

A matter of class

A look at the collective action regimes in the UK and US

by *Oliver Heinisch, James L McGinnis and Nadezhda Nikonova**

A significant development has taken place in the UK that will make it more attractive to private enforcement. On 1 October 2015, the UK's long-anticipated opt-out class action procedure became available. This article examines the UK's collective action rules and compares them with key aspects of current US class action practice. Given the general proximity between the UK and US legal systems and with an extensive body of US case law, we can expect there to be close examination of US class action procedures despite commonly expressed views critical of "the excesses of the US class action system". To what extent will the responsible UK court look across the Atlantic for guidance and be able to benefit from it? What conclusions can be drawn, if any, for potential success of the new collective action system?

Class actions in the UK

Thanks to a broad interpretation of jurisdiction, existing rules on disclosure and specialised courts conducting proceedings in English, the UK has become one of the most attractive venues for antitrust plaintiffs, though class actions have been scarce. But things are about to heat up. The Consumer Rights Act 2015 (CRA15) and drastic procedural amendments add competition opt-out collective actions to the remit of the Competition Appeal Tribunal. In addition to the preparatory legislative material, there are now three sources of rules governing collective actions: (1) the CRA15; (2) the Competition Appeal Tribunal Rules 2015 (the CAT rules); and (3) the CAT Guide to Proceedings 2015 (the CAT guide). An important fourth source will be case law interpreting these rules.

Bringing a collective action

Before a collective action can proceed, the CAT must grant a collective proceedings order (CPO) and certify the claims that are eligible for inclusion (CAT rule 79). Only claims arising after 1 October 2015 can be brought in collective proceedings.

Three requirements must be satisfied. First, there must be an "identifiable class" (see CAT guide section 6.37). Second, claims must raise common issues. Although only claims with "same, similar or related issues of law and fact" are eligible (see CAT rule 73(2)), the "assessment of individual issues" is "not fatal" (see CAT guide, section 6.37). The CAT also has wide discretion to approve collective proceedings in relation to only part of the claims (see CAT rule 74(6) and CAT guide, section 6.37). For instance, the CAT may grant a CPO for the liability portion of the case and then "direct that the quantification of damages proceed as individual issues" (see CAT guide, section 6.4, 6.79 and CAT rule 88(2)(c)). Lastly, claims must be "suitable" for collective proceedings as determined by eight broad factors, including a fairness and cost-benefit analysis (see CAT rule 79(2)(a)-(g)).

In deciding whether the collective action will proceed as opt-in or opt-out, the CAT will determine the strength of the

claim, the degree of commonality, and whether opt-in would be practical (see rule 79(2)(a)-(g)). It will also certify the representative who has applied to represent the class if it is "just and reasonable" to do so. There was considerable discussion on that point during the protracted consultation process which was seen as key to avoiding US-style class actions in the UK. The government decided not to include a presumption that law firms, special purpose vehicles and third-party funders would not fairly and adequately act in the interest of class members; instead, the entities are acceptable. However, admitting those organisations will be the exception rather than the rule, and the CAT has broad discretion when deciding on whether the representative would act fairly and adequately in the interest of the class.

Collective settlement

There will be no cost-shifting as a result of an early settlement offer by the defendants. However, settlement offers can be made without prejudice except as to cost. A party's rejection of a settlement offer can be taken into account at the end of the case when a decision is made as to costs. Otherwise, the usual rule fee-shifting rules apply (see CAT rules 94, 98).

Damages

There will be no punitive or treble damages in collective proceedings (see CRA15, Schedule 8, sections 6, 47C(1)). The introduction of collective opt-out actions, however, can increase the overall liability for defendants. Where the court makes an award of damages in opt-out class actions, any unclaimed damages must be paid to a charity or the Tribunal can order that the representative is paid an amount to cover its costs and expenses in connection with the proceedings (see CAT rule 97). This limitation was introduced to prevent representatives being driven by the financial incentive of unclaimed damages. Another important limitation is that damages-based agreements will not be permitted.

The CAT will be able to calculate damages "aggregately," via sub-classes, or individually (see CAT rules 73(2), 88(2)c). When dealing with a "large class with largely identical individual claims", the CAT "may calculate the damages on a class-wide basis" by either calculating "a lump sum award against the defendant" or by "using a formula to determine each represented person's claim" (CAT guide, section 6.78). Although the class representative is required to provide an estimate of the damages and a proposal for how they would be distributed among class members (see CAT guide, section 6.30 and CAT rule 75(3)(i)), it is ultimately up to the CAT "to give directions as to how each class member or represented person's entitlement is to be calculated" by either "specifying a formula" or appointing an "independent third party to determine the claims or any disputes regarding quantification" (see CAT guide, section 6.82 and CAT rule 92(1)).

* *Sheppard Mullin Richter & Hampton (London) and (San Francisco)*

The CAT's discretion and guidance

As the rules and guidance make clear, the CAT will have a wide discretion on a number of matters. But there is no guidance on two fundamental questions that have been at the heart of US class action litigation and certification: what will the standards be and how will they be analysed?

