

Benefits Of Controversial Changes To UK Competition Regime

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On March 26, 2015, the United Kingdom enacted the Consumer Protection Act 2015. Set to take effect on Oct. 1, 2015, the new law has been lauded by many for its progressive expansion of a collective private enforcement regime for competition law cases. While raising the stakes for companies engaged in violations of competition law, the law also opens the door to U.K. claimants seeking redress for losses caused by those violations.

However, not everyone has been quick to lend their support. Some have sharply criticized the proposed regime, predicting that it will suffer from all of the apparent “excesses” of U.S.-style class actions. In particular, the group Justice Not Profit, which is backed by the U.S. Chamber of Commerce,[1] has been particularly vocal about its opposition to the changes proposed by the act. Likening U.S. class actions to overindulgent children running amok in a candy store, Justice Not Profit warns that the proposed litigation model will open the floodgates in the U.K. to frivolous and unmeritorious claims. The group calls for stricter regulations in order to “prevent exploitation and abuse.”



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Justice Not Profit contends that no company, big or small, should have to expend millions of dollars defending itself against meritless claims or paying settlements to those who are undeserving. And, that is a valid point. However, what Justice Not Profit and other critics ignore is that when a company receives a large windfall from engaging in antitrust violations, it should be called upon to compensate its victims. A company who flouts the antitrust laws should not be permitted to operate with impunity. Rather, there must be some mechanism in place to encourage deterrence. The question becomes whether it is possible for a legal system to accomplish all of these things, and whether the U.K.’s Consumer Protection Act succeeds at getting us there.

Background

Over the past few years, there has been an uptick in collective private enforcement efforts throughout Europe. English courts have widely been viewed as being at the forefront of these efforts, however, concern persisted that it remained far too challenging for companies and consumers in the U.K. to recover damages caused by cartels. This is because under the current model, collective actions may only

be brought in the U.K. as an opt-in action, meaning claimants must affirmatively join the action in order to be considered a member of the class and share in any recovery. Only one such action has ever been brought in the U.K. on behalf of a group of consumers who were overcharged for replica football jerseys.[2] The case eventually settled, and each consumer who joined the action was compensated £20. Some believe this settlement failed to provide consumers with “meaningful” compensation and highlights the ineffectiveness of opt-in litigation, which has since been deemed unworkable and unsuccessful.[3]

In 2013, the U.K. sought to undertake a comprehensive overhaul of consumer rights reform. Culminating in the Consumer Protection Act 2015, the government elected to remodel the private enforcement mechanism available to claimants in competition cases. Cited as one of the most significant aspects of the act, the new law introduces, for the first time, an opt-out mechanism for collective actions brought before the Competition Appeal Tribunal, a specialist competition body.[4] Because an opt-out action may be brought on behalf of a class of unnamed, and initially unidentified claimants, representatives are afforded the opportunity to ascertain the full class as the proceedings progress, rather than at the outset, making it easier for claimants to commence collective proceedings on behalf of potentially injured parties.

Other features of the act have similarly been heralded by pundits, including: (1) lifting the limitation on a claimant’s ability to bring a “stand-alone” action, or an action that did not “follow-on” from an infringement decision by a national competition authority;[5] (2) authorizing the CAT to permit any person to act as the representative of the proposed class;[6] (3) permitting the use of third-party litigation funding to shoulder the costs associated with litigating the case;[7] and (4) providing for collective settlements.[8] Combined, these changes are thought to make it easier for claimants to access redress for losses suffered as a result of antitrust violations.

However, while greater access to civil justice has been praised by many, others strongly contend that the new law will not just open the door to collective redress, but will instead release the floodgates to frivolous and unmeritorious litigation, which will cost businesses millions, if not billions, of dollars to defend or settle.

