Consumer compensation and private antitrust enforcement in the United Kingdom – setting a trend for Europe?

By Sebastian Peyer[1]

I. INTRODUCTION

In past years the compensation of victims of anticompetitive activity has been high on the agenda in Europe and the United Kingdom. It has been acknowledged that many of those who were overcharged by firms breaching EU or U.K. competition law are not compensated for their losses. Breaches of competition law typically cause relatively small individual losses to consumers and businesses, especially when they are passed on along the chain of production. For many harmed individuals the costs of litigation outweigh the potential benefits. Claim aggregation is one way to address the issue: One representative is allowed to bring an action on behalf of all victims and the accumulated claims make it worthwhile to initiate legal proceedings against the culprits. While many EU Member States have proceeded gingerly on the road to group actions, the idea finally seems to be catching on. Despite the still prevalent cautious attitude towards "U.S.-style class action" — many stakeholders still hold on to the view that there is a "U.S. litigation culture" in which class actions are rampant and innocent firms are being blackmailed into settlements — policy makers have begun to introduce measures that aim at more flexibility with regards to group claims. Denmark introduced (opt-out) group actions in 2008, Italy in 2009 (opt-in) and the Netherlands have adopted an opt-out settlement procedure. The EU Commission identified a need for a coherent EU-wide approach and recommended Common Principles for group actions in 2013. The Common Principles favor an opt-in group action, i.e. a procedure in which every claimant has to be identified and explicitly join the claim, and a loser pays rule. In 2015, the U.K. government introduced opt-out group actions for claims based on breaches of competition law. The Consumer Rights Act 2015 sets out the details of the new class action regime and also introduces the opportunity for undertakings to set up a voluntary consumer redress scheme that can be approved by the U.K. Competition and Markets Authority ("CMA"). These legal innovations in one of the larger economies in the EU may well encourage other Member States to become more adventurous too. The U.K. government has certainly gone beyond the Commission's recommendation on group actions that confined group actions to opt-in procedures. In this short article I will summarize the recent developments and look at the potential implications of the U.K. developments.

II. THE NEED FOR BETTER COMPENSATION TOOLS

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The U.K. system of private antitrust enforcement had long been criticized for being ineffective in compensating small businesses and consumers. Tools to aggregate claims had been available for some time but they proved to be ineffective. The Civil Procedure rules provide for representative actions in CPR 19.6 according to which a claim can be brought by a representative when more than one person has the same interest in the claim. However, this route to class actions was shut in *Emerald Supplies v. British Airways* (2010) when the High Court held that it was not possible to determine the "same interest" of all members of the class until the question of liability had been tried. The High Court also denied a mass claim on behalf of 64,697 claimants in another case against British Airways (*Bao Xiang v. British Airways* (2015)) because the solicitors had not obtained proper authorization from the purported claimants.

Another route to seek compensation for breaches of competition law was provided by the old section 47B of the Competition Act 1998. It gave specified bodies the right to bring a competition claim on behalf of consumers in the Competition Appeal Tribunal — a specialist competition court that hears appeals against decisions of the competition authorities as well as private antitrust claims. When section 47B (old) was in force, only the consumer organization called "Which?" received the status of a specified body. Under the old regime the representative had to identify individual consumers that had suffered a loss and encourage them to join the claim (opt-in). This proved to be burdensome for the consumer organization. In the only opt-in representative action, "Which?" sued JJB Sports for fixing prices of Manchester United and England replica football shirts. The consumer organization was able to identify 130 individuals — a tiny fraction of those who were harmed. The case settled and it is estimated that the procedure provided benefits of around £20,000 whereas the costs were likely to be in the region of several hundred thousand.

The limitations of the old system for group compensation were obvious. The opt-in representative action had too narrow a focus and the consumer organization "Which?" made clear that it would not try to bring another case under section 47B (old). The opt-in consumer action was restricted to follow-on proceedings and there was no latitude to prove an infringement beyond the scope and timeframe that had been established by the competition authority. More importantly, the opt-in nature made it difficult to aggregate a sufficient number of claims to make the proceedings financially viable. Apart from the compensation problems, the ineffective system to deal with dispersed losses also raised fundamental questions about the deterrence effect of private antitrust claims. In response to the criticism, the U.K. government introduced an opt-out group action as well as a voluntary consumer redress scheme with the Consumer Rights Act 2015.

III. THE OPT-OUT GROUP ACTION

The Consumer Rights Act 2015 completely replaced section 47B. The new section 47B permits opt-out collective actions to be brought as either stand-alone or follow-on cases on behalf of U.K. citizens in the CAT; non-U.K. consumer can join a group action on an opt-in basis. According to section 47B (new), collective actions are a combination of two or more claims, brought either as stand-alone or follow-on damages actions or injunction claims for breaches of U.K. or EU competition law. A representative can combine two or more claims if they deal with the same, similar or related issues of fact or law. The representative can be a member of the class but this is not a compulsory requirement. However, the BIS consultation of 2012 indicated some reluctance to accept collective actions from entities that are not members of the class, especially law firms. According to the CAT Rules consumer organizations and other claim vehicles are allowed to bring claims but the Tribunal will consider whether it is just and reasonable to do so.

