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Evolving Private Remedies for Competition Infringements in Europe: Class Actions in the U.K.

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Winds of change are blowing through Europe's national courts, beginning with a new antitrust damages Directive requiring changes in national laws to facilitate private enforcement of competition law. This step was a major change, and an equally significant development has taken place in the U.K., which will make it even more attractive to private enforcement. As of 1 October, 2015, the U.K.'s long-anticipated opt-out class action procedure will be available.

Given the general proximity between the U.K. and U.S. legal systems and with a body of U.S. case law that has been developed for over half a century, we can expect there to be close examination of U.S. class action procedures. Despite commonly expressed views critical of "the excesses of the U.S. class action system," U.S. class action jurisprudence, for better or worse, remains the only reference point for the U.K.'s new procedure. Put simply, 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?

In this first in a series of articles examining recent EU developments, we address the U.K.'s collective action rules and compare them to key aspects of current U.S. class action practice. Next up will be a discussion of recent procedural enhancements and changes in U.K. competition procedures. Lastly, we will offer predictions of what we can expect to see from European Union member states in the course of implementing the private damages Directive required to be in place by December 27, 2016.

I. Class Actions in the U.K.

The U.K. courts have been driving the development of private enforcement, with France, Germany and the Netherlands being other important jurisdictions. Thanks to a broad interpretation of jurisdiction, existing rules on disclosure, and specialized courts conducting proceedings in English, the U.K. has become one of the most attractive venues for antitrust plaintiffs, though class actions have been scarce. Things are about to heat up even further. In effect, as of October 1, 2015, the

U.K. government has enacted the new Consumer Rights Act 2015 (CRA15) as well as the most drastic amendments to the procedural rules extending the jurisdiction of the Competition Appeal Tribunal ("CAT")[1] since its creation in 2003, by adding competition law collective actions exclusively to its remit. In doing so it went further than any other European Government and to a large extent overcame the fear spreading through most European jurisdictions of opening floodgates to U.S.-style class actions.

A. The Rules

In addition to the preparatory legislative material, there are now three new sources in which rules are set out: 1. the CRA15, 2. the Competition Appeal Tribunal Rules 2015 and 3. the CAT Guide to proceedings 2015. An important fourth source will be case law interpreting these rules.

1. Bringing a Collective Action

Collective actions will have to be brought exclusively before the CAT. Before an action can proceed, the CAT must grant a collective proceedings order ("CPO"). The CAT will certify claims that are eligible for inclusion.[2] Three requirements must be satisfied:

(1) There must be an "identifiable class" such that it is "possible to say for any particular person, using an objective definition of the class, whether that person falls within the class."[3]

(2) Claims[4] must raise common issues, *i.e.*, only claims with "same, similar or related issues of law and fact" are eligible.[5] This might require "the assessment of individual issues" which, however, is "not fatal."[6] After reviewing all of the circumstances, the CAT may approve collective proceedings in relation to only part of the claims.[7] 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."[8]

(3) Claims must be "suitable" for collective proceedings as opposed to individual proceedings as determined by eight broad factors, including a fairness and cost-benefit analysis.[9]

The CAT will decide whether the collective action will proceed as opt-in or opt-out.[10] In doing so, it will determine the "strength of the claim" and the degree of commonality and whether opt-in would be practical. It will also certify the representative who has applied to represent the class if it is "just and reasonable" to do so.[11] There was considerable discussion on that point during the protracted consultation process which was seen key to avoiding U.S.-style class actions in the U.K.[12] 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, the Government made clear that admitting those organizations will be the exception rather than the rule, and the CAT has broad discretion when deciding on whether it is just and reasonable for a representative to act and when deciding whether they would act fairly and adequately in the interest of the class. They will refer to the following non-exclusive factors[13]:

[W]hether that person—

a) would fairly and adequately act in the interests of the class members;
b) does not have, in relation to the common issues for the class members, a material interest
c) that is in conflict with the interests of class members;
d) if there is more than one applicant seeking approval to act as the class representative in respect of the same claims, would be the most suitable;

e) will be able to pay the defendant's recoverable costs if ordered to do so; and
f) where an interim injunction is sought, will be able to satisfy any undertaking as to damages required by the Tribunal.

2. 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. The fact that a party rejects a settlement offer can be taken into account at the end of the case when a decision is made as to cost. Otherwise, the usual rule fee-shifting rules apply.[14]

3. Damages

There will be no punitive or treble damages in collective proceedings.[15] However, the introduction of collective opt-out actions has the potential to 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 his costs and expenses in connection with the proceedings.[16] This limitation was introduced to prevent representatives being driven by the financial incentive of unclaimed damages. The CAT will be able to calculate damages "aggregately," via sub-classes, or individually.[17] 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."[18] 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,[19] 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."[20] Another important limitation is that damages-based agreements will not be permitted.

