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CLASS ACTIONS

Opt-Outs

OPT-OUT ANTITRUST CLASS ACTIONS—A U.S. PERSPECTIVE ON THE CONSUMER RIGHTS BILL PENDING IN UK's PARLIAMENT

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Will opt-out class actions proposed by the UK Parliament's Consumer Rights Bill bring the dreaded U.S.-style litigation culture to the United Kingdom? My personal assessment—that of a seasoned American antitrust practitioner—is that it's doubtful.

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But first, some background. Opt-out class actions are a form of what are known as collective actions or collective proceedings. Such actions are currently permitted in UK and European courts only on an opt-in basis—essentially a form of voluntary joinder—but then only in private claims for redress in the high court that follow on a prior public agency decision of wrongdoing under the competition laws of the UK or EU. Private antitrust actions in the UK are quite rare; only 27 such cases resulted in judgment in the 2005-2008 period. Only one collective action for damages has been brought on behalf of consumers.

The bill before the UK Parliament—denominated the Consumer Rights Bill—is an extensive consumer bill of rights.[1] As it relates to competition law, it is designed to make collective actions an important component of antitrust enforcement in UK courts.

The central idea is to provide an avenue for collective redress not only for large claims that might be brought individually, but also for small but meritorious claims that are not, or cannot be, efficiently asserted for various reasons. The vehicle proposed to accomplish this is the opt-out class action, which would have binding effect on all members of an identifiable class who do not opt out after appropriate notice.

The competition law reforms in the proposed statute are threefold:

First, the bill proposes to reform the Competition Appeal Tribunal (CAT)—a court with competition law expertise—by enabling it to hear stand-alone collective actions for the first time in addition to follow-on cases that are based on a public enforcement decision. The

[1] Consumer Rights Bill (HC Bill 180, 2013-2014), available at http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0180/14180.pdf

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CAT would be authorized to award collective damages if considered appropriate. The bill also provides for a fast-track class regime particularly designed for injunction proceedings.

Second, the bill provides for an elaborate alternative dispute resolution mechanism including class-wide settlement procedures.

Third, for the first time, the bill would provide for a controversial opt-out class action procedure that opponents of the legislation—such as the Confederation of Business Industry—contend will inevitably introduce into the UK a supposedly undesirable, U.S.-style litigation culture.

It is the burden of this article to explain why it is unlikely to do so.

Let me commence by describing how the proposed opt-out class action would work. As set forth in the bill now amplified by draft rules proposed by the CAT, claims on behalf of an identifiable class are eligible for inclusion in collective proceedings only if the tribunal considers that they raise the same, similar, or related issues of fact or law and are suitable for collective adjudication.[2] The proposed rules specify that the CAT may allow such proceedings in relation to only a part of a claim. For example, in a stand-alone collective action, the tribunal could make a collective proceedings order in relation to the existence of an infringement but leave issues of causation and quantum of damage to be dealt with on an individual basis.

Before the tribunal may issue a collective proceedings order, the proposed rules specify that the tribunal must, among other things, (1) weigh the costs and benefits of using a collective process; (2) consider whether there are any separate or similar claims pending by potential class members; (3) examine the size and nature of the class; (4) consider whether it would be practical to resolve the claim with an aggregate damages award as well as estimate the amount of damages that each class member might recover; (5) determine whether the class representative can respond to any costs it may be ordered to bear; and (6) most importantly, consider the strength of the claims as well as whether it is preferable to certify a class only on an opt-in basis. In this context, it may have to address contentious issues with respect to which entity actually suffered damage from an alleged infringement. For example, direct purchasers from an alleged wrongdoer may claim they have paid an illegal overcharge, but their customers, or perhaps the ultimate consumers, may claim that it is they who were actually damaged since the overcharge was passed on to them. This issue, which is also being considered for legislation by the EU, could yield serious conflict problems for class representatives and their counsel. The potential for such issues arising is implicitly recognized in proposed rules authorizing subclasses with their own representatives.

The collective redress process would be initiated by a proposed class representative who claims to have been damaged by a competition law infringement or by a third party, such as a trade association or recognized consumer group, if it satisfies the tribunal that it can serve as a just and reasonable fiduciary. If a class is certified, the action may then proceed to a final judgment that is binding on every class member who does not elect to opt out after receiving notice. An entity or consumer not domiciled in the UK may only assert claims on an opt-in basis.

Notice is the linchpin of the procedure. The duty of giving such notice will be the responsibility of the class representative. The form and content of the notice are generally set forth in the proposed rules, but the notice itself and the manner by which it is to be given must be approved by the tribunal. Presumably, where customer lists of allegedly injured parties are readily at hand, direct notice by mail will be feasible. But absent such circumstances, resort to notice by publication may be the only practical option.

In concept, this procedure looks very similar to its U.S. counterpart, which has been actively employed for almost 50 years. But looks can deceive: the opt-out procedure proposed here is avowedly devised to play out very differently from its U.S. analogue. In my view, it will do so for six interrelated reasons.

First, the proposed statute expressly provides that exemplary damages may not be awarded. There is thus no counterpart to the U.S. statutory award of treble or triple damages even though compound interest from the time of injury may be awarded. The limitation to single damages surely reduces the incentives to institute class proceedings save perhaps in follow-on cases or where public investigations are widely publicized but no findings yet made. Be that as it may, the limit to single damages changes the leverage enjoyed by the class in settlement discussions which will almost inevitably follow down the road.

