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Consumer Rights Act 2015: Private Actions for Breaches of Competition Law – Overview of the New Regime

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The entry into force of the Consumer Rights Act 2015 (“CRA15”) on 1 October 2015 sees the overhaul of the private enforcement regime in England & Wales. The CRA15, which amends both the Competition Act 1998 (“CA98”) and the Enterprise Act 2002 (“EA02”), introduces a number of significant reforms to the current regime, in particular ‘opt-out’ collective actions and collective settlements. In addition, from 1 October 2015, the Competition Appeal Tribunal (“CAT”) will have the jurisdiction to hear ‘stand-alone’ cases and to grant injunctions. Other key features of the new regime include the creation of a ‘fast-track’ procedure for straightforward claims; the harmonisation of the limitation period applicable to claims in the CAT with that of the High Court; and the introduction of voluntary redress schemes approved by the Competition and Markets Authority.

Wide-Ranging Reforms: A Boost for Claims and for the CAT

The wide-ranging reforms introduced by the CRA15 are intended to make it easier for both companies and individuals to bring claims for damages for breaches of UK and/or EU competition law, whether ‘stand-alone’ or ‘follow-on’ actions.

In order to achieve this aim, the CRA15:

- expands significantly the jurisdiction of the CAT;
- promotes collective actions, notably by introducing ‘opt-out’ collective actions and collective settlements; and
- grants the CMA powers to approve voluntary redress schemes.

In seeking to boost the number of claims and, hence, positioning England & Wales as a leading forum for private enforcement actions, the reforms under the CRA15 will promote the CAT as the venue of choice for claims.

In addressing the issues relating to the CAT's limited jurisdiction in terms of private enforcement, the entry into force of the CRA15 will likely result in an upturn in the number of cases commenced in the CAT.¹

Notwithstanding various 'claimant friendly' aspects of proceedings before the CAT, such as the absence of filing fees and generous cost rules, relatively few damages actions have been commenced in the CAT. Speaking at a recent conference, Marcus Smith, one of the CAT's Chairmen, anticipated "a fairly dramatic increase" in damages actions in the CAT following the CRA15 reforms.

The key features of the reforms introduced by the CRA15 are set out below.

Expanding the CAT's Jurisdiction

Jurisdiction to Hear 'Stand-Alone' Claims

Despite being a 'specialist' tribunal,² to date, the CAT has only had the jurisdiction to hear 'follow-on' damages actions (i.e., cases where an infringement of competition law has already been established by the European Commission, the CMA, or a 'sector regulator'). Claimants wishing to bring 'stand-alone' actions (i.e., cases where it is necessary for the claimant(s) to establish infringement), or so-called 'hybrid' actions were therefore obliged to commence proceedings in the High Court.

In practice, claimants often look beyond the findings of fact in infringement decisions (e.g., in terms of the defendant(s) to an action, duration, jurisdictional scope and the products/services concerned) in order to obtain 'effective redress' for the losses that they have suffered as a result of breaches of competition law.

In those circumstances, the limitations on its jurisdiction were a significant impediment to claims being brought in the CAT; a fact that is evident from the number of appeals that have tested the limits of the CAT's jurisdiction and the validity of its procedural rulings in damages actions.³

The reforms introduced by the CRA15 seek to address this issue, by allowing the CAT to hear both 'follow-on' and 'stand-alone' claims.⁴

Injunctions

The CRA15 will give the CAT the power to grant injunctions both in respect of individual claims and collective actions.⁵ These injunctions will have the same effect as those granted by the High Court, and will be enforceable as such (i.e., failure to comply with an injunction may lead to contempt proceedings, which could result in the imposition of a penalty, such as a fine).

¹ 'Competition Litigation Conference', MLex, Freshfields Bruckhaus Deringer, and Brick Court Chambers, London, 24 September, 2015.

² See <http://www.catribunal.org.uk/>, which states: "The United Kingdom Competition Appeal Tribunal is a specialist judicial body with cross-disciplinary expertise in law, economics, business and accountancy whose function is to hear and decide cases involving competition or economic regulatory issues."

