UK Consumer Rights Act 2015: Reforms to the private enforcement of competition law

Howard Cartlidge, Partner, and Lucy Davies, Associate, at Olswang LLP consider how the provisions of the Consumer Rights Act 2015 will bolster the position of the Competition Appeal Tribunal and facilitate access to compensation for competition law breaches. The article focuses on the effect of the new procedural provisions, and the possibility for companies of implementing voluntary redress schemes to deal with infringements

On 1 October 2015, reforms to rules concerning the private enforcement of competition law came into force. Housed in the Consumer Rights Act 2015 (the "CRA") and amending the Competition Act 1998 and the Enterprise Act 2002, the reforms are designed to make it easier for victims of infringements of competition law to seek and obtain compensation.

The UK government aims to achieve this objective by expanding the jurisdiction and functions of the Competition Appeal Tribunal so that it can hear a wider scope of competition damages actions and is better equipped to deal with procedural issues arising in such proceedings. In addition, the government has revised the current rules on collective proceedings and introduced voluntary statutory compensation schemes.

Taken in the round, the reforms should enhance the mechanisms for awarding compensation to victims of infringements of competition law firstly by making the Competition Appeal Tribunal (the "Tribunal") the 'go-to' forum for handling competition damages actions, and secondly by creating viable and less costly alternatives to pursuing individual court proceedings. The reforms and their effects and implications for business are considered in more detail in this article.

Expansion of the jurisdiction of the Tribunal

The expansion of the jurisdiction of the Tribunal was central to the reforms introduced by the CRA. The reforms expand the type of claims which can be heard by the Tribunal and strive to make the Tribunal the preferred forum for competition damages actions by broadly aligning the powers of the Tribunal with those of the High Court.

Under the new regime, the Tribunal will be able to hear both follow-on and standalone damages actions.

Follow-on damages actions are claims for compensation for loss suffered as a result of a proven infringement of competition law, brought on the basis of an infringement decision issued by either the Competition and Markets Authority (the "CMA") or the European Commission, which serves as evidence of the breach.

Standalone actions are brought in relation to infringements of competition law which are as-yet unproven. Claimants in such actions are required first to prove that there has been an infringement of competition law, and second that they have suffered loss as a result of that infringement.

Before the reforms were introduced, the Tribunal could only hear follow-on damages actions, and claimants wishing to bring standalone actions were required to launch proceedings in the High Court. Under the new regime, claimants will be able to launch standalone actions in the Tribunal, which is the UK's specialist competition law forum, and therefore arguably the best placed to determine questions of competition law.

To further bolster the Tribunal as the 'go-to' forum for competition damages actions, the CRA extends the limitation period for bringing proceedings in the Tribunal from two years to six, bringing it into line with the limitation period of the High Court. It had been noted that the short deadline for bringing follow-on actions in the Tribunal had often resulted in claims being time-barred from the Tribunal.

However, quite whether the new limitation period will have its intended effect is far from certain because of a rule contained in the Tribunal's revised rules of procedure (the "Revised CAT Rules"), which came into effect on 1 October 2015. The Revised CAT Rules state that the previous CAT Rules will apply to all those proceedings already commenced, and that the previous CAT Rules on limitation periods will apply where (amongst other things) the claim arose before 1 October 2015, thereby potentially precluding proceedings from benefitting from the Revised CAT Rules for many years to come.

Revisions to the Tribunal's rules of procedure

To support the expansion of the Tribunal's jurisdiction, the Revised CAT Rules contain amendments to the

Tribunal's case management functions.

Interim relief

Previously, the Tribunal did not have the power to award interim relief, a factor which may well have deterred claimants from electing to litigate in the Tribunal.

Now, pursuant to changes introduced by the CRA, the Tribunal has been given the power to grant both interim and final injunctions at any time during proceedings, including before proceedings are started and after judgment is given. The terms upon which an injunction can be granted are set out in the Revised CAT Rules.

In addition to the power to grant an injunction, the Revised CAT Rules include amendments which should ensure effective case management in both follow-on and standalone proceedings before the Tribunal. These amendments have been made with a view to reducing both costs and the length of time required for proceedings.

Admissibility of new evidence

One of these amendments concerns the Tribunal's discretion with respect to the admissibility of new evidence. Previously, the Tribunal had a broad discretion over the admissibility of new evidence.

The Revised CAT Rules retain this broad discretion and set out the criteria which should be considered by the Tribunal upon determining whether or not to admit new evidence.

However, new requirements have been added which require an applicant to identify in its grounds any evidence it wishes to admit that was not available to the maker of the disputed decision at the time when the decision was made. Similarly, a respondent wishing to object to the admission of new evidence should do so in its defence.

