THE GLOBAL LEGAL POST

Warnings about an unchecked rise in mass litigation are simply wrong

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Hausfeld global co-chair Anthony Maton takes issue with a think tank's claim that class actions could cost the UK economy £18bn

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By

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I recently caught up with the European Centre for International Political Economy (ECIPE) report on 'The Impact of Increased Mass Litigation in the UK', which was published on 10 June.

The central core of the argument is that the cost of mass litigation in the UK is £18bn – which makes for catchy headlines – and the implication is that this has been driven by ambulance-chasing lawyers and rapacious funders to the cost of the UK economy. Is this per year? For the next five years? For…?

I only speak to this from a competition litigation perspective where much of the activity in the collective redress space has been.

The first thing to say is that the changes brought by the Consumer Rights Act 2015 (CRA) to allow collective competition actions in the UK were very carefully thought about and debated. This process included the 2005 Civil Justice Council Report on Collective Redress; the 2008 Ministry of Justice Consultation 'Improving Access to Justice through Collective Actions'; the 2012 Department for Business, Innovation and Skills (BIS) Consultation on Private Actions in Competition Law; the 2013 BIS Government Response to the Consultation, and then the drafting and debate during the legislative process for the Consumer Rights Act of 2015 itself.

Since then, there has been much scrutiny from the courts, including a large number of appeals – brought by some of the best defendant firms in the country. So, the idea that this is "an unchecked rise in mass litigation" is simply wrong – it was a very checked, and considered, exercise of parliamentary sovereignty that led to this change in the law which has had, and continues to have, as I say, strict oversight from the courts since.

Second, one of the major drivers for these reforms was competitive and economic performance. It is a sine qua non that a more competitive economy is a more successful one. Hence the deliberate policy encouragement of private enforcement across the EU in the last 20 years. This was at the very heart of the proposals for reform and debate in parliament. As Vince Cable, then Secretary of State, said on introducing this part of the bill: "Competition is good for growth and one of the pillars of a vibrant economy, so a key part of the work is tackling anti-competitive behaviour."

It is also well established that anti-competitive behaviour is often not detected, despite vigorous public enforcement with whistleblower incentives, and – when detected – the profits vastly surpass the level of fines for the infringer.

Third, great care was taken in constructing the regime to ensure safeguards against its misuse. As Vince Cable again said: "We do not want an American-style system of prodigious and constant litigation, which would be costly and benefit only lawyers. Nonetheless, we believe that there is some imbalance in the current system that needs to be redressed."

I'd quibble at the "some" – absent the reforms, there would be no access to justice for literally millions across multiple cases. The courts have taken their responsibility in reviewing the regime in all aspects at first and appellate level over the last few years extremely seriously.

Fourth, much play is made in the paper of the availability of redress schemes. There is in fact a voluntary redress scheme built into the CRA allowing those who have been found guilty by a regulator of infringing competition law to pay voluntary redress, and it has been used precisely zero times. Practical evidence, if any was needed, that those who have infringed competition law do not voluntarily pay and only do so when forced in the face of well-financed and well-run litigation. It is worth noting that other major non-redress voluntary compensation schemes, including Post Office Horizon, IRHP and HBoS Reading, have been bedevilled with problems, typically around gatekeeping and delay.

Fifth, remember that many of those who are sued are either by previous regulatory finding or subsequent court judgment, infringers of competition law. This is not an attack on the innocent, but rather companies that have – often deliberately – broken laws that have clear civil and, in this jurisdiction, criminal sanctions.

Sixth, the report is quick to point out that the "proliferation of mass litigation undermines the country's ambitions to boost investment, support innovation and attract global business" but conveniently ignores several other structural, policy and market-driven factors that global investors and innovators weigh up when deciding where to commit capital – a major flaw in its methodology.

I can think of the tax regime and incentives, regulation, political risk, transport links, digital connectivity, skills gap, environmental and ESG requirements, energy and commodity costs, access to finance and (venture) capital markets, and dare we say, the Brexit factor. Moreover, the legal and financial sectors are themselves important net exporter segments of the UK economy, contributing to the UK's overall positive trade balance.

Seventh, it is said that the costs are not matched by proportional gains for claimants. To date, this is almost entirely untested in this country. In other areas of law, offenders are punished as demonstrated by our overflowing prisons. Some of the gains made by breaking the law should find their way back into the pockets of the consumers and businesses who have suffered as a result.

Is it really better for the money to remain in the hands of the offending corporates than to be returned to at least some of those who have suffered loss and a charity that can fund access to justice? It is as if we are saying that because the police only recovered half of the Brink's-Mat gold they shouldn't have bothered with the rest – better it stays with the crooks.

Eight, the roles of funders are criticised, which is odd as they are part of the very entrepreneurial system that this report welcomes. They invest where they see strength to make a return and take on considerable risk doing so, particularly in a jurisdiction where adverse costs are a very real thing. They have no interest in backing anything other than very strong claims supported by robust due diligence. And yes, when they make the right decisions, they are rewarded; but without their assistance, there is no way that those with strong claims but no financial means to bring them would be able to do so. Think Post Office.

Ninth, the report's modelling blinds with science and focuses on a scenario where "the costs of mass litigation are 30% of the current costs in the US as a basis to estimate litigation costs in the UK". In my view, the report doesn't properly justify why 30% is the best UK analogue. Why not 10% or 20%?

The extrapolation ignores important limitations. Using US costs ignores important institutional differences. The concepts in Federal Rule of Civil Procedure 23 of "commonality" and "predominance" differ substantially from the UK's Competition Appeal Tribunal requirements of "opt-in" versus "opt-out" certification criteria. US figures blend thousands of small consumer finance, environmental and securities cases with a few giant cases.

Transposing that mix to the UK overlooks sectoral differences. As highlighted above, UK claims are currently dominated by competition-law actions against tech platforms, which have very high stakes but perhaps fewer aggregate claimants than, say, US consumer lending suits.

There is the critical difference of costs shifting. US defendants incur unrecoverable costs even if they successfully defended the claim. However, under the 'loser pays' UK rules, costs can be recovered. UK collective claimants can and do pay adverse costs awards, backed up by ATE insurance cover and/or funder indemnities. In that situation, it is funders and insurers, not the corporate defendants, who end up out of pocket.

Tenth, as a general point, the report gives comparatively less attention to the social or consumer-protection benefits of collective redress. That asymmetry suggests a steer toward highlighting threats to corporate balance sheets from cost of litigation, rather than the redress of systemic harms.

Eleventh, the report questions who really benefits from mass litigation, implying it is the villainous lawyers and funders. But who really benefits from this report? Fair Civil Justice (FCJ), which promotes this report? It campaigns to ensure 'access to justice' and 'fair outcomes for individuals and small businesses'. In 2023, FCJ was launched by the US Chamber of Commerce Institute for Legal Reform. Its board and, incidentally, the ECIPE steering board, also includes representatives from large business or trade associations, such as BritishAmerican Business and the British Chambers of Commerce.

Some of these business groups have historically pushed against collective redress mechanisms or regulatory interventions that would empower consumers against the corporate interests they typically advocate. Business can and should engage in policy discussions, but let's be transparent about it.

In conclusion, and perhaps the most important point I want to make: even if you remain unconvinced by any of the above, surely one certain way for mass litigation to stop impacting the UK economy in the way described in this report is, of course, for corporates and institutions to stop breaching (competition) law or abusing their position in the first place.

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