The material test for the new class action appears to be modelled after Rule 23(a)(b)(3) of the U.S. Federal Rules of Civil Procedure. Section 47(B) is fairly generous stating that claims are eligible for

collective proceedings if "they raise the same, similar or related issues of fact or law." The CAT rules specify the requirements: The claim can be brought if the lead claimant represents an identifiable class of persons and raises common issues that are suitable to be brought in collective proceedings. Unlike the U.S. class action rules, there is no numerosity requirement, i.e. a rule stating explicitly that a joinder of claims must be impractical. It has been pointed out that the opt-out class action may not be available to claimants for years to come due to the unfortunate phrasing of the rules that guide the transition from the old regime to the reformed opt-out process.[2] In essence, the transition rules declare the time when the damage accrued as the point of reference for the use of section 47B (new). Infringements of competition law are often discovered many years after they occurred and those infringements that occurred before 2015 will have to be dealt with under the old, ineffective regime if the transition rules are taken at face value. Even if the courts find a way around this, it may take a while before the first opt-out group action is being brought.

Even if the transition period can be adjusted, the Consumer Rights Act 2015 has built safeguards into the class action regime that are to prevent the emergence of a "litigation culture" and "speculative litigation" because the government and many stakeholders had expressed concerns during the drafting process that opt-out class actions may lead to excessive litigation and litigation blackmail. For example, section 47C (1) prohibits exemplary damages. Exemplary damages are rarely awarded in English civil litigation — *2 Travel Group Plc v. Cardiff City Transport Services* Ltd being the only competition case where the defendant was punished. Exemplary damages are not normally available in follow-on proceedings as they would punish the offender twice. Even if they were available, potential windfall profits from exemplary damages are unlikely to play a large role in the claimant's profit calculation and, thus, have probably little influence on the incentives to bring an opt-out class action.

Section 47C (8) (new) is potentially more limiting, declaring damages-based funding agreements unenforceable. Under a damages-based agreement the lawyer's pay is determined by a percentage of the damages award if the case is won. The damages-based funding agreement would allow lawyers to pursue a claim without financial risk to the claimants. While damages-based agreements are prohibited, conditional fee agreements, i.e. so-called "no-win, no-fee" agreements, are still permitted. In a "no-win, no-fee" agreement, the lawyer's fee is normally based on an hourly rate with a success fee if the case is won. The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 does no longer permit claimants to recover the success fee from the defendant (or the costs of after-the-event insurance if it is taken out). It means that the claimant has to pay the success fee, after-the-event insurance premium or, for example, costs for experts out of the damages award. In a jurisdiction with high litigation cost this can be substantial. The success fee that the claimant has to pay is likely to reduce the potential gains from litigation and will lessen the incentives to bring class actions. Section 47C (6) stipulates that representatives can request that unclaimed sums of money are to be paid to them to cover the litigation expenses. However, this payment is rather uncertain. Overall, the opt-out class action certainly requires some fine-tuning and the next few years will show whether the procedure is being used to claim compensation.

IV. THE CONSUMER REDRESS SCHEME

If class litigation is intended to be the stick with which to threaten infringers, the U.K. government has also offered a carrot in the shape of a voluntary consumer redress scheme that may encourage firms to offer compensation to consumers in exchange for a discount on the fine. The Consumer Rights Act 2015 encourages firms to settle their disputes and set up compensation funds for consumers. The new sections 49C-

[2] http://competitionbulletin.com/2015/10/01/private-actions-the-cra-2015-giveth-and-the-2015-cat-rules-taketh-away/.

49E of the Competition Act 1998 give powers to the Competition and Markets Authority to approve such voluntary redress schemes. The idea of the redress scheme is to provide more effective compensation to victims of anticompetitive conduct and, at the same time, avoid the risks and expenses of litigation. Companies that apply for the redress scheme during the investigation process may receive a discount on the fine of up to 20% of that fine. This discount can only be applied by the CMA and cannot be offered to firms that have been fined by the EU Commission. Parties compensated under the scheme will normally lose their right to claim compensation in the courts. Under the redress scheme, a company that has infringed competition law may apply to the CMA for approval of a redress scheme during or after the public investigation has been completed. In both instances the redress scheme will be approved at the same times as the infringement decision or afterwards. In making the decision, the CMA has to evaluate the scheme, taking into account the amount or the value of the compensation offered under the scheme, the setup and the governance of the scheme. Once the scheme has been approved, individuals can claim compensation against production of adequate evidence. More details on the application and approval of redress schemes are provided in the CMA's Guidance document.

