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Is US Class Action Culture Coming To The UK?

Law360, New York (September 14, 2015, 12:37 PM ET) --

Ashley Bass Kenny Henderson

The Consumer Rights Act 2015 will introduce a new opt-out mechanism for antitrust collective proceedings in the U.K..[1] The mechanism will aggregate claims that are individually uneconomical to bring into potentially high-value claims. The opt-out mechanism will be available to U.K.-domiciled claimants only, although foreign-domiciled claimants will be able to opt in to claims. The U.K. government intends to introduce the mechanism on Oct. 1, 2015.

As with U.S. class actions, certification will be a key battleground. This will be the U.K.'s first opt-out class action mechanism,[2] and in the absence of domestic precedent, the U.K. will likely look to how litigated issues have been addressed and considered under foreign analogous systems. With its well-developed body of law in this area, it would be natural for the U.K. tribunals to pay particular attention to the U.S. experience.

This short article considers the key parameters of the pending U.K. mechanism and examines analogous U.S. thresholds for certification.

Key Differences From the U.S. Opt-Out System

During the pre-legislation consultation, the U.K. government stated that safeguards in the new mechanism would prevent development of a perceived U.S.-style litigation culture. To that end, while introduction of an opt-out mechanism is a significant move toward the U.S. system, other important differences have been retained. In particular, in the U.K. system: (1) damages will be on a compensatory basis (no punitive/exemplary damages or U.S.-style treble damages);[3] (2) no jury trials will be available; and (3) contingency fees will not be permissible in U.K. opt-out proceedings.

Furthermore, the usual English litigation approach to cost-shifting will be retained. Two-way cost shifting imposes significant settlement pressures and discourages frivolous claims, as claimants face the risk of paying defendant fees. The new U.K. opt-out mechanism imposes the adverse cost risk on the class representative rather than on the individual class members; thus, third-party funding will likely be needed to indemnify proposed representatives. The representative's ability to pay an adverse costs order is a factor when determining the suitability of the proposed representative at the certification stage, and so funding may be examined at this point.

Certification Under the CRA

Collective actions under the Consumer Rights Act must be brought before the U.K.'s specialist antitrust tribunal, the Competition Appeals Tribunal (CAT). The circumstances in which certification is approved, through grant of a collective proceedings order, are set out in the CRA, as supplemented by the CAT's procedural rules.[4] In short, there are three stages to certification: (1) suitability of the proposed class representative;[5] (2) eligibility of the claims for collective redress;[6] and (3) whether a collective claim should proceed on an opt-in or on an opt-out basis.[7] The CRA and draft CAT rules set out broad parameters for the CAT's assessment of each stage, including nonexhaustive factors that the CAT should consider, but the framework gives the CAT broad discretion.[8]

Comparisons With the U.S. Certification Standards

The test to be applied by the CAT when granting CPOs as set forth in the draft CAT rules bears a number of similarities to the test applied by the U.S. courts under Rule 23 of the Federal Rules of Civil Procedure. In order for the U.S. courts to certify a class action, Rule 23(a) of the FRCP requires: (1) that "the class is so numerous that joinder of all members is impracticable"; (2) that "there are questions of law or fact common to the class"; (3) that "the claims or defenses of the representative parties are typical of the claims or defenses of the class"; and (4) that "the representative parties will fairly and adequately protect the interests of the class." Additional requirements are grafted onto class certification in FRCP 23(b), which requires that common issues "predominate over any questions affecting only individual members" and that the class action mechanism is "superior to other available means for fairly and efficiently adjudicating the controversy."

In the U.S., the words of the statute as set forth in FRCP 23 are meaningful and drive a substantial portion of the analysis of class certification claims in antitrust cases. For example, class certification defense frequently focuses on whether common issues truly "predominate" and whether the claims of the putative class representative are "typical" of the claims of the class.

Interestingly, despite the apparent overall similarities between the U.K. and U.S. rules, on examining the wording of the key tests, certain differences start to emerge. For example, the relevant provision in the draft CAT rules requires that the claims of the class raise "common issues", i.e., the "same, similar or related issues of fact or law."[9] However, Rule 23(b)(3) of the FRCP states that "the questions of law or fact common to class members predominate over any questions affecting only individual members." Notably, in the U.S., not only must there be common issues (as in the U.K.), but there must also be more "commonality" than not between the claimants' various claims.

Similarly, Rule 79(1)(c) of the draft CAT rules requires that the proposed claims are "suitable to be brought in collective proceedings", while the U.S. equivalent, Rule 23(b)(3) of the FRCP, states that the proposed class action must be "superior to other available methods."

And, FRCP 23 requires that the claims or defenses of the representative party are “typical” of the claims or defenses of the class; however, the CRA and the draft CAT rules contain no similar “typicality” language.

Perhaps these are simply linguistic differences in emphasis, and only time will tell whether the rules applied by the CAT translate into different outcomes than would arise in the U.S. Given the U.K.’s stated concern on the perceived excesses of the U.S. litigation culture, in particular the excesses generated by class action litigation, one would have thought that the U.K. government would have gone to great pains to ensure that the rules governing CPOs were as stringent as, if not more stringent than, the U.S. analogues. Yet the looseness of some of the language leaves open questions as to how the CAT will apply the rules in practice and how the standards for CPOs will develop.

