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BLOG

Class Actions 101: An Introduction to UK Collective Actions and How They Differ from US Class Actions

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In recent years, the UK has seen a rising trend of individuals coming together to collectively bring claims against large companies due to the introduction of new European procedural rules allowing for "collective actions."

Traditionally seen as a U.S. procedure, class actions are now flourishing in Europe and the UK. Global technology and financial services companies are facing ongoing cases before the English courts including a claim from 46.2 million individuals, valued at £14B, and a claim from almost 20 million individuals, valued at £1.4B.

Most recently in July 2023, the Court of Appeal in *Forex*[1] permitted a £2.7B class action against six investment banks for alleged foreign exchange manipulation concerning spot trading in the G10 currencies. The context of the class action is that on May 16, 2019, the European Commission found that the banks had each participated in one or both of two FX spot trading cartels in breach of EU competition law, for which they were fined €1.07B. Phillip Evans, a former Inquiry Chair at the Competition and Markets Authority (CMA) sought the permission of the Competition Appeal Tribunal (CAT) to act as Proposed Class Representative (PCR) on behalf of the classes and filed a claim on December 11, 2019. The CAT handed down a judgement on March 31, 2022, deciding that the proposed collective proceedings could be certified, but on an opt-in basis only, effectively "denting" the claim. However, a successful appeal led to a ruling by the Court of Appeal on July 25, 2023[2], that the claim can proceed on an opt-out basis – lending further credibility to the usage of the procedure. The Court of Appeal clarified that there was no presumption in favour of opt in or opt out proceedings in collective action claims in the CAT.

Further, in August 2023, a collective action claim was brought in the CAT against the first of six water companies alleging a failure to properly report sewage spills and pollution of rivers and seas, with compensation payments sought for an estimated £330M. Given that the number of pollution incidents reported to regulators is an important factor in determining the price that can be charged to consumers, the alleged underreporting of these incidents would have resulted in excessive and illegitimate service charges. The Proposed Collective Representative in this case is Professor Carolyn Roberts, an environmental and water consultant. Roberts alleges that a water company abused its dominant market position by underreporting the number of pollution incidents it caused. This claim is significant for not only being an "opt-out" collective proceedings claim, enabling compensation to be sought out on behalf of millions of household consumers, but also for being the first collective proceedings claim in the UK with a strong environmental focus and impact. For the most part so far, UK collective actions have copied theories asserted in the U.S. or elsewhere in the world—but because of the UK's substantial focus on environmental regulation, it

would not be surprising to see the UK out in front of a new generation of environment-related class actions, e.g., based on alleged regulatory violations, "greenwashing" advertising claims, or other types of matters.

These cases highlight the very real threat that companies across a breadth of industries are facing from the collective action mechanism recently developed in the UK. Class actions in the UK have been limited in comparison to other jurisdictions, such as the U.S. and Australia; however, the rise of third-party funding and potential loosening of court rules is driving forward large-scale actions. In 2020, the UK Supreme Court handed down its judgment in *Merricks v Mastercard* [2020] UKSC 51 and approved a more permissive approach to the certification stage of collective proceedings (in which the CAT determines the eligibility of claims for collective proceedings). The Supreme Court held that the complexity of damages and risk of over or under compensation was not a bar to certification. The ruling has encouraged more collective claims and it is likely that this trend will continue.

Depending on their subject-matter, collective actions in the UK exist on either an "opt-in" and "opt-out" basis, although most of the actions operate on an " opt-in" basis, meaning that in order to participate, each claimant must proactively join in proceedings or authorise a party to bring a claim on their behalf. These are most common in what is known as a Group Litigation Order (GLO), which is a mechanism whereby the Court will group claimants together for the efficient management of claims which give rise to " common or related issues of fact or law," so that these common issues can be dealt with together, typically by the selection of one or more test cases.

In 2015, an opt-out regime was introduced regarding infringements of competition law under the Competition Act 1998 and the Consumer Rights Act 2015. There is currently a debate playing out in the Courts on whether the English legal system should make wider use of opt-out procedures to protect consumers. In the meantime, opt-out procedures are growing. The collective proceedings regime in the CAT has seen a surge in cases, with 10 of the 27 applications for a Collective Proceedings Order (CPO) commenced since 2015 being brought in 2022 alone.

