

## Competition law and the Consumer Rights Act 2015

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**Competition analysis: Richard Pike, partner, Constantine Cannon LLP, considers the main competition law changes introduced by the Consumer Rights Act 2015 (CRA 2015).**

### Original news

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*CRA 2015 amends the law relating to the rights of consumers and protection of their interests through a framework that consolidates key consumer rights covering contracts for goods, services, digital content and the law relating to unfair terms in consumer contracts. CRA 2015 also introduces investigatory powers for enforcing the regulation of traders, and to provide for private actions in competition law and the Competition Appeal Tribunal (CAT).*

### What are the main changes introduced by CRA 2015?

The Consumer Rights Act 2015 (CRA 2015) introduces lots of changes to consumer law but the competition aspects are largely contained in Schedule 8. The most notable competition change introduced by CRA 2015 is the introduction of collective actions for competition infringements and, in particular, the scope for such competition actions to be continued on an opt-out basis. Associated with this, there will also be the scope for collective settlements. One of the other significant changes is the introduction of a fast-track system particularly targeted at SMEs (though not exclusively available to them). Other changes include the introduction of voluntary redress schemes and various technical changes designed to improve the usefulness of the CAT as a specialist competition tribunal and to align various aspects of its functions with those of the High Court.

See further, CRA 2015 and competition damages actions--key changes.

### What will the effect be of changing the limitation period for follow-on actions where investigations by competition authorities and subsequent appeals may go on for more than six years?

It is unlikely ever to be an issue, for a number of reasons. First, and most importantly, the Damages Directive (Directive 2014/104/EU) will require a further change to English law by the end of next year that will extend limitation periods until at least one year after the conclusion of any competition infringement investigation or proceedings. Once that is in force there should be no scope for limitation periods to expire before investigations and appeals are completed.

Second, the transition provisions in the Competition Appeal Tribunal Rules 2015, SI 2015/1648, r 119 preserve the existing limitation position for all infringements where the conduct in question occurred before 1 October 2015. In reality, any infringement decisions made in the near future are almost certain to relate to conduct before 1 October 2015 so they will continue to benefit from the limitation period continuing until two years after the end of any appeals. Finally, six years should rarely be a problem anyway given that concealment will usually apply to delay the start of limitation running for most cartels. There might be more of an issue with abuse of dominance or other non-cartel cases but they are less common bases for damages actions anyway and if it is a good claim then it is likely to be worth issuing to stop limitation running even if a decision is still pending.

### Are we likely to see the approval of many 'opt out' actions?

The transitional provisions in the Competition Appeal Tribunal Rules 2015, SI 2015/1648, r 119 are going to cause a bit of a headache for anyone looking to issue collective actions in the near future. The effect of rule 119 is to effectively make it impossible to bring a collective action for a standalone claim where the conduct occurred before 1 October 2015. It also probably means that permission will have to be obtained from the tribunal to bring any follow-on claim where appeals are still pending.

The combination of these provisions will at least temporarily rule out a number of the claims that were thought to be most likely to be brought as collective actions in the near future. For example, FOREX claims can probably only be pursued as collective actions once the European Commission has come out with an infringement decision. For these reasons, it may be a while before we see any opt-out actions and the first ones may be quite minor affairs. I do anticipate, however, that opt-out actions will become more prevalent over time as long as the CAT does not mishandle the early ones. I am sure we are not alone in having our own advanced plans for possible actions.

### **Who can and can't act as a representative of a class in a collective action?**

The only restriction on who can act as a class representative is that the tribunal must consider that it is 'just and reasonable' for them to act as such. Although the government talked in the consultation papers about prohibiting law firms and funders from acting as class representatives, that was never actually reflected in the legislation. Nonetheless, I anticipate that the tribunal will be reluctant to appoint either a law firm or a funder as it will see too many actual or potential conflicts of interest (as noted in the tribunal's new 'Guide to Proceedings', issued on 1 October 2015).

