Competition briefing

Opt-out collective actions regime to enter into force from 1 October 2015

WHAT YOU NEED TO KNOW

- On 26 March 2015, the Consumer Rights Act (CRA) finally received Royal Assent, following a lengthy Parliamentary approval process.

- Wide-ranging and significant reform of private competition law actions in the UK will now enter into force on 1 October 2015, including the introduction of a controversial new opt-out collective actions regime for consumers and businesses.

- These changes will have a major impact assisting the ability of parties to sue for competition law breaches in the UK, and are intended to facilitate greater private enforcement.

Overview

The main reforms implemented by the CRA are:

- a new opt-out collective actions regime for consumers and businesses which is intended to make it easier for competition law private actions to be brought by consumers and businesses;  
- the expansion of the role of the Competition Appeal Tribunal (CAT), making it the main court for competition private actions in the UK;  
- a new fast-track procedure for simpler competition claims in the CAT, focused in particular on claims by individuals and SMEs;  
- the introduction of an opt-out collective settlement regime; and  
- a new power for the Competition and Markets Authority (CMA) to approve voluntary redress schemes, intended to facilitate settlement of claims which might otherwise be brought in court.

Revised Rules of Procedure for proceedings before the CAT to reflect the new regime are the subject of an ongoing consultation which ends on 3 April 2015 (the Draft CAT Rules). The CMA has also recently published draft guidance on its approach to approving voluntary redress schemes, with comments invited by 29 March 2015.

New opt-out collective actions regime

A new collective actions regime will be introduced with effect from 1 October 2015. The headline points to note are that:

- consumers and businesses will be able to bring a private action for damages for losses suffered as a result of an infringement of EU or UK competition law on an "opt-out" basis, i.e. on behalf of an entire class of claimants (other than those who have expressly opted out of the action), without needing to identify every individual claimant. This is intended to make it easier for private actions to be brought in respect of competition law infringements;  
- the opt-out aspect will only apply to UK-domiciled members of the relevant class. Class members domiciled outside the UK will be required to expressly opt-in if they wish to join the collective proceedings;  
- the new opt-out regime will apply to claims brought on or after 1 October 2015, even if the infringement of competition law to which the claim relates occurred prior to that date; and  
- where a claim is successfully brought on a collective opt-out basis, damages will be calculated by reference to the class of claimants (with any unclaimed funds left in the damages "pot" being allocated to the Access to Justice Foundation, rather than returned to the defendant(s)). This will
significantly increase the level of potential exposure for businesses, and increase the likelihood of claims being brought in circumstances where the individual loss per consumer is relatively small but a large number of consumers have been affected.

The new regime will be subject to a number of safeguards, intended to avoid a US-style "class action" regime and encouraging unmeritorious litigation. These include:

- a certification process before the CAT, intended to ensure that only meritorious cases are permitted to proceed and that an opt-out process is only used where appropriate. The Draft CAT Rules provide that this will include:
  - a preliminary merits test;
  - an assessment of the adequacy of the representative; and
  - a requirement that a collective action is the best way of bringing the case;
- a prohibition on treble damages and exemplary damages;
- maintaining the "loser pays" costs rule, so that those who bring unsuccessful cases will be liable for costs (see further below);
- a prohibition on contingency fees for lawyers acting in opt-out competition collective actions (which will require an amendment to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 for competition cases); and
- restricting the opt-out aspect of a claim to UK-domiciled claimants (although non-UK-domiciled claimants will be able to expressly opt in to join the claim if they wish to do so).

With regard to the issue of who will be permitted to act as a representative of a class of claimants, the CRA provides that the representative must either be a member of the relevant class or the CAT must consider it "just and reasonable" for that person to act as a representative in the proceedings. The CRA does not provide further guidance on this issue, but the Draft CAT Rules provide that the CAT will take into account various factors when deciding whether to approve a proposed representative, including any conflict of interest and whether the proposed representative would fairly and adequately act in the interests of the class members.