We set out below a table summarising the key features of UK-style class actions and highlighting the main differences and similarities with class actions in the U.S.

	UK CLASS ACTIONS	COMPARISON WITH U.S. CLASS ACTIONS
Types of actions	• **Opt-In** actions require "would-be class members" to take proactive steps to be included in the class. Opt-in actions have historically been the most common type of UK class actions. • **Opt-out** actions are where a claim can be brought on behalf of a defined group without identifying all of the individual claimants or obtaining their authorisation. Opt-out actions are available albeit only for breach of competition law at present. The members of a class in opt-out actions are, by nature, larger than opt-in. • Another available opt-out action is the **Representative Action** procedure. It dates back hundreds of years, but to-date has rarely been used. The UK Supreme Court's decision in *Lloyd v Google [2021] UKSC 50* has lowered	• In the UK, opt-in class actions are more developed than opt-out. • In the U.S., both types of class actions (and, in some instances, mandatory participation classes) exist though claims for monetary damages most commonly proceed on an opt-out basis. • This fundamental structural distinction with the U.S. model is beginning to become blurred, and we expect UK claimant lawyers and funders to explore innovative ways of structuring litigation to increase the class size and therefore aggregate value of claims. The Court of Appeal's decision of July 25, 2023 in *Evans v Barclays Bank PLC & Ors* will likely make it easier for opt-out collective actions in the UK's CAT to proceed.

	the threshold imposed for Representative Actions.	
Procedure	**OPT-IN** • Obtaining a GLO: A claimant or defendant may apply for a GLO at any time or this may be directed by the court's own initiative. • Group members each issue their own claim and the court may grant a GLO if the claims "give rise to common or related issues of fact or law." • The court will then set up a **Group Register** that lists the claims that are subject to the GLO. Judgments and rulings concerning common issues (GLO issues) are binding on all claims subject to the GLO. • **No class representative** to represent interests of all in the same class, albeit the court may select test cases to try and encourage efficiencies amongst the group. **OPT-OUT (competition collective actions)** • Exclusive jurisdiction of the CAT. • A proposed representative will attend an approval hearing and apply for a CPO. • Requires a class certification through the granting of a CPO by the CAT based on 3 criteria: an identifiable class, common issues and suitability. • Following *Merricks v Mastercard*, the "Suitability Criterion" requires a relative assessment, to consider whether the claims are more suitable for collective rather than individual action. • Group members each issue their own claim and the court may grant a GLO if the claims "give rise to common or related issues of fact or law." • The court will then set up a **Group Register** that lists the claims that are subject to the GLO. Judgments and rulings concerning common issues	**OPT-IN** • The UK does not have class representatives in the case of GLOs. • In the U.S., named class representatives represent the interests of all members of the class in collective proceedings, assuming they meet the requirements for class certification. • In the U.S., many class actions are litigated in federal courts, though it depends on subject matter and other issues. In the UK, GLOs may be filed with both the County Court or the High Court. **OPT-OUT** • Given the recency (2020) of the opt-out concept, there is limited caselaw on such actions in the UK, compared to the greater availability of caselaw in the U.S.. • Opt-out procedures in the U.S. carry a lower threshold to certify when compared to the UK and permit a prolonged discovery process to determine whether a class can be certified. In hearing early disclosure applications in the UK, courts will not tolerate "fishing expeditions" to establish whether or not the claimants have a good and arguable case or not. That said, the UK courts have demonstrated some flexibility as regards to disclosure at an early stage. For example, in the phone hacking group litigation, Mann J gave directions for an early disclosure regime under which a claimant, on issuing a claim, was entitled to disclosure of data in respect of calls made to the claimant's mobile telephone and to certain of their associates. The aim was to enable each claimant to assess the level of potential phone hacking at an early stage.