4. The CAT's Discretion and Guidance

As the rules make clear the CAT will have wide discretion on a number of matters prompting Government and the CAT to provide detailed guidance.[21] In its latest response to the public consultation[22] the Government also provided some insights into how it intends discretion should be exercised when deciding on various procedural requirements at the certification stage and throughout the proceedings, but none of the Guidance provided seem to resolve two fundamental questions that have been at the heart of U.S. class action litigation in general and certification in particular: what will the standards be, and how will they be analyzed?

II. The U.S. Experience—a quick look at the U.K. rules on certification

The U.K. standard appears similar to U.S. "Rule 23,"[23] and it is obvious that the collective proceedings order is a critical stage in the proceedings. That has always been true of the analogous "class certification order" in the U.S., if not more so. In the U.S. it is well understood that exposure to class wide damages—automatically trebled in competition cases plus an award of attorney's fees—provides a nearly overwhelming pressure to settle if the class is certified.[24] Will that dynamic occur in the U.K., or will the U.K.'s more restrictive rules and rejection of punitive damages give defendants more strategic choices?

A. Significant U.S. Developments

In the U.S., this settlement process and the crushing expense of class action litigation has resulted in two significant developments.

1. Higher Pleading Standard

The U.S. Supreme Court held in *Twombly v. Bell Atlantic*: "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions … [f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true [because] it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive."[25]

The explicit reason for this new standard was to eliminate at the pleading stage large cases that are without merit. Most observers would agree that this filter has been at least partly effective, and antitrust class actions have been an area where its impact has been felt.

It will have to be seen how the CAT and appeal courts will interpret in particular Rule 75 (2) (h), (3) (g), (h), (i) which require the Plaintiff to substantiate its claim with concise statements of facts and law.

2. Higher Predominance Requirement

For many years, the key issue at the U.S. certification stage has been the initial evaluation of a plausible damages model (that could then be tested more fully at trial). The law requires that plaintiffs' model demonstrate 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, U.S. courts would otherwise end up adjudicating millions of individual claims, eliminating the efficiency that was supposed to be achieved with a class action in the first place.

As a practical matter, federal district courts in the U.S. have had wide discretion in the amount of expert economic proof they require at the certification stage. The focus was on the word "plausible," a very loose and elastic standard. Now, the Supreme Court has made clear the analysis must be "rigorous." There remains controversy in the U.S. as to what "rigorous" means but there can be little doubt that the class certification hurdle now is higher: "Before [*Comcast*], the case law was far more accommodating to class certification … it is now clear, however, that Rule 23 not only authorizes a hard look at the soundness of ***statistical models*** that purport to show predominance – the rule commands it.[26]

In U.S. 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 in the process. Thousands of pages of back-up data and computer runs are examined in minute detail. The experts are deposed, sometimes for several days. Hundreds of pages of legal briefs are filed. There are extensive evidentiary hearings. Increasingly, the experts must testify.

Why all the fuss? Treble damages exposure in U.S. antitrust class actions can reach many billions of dollars. While expenses in the U.K. will necessarily be less, given the lack of punitive damages (and smaller market) will the intensity of the examination of these issues necessarily be correspondingly less as well? Unlike in the U.S., the U.K. rules anticipate that the CAT will engage in some individual

inquiries. So far, however, there is very little guidance on these issues but more likely than not the CAT will have to address them down the line.

III. Will the floodgates open to collective actions in the U.K. or will they slowly trickle through the gates?

The CAT will have wide discretion in deciding on a number of important elements at certification stage and when determining damages which, in addition to the lack of precedents and experience, will make it particularly vulnerable to early challenges.

This will likely have a deterrent effect to most plaintiffs at least until test cases have brought some further clarity. This will also explain why an immediate surge in opt-out collective actions in the U.K. is unlikely. Although the CAT has a wealth of experience in dealing with appeals of regulator decisions it has little experience in private damages and in particular collective actions. In addition, the many uncertainties intrinsic in a new system and the broad discretion given to the CAT, in particular at certification stage, will require several test cases with the potential of satellite litigation before there is sufficient legal certainty encouraging plaintiffs and funders to come forward. Whether the system does provide sufficient incentives for funders to support those early cases remains to be seen and failure to do so would result in a return to the status quo. However, even if class actions are not an immediate reality the risk of class actions in the U.K. will likely become an additional factor when negotiating world-wide settlements.