The Government has made clear that it is minded to introduce a presumption into the CAT Rules that organisations that offer legal services, special purpose vehicles and third party funders should not be able to act as representatives in collective actions (although they would still be permitted to provide legal advice and/or funding in relation to the claim). Views are being sought on this proposal in the ongoing consultation on the Draft CAT Rules, and it remains to be seen whether – and if so how – it will be implemented. However, given that the CRA prevents any class member from being held responsible for costs awarded against a class representative in opt-out collective proceedings, questions have been raised as to whether sufficient incentives remain for individuals or private bodies to act as representatives in such cases. When combined with the proposed presumption preventing law firms, special purpose vehicles and third party funders from acting as representatives, it is unclear who is expected to be willing to take the (potentially significant) risk of bringing a claim where each individual's share of the damages is likely to be relatively small and/or the mechanisms to be employed by funders to mitigate the risk faced by the class representative in this regard.

**Expansion of the CAT's jurisdiction**

The CAT's jurisdiction has been widened by the CRA, with the aim of making the CAT the main court for all competition actions in the UK. In summary:

- the CAT will have the power to grant both interim and final injunctions. The Draft CAT Rules propose that the CAT should be permitted to exercise this power wherever it appears to it to be "just and convenient" to do so.

Limitation periods for the CAT will be harmonised with the High Court of England and Wales so that the six-year limitation period as set out in the Limitation Act 1980 will apply to all private action cases in the CAT or High Court of England and Wales, whether stand-alone or follow-on (in Scotland, the limitation period will remain five years, in line with the Scottish Court of Session). In accordance with the Limitation Act 1980, the six-year limitation period will begin to run from the date on which the cause of action arose (i.e., when the loss was suffered), subject to section 32(1)(b), which provides for suspension of time where there is deliberate concealment (which is likely to be the case where a secret cartel is in operation).

It is notable that although the new opt-out collective actions regime will apply to claims arising before 1 October 2015 (see above), the new limitation period
will only apply to claims arising on or after 1 October 2015. For claims arising before 1 October 2015 (even if the proceedings are brought before the CAT after 1 October 2015), it appears that the existing two-year limitation period from the date of any final appeal decision in follow-on claims in the CAT will apply. This appears to be somewhat of an unintended consequence of the CRA, and it will therefore be important to consider carefully which limitation period applies to a particular case.

The new limitation rules are likely to require further amendment when the EU Damages Directive is implemented in the UK (anticipated in October 2016, although the deadline for implementation is not until 27 December 2016). While the six-year limitation period will meet the EU Damages Directive requirement of a minimum five year period, the revised rules will need to be amended further to reflect additional requirements relating to suspension of the limitation period pending the conclusion of an investigation by a relevant competition authority (and any related appeals). In practice, this aspect of the EU reforms will make it very hard to take limitation period points in follow-on anti-trust cases.

New fast-track procedure for simpler competition claims in the CAT

The Consumer Rights Act will also introduce a new fast-track procedure for simpler competition claims in the CAT, intended to facilitate access to redress, particularly for individuals and SMEs. The detail of the procedure will be set out in the revised CAT Rules. On the basis of the Draft CAT Rules, where the fast-track procedure is followed:

- the final hearing will be commenced within six months of a CAT Order stating that the proceedings are to be subject to the fast-track procedure; and
- the amount of recoverable costs will be capped at a level to be determined by the CAT on a case-by-case basis.

In deciding whether to make particular proceedings subject to the fast-track procedure, the Draft CAT Rules state that the CAT will take into account a variety of factors including:

- whether one of the parties is an individual or an SME;
- whether the time estimate for the final hearing is three days or less;
- the complexity and novelty of the issues involved;
- the number of witnesses involved (including expert witnesses, if any);
- the scale and nature of the documentary evidence involved and the likely extent of any disclosure; and
- the nature of the remedy being sought and – if the claim is for damages – the amount of damages being claimed.

This approach is intended to strike an appropriate balance between facilitating access to redress and ensuring that larger and/or more complex cases are properly heard and dealt with by the CAT. However, there would seem to be a risk that the six-month deadline for commencement of the final hearing could, in practice, have an adverse effect on access to redress in some cases by increasing costs, due to the intense work which may be required to be in a position to go to trial within six months (in particular, collation of evidence and expert reports).

It remains to be seen whether the CAT will be granted a greater degree of discretion in the final version of the CAT Rules, and how frequently the new fast track procedure will be used in practice. However, assuming the Draft CAT Rules are adopted in their current form, we anticipate that the fast-track procedure will be used mainly for applications for injunctive relief, rather than claims for damages (which tend to be more complex and require greater disclosure).

