

The impact of the new Consumer Rights Act on antitrust litigation

The Consumer Rights Act 2015 will introduce a number of changes to antitrust litigation in England and Wales. These changes are expected to come into force on 1 October 2015.

The Consumer Rights Act

The Consumer Rights Act 2015 ("the Act") will introduce a number of changes to antitrust litigation in England and Wales. The Act will amend the Competition Act 1998 ("CA98") and the Enterprise Act 2002 ("EA02") to allow the Competition Appeal Tribunal ("CAT") to hear stand-alone cases; introduce collective proceedings and procedures for collective settlements; harmonise limitation periods with those of the High Court; provide for schemes of voluntary redress approved by the Competition and Markets Authority ("CMA"); and introduce a fast-track scheme for SMEs.

Stand-alone claims

The Act will amend section 47A of the CA98 to allow the CAT to hear stand-alone claims, including claims for damages or an injunction. Currently, the CAT can only hear follow-on claims after a decision by a competition authority has established the relevant infringement.

Collective proceedings

Collective proceedings will be able to be brought before the CAT, under the

new section 47B of the CA98. These proceedings combine two or more claims to which section 47A applies – i.e. stand-alone or follow-on claims for damages or injunctive relief for breaches of UK or EC competition law.

Collective proceedings must be started by a person who proposes to be the representative in those proceedings. The Act does not require a representative to be a member of the class of claimants in the proceedings. However, a consultation in February 2015 by the Department for Business, Innovation and Skills on new CAT rules proposes to introduce a presumption that organisations that offer legal services, special purpose vehicles and third party funders should not be able to bring cases. The Government has not yet published the results of the consultation and its final views on this point.

In any event, any collective proceedings will only be able to be continued if the CAT makes a collective proceedings order. It will only do this if it considers that the person bringing the proceedings is someone the CAT would authorise to act as a representative, and it must also be satisfied that the claims are eligible for inclusion in collective proceedings. In order to be eligible, they must raise the same or similar or related issues of fact or law.

Under the original section 47B, claims could only be made (a) by a specified body (e.g. the Consumers' Association) bringing consumer claims made, or continued on behalf of, at least two individuals, and (b) on an "opt-in" basis – i.e. with the consent of the individual concerned. Under the new section 47B, collective proceedings are not limited to such claims and may be opt-in or "opt-out" – i.e. brought on behalf of each class member without specific consent, unless a class member elects to opt out by notifying the representative that his claim should not be included in the proceedings. Opt-out proceedings will not include any class member who is not domiciled in the UK at a specified time. Those claimants must opt in to the proceedings. The CAT will decide whether a claim should proceed on an opt-in or opt-out basis.

The new section 47C of the CA98 contains two further safeguards against excessive claims. The first is a ban on exemplary damages in collective proceedings. The second makes damages-based agreements (under which lawyers' remuneration is based on the amount they recover) unenforceable if they relate to opt-out collective proceedings, although conditional fee agreements (sometimes called "no win no fee") are still permitted. In opt-out collective proceedings, the CAT may

order that the damages be paid to the representative on behalf of the represented persons.

Injunctions

Under the CA98, the CAT could not grant injunctions. The new section 47D inserted into the CA98 by the Act will give the CAT the power to grant injunctions in section 47A and in collective proceedings. The injunctions will have the same effect as injunctions granted by the High Court, and will be enforceable as if they were such injunctions. This means that failure to comply with an injunction could lead to a penalty for contempt of court.

Limitation

At present, the limitation period for claims brought before the CAT is two years from the later of:

- the date on which the substantive infringement decision becomes final and can no longer be appealed; and
- the date on which the action accrued.

The new section 47E of the CA98 makes the limitation period for CAT claims the same as those before the High Court. It will be six years from the date on which the cause of action accrued. As with High Court proceedings, where there has been deliberate concealment of wrongdoing, the time period for bringing a claim will not begin to run until the claimant discovers, or ought reasonably to have discovered, the concealment. Section 47E will not apply to claims arising before the commencement of the Act.

Collective settlements

A further change introduced by the Act is provision for collective settlements, in sections 49A and 49B of the CA98. Section 49A applies to

cases in which a collective proceedings order has been made and the proceedings are opt-out proceedings. In these cases, an application for approval of a proposed collective settlement may be made to the CAT by the representative and the defendant in the collective proceedings. They must provide agreed details of the claims to be settled, and the proposed terms of settlement. The CAT can approve the settlement only if it believes the terms to be just and reasonable. The settlement will then bind those domiciled in the UK who did not opt out, or those who opted in.

Section 49B applies to cases where no collective proceedings order has been made but, if collective proceedings were brought, the claims could be made at the beginning of the proceedings. The application in this case must be made to the CAT by the person who proposes to be the settlement representative and the person who, if collective proceedings were brought, would be a defendant. The CAT must make a collective settlement order before approving a proposed collective settlement. The approved settlement will then bind all class members unless they opt out or are not domiciled in the UK and do not opt in.

Voluntary redress schemes

The Act also inserts a new section 49C into the CA98, dealing with the approval of redress schemes by the CMA. The section allows the CMA to approve proposals by infringers to compensate those harmed by their infringements. A proposal can be considered at any time, but only approved after the infringement decision to which the scheme relates has been made or, in the case of a decision of the CMA, at the same time as that decision is made. The

scheme can be approved subject to conditions requiring further information about the operation of the scheme to be provided. Once a scheme has been approved, neither the CMA nor the compensating party may vary it.

The CMA may consider discounting any infringement penalty in exchange for participation in the scheme. In [Draft Guidance](#) issued in March 2015, a discount of up to 10% may be applied to any fine imposed.

Participation in the scheme will not, however, prevent a scheme beneficiary from starting or continuing legal proceedings against the infringers, or seeking compensation in some other way, unless this is a term of the scheme.

Fast-track procedure for SMEs

Lastly, the Act will also amend the EA02 to introduce a fast-track procedure for simpler competition claims in the CAT. The fast-track procedure is outlined in the [Draft CAT Rules 2015](#), which are currently subject to consultation. The consultation explains that the procedure 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."

When considering whether a claim should be "fast-tracked" the CAT may take into account all matters including whether one or more of the parties is an individual or a micro, small or medium sized enterprise ("SME"); whether the time estimate for the hearing is three days or less; the complexity and novelty of the issues; and the number of witnesses and scale and nature of the documentary evidence involved.

The Draft CAT Rules 2015 explain that the final hearing will be fixed

within six months of the CAT ordering the fast-track procedure. The amount of recoverable costs will be capped at a level determined by the CAT. In addition, the Draft CAT Rules 2015 propose that in the context of fast-track, the CAT may grant an interim injunction without requiring the applicant to provide an undertaking as to damages or subject to a cap on the amount of the undertaking.

Conclusion

The changes in the Act are intended to make the CAT a more attractive venue for bringing antitrust claims,

particularly for claims of smaller value. The CAT will be able to hear stand-alone claims and grant injunctions, and the limitation period for claims will be the same as it is for claims in the High Court. The new procedures will be supplemented by new CAT rules (currently the subject of the BIS consultation exercise discussed above) and guidance from the CMA. The introduction of a fast-track procedure (with a time estimate of three days or less) is unlikely to be suitable for many follow-on or stand-alone cases which typically involve the consideration of complex

economic evidence.

The most significant change is likely to be the introduction of opt-out collective proceedings. While there are still concerns that the availability of opt-out proceedings will lead to a US-style class action regime, the safeguards in the Act requiring the approval of class representatives, the certification of proceedings and the ban on exemplary damages and damages-based agreements are likely to limit the excesses of US class actions.

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