Justice Not Profit

Chief among the act’s opponents, Justice Not Profit takes aim at the opt-out mechanism introduced by the new law, complaining that it is “prone to abuse and generates significant costs for businesses of all sizes.”[9] According to the group, introducing U.S.-style opt-out litigation in the U.K. will significantly increase the volume and “coercive power of litigation.”[10] Specifically, the group fears that by allowing representatives to bring claims on behalf of large groups of unnamed consumers, the Aat will necessarily inundate businesses with unmeritorious claims. Accordingly, businesses named as defendants will be forced to settle such cases in order to avoid the expense, and other negative consequences associated with large-scale, protracted litigation.

Furthermore, the group has expressed a deep concern over third-party litigation funding, which it perceives as “converting the civil justice system into a means for profit-making third parties ... to hijack disputes for their own ends.”[11] Third-party funders are investment companies who agree to fund a lawsuit in exchange for a share of any compensation received from the case. Although unsupported by any actual experience, the group contends that funders will be motivated to fund even the weakest of claims if it perceives any chance for a settlement or damages award. This concern is further compounded by the group’s claim that only a fraction of any settlement or damages award is actually

received by claimants.[12]

Accordingly, Justice Not Profit (audaciously) accuses class action lawyers and third party litigation funders of turning a profit by targeting consumers who have been victimized by antitrust cartels. In support of its argument, the group cites to a telephone survey conducted by Public Opinion Strategies and Penn Schoen Berland on 800 voters throughout the U.S. for the proposition that U.S. consumers believe that class action lawyers benefit more than those they purport to represent.[13] The group further cites to the survey to make the claim that while 60 percent of U.S. consumers (really, 800 randomly selected voters) acknowledged that they were included in a class action (acknowledged that they received notice in the mail or via email advising them that they are a potential member of a class action), only 14 percent “reported receiving anything of meaningful value as a result.”[14] It is noteworthy that this survey did not specifically solicit responses from class members of U.S. antitrust class actions, and yet Justice Not Profit uses it to lend support to its very specific attack on the collective action mechanism proposed in the U.K. for competition cases.

In Defense of the U.S. Antitrust Class Action

In October 2014, the Center for Justice & Democracy at New York Law School published a comprehensive report on the effectiveness of class action litigation as a tool for individuals and small businesses seeking justice.[15] Specifically, the report surveyed a selection of class action cases spanning various areas of the law, including nine U.S. antitrust class actions. According to the report, each of the nine antitrust cases examined resulted in settlements that collectively distributed over \$1.4 billion to tens of thousands of class members who were mainly comprised of consumers and small and medium-sized businesses.[16]

Notably, in many of the antitrust cases examined by the report, the civil class action followed from a criminal investigation by the U.S. Department of Justice. However, as is often the case, the DOJ did not seek restitution in connection with its criminal investigation, choosing instead to rely on private enforcement to provide compensation to the victims.[17] Thus, without private enforcement regimes, the victims of those nine antitrust conspiracies would not have been able to recover damages. And these nine cases are just a handful of many other similar examples.

Take, for instance, the Air Cargo antitrust litigation, a case involving a massive global conspiracy among airfreight shipping carriers to impose non-negotiable fuel and security surcharges on shipments of goods to and from the U.S. According to the U.S. Department of Justice, the conspiracy affected over \$20 billion in commerce.[18] Twenty-one carriers pled guilty in the U.S. for their participation in the conspiracy, and agreed to criminal fines in excess of \$1.8 billion.[19] However, the defendants were never ordered to pay restitution to the victims of their scheme.[20]

Private civil actions have been brought against the Air Cargo defendants in many jurisdictions around the world, including in the U.S. and the U.K. In the U.S. civil class action, *In re Air Cargo Shipping Services Antitrust Litigation*, 06-md-1775 (EDNY), settlements have been reached with 24 defendants. To date, over \$320 million has been distributed to class members (with even more pending approval by the court) who have received awards ranging from tens of thousands of dollars to some over \$1 million.[21] Thus far, this has been the only means by which class members have received compensation for the losses they suffered as a result of the price-fixing conspiracy. Meanwhile, as of the date of the Center for Justice & Democracy’s report, the cost of litigating the case had reached over \$11 million, not including attorney’s fees.[22]

In Defense of the U.K. Competition Collective Action

When one factors in the millions of dollars in costs associated with litigating complex, global antitrust cases, it is clear that without access to class actions, many would be left with no recourse at all. It is precisely for this reason that the policy objective behind the U.K.'s new law is to provide access to consumers and small businesses who seek redress against large corporations who have engaged in anti-competitive practices. Importantly, the act also works to deter such conduct in the first instance.