The US experience

The UK standard appears similar to the US rule 23 (see Fed R Civ Pro 23(a),(b) dealing with the conditions that have to be met when bringing a class action). Indeed, it is clear that the CPO in the UK and the analogous “class certification order” in the US represent a critical stage in the proceedings. It is well understood in the US that exposure to class-wide damages – automatically trebled in competition cases plus an award of attorney’s fees – exerts enormous pressure to settle if the class is certified. Will that occur in the UK, or will the UK’s more restrictive rules and rejection of punitive damages give defendants more strategic choices?

In the US, the settlement process and the crushing expense of class action litigation has resulted in two significant developments: the higher pleading standard and the higher predominance standard.

Higher pleading standard

In 2007, the US Supreme Court in the *Twombly v Bell Atlantic* case required plaintiffs to plead enough facts to make the complaint plausible, citing the expensive nature of antitrust discovery as a reason for the heightened standard. The new requirement probably discouraged the filing of borderline cases. It will have to be seen how the CAT and appeal courts in the UK interpret rules 75(2)(h) and (3)(g)-(i) that require plaintiffs to substantiate their claims with concise statements of facts and law.

Higher predominance requirement

A key issue at the US certification stage is the initial evaluation of a plausible damages model that can later be proved at trial. The law requires that the plaintiffs’ model demonstrates that individual class member claims can be shown with common proof rather than requiring individual consideration (commonly referred to as “predominance”). Without a predominance requirement, US courts could end up adjudicating on millions of individual claims, eliminating the efficiency that was supposed to be achieved with a class action in the first place.

The Supreme Court in the 2013 *Comcast Corp v Behrend* case explained that the predominance analysis must be rigorous. Previously, “the case law was far more accommodating to class certification. [It] is now clear, however, that rule 23 not only authorises a hard look at the soundness of statistical models that purport to show predominance – the rule commands it” (see *Re Rail Freight Fuel Surcharge Antitrust Litig* 725 F 3d at 255).

In US antitrust class actions, the phrase “statistical models” refers to multi-hundred page reports from leading economists that are filled with complex regression equations. Discovery of these experts is time-consuming and expensive – millions of dollars are spent, thousands of pages of backup data and computer runs are examined, experts are deposed, hundreds of pages of legal briefs are filed, and extensive evidentiary hearings are held by the court.

Why all the fuss? Treble damages exposure in US antitrust class actions can reach many billions of dollars. While expenses in the UK will necessarily be less, given the lack of punitive damages, will the intensity of the CAT’s examination of the pleadings and preponderance issues be correspondingly less as well? The UK rules anticipate that the CAT will engage in some individual inquiries, but offer little guidance as to their nature and extent. The CAT will probably have to confront these issues down the line.

Class action incentives

The excesses of the US class action system in competition cases are in part the natural result of the place of class actions in the US enforcement system. The more punitive US antitrust laws are seen as an integral part of enforcement: “The purpose of treble damages is to deter violations and encourage private enforcement of the antitrust laws”: see *Pollock & Riley Inc v Pearl Brewing Co (1974)*. With the traditional US “no-fee-shifting” rule in place, the class action plaintiffs’ bar has no risk beyond an investment in costs and expert fees, and sees the potential for a large fee award – possibly 20% or more of the recovery – premised on treble damage exposure. Whether the UK system provides sufficient incentives for plaintiffs and funders to support opt-out actions remains to be seen, and failure to do so would result in a return to the status quo.

Will the floodgates open?

The experience from across the Atlantic strongly suggests that, whether intended or not, the UK system will not result in a flood of class actions. There is no doubt that a US plaintiffs’ lawyer would find the UK system relatively unfriendly to the point of actually discouraging all but cases virtually assured of success. The potential fee awards in a system without treble or punitive damages may not balance the risk of fee-shifting.

The CAT has wide discretion in deciding on a number of important elements at the certification stage and when determining damages which, in addition to the lack of precedents and experience, will make it particularly vulnerable to early challenges. The many uncertainties intrinsic in a new system and the broad discretion given to the CAT will require several test cases with the potential of satellite litigation before there is sufficient legal certainty encouraging plaintiffs and funders to come forward. It remains to be seen whether the system will provide sufficient incentives for funders to support those early cases.

Although widespread class actions are not an immediate reality, the risk of class actions in the UK will probably become an additional factor when negotiating worldwide settlements.

Conclusion

The UK is at the beginning of establishing itself as a collective actions forum. The rules are well crafted and have the necessary flexibility to establish a rigorous collective action system. But this will require motivated plaintiffs and funders to come forward to prevent the collective action system from becoming a shelf-warmer. In exercising their discretion, the CAT judges will have to balance individual and public interests in granting CPOs. Whether the result is an inclination to reject anything that smacks of the US system, or a more balanced appraisal, remains to be seen. In any event, both plaintiffs and possible defendants better be prepared not to be caught off guard.