

UK Introduces Reforms to Facilitate Private Actions in Antitrust Cases

From October 1, 2015, new rules will make it easier for claimants to pursue antitrust damages claims in the UK. These reforms, introduced under the Consumer Rights Act 2015 (the “Act”), are the final piece of the Government’s wide-ranging reforms to UK competition law, which began in 2010.¹ The main objective is to promote the Competition Appeal Tribunal (the “CAT”) as the principal venue for competition claims in the UK, including through the introduction of a collective action regime designed to facilitate redress for victims of competition infringements whose individual losses are insufficient to justify the costs of a claim. The reforms comprise four key elements:

- Expanding the powers of the CAT to encompass standalone damages actions and the power to grant injunctions;
- Introducing collective actions and settlements;
- Revising the CAT’s Rules of Procedure; and
- Introducing a system of voluntary redress through the Competition and Markets Authority (“CMA”).

I. THE CAT AS THE PRINCIPAL VENUE FOR COMPETITION LITIGATION IN THE UK

The CAT was established as a specialist tribunal to hear cases involving competition issues. However, until now, its role has been limited to hearing appeals of decisions of the UK competition authorities and certain types of follow-on damages actions.² Limits on the CAT’s jurisdiction have resulted in many claims involving competition law being brought before the civil courts (typically the High Court of England and Wales). Even in follow-on damages cases where there was a choice, claimants often chose to bring actions before the High Court. One important reason for doing so was that claims could be launched in the High Court before the European Commission or UK competition authority issued an infringement decision, which could not be done before the CAT. This allowed claimants to establish jurisdiction early, before any other party launched the case in a less claimant-friendly jurisdiction. Unlike the CAT, the

¹ See CGSH Alert Memo, “UK Government’s Response on Private Actions in Competition Law”, March 13, 2013.

² A follow-on action is a claim for damages where the competition law infringement has already been established by the European Commission, the Competition and Markets Authority (the “CMA”), or another UK competition authority.

High Court can also issue injunctions, allowing victims of antitrust infringements to obtain prompt relief from ongoing damage.

Under the new regime, the CAT is intended to become the principal venue for all competition cases in the UK.

- The CAT will now have the power to hear standalone claims as well as follow-on actions.³
- A new collective action regime in the CAT analogous to US class actions will enable representatives to bring opt-out and opt-in proceedings on behalf of a class of victims, on either a standalone or follow-on basis.⁴
- The CAT will have the power to award injunctive relief (including interim relief).
- The civil courts will have the power to transfer cases involving questions of competition law to the CAT (and *vice versa*).
- The limitation periods for bringing actions before the CAT have been harmonised with the rules for bringing claims before the civil courts (discussed further below).

II. COLLECTIVE ACTIONS AND COLLECTIVE SETTLEMENTS

Collective actions

The Act introduces a new collective action procedure that will allow a representative to bring an action before the CAT on behalf of a class of claimants whose cases raise the “*same, similar or related issues of fact or law.*” Collective proceedings may be brought on an opt-out or an opt-in basis, although claimants not domiciled in the UK will always have to opt in (even where a claim is otherwise brought on an opt-out basis). Before the Act, only “*specified bodies*” could bring representative actions before the CAT, only on behalf of consumers, and only on an opt-out basis.⁵

³ A standalone action is a claim where there is no infringement decision and so the claimant must prove the fact of the infringement as well as showing that it suffered loss as a result. Some claims are brought on a “hybrid” basis, where the claimant alleges an infringement that is broader than the scope of an infringement established by the European Commission or a UK competition authority.

⁴ In opt-in proceedings, a representative brings a claim only on behalf of members of a specified class who have chosen to participate. In opt-out proceedings, a representative brings a claim on behalf of all members of a specified class except for those who have chosen not to participate.

⁵ The only organisation ever specified in this way was The Consumers’ Association (commonly known as “Which?”) and only one such action was ever brought: Case No. 1078/7/9/07 *The Consumers’ Association v*

Under the new procedure, the CAT will be responsible for deciding – at the outset of the proceedings – whether collective proceedings are appropriate and, if so, whether the action should be brought on an opt-out or opt-in basis. The CAT will consider not only whether the individual claims lend themselves to collective proceedings but also the suitability of the representative. The representative need not be a class member but the CAT has to be satisfied that it is “*just and reasonable*” for that person to act as representative. Among other things, the CAT will consider whether the person has a material interest in conflict with the interests of class members and its ability to pay the defendant’s recoverable costs if ordered to do so.⁶ The new CAT Rules specify a non-exhaustive list of factors that the CAT will take into account in determining whether claims are suitable to be brought in collective proceedings:

- Whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;
- The costs and the benefits of continuing the collective proceedings;
- Whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;
- The size and the nature of the class;
- Whether it is possible to determine for any person whether he is or is not a member of the class;
- Whether the claims are suitable for an aggregate award of damages; and
- The availability of alternative dispute resolution and any other means of resolving the dispute.