Disclosure

The rules of disclosure have also been amended in the Revised CAT Rules. Similarly to the rules governing the admission of new evidence, the Tribunal has a broad power when making directions with respect to the disclosure of documents. The Revised CAT Rules set out the parameters within which the Tribunal may make disclosure orders.

The broad discretion afforded to the Tribunal with respect to the disclosure and admissibility of new evidence can be contrasted to the rigid rules applied in the High Court, and is likely to be a factor which claimants take into account when deciding in which forum to bring a claim.

Fast-track procedure

Finally, the CRA provides that the Tribunal may amend the CAT Rules to create a 'fast-track procedure' and this is now contained in the Revised CAT Rules. The fast-track procedure will be available for 'suitable' damages claims. This will be assessed on (amongst other things) the complexity of the claim, whether the proceedings raise any novel issues and the size of the parties involved.

The fast-track procedure can either be requested by the parties to the proceedings or the Tribunal can determine on its own initiative that a case is suitable to be fast-tracked. Once a claim has been fast-tracked it should be listed within six months and the costs in fast-tracked claims will be capped at a level to be determined by the Tribunal. The fast-track should provide claimants in straight-forward proceedings with a mechanism to procure compensation much earlier than might usually be the case in standard proceedings, and the provision to cap costs should ensure that the costs of litigation do not spiral out of control.

Collective proceedings

In addition to expanding the jurisdiction and functions of the Tribunal, the CRA also significantly expanded the scope of the rules governing collective proceedings, set out in the Competition Act 1998.

Collective proceedings are a type of class action for damages in which a claim is brought by a representative on behalf of a certain category of claimants – for example, those which have suffered loss as a result of a particular infringement of competition law.

Collective proceedings can be an effective mechanism to assist victims in obtaining compensation because they negate the need for each individual claimant to bring a separate claim.

Under the previous regime collective proceedings were very restrictive in scope. Collective proceedings had to be brought by consumer bodies and only opt-in collective proceedings were permitted (whereby claimants only join collective proceedings when they actively assert membership to a claim). Under the new collective proceedings regime, the rules governing which are set out in the Revised CAT Rules, opt-out collective proceedings (where claimants automatically fall within a class for the purposes of proceedings unless they take the necessary prescribed steps to opt-out), as well as opt-in proceedings, are permitted.

Collective proceedings should become easier to commence, because the requirement for the Consumers' Association to bring the claim has been removed. The reforms allow collective proceedings to be filed by 'any person'. However, before proceedings can continue, the Tribunal has to make a collective proceedings order (the "CPO"). The CPO will only be issued if the Tribunal considers that the person who brought the claim is authorised to act as a representative in collective proceedings and that the claims raise the same, similar or related issues. Once a CPO has been issued, collective proceedings progress in the same way as individual proceedings up to the point that an award of damages is made.

When awarding damages in opt-out collective proceedings the Tribunal will make an award for the whole of the collective action, rather than undertaking an individual assessment with respect to the damages recoverable by each individual represented

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by the collective action, although the Tribunal may also give directions as to how individual awards are to be quantified. Awards of damages in opt-in proceedings can also be made on this basis, but it is not required. Unlike in individual proceedings, the Tribunal is unable to award exemplary damages in collective proceedings.

The rules on collective proceedings also envisage collective settlements. Where the parties to an opt-out collective proceeding wish to settle the claim, the authorised representative and the defendant are required to make an application to the Tribunal setting out the claims to be settled and the proposed settlement terms.

The Tribunal will approve any proposed settlement which it considers is just and reasonable and the settlement will become binding on all those falling within the class to which the proceedings relate, except those which have chosen to opt-out of the settlement by the time specified in the collective settlement approval order handed down by the Tribunal.

Opt-in collective proceedings are not subject to such stringent settlement requirements, although they cannot be settled without the CAT's permission before the expiry of the time specified in the CPO by which a class member may opt-in to the proceedings.

For those collective proceedings which either have not yet been filed with the Tribunal or have not yet been issued a CPO, a collective settlement order (the "CSO") can be obtained from the Tribunal. The CAT will grant a CSO if it considers that it is just and reasonable for the named person to act as the settlement representative, that the settlement is in relation to claims which raise similar issues of fact and law and would therefore be eligible for inclusion in the proceedings, and that the terms of the proposed settlement are just and reasonable.

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Collective proceedings are considered by the UK government as a way to reduce the costs of litigation and to make it easier for consumers to stand up for their rights. It sees a growing demand for consumer actions, and hopes that the reformed collective proceedings regime will be more effective than the previous regime – under which only one collective claim was brought.

It appears that the main barriers to bringing collective proceedings have been removed, but only time will tell whether there is a significant appetite for such claims.

Voluntary compensation schemes

In a bid to facilitate the award of compensation, the CRA grants to the CMA, as well as the UK's sector regulators, the power to approve voluntary redress schemes.