Moreover, the act is not without its safeguards. First, the act makes clear that collective actions may only be commenced by a person or company with a genuine interest in the case, which may include trade associations or consumer groups.[23] The CAT is entrusted to approve the most appropriate class representative, and despite Justice Not Profit's concerns, it is generally not the policy of the U.K. government to allow claims to be brought by law firms, or third party litigation funders for these cases.[24]

Furthermore, the CAT is specifically authorized to determine whether claims will proceed as an opt-in or opt-out case. [25] Opt-out cases are limited to those brought on behalf of class members who are domiciled in the U.K., while non-U.K. domiciled individuals or companies must opt in to the action.[26] In addition, the CAT is required to certify claims in order for them to proceed as a collective action.[27] These procedures are further viewed by proponents of the law as safeguards against the influx of meritless claims.

Finally, the act prohibits the use of contingency fee arrangements, or damages-based agreements, in opt-out collective actions.[28] While allowing for third-party funding opportunities, it is important to note that third-party litigation funders operate under a specific code of conduct, which is policed by the Association of Litigation Funders.[29] While Justice Not Profit warns that these companies will facilitate abuse and exploitation, the group provides no such examples. To the contrary, such litigation funding is common throughout Europe, and is used effectively in many cases to help claimants pay the daunting costs associated with litigating collective actions.

Essentially, the goal of the new law is to effect change, and provide access for claimants who would otherwise have no recourse. As a spokesperson for the U.K.'s Department of Business, Skills and Innovation stated: "We are not introducing a US-style class actions regime. The Consumer Rights Act is about getting a better deal for businesses and consumers. The current opt-in regime isn't working, so we are transforming the system to ensure consumers and small businesses can hold those that breach competition law to account in the way big businesses can." [30]

Conclusion

Antitrust conspiracies affect billions of dollars of commerce each year, and while litigation abuse is a valid concern, realistically speaking, class actions are often the only means by which victims of antitrust conspiracies are able to seek redress for losses they suffered.[31] This compensation is more than just a nominal amount, rather, antitrust settlement and damages awards represent a significant recovery for those who have been targeted by price-fixing cartels. Justice Not Profit's argument to the contrary is as bold as it is misleading. The group advocates a scheme that has already been deemed ineffective; one that does not offer justice for victims of antitrust violations, but only ensures profit for those who violate the law. By contrast, the changes proposed by the U.K.'s Consumer Protection Act 2015 offer a mechanism to facilitate collective redress in a way that grants claimants access to recovery, and deters businesses from engaging in anti-competitive practices. This will bring victims in the U.K. justice ... not

profit.

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[1] Justice not Profit is backed by the U.S. Chamber Institute for Legal Reform, a not-for-profit public advocacy group affiliated with the U.S. Chamber of Commerce, which “represents the interests of more than three million businesses” that “conduct substantial business in the UK.” About Us, Justice Not Profit, <http://www.justicenotprofit.co.uk/about-us/>

[2] The Consumers Association v. JJB Sports PLC (2007) CAT Case No. 1078/7/9/07.

[3] Lesley Ainsworth, UK: Settlement Reached In The First Representative Private Action For Damages Under UK Competition Law, Mondaq (Feb. 7, 2008), <http://www.mondaq.com/x/56322/Antitrust+Competition/Settlement+Reached+In+The+First+Representative+Private+Action+For+Damages+Under+UK+Competition+Law>.