³ See, in particular, *BCL Old Co and ors v BASF SE (formerly BASF AG) and ors* [2009] EWCA Civ 434, [2010] EWCA Civ 1258 and [2012] UKSC 45, *Enron Coal Services Limited (in liquidation) v English Welsh & Scottish Railway Limited* [2009] EWCA Civ 647 and [2011] EWCA Civ 2, *Deutsche Bahn AG & ors v Morgan Crucible Company PLC & ors* [2012] EWCA Civ 1055, and *Emerson Electric Co & ors v Morgan Crucible Company PLC decision* [2012] EWCA Civ 1559.

⁴ The CRA15 amends section 47A of the CA98 to allow the CAT to hear 'stand-alone' claims, including claims for damages or applications for injunctive relief.

⁵ The CRA15 inserts a new section 47D into the CA98.

Additionally, for injunctions in ‘fast-track’ cases (see below), the CAT will have the power to waive the usual requirement for a cross-undertaking as to damages, where a claimant must provide, upfront, security for any potential harm to the defendant in the event that it is determined subsequently that the injunction should not have been granted.

Harmonisation of Limitation Periods

Another issue addressed by the CRA15 is the disparity between the limitation periods applicable to claims brought before the CAT and the High Court.

Until now, the time limit for making a claim for damages in the CAT has been two years from the later of the following: (i) the date on which the infringement decision becomes final and can no longer be appealed on substance; or (ii) the date on which the action accrued.⁶ From 1 October 2015, the limitation period for commencing claims in the CAT will be aligned with that in the High Court – i.e., six years from the date on which the cause of action accrued.⁷

Revised Procedural Rules

In order to give effect to the changes to the CAT’s powers under the CRA15, on 8 September 2015, the Government published the Competition Appeal Tribunal Rules 2015 (the “2015 Rules”). The 2015 Rules will come into force on 1 October 2015 and will govern the procedure for cases commenced in the Tribunal on or after that date.⁸

Collective Proceedings

‘Opt-Out’ Collective Actions

Until 30 September 2015, only ‘opt-in’ collective actions were permitted in the CAT.⁹ Claims could only be made in very limited circumstances – i.e., by a specified body (the Consumers’ Association) bringing actions made, or continued on behalf of, at least two individuals (consumers), with the consent of the individuals concerned.¹⁰

The CRA15 promotes collective actions. From 1 October 2015, ‘opt-out’ collective actions will also be permitted, under the new section 47B of the CA98.

In such cases, a nominated representative, approved by the CAT, will bring the claim on behalf of a defined group of claimants,¹¹ who will then share any damages awarded.¹² The CAT must be satisfied that the claims are eligible for a collective action. In order to be eligible, they must raise the same or similar or related issues of fact or law.

‘Opt-out’ proceedings will not include any class member who is not domiciled in the UK. Any non-domiciled claimants must ‘opt-in’ to the proceedings.

⁶ The Competition Appeal Tribunal Rules 2003, Rule 31.

⁷ The new section 47E of the CA98 will not apply to claims arising before 1 October 2015.

⁸ See <http://www.catribunal.org.uk/247-8913/The-Competition-Appeal-Tribunal-Rules-2015.html>.

⁹ The original section 47B of the CA98 provided only for claims made, or continued, by a specified body (i.e., the Consumers’ Association) on behalf of at least two individuals (consumers), on an ‘opt-in’ basis – i.e. with the consent of the individual concerned.

¹⁰ In fact, only one claim of this type has ever been brought in the CAT; see Case 1078/7/9/07, *The Consumers Association v JJB Sports PLC*.

¹¹ Claimants will automatically fall within the ‘class’ for the purposes of the action unless a class member elects to ‘opt-out’ by notifying the representative that his claim should not be included in the proceedings. The CAT will determine whether a claim should proceed on an ‘opt-in’ or ‘opt-out’ basis.