The representative will be responsible for distributing any aggregate award of damages between the members of the class (apart from any who have opted out or failed to opt in). If any damages remain undistributed in opt-out proceedings, they will not be returned to the defendant. Rather, the CAT may direct that all or part of any undistributed damages be paid to the representative in respect of costs or disbursements incurred in connection with the proceedings.

JJB Sports PLC. Before the High Court, it is possible to group claims by virtue of a Group Litigation Order or a representative claim. Neither a Group Litigation Order nor a representative claim has been brought successfully in a competition case.

⁶ The Government declined to introduce a presumption in the CAT rules to exclude certain bodies such as legal service providers, special purpose vehicles and third party funders from bringing collective proceedings. It is concerned that a presumption is too inflexible and noted that the CAT rules already contain factors that the CAT must consider in certifying the suitability of a person as representative: BIS response paper, “Competition Appeal Tribunal (CAT) Rules of Procedure”, September 2015.

The remainder of the undistributed damages will be allocated to the Access to Justice Foundation, a grant-making charity.

In general, costs will be awarded to or against the representative. Representatives may enter into a variety of funding arrangements, including conditional fee agreements and after-the-event insurance, but damages-based agreements (under which lawyers conduct litigation in return for a share of any damages) are prohibited for opt-out collective actions. Third parties could also fund litigation in return for a share of the proceeds.

Collective settlements

In tandem with the introduction of collective proceedings, the Act also introduces a collective settlements regime in the UK. This is available for both opt-in and opt-out collective actions. The CAT is responsible for approving a proposed collective settlement if and when it is satisfied that its terms are “*just and reasonable*”. In the case of opt-out collective proceedings, an approved collective settlement is binding on all of the members of the class who were domiciled in the UK and did not opt out of the collective proceedings, and all those non-UK-domiciled members who opted in. Class members can also opt out of the collective settlement.

The new CAT Rules specify that a proposed collective settlement should include “*any related provisions as to the payment of costs, fees and disbursements*” and “*specify how any sums received under the collective settlement are to be paid and distributed.*” Again, the new CAT Rules set out a non-exhaustive list of factors guiding the CAT’s determination of whether the terms of a collective settlement are just and reasonable.

III. CAT RULES OF PROCEDURE

In order to implement the changes brought about by the Act, new CAT Rules were published in September 2015. Together with the Act, these Rules align a number of the CAT’s procedural rules with the Civil Procedure Rules that apply to High Court cases. The Rules also provide more detail as to how the CAT will handle collective proceedings (which are unique to the CAT). The CAT is expected to publish a new Guide to Proceedings in due course, to provide more practical guidance on the implementation of the Rules. While many of the changes are technical, the following changes are of particular significance.

Limitation periods

A six year limitation period will in future apply to all private actions in England, Wales and Northern Ireland. In Scotland, the limitation period will be five years, in line with the Scottish Court of Session.⁷ Previously, the limitation period for follow-on claims before the

⁷ The limitation period runs from the date on which the cause of action first arose, *i.e.*, when the loss was suffered. The limitation period is suspended where there is deliberate concealment, which is likely to apply in cases involving secret cartels.

CAT was two years, beginning only once the relevant infringement decision became final, *i.e.*, after the exhaustion of appeals or the period for appeals had expired. This divergence, which led to a number of satellite disputes over the running of the limitation period, encouraged many claimants to bring their claims before the High Court.⁸

The Act provides for special rules in relation to limitation periods for collective proceedings. The limitation period for bringing any claim will be suspended from the date on which collective proceedings are commenced. The limitation period will resume if: (i) the CAT declines to make a collective proceedings order, or the order is revoked; (ii) the CAT rejects the claim, or it is withdrawn; (iii) a person fails to opt in within the relevant time in the case of opt-in proceedings; (iv) a person opts out of the claim in the case of opt-out proceedings; or (v) the claim is settled, dismissed, discontinued or otherwise disposed of without an adjudication on the merits.

Fast-track procedure

The Act introduces a fast-track procedure designed to facilitate access to justice for small and medium sized businesses (“SMEs”). The CAT is responsible for determining whether proceedings should be subject to the fast-track procedure. Among other things, it will consider the complexity and novelty of the issues involved, whether the time estimate for the main substantive hearing is three days or less, the number of witnesses involved, and the likely extent of any disclosure required.

