgment obtained in the collective proceedings where the individual consumers can prove that they were harmed by the same behaviour.[137]

Another significant difference lies in the absence of damages relief in the consumers public interest collective action mechanism in China: it only allows claimants to apply for the cessation of the illegal behaviour.[138] By contrast, the ultimate goal of the UK's opt-out collective proceedings are to compensate the harmed consumers, as illustrated in the recent *Mastercard* case.[139] In that case, the UK CAT stressed that demonstrating a feasible calculation method for the calculation of how each individual's damages could be recovered from the aggregate damages is the key to obtaining a CPO from the CAT, so as to enable the opt-out collective proceedings to proceed to fruition.[140]

Therefore, based on the comparative analysis of China's consumer public interest collective and the opt-out collective proceedings in the UK, the author submits that damages relief is required when consumers public interest collective actions are brought to address mass consumer harm caused by anti-competitive behaviour under the AML. Moreover, the court will need to be competent to assess the proposed calculation method of each individual's losses recovered from the aggregate estimated damages, to ensure that the damaged consumers could be compensated through the taking of collective proceedings.

[132] Article 54 of the CPL 2017, see fn.57.

[133] *Tangshan Renren Information Service Co Ltd v Beijing Baidu Network Technology Co Ltd* [2009] Beijing Intermediate People's Court No.1, Yi Zhong Min Chu Zi No.845, 18 December 2009. Upheld on appeal by Beijing High People's Court, *Tangshan Renren Information Service Co Ltd v Beijing Baidu Network Technology Co Ltd* [2010] Gao Min Zhong Zi No.489, 9 July 2010.

[134] *Consumers Association v JJB Sport plc* [2009] CAT 2; 2009 WL 364157.

[135] For a variety of views on this debate, see: Xiangui Chen and Yiyan Zhou, "Critical Review of Developments of Opt-out Collective Action in the EU Member States" (2014) 4 Southeast Academic: *https://core.ac.uk/download/pdf/41436192.pdf*. [Accessed 26 May 2020]. Chen and Zhou hold the view that it is not wise to adopt opt-in or opt-out alone in modern class action mechanisms; instead, the best practice they suggest is to add opt-out into the existing opt-in class action, so as to form a mixed mechanism. Also see: The Renmin University School of Law Team on "Amendments and improvements of the Civil Procedure Code", *Legislative Proposals for Amendments (Third Draft) to the Civil Procedure Law of the People's Republic of China and the Reasons for the Proposals* (Beijing: People's Court Press 2005). In this discussion, Professor Jiangguo Xiao is of the view that in the case only concerning private interests, the existing "opt-in" proceeding is more enforceable than "opt-out" because it is difficult for courts to determine the total amount of damages when the number of victims is uncertain; however, opt-out proceeding is more practical in the case concerning public interest: *http://www.china-judge.com/ReadNews.asp?NewsID=3144&BigClassName=%B7%A8%C2%C9%CB%BC%CF%EB&BigClassID=16&SmallClassID=20&SmallClassName=%CB%DF%CB%CF%B7%A8%D1%D0%BE%BF&SpecialID=0* [Accessed 26 May 2020]. Indeed, the debate on opt-out proceedings has not been confined to competition claims, but also concerned its extension to other civil class actions. Recently, opt-out class action has been adopted by the amendment of Securities Law in 2020 to expressly allow opt-out from damages actions arising from securities transactions: *https://finance.sina.cn/2020–04–15/detail-iircuyvh7812055.d.html?from=wap* [Accessed 26 May 2020].

[136] Judicial Interpretation of the Supreme People's Court on Certain Issues Concerning Consumer Public Interest Litigation [2016] No.10.

[137] Article 16 Judicial Interpretation [2016] No.10.

[138] Article 13 Judicial Interpretation [2016] No.10.

[139] *Walter Hugh Merricks CBE v Mastercard Incorporated, Mastercard International Incorporated, Mastercard Europe S.P.R.L.* [2017] CAT 16, 2017 WL 03128998.