Second, while English law newly permits contingency fee agreements whereby a lawyer may share any recovery with a client, such fee arrangements would be expressly prohibited in opt-out competition class actions. In the United States, contingency fee agreements are the indispensable engine of class litigation. Class counsel, as well as undisclosed third-party financiers, may shoulder much of the costs of litigating the cases as well as share the risk of ultimate loss. Indeed, a class action plaintiff bar has emerged which touts itself as willing and able to mount collective actions often on a massive scale and substantially risk free to the nominal class representative.

Third, the statute would not alter the general British rule that the loser pays legal costs including the attorney's fees of the victor though this might be subject to the tribunal's discretion, the exercise of which cannot be known when the case commences. That risk is ameliorated at least to some extent by the availability of insurance which may, however, be costly. In any event, a would-be class representative would be at considerable financial risk that it will be unable to share with class members. In the United States, while a successful plaintiff is statutorily entitled to recover reasonable fees and costs, defendants are not. As a consequence, the prospect of very large costs may prompt defendants to bail out of a case by settlement at an early stage—a temptation heightened by the absence of any right of contribution among antitrust wrongdoers.

Fourth, there will be no trial by jury. In the United States, this is a constitutional right that can be invoked by either side. Some, including me, question the value of this right at least in complex competition law cases, whether criminal or civil. But U.S. courts generally have

[2] Competition Appeal Tribunal, Draft Tribunal Rules on Collective Proceedings and Collective Settlements (March 2014), Rule 7(1), available at http://catribunal.org.uk/files/Collective_Actions_Rules_Draft.pdf

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rejected the notion that there should be an exception to the right to trial by jury for antitrust cases in which lay jurors must assess complicated economic concepts often debated by sophisticated experts in seemingly incomprehensible testimony.[3] Consequently, trial in the United States of an antitrust case may boil down to a form of morality play pitting the small guy plaintiffs against one or more big guys with the cards stacked in the plaintiffs' favor.

Fifth, no change is proposed in British court practices governing what Americans call pretrial discovery. While UK law has recently expanded the scope of documents disclosures, it remains significantly more restrictive than its U.S. counterpart. Most significantly, there is no right to pretrial testimony under oath (the classic U.S. deposition) either from opposing parties or third parties. I further understand that while disclosures are required to be exchanged and while procedure has recently been enhanced—thereby inviting pretrial controversies over adequacy and the like—there is, at best, only limited processes for pretrial ascertainment of the facts. It is vastly different in the United States, where compulsory pretrial testimony and production of documents is a central feature of virtually all litigation. Enormous amounts of money can be spent in the preparation for and in the taking of depositions of opposing or third parties as well as in the production of documents, which now includes retained emails that may have to be searched using keywords or more sophisticated tools such as predictive coding. All testimony and documents must be screened for relevance and privilege, which necessarily invites endless pretrial disputes. You may ask why Americans are so wedded to this prolonged, expensive and exhaustive process. The reason is that Americans seemingly abhor trial by surprise or ambush and believe extensive pretrial discovery will enhance fair and proper outcomes.

Sixth and finally, the proposed class certification process, with the broad discretion that will be entrusted to the CAT, seems designed to avoid many of the U.S. pitfalls. As noted above, if the proposed rules are adopted, the CAT may consider a wide range of factors in deciding whether to issue a collective proceedings order, including, most significantly in my view, the merits of the asserted claim.[4] How extensive that consideration will be and how it will be undertaken remains to be seen. But it is likely to affect any decision to certify. In the U.S., the initiating claim, or complaint, as it is called, may upon motion by the defendants be subjected to a preliminary court scrutiny to determine whether the facts alleged, if proven, plausibly establish a violation of the competition laws.[5] If it does, the case may then proceed to the class certification stage. But at least until recently, consideration of the merits was thought to be out of bounds under Supreme Court precedents extending back to the 1970s. While there may be emerging cracks in that bar, the battle over whether a class should be certified usually turns, not on any assessment of the merits, but rather on whether common issues of law and fact predominate.[6] If they are found to do so, the resulting certification virtually guarantees a future settlement simply because the litigation costs and consequences of loss are so heavily multiplied for defendants confronting a certified class. Consideration of the merits generally occurs only after the heavy artillery of discovery has been survived and motions for summary judgment or dismissal are deemed ripe for consideration. But those motions are usually denied since trial courts understand that denial will likely yield a settlement.

In sum, on these six important issues the Consumer Rights Bill appears to have landed on middle ground, providing some of the benefits of the U.S. opt-out class action, while at the same time taking precautionary steps to prevent some of its excesses. Thus, if the bill passes, the British and U.S. opt-out class action procedures will share a common name and structure, but the differences in real-world application may be very great.

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[3] *E.g.*, *In re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069 (3d Cir. 1980) (''a court should deny jury trial on due process grounds only in exceptional cases when the court, after careful inquiry into the factors contributing to complexity, determines that a jury would be unable to understand the case and decide it rationally.'').

[4] Department for Business, Innovation and Skills, *Private Actions in Competition Law: A consultation on options for reform – government response* (January 2013), paragraph 5.55; Competition Appeal Tribunal, Draft Tribunal Rules on Collective Proceedings and Collective Settlements (March 2014), Rule 7(2), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf.

[5] Fed. R. Civ. P. 12(b); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

[6] *See generally* D. Goldstein, S. Leong and R. Rinkema, ''A Year Later: *Comcast*'s Impact on Antitrust Class Actions,'' available at http://blogs.orrick.com/antitrust/author/dgoldstein/.