Cases under the fast-track procedure will proceed to substantive hearing within six months and the amount of recoverable costs will be capped at a level to be determined by the CAT. A case may be removed from the fast track using the same eligibility criteria.

Under the fast-track procedure, the CAT may grant an interim injunction without the usual requirement that the applicant provide an undertaking as to damages (payable in the event that the injunction is ultimately overturned) or the CAT may cap the amount of any undertaking as to damages.

Offers to settle

The Rules introduce provisions similar to those in Part 36 of the Civil Procedure Rules, setting out procedures for making a formal offer to settle with defined costs consequences, called a “Rule 45 Offer”. The Rules provide for adverse cost consequences in the event that a claimant refuses to accept a Rule 45 Offer and ultimately fails to obtain a judgment that is more advantageous than the amount offered.

⁸ After the UK implements Directive 2014/104/EU (the “Damages Directive”), the limitation periods will be suspended during an investigation by a competition authority and must then run for at least one year after the infringement decision has become final. The deadline for the implementation for the Damages Directive is 27 December 2016.

Importantly, a Rule 45 Offer cannot be made in collective proceedings. Parties in collective proceedings are limited to making *Calderbank* offers, *i.e.*, offers made without prejudice as to costs that do not attract the same strict cost consequences of a Rule 45 Offer, but which may be taken into account by the CAT at the end of a case when considering what order to make as to costs.

IV. VOLUNTARY REDRESS SCHEMES

The Act also gives the CMA and other UK competition authorities the power to certify voluntary redress schemes proposed by firms that are found to have infringed competition law. Where a voluntary redress scheme is certified in respect of an infringement under investigation, the CMA or other UK competition authority may grant the firm under investigation a discount on any fine of up to 20%.

In order to have a voluntary redress scheme certified, a firm must agree to establish an independent board (comprising relevant experts) to assess and administer individual claims for compensation. Where a scheme is certified, the CAT will, when determining any subsequent claim for damages, and when considering whether to allow collective proceedings, take this into account as an available form of alternative dispute resolution. The CMA has published guidance on the criteria and procedure for voluntary redress schemes, which will also come into effect in October 2015.⁹

V. COMMENT

These reforms have the potential radically to alter the landscape for private competition enforcement, not only in the UK but across Europe.

First, within the UK, the CAT should enjoy a renaissance of its role as a forum for private enforcement, through its new powers to hear standalone actions, the alignment of its limitation periods with those of the civil courts, and the ability of the High Court to transfer appropriate proceedings to the CAT. The fast-track procedure has the potential to increase markedly the number of damages actions by consumers and SMEs, in particular due to the capping of costs and the possibility of partial or total waiver of an undertaking as to damages in injunctions.

The most profound change, however, is likely to be the introduction of opt-out class actions. When introducing the draft Damages Directive, the European Commission shied away from harmonising the rules on collective proceedings, and issued only a recommendation that Member States introduce a mechanism for collective redress. The UK's decision to introduce a fully-fledged opt-out class action regime (albeit with safeguards) marks a watershed moment for

⁹ In the guidance, the CMA states that in the majority of cases where it approves a scheme at the time of issuing an infringement decision it will reduce the penalty it would otherwise have imposed to recognise the provision of redress through the offer of the scheme. Any penalty discount is likely to be up to a maximum of 20% of the penalty the CMA would otherwise have imposed.

private enforcement in Europe, and there will be a strong desire among victims of antitrust infringements, as well as specialist law firms, to establish the UK regime as a model for securing redress for smaller and dispersed victims, and to encourage other Member States to adopt similar mechanisms.

There remain, however, question marks over the viability of the collective action regime given the attempts by the UK Government to avoid the perceived excesses of the U.S. “class action culture”; in particular, the effects of the prohibition on damages-based agreements in opt-out cases and the risk of an adverse costs order against the representative. These aspects could present challenges for claimants. Further, it is uncertain how willing the CAT will be to certify opt-out proceedings and how strict it will be in assessing the suitability of representatives. While we therefore expect to see attempts to capitalise on the new regime, whether the UK is destined to become an established venue for class actions is still to be determined.

If you have any questions, please feel free to contact any of your regular contacts at the firm or any of the partners or counsel listed under “[Antitrust and Competition](#)” or “[Litigation and Arbitration](#)” in the “Practices” section of our website at <http://www.clearygottlieb.com>.

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