[140] In *Mastercard* the lack of a plausible way of reaching even a very "rough-and ready" approximation of the loss suffered by each individual claimant from the aggregate loss (calculated according to the applicant's proposed method) was the main reason for the CAT's dismissal of the request to grant a CPO.

Due to the public interest test applied in the consumers public interest collective action, the burden of proof to provide evidence that the public interest has been harmed in the context of AML claims will lie on the claimants. It is submitted that the public interest test would, to some extent, increase the difficulties claimants would face in bringing consumers public interest collective actions, but this difficulty can be dealt with by expressly revising the existing public interest element in the consumers public interest collective action mechanism, by adding the restriction or distortion of competition (as an indicator of harm to the public interest) into the actual public interest test.

As for SMEs harmed by anti-competitive behaviour, the consumers public interest collective actions mechanism shall not be of assistance to them in their quest for claiming damages. In such situation, the taking of opt-in collective action is the only practical way for taking private action to claim damages from, for example, giant companies, such as SOEs (because individual small companies may not be wish to engage in individual litigation against the big companies, for fear of damaging a necessary trading relationship with the big companies[141]).

Considering the strength and weakness between opt-in proceedings on the one hand and opt-out proceedings on the other, it is suggested that the opt-in proceedings be regarded as the primary form of proceedings, with opt-out proceedings to be regarded as an alternative and adapted with necessary limits: specifically, opt-out proceedings could be confined to mass consumer damage situations, where the claimants could provide a plausible way of calculating their individual losses to be recovered from the aggregate damages, as well as provide evidence to prove the damage to the public interest. Whereas, the opt-in collective proceeding could have wider application, i.e. opt-in could apply to both consumer and SME mass harm situations.

In deciding whether litigation could be brought on the basis of opt-in or opt-out proceedings, the court should have a discretion over it. Judicial discretion could be exercised by reference to a number of factors, such as: the number of victims, the likely extent of the individual loss; the degree of commonality; the qualifications needed to act as a representative entity; funds; and access to evidence. Furthermore, it is assumed that the assessment of whether these factors are qualified to apply to opt-out proceeding is subject to the application of a legislative threshold[142] for damages in the event of an opt-out action. It is suggested, therefore, that detailed standards regarding the above-mentioned factors should be laid down by means of a Supreme People's Court judicial interpretation, to provide guidance for the courts in determining whether the representative action should be based on opt-in or opt-out proceedings.

Conclusion

To properly and fully compensate for the harm arising from anti-competitive behaviour, in particular the situation of mass harm claims, a properly designed collective action mechanism would be an effective way for consumers and SMEs to recover their losses. This has been demonstrated by the introduction of different types of collective action mechanism in the Member States of the EU.[143] However, the current legislation concerning the collective action in competition matters in China is not well developed, nor can it keep up with the pace of antitrust mass harm claims. Consequently, this has led to very few successful collective actions for competition law claims brought by consumers or SMEs.

The Judicial Interpretation [2012] No.5 concerning the antitrust damages action generally allows two or more actions to be heard jointly in a single trial.[144] While this could serve as a legal basis for collective redress in the field of competition law, it fails to provide any detailed procedural regulation and guidance for *collective* actions based on the AML.

The collective redress mechanism provided by the CPL 2017 includes three types of collective proceedings: joint action; opt-in representative action; and public interest collective action. But each action has its own weakness when invoked in mass harm claims. The joint action and opt-in representative action are fine so far as they go, but they are unsuitable for litigating in competition law mass harm claims, because they are only suitable for claims brought by a small number or specified number of consumers, rather than a mass harm claim. In this respect, the public interest collective action is a potentially significant innovation that may enhance consumer collective redress, because it allows the representative action to be brought on behalf of a large and unspecified number of consumers.

