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The UK Consumer Rights Act 2015 (**CRA**) entered into force on 1 October. As well as amending a number of aspects of consumer protection law, the CRA implements sweeping reforms of the private competition litigation regime in the UK. Although the most high profile change is the introduction of the UK's first opt-out collective actions procedures for competition law claims, the CRA also makes a number of more incremental changes to the jurisdiction of the UK's specialist Competition Appeal Tribunal (**CAT**). Together, these changes are intended to strengthen the CAT's role as the default forum for competition litigation in the UK and thereby to create a more effective private enforcement regime, especially for large groups of companies and individuals who have suffered widely-dispersed harm as a result of infringements of competition law.

Background

It is a well-established principle of EU law that any company or individual that suffers harm as a result of another party's anti-competitive conduct is entitled to bring an action before the courts for compensation for losses suffered or other relief. Such claims fall into two broad categories: (i) 'follow-on' actions, where the claimant relies on a prior infringement decision of a competition authority (in the UK, the Competition and Markets Authority (**CMA**) or a UK sectoral regulator or, at the EU level, the European Commission (**Commission**)) to determine the defendant's liability; and (ii) 'standalone actions', where there is no prior infringement decision covering the specific points addressed by the claim and therefore the claimant must prove its case in its entirety.

Although the CAT gained jurisdiction to hear competition law damages actions as far back as 2003, this was originally limited to 'follow-on' actions only. The CAT was therefore unable to deviate from the specific findings of the infringement decision on which the claim was based or to grant injunctive relief. Claims before the CAT were also subject to a specific limitation regime that, in practice, made it hard for claimants to start proceedings while any appeals against the decision on which the claim was based were pending. Since the High Court retained the ability to hear both standalone and follow-on claims (subject to normal limitation rules) and could grant the full range of relief, it remained the preferred forum for UK competition litigation.

The CAT consumer claims regime, which was also introduced in 2003 with the explicit objective of facilitating claims by large groups of consumers, ultimately proved unsuccessful due in large part to the need for individual claimants expressly to join proceedings brought on their behalf by an approved consumer body. Since only one such claim was brought in ten years (which ultimately resulted in a settlement under which each of the 130 claimants received a payment from the defendant of £20), the regime was widely judged to be a failure.

The extensive reforms brought in by the CRA were designed to address these shortcomings. The key changes are as follows:

- the introduction of a new CAT regime for collective proceedings, which may be brought on an opt-in or opt-out basis;
- the expansion of the CAT's jurisdiction to enable it to hear both follow-on and standalone claims;
- the granting to the CAT of powers to issue and enforce interim and final injunctions, on the same basis as the High Court (except for claims brought in Scotland, where such relief remains available from the Court of Session only);
- the introduction of a collective settlement regime;
- the introduction of a new procedure for approval of voluntary redress schemes by the CMA;
- the creation of a new 'fast-track' procedure for 'simple' competition claims, under which final hearings must be held within six months of the claim being brought and recoverable costs will be capped; and
- the alignment of limitation periods for claims before the CAT with general limitation rules for claims before the general courts.

Given their significance, this alert focuses on the first of these changes. Although the Government has specified the CAT's new rules of procedure (the **2015 Rules**), which govern implementation of the changes introduced by the CRA, the CAT has been given significant discretion as far as detailed implementation is concerned. The CAT itself has published a new Guide to Proceedings, which includes extensive treatment of its new powers, while important aspects of the regime remain to be clarified through decisional practice.

Collective proceedings

The new collective proceedings regime is the most significant reform introduced by the CRA. Collective proceedings, which are defined as proceedings brought on behalf of a defined class of persons by a representative, may be brought on an opt-in or opt-out basis. In either case, such claims may be brought only after the CAT has: (1)approved the class representative; and (2) certified the claim as eligible for inclusion in collective proceedings. If both these conditions are satisfied, the CAT will issue a Collective Proceedings Order (CPO) and the claim may proceed.

Approval of class representative

The identity of the class representative is of central importance to the new regime. It is self-evident that there will be no collective proceedings unless representatives come forward to bring claims on behalf of classes of persons who are alleged to have suffered harm as a result of a competition law infringement. Given the heavy burden of litigating competition claims, as well as the attendant risk of paying defendants' legal costs in the event that a claim is unsuccessful (under the 'cost-shifting' principle), potential class representatives will need to be well-resourced and adequately incentivised to bring claims. While this may suggest that claimant law firms or funding vehicles would be the most likely candidates for representative status, the Government was mindful of the risk of creating a 'US-style' litigation culture, in which companies would be plagued by potentially meritless claims. As a result, a number of additional safeguards have been built into the regime, over and above cost-shifting.

Under the new rules, the CAT has wide discretion to approve a person as a representative provided if it considers that it is "just and reasonable" for it to do. In reaching this decision, the CAT must consider whether the person concerned:

- would fairly and adequately act in the interests of the class members;
- does not have a conflict of interest with class members;
- is the most suitable representative; and
- would be able to pay the defendant's recoverable costs, if ordered to do so, or satisfy any undertakings as to damages, in the event an interim injunction is sought.