[4] Consumer Rights Act, (2015) § 47B, available at: <http://www.legislation.gov.uk/ukpga/2015/15/schedule/8/enacted>.

[5] Id. at § 47A(2).

[6] Id. at § 47B(8).

[7] CAT Rules (2015 Draft), at Rule 112, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/401972/bis-15-76-draft-competition-appeal-tribunal-rules-2015.pdf.

[8] Consumer Rights Act, (2015) § 49.

[9] Written Evidence Concerning Schedule 8 of the Consumer Rights Bill, U.S. Chamber Institute for Legal Reform, (Feb. 24, 2014), http://www.instituteforlegalreform.com/uploads/sites/1/ILR_Written_Evidence_re_Schedule_8_of_the_UK_Consumer_Rights_Bill_-_2-24-2014.pdf.

[10] Our Concerns, Justice Not Profit, <http://www.justicenotprofit.co.uk/our-concerns/>.

[11] Id.

[12] Id.

[13] International Comparisons of Litigation Costs, U.S. Chamber Institute for Legal Reform (May

2013),http://www.agefiactifs.com/sites/agefiactifs.com/files/files/2013/12/8961722S_EtudeCCEU.pdf.

[14] Joanne Doroshow, *First Class Relief: How Class Actions Benefit Those who are Injured, Defrauded and Violated*, Center for Justice Democracy at New York Law School (Oct. 2014).

[15] *Id.*

[16] *Id.*

[17] In fact, many guilty plea allocutions represent on the record that restitution will not be ordered as part of the plea given the pending of related class actions filed on behalf of victims of the antitrust cartel.

[18] Ronald T. Hosko, Joint Statement with Antitrust Division Assistant Attorney General William J. Baer Before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy, and Consumer Rights (Nov. 14, 2013), <https://www.fbi.gov/news/testimony/cartel-prosecution-stopping-price-fixers-and-protecting-consumers>.

[19] *Id.*

[20] See, e.g., Plea Agreement at 12, *United States v. Lan Cargo S.A., et al.*, Case No. 09-CR-00015 (D.D.C. February 19, 2009), ECF No. 9.

[21] Joanne Doroshow, *First Class Relief: How Class Actions Benefit Those who are Injured, Defrauded and Violated*, Center for Justice Democracy at New York Law School (Oct. 2014).

[22] *Id.*

[23] Consumer Rights Act, (2015) § 47B(8).

[24] *Id.* at § 47B(8); see also Business, Innovation and Skills Committee, Sixth Report, at ¶283, Consumer Rights Bill (Draft),<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmbis/697/69708.htm> (“We recommend that revised Tribunal Rules should clarify that collective proceedings cannot be brought by law firms, third party funders or special purpose vehicles.”)

[25] Consumer Rights Act, (2015) § 47B(11).

[26] *Id.* at § 47B(11)(b)(i)-(ii).

[27] CAT Rules (2015 Draft), at Rule 78, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/401972/bis-15-76-draft-competition-appeal-tribunal-rules-2015.pdf.

[28] Consumer Rights Act, (2015) § 47C(8).

[29] Rocco Pirozzolo, *Collective action funding concerns*, *The Law Society Gazette*, Oct. 10, 2014, <http://www.lawgazette.co.uk/law/practice-points/collective-action-funding-concerns/5044084.fullarticle>.

[30] Owen Bowcott, U.S. Chamber of Commerce lobbies against class actions in U.K. courts, The Guardian, Jul. 15, 2015, <http://www.theguardian.com/business/2015/jul/15/us-chamber-commerce-lobbies-against-class-actions-uk-courts>

[31] Ronald T. Hosko, Joint Statement with Antitrust Division Assistant Attorney General William J. Baer Before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy, and Consumer Rights (Nov. 14, 2013), <https://www.fbi.gov/news/testimony/cartel-prosecution-stopping-price-fixers-and-protecting-consumers>.

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