¹² In order to safeguard against excessive claims, exemplary damages will not be available in collective proceedings.

'Opt-Out' Collective Settlements

The CRA15 reforms will introduce a collective settlement procedure. The new section 49B of CA98 allows the CAT to make an order approving the settlement of claims without a claim having already been brought before the CAT.

The settlement will be negotiated by the representative – a collective settlement approved by the CAT is binding on all UK-claimants that did not 'opt-out' in the specified time and any non-UK domiciled claimants that have opted-in.¹³ The collective settlement order must include authorisation of the representative and a description of a class of persons with eligible claims.

'Fast-Track' Procedure

The CRA15 introduces a 'fast-track' procedure for straightforward claims in the CAT. This procedure, which is designed to "*provide an effective way of dealing with private actions in a short timescale, at less cost and with a cap on costs*",¹⁴ provides that the main substantive hearing should commence as soon as practicable and, in any event, within six months of an order of the CAT stating that the particular proceedings are to be subject to the 'fast-track' procedure.¹⁵

In deciding whether the 'fast-track' procedure should apply, the CAT shall take into account all matters it thinks fit, including:

- whether one or more of the parties is an individual or a micro, small or medium-sized enterprise;
- whether the time estimate for the main substantive hearing is three days or less;
- the complexity and novelty of the issues involved;
- whether any additional claims have been or will be made;
- evidence – both in terms of the number of witnesses of fact and expert witnesses, if any, and the scale and nature of the documentary evidence involved;
- whether any disclosure is required and, if so, the likely extent of such disclosure; and
- the nature of the remedy being sought and, in respect of any claim for damages, the amount of any damages claimed.¹⁶

Voluntary Redress Schemes

In addition to the reforms outlined above, the CRA15 introduces voluntary redress schemes as a form of alternative dispute resolution.

These statutory compensation programmes are designed to provide victims of competition law infringements with the means to obtain compensation without having to engage in litigation.

¹³ Section 49A of the CA98, as amended by the CRA15, specifies who is or is not bound by a collective settlement, by reference to the time for 'opt-out'/'opt-in'.

¹⁴ Competition Appeal Tribunal (CAT) Rules of Procedure: Review by the Right Honourable Sir John Mummery, Consultation, February 2015, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/401678/bis-15-75-competiiton-appeal-tribunal-cat-rules-of-procedure-consultation.pdf.

¹⁵ The 2015 Rules, Rule 58.

¹⁶ *Ibid.*

The Competition Act 1998 (Redress Scheme) Regulations 2015 were published on 5 August 2015. These Regulations set out the rules to be followed by the CMA and the sector regulators when approving voluntary redress schemes and will come into force on 1 October 2015.

The CMA's Guidance on the approval of voluntary redress schemes for infringements of competition law was published and came into effect on 14 August 2015.¹⁷

According to the CMA, voluntary redress schemes make it easier, quicker and less costly for those who have suffered from breaches of competition law to obtain compensation. However, affected consumers and businesses may still litigate if they prefer (albeit they will not be able to do so if they apply for compensation under an approved redress scheme).

Companies will be able to submit a voluntary redress scheme to the CMA (or concurrent regulator) for approval either during the course of an ongoing UK investigation, or once the European Commission, CMA or sector regulator has already made an infringement decision. Schemes will not be approved until any infringement decision is finalised.

A redress scheme submitted prior to an infringement decision may lead to a reduction in penalty of up to 20%.

Further Changes on the Horizon

The EU Damages Directive, which is intended to harmonise certain procedures for damages actions in respect of harm caused by infringements of EU competition law was 'signed into law' on 26 November 2014.¹⁸

Member States need to implement the Directive in their legal systems by 27 December 2016.

Although the regime under the CRA15 already complies with the majority of the procedural rules set out in the Damages Directive, there will likely be additional changes when the Damages Directive is transposed into national law.

¹⁷ See: www.gov.uk/government/uploads/system/uploads/attachment_data/file/453925/Voluntary_redress_schemes_guidance.pdf.

¹⁸ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1.