IV. The U.S. Experience—Class action incentives

The experience from across the Atlantic strongly suggests that, whether intended or not, the U.K. system will not result in a flood of class actions. At the outset, it is worth noting that "the excesses of the U.S. class action system" in competition cases are in no small part the natural and at least partly intended result of the place of class actions in the U.S. enforcement system. First, the much more punitive nature of U.S. antitrust laws stemmed from perceived and largely real excesses of consolidation as the U.S. industrialized. The Sherman Act of 1890 had an explicit political and even populist bent. All else equal, big is bad. And Americans vehemently agree with Adam Smith: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."[27] Second, private actions are viewed as an integral part of enforcement and there are explicit incentives to encourage them: "The purpose of treble damages is to deter violations and encourage private enforcement of the antitrust laws."[28]

With the traditional U.S. 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. The result – again largely intended – is for class actions to follow every government action and more besides. The foregoing discussion of tightened class certification standards can be seen, however, as some recognition that the pendulum has swung too far in the direction of class plaintiffs.

There is no doubt that a U.S. plaintiffs' lawyer would find the U.K. system very unfriendly to the point of actually discouraging all but cases virtually assured of success. Perhaps that was the intention of the legislation. Nonetheless, that may well be the result. To use the timeworn expression: "whether they threw out the baby with the bathwater" is another question.

V. Conclusion

The U.K. is at the very beginning of establishing itself as a collective actions forum. The rules are well crafted and, although they need further fleshing out, they have the necessary flexibility to establish a rigorous European-style 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 then have to balance the individual and public interests involved when deciding individual issues of certification and procedure. Reference will no doubt be made one way or the other to what their U.S. counterparts have developed over the last 50 years. Whether the result is an inclination to reject anything that smacks of the U.S. system – or a more balanced appraisal – remains to be seen. In any event both plaintiffs and possible defendants better be prepared to not be caught off guard.

[1] The CAT is the specialized Court based in London dealing with cases involving competition or economic regulatory issues.

[2] The Competition Appeal Tribunal Rules 2015, Rule 79 (hereinafter “CAT Rules”).

[3] CAT Guide to Proceedings § 6.37 (2015). Class members can be persons domiciled in the U.K. For those not domiciled they can choose to opt-into an opt-out proceeding.(CAT Rules 73, 80, 82.)

[4] Only claims arising after 1 October 2015 can be brought in collective proceedings. This will add some significant delay to the system getting up and running. Claims arising before 1 October will have to be brought under the old regime.

[5] CAT Rule 73(2).

[6] CAT Guide to Proceedings § 6.37.

[7] CAT Rule 74(6); CAT Guide to Proceedings § 6.37.

[8] CAT Guide to Proceedings § 6.79; CAT Rule 88(2)(c); *see also* CAT Guide to Proceedings § 6.4.

[9] CAT Rule 79(2)(a)-(g).

[10] Id.

[11] Id. Rule 78 (a representative may be a class member or not).

[12] CAT Rules of Procedure, Government Response, Sept. 2015.

[13] CAT Rule 78(2); see also CAT Rule 78(3).

[14] CAT Rules 94, 98.

[15] CRA15 Schedule 8, section 6, 47 C (1), see also CAT Guide to Proceedings, 6.77, Government Response, § 3.8.

[16] CAT Rule 97.

[17] CAT Rules 73(2) and 88(2)(c).

[18] CAT Guide to Proceedings § 6.78.

[19] CAT Guide to Proceedings § 6.30; CAT Rule 75(3)(i).

[20] CAT Rule 92(1); CAT Guide to Proceedings § 6.82.

[21] On 1 October 2015 the CAT issued the new Guide to proceedings.

[22] UK Government Response: Competition Appeal Tribunal (CAT) Rules of Procedure, September 2015.

[23] Fed. R. Civ. Pro. 23(a) requires four conditions to be met to bring a class action: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Rule 23(b) has one additional hurdle, the most common for opt-out class actions is subsection 3: "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

[24] *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 250 (D.C. Cir. 2013) (the decision to certify a class is accompanied by a 'death-knell'—*i.e.*, it places substantial pressure on the defendant to settle independent of the merits of the plaintiffs' claims.").

[25] *Twombly v. Bell Atlantic*, 550 U.S. 544, 545-46 (2007).

[26] *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 255 (emphasis added).

[27] Adam Smith, The Wealth of Nations (1776).

[28] *Pollock & Riley, Inc. v. Pearl Brewing Co.*, 498 F.2d 1240, 1242-43 (5th Cir. 1974) (citing *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 751-52 (1947)). See also *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 667 (5th Cir. 1974) ("The prospect of a damage award multiplied three-fold should provide an incentive for private parties to instigate costly and uncertain litigation, thus supplementing Governmental enforcement.").

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