The new Guide to Proceedings warns sternly that being a class representative "involves significant and serious obligations and is not a responsibility to be taken on lightly." Although the Government's consultation on the draft 2015 Rules indicated that it was minded to introduce a presumption that organisations that offer legal services, special purpose vehicles and third party funders should not be able to act as representatives, to address the concern that it would be opening the claims floodgates, this has not been carried over into the final 2015 Rules. Instead, the new Guide to Procedures states that "there is no blanket prohibition against certain types of organisation taking on the role of class representative", albeit while going on to note that the potential for "conflict between the interests of a law firm or third party funder and the interests of the class member may mean that such a body is unsuitable to act as a class representative". To the extent that this rather vague pronouncement may be read as indicating a disinclination on the part of the CAT to approve law firms and funders as representatives, such bodies may take encouragement from the fact that the CAT appears to be less hostile to approving special purpose vehicles (SPVs). This potentially leaves the road open for claimant law firms and funders to initiate proceedings through friendly SPVs, whether on a case-specific or wider basis.

Claim certification

The CAT will issue a CPO only if it is satisfied that the claims in question are eligible to be included in collective proceedings. This requirement will be met only if:

- the claims are brought by an identifiable class of persons, defined as narrowly as possible, i.e. it must be possible to determine whether any particular person falls within the class using an objective definition;
- the claims must raise "the same, similar or related issues of fact or law"; and
- the claims must be "suitable" for collective proceedings. According to the new CAT Rule 79, when determining suitability the CAT will take into account "all matters it thinks fit", which will include: whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues; the costs and benefits; the size and nature of the class; and whether the claims are suitable for an aggregate award of damages.

Opt-in or opt-out?

The categorisation of collective proceedings as opt-in or opt-out will have significant consequences, with only opt-out status ensuring that all UK-domiciled members of a class will be automatically affected by its outcome, unless they expressly elect to be excluded. (Class members domiciled outside the UK may individually elect to join opt-out proceedings, before a deadline specified in the CPO.) While the class representative may choose to apply for opt-out status for collective proceedings, the final decision on whether those proceedings should continue on an opt-in or opt-out basis rests with the CAT.

It is interesting to note that the Guide to Proceedings notes a "general preference" on the part of the CAT for opt-in proceedings "where practicable", in light of the "greater complexity, cost and risks of opt-out proceedings". The greater ability to aggregate large numbers of claims, coupled with the failure of the previous opt-in consumer claims regime, suggests that, in contrast, representatives will have a strong preference for bringing claims on an opt-out basis. The willingness of the CAT to grant approval for such claims in practice will therefore be watched particularly closely.

Comment

Although the number of private competition law claims has been rising across the EU in recent years, the UK has proved to be a particularly popular jurisdiction for claimants (along with Germany and the Netherlands). The changes introduced by the CRA look set to cement the UK's position as a forum of choice for competition litigation.

Nevertheless, a great deal depends upon how the CAT exercises the wide discretion that it enjoys under the new regime, especially with respect to class certification, which is likely to become a key battleground. Based on US experience, there is likely to be extensive satellite litigation around this issue, which may take time to work through before the underlying competition claim itself can be litigated. (While it is notable that defendants will be unable to appeal a certification decision of the CAT on its merits, they will be able to bring judicial review proceedings. Such proceedings, which have to be brought without delay, focus on the narrow question of whether the decision being reviewed was fundamentally flawed on grounds of illegality, irrationality or procedural impropriety. Since review courts are generally reluctant to overturn the decisions of specialist tribunals such as the CAT with respect to the exercise of discretionary powers, the prospects for such proceedings succeeding in practice may be limited.)

It is important to bear in mind that unsuccessful claimants will still be exposed to the risk of having to pay the legal costs of successful defendants (except in fast-track cases, which are likely to be limited to straightforward claims from SMEs for injunctive relief). Even successful claimants will only be able to claim for their actual loss, rather than treble damages, and the CAT is specifically prohibited from awarding exemplary damages in collective proceedings.

Given these risks, funding may prove to be a key stumbling block for claimants. Contingency fees are expressly not permitted for opt-out collective actions, although they may be used for opt-in proceedings. As a result, it may be that third party funders or the claimant law firms themselves will ultimately need to bear the risk and financial burden of proceedings. How far they will be prepared to do so remains to be seen.

Additional uncertainty has been introduced by the new EU Damages Directive, which has introduced new EU-wide rules on fundamental issues such as limitation periods and damages that cut across aspects of the UK regime. These discrepancies will only be resolved over time, as the Damages Directive is implemented in the UK and litigation clarifies outstanding issues.

In any case, it is likely to be some time before the impact of the new regime is felt by businesses and consumers. Proceedings that have already been brought before the CAT will continue to be governed by the old rules as if they were still in force. Concerns have also been expressed over the potential for the transitional provisions of the new CAT Rules regarding limitation (which were not consulted on) to delay effective implementation of the new regime for new claims for a significant period. No doubt the boundaries of the new regime will be tested by claimant firms wishing to explore the opportunities opened for them by the new regime and, sooner or later, the recent changes look set to alter the balance of UK competition proceedings materially in claimants' favour.