It is generally a good idea to avoid costly litigation and solve disputes pre-judicially. However, the redress scheme may be open to misuse and undermine the efforts to establish an opt-out class action regime. I have criticized the Guidance in more detail elsewhere but there is one point that becomes rather important in the light of the new group action regime.[3] Assuming that even a low compensation offer is better than no compensation (given that courts are too expensive), there is a risk that the Consumer Redress Scheme may be used strategically to undermine opt-out class actions. It is in the nature of settlements, like the Consumer Redress Scheme, that individuals gain nominally lower but hassle-free compensation. Those who claim compensation under the redress scheme will not be able to claim compensation in the courts. Consequently, a successful redress scheme will reduce the size of the potential class of claimants. It is also unlikely that all injured consumers will come forward, leaving a class of injured parties without compensation. Thus, the redress scheme could be used to reduce the size of a class of potential claimants to the point where it is no longer profitable to bring a collective action on behalf of those who are dissatisfied with the settlement offer and decided not to make use of it. It may also make it more difficult to estimate the size of the class but some kind of limited disclosure may help with this problem. Finally, when certifying a group action the CAT takes into account whether there have been any efforts to resolve the dispute outside the courts, e.g. via an approved redress scheme. Thus, setting up a redress scheme may help to demonstrate that a collective action is not needed to dispose of the dispute.

The involvement of the U.K. competition authority in approving a settlement agreement between companies and consumers raises questions as to the role competition authorities ought to play in compensation claims. Competition authorities commonly fine a company that is subsequently asked to pay out compensation either by settling with groups of consumers or by paying a damages award following litigation. In the current system the competition authority deals with the entire case bar the calculation of the overcharge although it is probably best placed to obtain the relevant information, including data proving overcharges. If compensation is deemed so important, would it not make more sense to involve the competition authority in the provision of compensation (calculation)? The division of private compensation and public enforcement creates two layers of enforcement that are fairly disconnected. Many issues that have been (or could have been) addressed on the public level are (re)litigated on the private enforcement level. If an authority based its fines on overcharges, it would potentially raise the overall punishment (i.e. public fines

[3] For my criticism on the draft Rules see https://competitionpolicy.wordpress.com/2015/06/12/why-harmed-consumers-may-be-more-satisfied-in-the-future-the-cmas-new-redress-scheme/.

and private damages added together) and facilitate the coordination of public and private enforcement. I admit that this may be an unpopular proposal with the authorities as their fining guidelines look at crude measures for harm such as affected markets with various factors that reduce or increase the fine. However, the existing system potentially creates more waste by duplicating enforcement efforts. Having the competition authority to approve a redress scheme can only be the beginning of a better integration of public and private enforcement.

V. OUTLOOK

What do the developments in the United Kingdom mean for private antitrust enforcement in Europe? It is likely that some Member States will follow the U.K.'s template if they are not already contemplating similar measures. EU Member States have been reluctant to accept that consumers will only receive some kind of compensation if legal devices are created that would allow claims to be aggregated. More recently, policy makers appear to open up to the full potential of private antitrust enforcement. While class actions are certainly a viable option to provide compensation, schemes like, for example, the consumer redress scheme that avoid courts may be a good alternative. Litigation is costly and if parties can agree on some kind of adjustment for the harm suffered from breaches of the competition rules outside court, it would help to save resources. The U.K. experience with opt-in class actions has also been a striking demonstration why this type of group compensation may not be worthwhile in antitrust enforcement.

Despite the recent developments, some problems remain with the direction of private antitrust policy. U.K. and EU policy makers view private antitrust actions litigation primarily as a tool to compensate. This is too narrow a focus. It essentially ignores two important aspects of private antitrust enforcement: deterrence and the wider range of remedies available. If group actions are used to their full potential, they may not only help to compensate victims but hey will also create a threat for those undertakings that consider a breach of the antitrust laws. It is commonly held in Europe that public authorities provide deterrence and private antitrust enforcement pursues a compensation function only. Given that fines are regularly reduced on appeal and there is little evidence that public authorities over-deter, this sounds like a fanciful division of functions. If private antitrust actions in general, and group claims in particular, were used to their full potential, they could help to properly deter firms from breaching the antitrust laws in the first place, thus, reducing the need for costly legal actions to compensate. An add-on to this argument is that the current focus on compensation may justify the existence of damages group actions but it fails to include, for example, injunctions. Section 47B (new) permits victims of anticompetitive conduct to bring an injunction group claim. The existence of this remedy cannot be reconciled with a compensation-based approach. Overall, the new measures introduced to facilitate compensation for consumers may have a long-term effect by influencing other European jurisdictions as well as the policy debate about the role of private antitrust enforcement.