Perhaps the perceived excesses of the U.S. class action culture will be avoided in the U.K. solely through shunning treble damages, jury trials and contingency fees for out-opt claims. Nonetheless, defendants in the U.K. will be well served to argue that the rules for certification should be applied stringently and that CPOs should not be granted lightly. The CAT appears to have a significant amount of discretion in how to apply the CPO rules, and prudent defendants will explore arguments against certification that have proven effective in the U.S., based on similar statutory language. Indeed, U.K. defendants could look to a number of recent important victories by the U.S. antitrust defense bar that have gone some way to making class certification more difficult.[10]

Impact of the New Opt-Out Mechanism

The legislative framework for antitrust claims in Europe is undergoing a period of significant change, with initiatives at both the EU and member state level. The recently passed Antitrust Damages Directive[11] is intended to facilitate antitrust damage claims, and requires that member states apply certain minimum standards to facilitate such claims. Notably, however, the Antitrust Damages Directive does not mandate that member states introduce a collective redress mechanism, leaving these matters up to individual member states.[12]

Although other European jurisdictions have introduced collective redress regimes, the U.K.’s opt-out system is far more expansive and will further cement the U.K.’s position as the jurisdiction of choice for antitrust damages cases. For example, Portugal has had an opt-out system for many years, but it is rarely used. Belgium introduced an opt-out mechanism in September 2014.[13] But, the Belgian mechanism is more restrictive than the UK mechanism as to who may be a class representative, which may hinder development of Belgian antitrust class actions. Further like the U.K. system, the opt-out element of the Belgian mechanism is restricted to persons domiciled within the jurisdiction, which will also limit the impact of Belgian claims given the relatively small size of the Belgian population and economy. None of these systems comes anywhere near the anticipated popularity of the impending U.K. system.

As a further observation, early collective action claims in the U.K. will be hard fought, particularly at the certification stage, with the plaintiff and defense bars eager to establish precedents. If the mechanism proves effective, there will likely be a significant uptick in antitrust claims in the U.K. This may particularly be the case with respect to consumer suits. Indirect purchasers have standing to bring claims in Europe,[14] but prior to introduction of this mechanism, typical claims were from direct purchasers or at least those sufficiently high in the distribution chain to have bought sufficient goods or services to make a claim economically viable. New opt-out claims will now likely be brought also on behalf of consumers at the end of the distribution chain, adding an additional level of exposure for defendants.

Thus, given the potential for a significant expansion of collective claims in the U.K., defendants faced with such claims must craft an early strategy to manage and defeat certification. Given the similarities between the U.K. and U.S. standards for certification, any defendant in the U.K. should consider whether there are defense strategies that have developed in the U.S. that may be called upon to help defeat certification in a particular case once the cases come knocking.

—By Ashley Bass and Kenny Henderson, Covington & Burling LLP

Ashley Bass is a partner in Covington's Washington, D.C., office. Kenny Henderson is special counsel in the firm's London office.

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[1] The CRA introduces other reforms in this context, such as new opt-out collective settlements. However, this article focusses on the new opt-out mechanism.

[2] The English Civil Procedure Rules ("CPR") Part 19.6, provide for a 'Representative Action', with some similarities to opt-out class actions. However, this mechanism has rarely been used effectively, and its use was rejected by both the High Court and the Court of Appeal in the antitrust claim of Emerald Supplies Ltd v British Airways[2010] EWHC Civ 1284 (Court of Appeal), on account of the class members not having the "same interest."

[3] CRA, sch. 8, para. 6, 47C(1).

[4] The CAT Rules were published in their proposed final form on 8 September 2015 as Statutory Instrument No. 1648 of 2015 ("Draft CAT Rules").

[5] CRA, sch. 8, para. 5, 47B(5)(a), 47B(8), Draft CAT Rules, r 78.

[6] CRA, sch. 8, para. 5, 47B(5)(b), 47B(6), Draft CAT Rules, r 79.

[7] Draft CAT Rules, r 79(3).

[8] The UK Government has also announced its intention to update the CAT's Procedural Guidelines, which supplement the CAT Rules, but the proposed updates have not yet been published.

[9] Draft CAT Rules, rr 79(1)(b) and 73(2).

[10] The Supreme Court has recently reaffirmed on multiple occasions that litigation should be conducted by individuals, with class actions as the exception. See e.g.,Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013), "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'"; Am. Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2310 (2013), "[Rule 23] imposes stringent requirements for certification that in practice exclude most claims."

[11] 2014/104/EU

[12] In June 2013, the European Commission published a non-binding recommendation (Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law OJ L 201/60), which recommended that Member States introduce collective redress mechanisms, but on an opt-in basis only.

[13] Code of Economic Law, Book XVII, Title II (Wetboek Economisch Recht, Boek XVII Titel 2).

[14] Manfredi, Case C-295/04.

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