A voluntary redress scheme is a statutory compensation programme, designed to provide victims of a competition law infringement with a means to obtain compensation without having to go to court. Businesses which have infringed EU or UK competition law will be able to apply to a UK regulator to approve the terms of the redress scheme, pursuant to which the infringing party will voluntarily agree to pay compensation to victims of the infringement.

Voluntary redress schemes are regulated by The Competition Act 1998 (Redress Scheme) Regulations 2015, which came into force on 1 October 2015, and are accompanied by guidance produced by the CMA.

If an infringing company wishes to offer a redress scheme, it must first appoint a board to independently devise the terms of the scheme. The Redress Regulations require the board to comprise a senior lawyer or judge as the chair and at least four other members – including an economist, an industry figure, a representative of those entitled to compensation under the scheme and other suitable persons, such as accountants or market experts.

The Redress Regulations specify the information which the board must take account of when determining the terms of the scheme, this includes the category of persons which will be entitled to claim under the scheme as well as administrative considerations such as how the application process will function. A majority of the board must approve the scheme before it is submitted to a regulator for approval.

The CMA or sector regulator cannot approve a scheme until there is a final decision from the relevant competition authority (either a UK regulator or the European Commission), and it will not assess the details of the scheme being proposed; rather the regulator will consider whether it has been put together in compliance with the Redress Regulations. Once the scheme has been approved, it becomes binding on the applicant and gives an enforceable right to both those entitled to claim for compensation and the regulator in the event that the applicant breaches its duty under the terms of the scheme.

A claimant to the scheme receives its compensation in full and final settlement of its loss, and once it has received a payment through the redress scheme that claimant will not be able to launch proceedings for damages in the High Court or Tribunal with respect to the same harm caused by that infringement. However, in the event that a claimant does not accept the award of compensation offered through the scheme it may still choose to bring a court action to obtain compensation.

For victims of infringements of competition law, the benefit of a voluntary redress scheme is that it allows for the award of compensation whilst avoiding the costs associated with litigation, although it will not be known until such schemes are in operation whether the amounts of compensation awarded under the schemes are equivalent to that which a claimant might expect if successful in court proceedings. For infringing companies, the benefits of devising a redress scheme are clear.

The CMA has indicated that entering into a voluntary redress scheme might be considered as a mitigating factor in the determination of a fine, potentially reducing any fine by up to 10%. In addition, where a redress scheme is devised and is used by claimants in lieu of bringing proceedings, the infringing company stands to retain more financial control over monies paid out in compensation following an infringement decision.

Conclusions

Overall, the reforms contained in the CRA appear to take positive steps towards facilitating the ability of victims of infringements of competition law to seek and obtain compensation.

The provisions made to bolster the position of the Tribunal as the 'go-to' forum for competition damages actions appear likely to be effective. In particular, granting the Tribunal the ability to hear standalone claims is a positive step forward for victims because, as the UK's competition specialist, it is probably better placed than the High Court to make decisions regarding infringements of competition law.

Equally, extending the case management powers of the Tribunal to grant injunctions, retaining the Tribunal's broad discretion regarding disclosure and the admissibility of evidence, and the creation of a fast-track procedure should have the combined effect of ensuring that the Tribunal is able to contend seriously with the High Court when claimants are considering the forum in which to launch proceedings.

These reforms also have the added benefit of reducing the cost and length of litigation. However, the provision in the Revised CAT Rules regarding the application of the new limitation period could potentially limit the effectiveness of these changes – this is likely to be played out in the courts over the coming months and years.

In assessing risk and planning commercial strategy, Compliance Officers are wise to take these reforms, and the likelihood of speedier access to justice for victims of competition law, into account.

Similarly, the new collective proceedings regime should facilitate access to compensation for victims of infringements of competition law – particularly for consumers. Collective proceedings also reduce the costs of litigation by negating the need for individual claimants to bring separate claims. The only question which remains is whether there will, in practice, be an appetite for this type of proceedings. Companies, however, would nonetheless be wise to note that any competition law infringements may be more readily pursued in the future, even by the ultimate consumer of goods or services.

The same question as to appetite for change hangs over voluntary redress schemes. On the face of it, voluntary redress schemes are a positive development in improving access to compensation, whilst allowing businesses a certain degree of control over the compensation payable for any infringements. However their success will depend firstly on the willingness of infringing companies to offer a voluntary redress scheme, and secondly, on whether the amounts of compensation awarded under such schemes will be comparable to damages awarded by either the High Court or the Tribunal.

Compliance Officers should be aware of the possibility of implementing a voluntary redress scheme, and should be quick to examine the possible advantages and disadvantages of creating such a scheme in the context of any particular infringement on the part of their organisation.

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