However problems remain. Hopes that the procedural gap would be filled by the insertion into the Civil Procedure Law in the 2012 first amendment of the art.55 consumers public interest collective action mechanism, have not been realised. There have been no art.55 consumers public interest collective actions brought in China by consumer associations since the public interest collective action mechanism was put into place in 2012.[145] The action is deficient in three key respects. First, the public interest element's express terms need to be revised in order to include competition harm to consumers as falling within the action's scope. Second, the action has

[141] Rachel Burgess, "SMEs and Private Enforcement of Competition Law: Achieving Redress" (2016) 9(3) G.C.L.R. 77–81.
[142] The claimant needs to provide evidence on the method of calculation of the individual losses, and the damaged public interest.
[143] Commission Recommendation 2013/396/EU of 11 June 2013 on Common Principles for Collective Redress Mechanisms in the Member States for injunctions against and claims on damages caused by violations of EU rights [2013] OJ L 201/26, para. 9.
[144] Article 6 of Judicial Interpretation of the Supreme People's Court on Certain Issues Concerning Hearing of Civil Disputes arising from Anti-Competitive Behaviour [2012] No.5.
[145] The consumer public interest collective action was first adopted in 2012 when the CLP was amended, and it was somewhat clarified by the Judicial Interpretation of the Supreme People's Court on Certain Issues Concerning Consumer Public Interest Litigation [2016] No.10.

been undermined by the lack of provision of a remedy in damages. And, third, the potential for consumers to take action is severely limited by the designation of the national consumer association as the designated representative for the bringing of collective claims.

Therefore, based on this analysis, it is submitted that China's CPL has no effective procedural mechanism for dealing effectively with consumers litigating mass claims for infringement of competition law. Although the consumers public interest collective action mechanism in China is similar in some respects to the opt-out collective litigation mechanism recently adopted in the UK to specifically cater for competition law claims in the UK (allowing the Consumers Association to bring collective action on behalf of an unspecified number of consumers), the analogous mechanism in China suffers from key deficiencies that make it unworkable in practice.

Apart from a lack of legal certainty as to whether the art.55 consumer public interest collective action mechanism can be invoked in collective antitrust litigation in China, the key weakness in the action is the fact that compensation for loss is not provided as the remedy by the consumer public interest collective action mechanism. The primary remedy is a cease and desist remedy, which often will not be sufficient to address the consumers' claims as it shall not be the remedy they seek. Therefore, in order to incentivise consumers to launch collective action, China must revise its Civil Procedure Law and take steps to make compensation relief available as the primary relief in consumer public interest collective action, particularly for claims taken to vindicate AML infringements. The competent court should have discretion over whether the litigation could be brought on the basis of opt-in proceedings, or public interest collective proceedings, according to criteria, such as the scale of claimants, commonality, suitability, the public interest test and the goal of full compensation.

It is worth noting that both opt-out proceedings in the UK and the consumers public interest collective action in China are currently only applicable to the collective action brought by consumers. As for SMEs, the old opt-in representative action can still be applied to mass harm claims by small companies. In such a situation, trade associations in China need to be allowed to bring such collective action on behalf of small businesses, provided these associations satisfy objective requirements set out for the representative.[146]

Finally, it is worth noting in conclusion that while in the UK several cases have been brought before the CAT on the basis of opt-out proceedings, and although limitations have been imposed on the application of opt-out proceedings, nevertheless the CAT has taken a cautious approach to opt-out proceedings, as seen in the recent *Mastercard*[147] case which, subsequent to the overturning decision from the Court of Appeal, now has gone to the Supreme Court and was heard on 13-14 May 2020, pending the decision of a proper approach to the distribution of an aggregate amount at the certification stage. The CAT conducted a highly fact-specific analysis concerning opt-out proceedings in that case, dismissing the CPO, because, from the method proposed by the applicant, it could not determine a practical way in which to calculate an estimated loss for each individual claimant from among the aggregate damages.

[146] The representative should possess sufficient financial and human resources; legal expertise; a direct relationship between the collective representative and the represented litigants; and no conflict of interest.

[147] *Walter Hugh Merricks CBE v Mastercard Incorporated, Mastercard International Incorporated, Mastercard Europe S.P.R.L.* [2017] CAT 16, 2017 WL 03128998.