The most attractive class representatives, at least from the perspective of the tribunal, are likely to be pre-existing consumer or trade associations but I fully expect to see individual class members acting as class representatives as well. Claimant lawyers will probably want to line-up sophisticated class member claimants as the first class representatives and/or move forward with a number of class members as representatives (perhaps for a series of different sub-groups).

### **In what circumstances will the CAT certify an 'opt-out' collective action? Is this certification process workable?**

The CAT can only certify a collective action if the class members' claims are for breach of UK and/or EU competition laws and if they raise the same, similar or related issues of fact and law. It is very much in the discretion of the tribunal whether to certify an opt-out or opt-in claim. I would expect an opt-out claim to be deemed appropriate where there are a large number of class members and most only have relatively modest claims (even a claim for tens or hundreds of thousands of pounds could be considered modest given the high cost of pursuing litigation). This should favour the use of opt-out claims in many cartel actions even though the Guide to Proceedings suggests that the CAT will start off with a preference for opt-in proceedings where practicable.

In terms of other possible obstacles to the process being workable, one of those that has attracted much attention is that, as part of the certification process, the CAT is required to consider the strength of the claim. I think this is, however, a bit of a red herring as the CAT has been at pains to say that it does not intend to carry out a full merits review and, in fact, the new Guide to Proceedings indicates that it is likely to consider the minimum threshold to have been met wherever there is a follow-on claim. Some of the other issues that may arise are around the amount of disclosure that might be required at the certification stage and how the tribunal will deal with pass-through in relation to certification.

On disclosure, the situation in the US is that there is an increasingly heavy disclosure/discovery burden at the certification stage. If the same approach were followed here it could really bog down the whole process and delay certification for years. I am encouraged that the new Guide to Proceedings suggests that any disclosure at this stage should be limited (or non-existent). The issue with pass-through is that it is arguably quite a claimant-specific thing. Defendants may try to argue that this means the main issues are individual rather than common issues. If the CAT goes along with that then it will make opt-out collective proceedings impossible in nearly all cases. I expect, therefore, that it will take a much more pragmatic approach. All said, I am hopeful that certification will be workable though we can be sure that defendants will test the legislation and bring a lot of appeals to try to bog things down.

### **How will the CAT deal with settlement proposals in collective actions, including 'Calderbank' proposals? When will the CAT permit collective settlements on an 'opt-out' basis?**

I expect that the CAT is going to be quite hands-on in the approval of opt-out settlements. It is going to need to be persuaded that the settlement is for a fair value and, as part of that, it is going to want to see expert evidence and to be reassured that there has been a reasonable amount of disclosure as part of the negotiations. It is going to be conscious that it is effectively defending the interests of a lot of people who are not before the tribunal. If it is persuaded, though, that

the settlement falls within a reasonable range then it will approve it on an opt-out basis. It is generally quite a sensible and pragmatic tribunal so it is not likely to go so far as to effectively conduct a trial of the issues before approval.

Settlement proposals, as opposed to settlement approvals, will only come before the CAT if there are disputes over costs after trial or settlement. Realistically, I don't see that being likely to happen much at all. It is likely that all or very nearly all collective actions will settle without trial and they are likely to do so on a basis that takes account of costs. Claimant lawyers are going to be very reluctant to settle liability but leave costs to be decided by the tribunal. Further, I suspect that the tribunal will only impose costs consequences for failure to accept settlement proposals in quite rare cases. It is going to be so hard for anyone to accurately value a claim before disclosure and experts' reports that earlier offers are likely to be treated with circumspect.