Opt-out collective settlement

Businesses which have had competition law claims made against them will be able to propose opt-out collective settlements to the CAT through a new regime similar to the Dutch Mass Settlement Act of 2005. An application for approval of an opt-out collective settlement may be made either before or after an opt-out collective proceedings order has been made by the CAT in respect of the claims:

- Where an opt-out collective proceedings order has already been made by the CAT, both the defendant(s)’ and the claimants’ authorised representative must apply to the CAT for approval of any collective settlement. If the CAT is satisfied that the terms of the proposed settlement are “just and reasonable”, it may make an order approving the settlement.
- Where an opt-out collective settlement is proposed before a collective proceedings order has been made by the CAT (i.e. at a very early stage), the CAT may approve the proposed settlement provided that it is satisfied that the claims could be made at the commencement of the proceedings if collective proceedings were brought. In such cases, the application for approval must be made by the potential defendant(s) and the proposed
settlement representative for the class of claimants. The CAT will then make a collective settlement order prior to approving the proposed settlement (which will include authorisation of the proposed settlement representative and a description of the relevant class of persons). Subsequent approval of the proposed settlement may only be granted if the CAT is satisfied that the terms are "just and reasonable".

In either case, once approved by the CAT, the collective settlement will be binding on all members of the relevant class domiciled in the UK, other than those who have expressly opted out of the settlement by a specified date. Non-UK domiciled members of the class will not be bound by the collective settlement unless they expressly opt in.

CMA approval of voluntary redress schemes

The CRA inserts provisions into the Competition Act 1998 regarding approval of voluntary redress schemes by the CMA (i.e. a scheme under which a person offers compensation in consequence of an infringement decision against that person). This is a new discretionary power which the CMA may exercise where a redress scheme is submitted for approval by the parties.

A redress scheme may be considered by the CMA before an infringement decision has been made, and early discussions with the CMA where a business is considering setting up a voluntary redress scheme will be encouraged. However, the CMA may not approve a redress scheme under its new CRA powers until after the infringement decision has been made, or, in the case of an infringement decision by the CMA, at the same time as the decision is made. During the legislative approval process the Bill was amended to also allow the CMA to approve a proposed redress scheme subject to a condition (or conditions) requiring the provision of further information about the operation of the scheme, including the amount or value of compensation to be offered under the scheme or how this will be determined.

However, the CMA's role in this context will be limited to considering whether a redress scheme has been set up in accordance with regulations to be issued by the Secretary of State (the Regulations). The Regulations have not yet been published, but draft CMA guidance on voluntary redress schemes published for consultation on 2 March 2015 makes clear that detailed determination of compensation will be carried out by an independent Board (set up by the applicant, in accordance with the Regulations), rather than the CMA.

Applying for approval of a redress scheme will be voluntary, and businesses will remain free to set up compensation schemes without submitting them for CMA approval. However, the formal CMA approval process is intended to provide a statutory route through which multiple offers of compensation can be made quickly and easily, offering a lower cost alternative to expensive litigation. As an additional incentive, the CMA has also indicated that it expects that in the majority of cases where it approves a redress scheme it will reduce the penalty imposed on the infringing party by up to ten per cent (although this will not be an automatic reduction).

Next steps

The reforms implemented by the CRA will enter into force on 1 October 2015. It is expected that final versions of the revised CAT Rules and CMA guidance on voluntary redress schemes will be published prior to this date, clarifying exactly how some of the changes will operate in practice. It is clear that the new regime has the potential to radically change private enforcement of competition law in the UK, and it is important for businesses to consider the potential implications and prepare accordingly. In practice, availability of funding may limit the impact of the new opt-out collective actions regime. However, a number of third party funders and claimant law firms have indicated that they are interested in taking on test cases under the new rules, and the clear policy intention is to encourage a significant increase in private enforcement of competition law.
Further information

If you would like to discuss any aspect of the CRA and its potential implications for your business, please do not hesitate to contact any of the contacts below or your usual Ashurst contact.

**Euan Burrows**  
Partner  
T: +44 (0)20 7859 2919  
euan.burrows@ashurst.com

**Mark Clarke**  
Partner  
T: +44 (0)20 7859 1562  
mark.clarke@ashurst.com

**Ruth Sander**  
Senior Professional Development Lawyer  
T: +44 (0)20 7859 1193  
ruth.sander@ashurst.com
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