	(GLO issues) are binding on all claims subject to the GLO. • **No class representative** to represent interests of all in the same class, albeit the court may select test cases to try and encourage efficiencies amongst the group.	
Damages	• Damages and injunctions are available for claims brought under the opt-in mechanisms and for representative actions. • Damages are generally calculated on a compensatory basis. Restitutionary damages or an account of profits can be used where appropriate. • For CPOs, the CAT can make an aggregate award of damages to be calculated on a class-wide basis. • In principle, exemplary damages are available in English law. They are not available for claims under the CPO regime.	• The scope of damages available in the UK is narrower compared to the U.S. • Whilst punitive and exemplary damages are available in the UK, these are very rare in practice. • GLOs may allow individualized proceedings for damages, however these are less common than in the U.S. where individualized damages may be determined late in the litigation.
Settlement	• There are no requirements for court approval of settlements of opt-in claims (save that, if the opt-in claim is made in the CAT, the class representative cannot settle the proceedings prior to the deadline for class members to opt-in to the proceedings unless court approval is obtained). Each claimant can make its own decisions in respect to settlement. • For opt-out CPO claims, settlements must be approved by the CAT in the form of a "collective settlement approval order." The CAT will only make such an order where it is satisfied that the terms of collective settlement are "just and reasonable" taking account of all relevant circumstances set out under the CAT rules. • Representative Actions allows for a claim to be begun by or against one or more persons as representatives of	• In the UK opt-in actions, settlement does not require approval from the courts, unlike in the U.S., where the general requirement to approve class settlements is a protracted process and must follow the rules set out in Fed R Civ P 23(e)(2).

	any others who have the "same interest" in the claim. Those represented are not joined as parties. In settlement of such actions, the court's approval is required and will only provide such approval if it is "satisfied that the settlement is for the benefit of all the represented persons". CPR 19.9(5) and (6).	
Jurisdiction limitations	• **OPT-IN:** No territorial restrictions to who may be group members • **OPT-OUT:** court's jurisdiction restricted to persons domiciled in the UK, but persons domiciled elsewhere may opt-in to such a claim.	• In the UK, personal jurisdiction will not be a ground for dismissing a claim, unlike in the U.S. where it can be a basis to eliminate a class action or narrow its scope. • Subject-matter jurisdiction is a ground for dismissing a claim both in the UK and the U.S.
Evidence	• **OPT-IN:** No special rule for disclosure in collective actions. • **OPT-OUT:** The CAT has the power to make an order requiring members of the class to give disclosure.	• Disclosure in the UK is more limited and less adversarial than discovery in the U.S.. Depositions and declarations, available in the U.S., do not exist in the UK. • Procedure regarding witnesses is more closely controlled in the UK, there is a ban on any sort of "witness coaching" and stricter safeguards are in place regarding witness statements than those in the U.S..
Appeal	• **OPT-IN:** No special rule. • **OPT-OUT:** appeals are only available on a point of law as to the award of damages or the grant of an injunction. Other decisions of the CAT can be challenged by judicial review. A decision to refuse a CPO in an application that sought aggregate damages is a decision relating to the "award of damages" over which the Court of Appeal had jurisdiction to hear an appeal.	• In both jurisdictions, a party does not have an automatic right to appeal, judicial permission must be granted to allow an appeal. • In the U.S., trial courts are given discretion to grant or deny class certification; however, they are subject to judicial review either immediately or at the end of the case.
Costs &	• UK courts have the discretion to apply	• Costs rules differ between the UK and

Funding	costs shifting mechanisms ordering the losing party to pay some of the winning party's fees. • **OPT-IN:** all claimants bear direct the adverse costs risk. • **OPT-OUT:** the adverse costs risk is primarily borne by the representative. • **Litigation funding**. On July 26, 2023, the Supreme Court handed down a judgment in *PACCAR v. CAT* which precludes opt-out collective actions from being funded by litigation funding agreements which provide for a reward-based return. As for opt-in claims, litigation funding agreements must now comply with the formal requirements of the Damages-Based Agreements Regulations 2013. In order to comply, such agreements will need to have a return based on a multiple of costs provided by the funder rather than a return based on a percentage of a damages award.	U.S. • In the U.S., each party will pay their own respective costs—though plaintiffs benefit from many fee-shifting statutes that can be implicated in class actions, and practically, very few class action settlements and judgments against defendants do not involve payment of plaintiffs' counsels' fees. • Third-party funding is more mainstream in the UK than in the U.S. since it is rare that plaintiffs or their counsel would be made to pay a defendants' fees.

[1] *Mr Phillip Gwyn James Evans v Barclays Bank Plc & Ors and Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC & Ors* [2023] EWCA Civ 876 (Forex)

[2] *Evans v Barclays Bank PLC & Ors* [2023] EWCA Civ 876

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