### **When will the Competition and Markets Authority (CMA) authorise a voluntary redress scheme? Are these schemes likely to be popular?**

I doubt the voluntary redress scheme will be popular at all. The offer of a discount on the fine only works for UK infringements and there have been very few UK infringement decisions (and even fewer that have survived appeal). The discount will also only be a motivation if the offender has concluded that it is likely to face claims from virtually all purchasers anyway and the saving on the fine is more than enough to cover the costs of setting up the scheme (which has been made rather bureaucratic by the CMA). The concept of a voluntary redress scheme was attractive as an alternative to class actions but if class actions are available and prove popular then I suspect that collective settlements through that route will be much more popular than use of the voluntary redress scheme.

See further, Voluntary redress schemes--friend or foe?.

### **What's the relationship between voluntary redress schemes and the certification process above for collective actions?**

There is no direct link in the legislation, but the existence of a voluntary redress scheme might conceivably make the tribunal less willing to certify an action. If, for example, it was clear that a lot of potential class members were taking advantage of a voluntary scheme then that might suggest that there was no need for a class action. If the tribunal were to take that approach then it might encourage more defendants to offer voluntary redress. I suspect, however, that it will not work like that in practice. I think it is more likely that the tribunal would take the view that class members should be allowed a choice and that any settlements through voluntary redress should simply be deducted from any damages awarded at the end of the case.

### **How will the changes affect the dynamics of choosing whether to bring cases before the CAT or the High Court?**

The limitation issues with rule 119 will mean that the High Court remains popular for the time being, but the CAT is likely to become more popular over time. The changes have done a lot, in theory, to overcome the known issues with the CAT's damages jurisdiction and unless significant new issues arise in relation to the wording of the legislation, it is likely to be seen as an attractive alternative. Its specialist judges, docketing system, referendaire support and pro-active case management all make it a good venue.

### **Will these changes have any impact on the relationship between public and private enforcement of competition law?**

The changes are only likely to have a limited impact on public enforcement. The risk and total expected cost of potential damages claims are factors always taken into account by corporate clients in considering whether to seek leniency. These reforms are likely to increase the cost associated with claims. However, the possibility of obtaining complete immunity from fines if first in will still be a very strong motivating factor. A client considering an immunity application will only avoid the costs of a damages claim if the cartel remains undetected forever. If there is more than a minimal chance of detection then the saving on fines will make an immunity application desirable no matter how great the civil liability. The motivation to seek immunity will be even stronger if there is a realistic risk of criminal prosecution (always the case if the cartel extended to the US). Where the changes might conceivably make more of a difference is in relation to those seeking

partial immunity and in seeking settlement. Partial immunity may look somewhat less desirable. By contrast, settlement may look more desirable as it will allow a shorter decision and typically a narrowing of the cartel scope.

### **Do the changes make the UK private actions regime more attractive?**

Yes, although the collective actions reforms provide only limited benefits to foreign claimants given that the opt-out provisions only apply to UK-domiciled claimants. Some foreign claimants will be keen to pro-actively opt-in in order to take the benefit of the work done by the representative claimant and to gain the likely leverage in negotiations from the size of the claim exerted on behalf of the opt-out class. It may be, however, that opt-out classes are only proposed on national lines on the basis that the conditions of supply vary too much in different jurisdictions to make it practicable to have a single class. If that happens then the impact on foreign potential claimants may be very limited.

### **How does the UK compare with other regimes?**

It is more expensive than other options but, as so often in life, you get what you pay for. It is a good system. Potential claimants are, I think, becoming more reluctant to sue in Germany. The Netherlands is probably therefore the main competitor for competition damages actions (although Finland is proving to be quite good as well). There are pros and cons to each but the UK is likely to be one of the top choices for any sort of sizeable claim.

### **Are further changes to the private actions regime in the UK likely in the near future, for example in relation to the Damages Directive?**

Yes, some changes should be made to implement the Damages Directive. For example, it is hard to see how anyone could say that the current arrangements on limitation periods reflect the requirements of the Directive. Beyond changes to implement the Directive, though, I think we will not see any other changes for a while as people will want to see how these changes work first.

*Interviewed by Diana Bentley.*

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