

Knowledge

Practical guide to competition damages claims in the UK

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Reforms to damages litigation in the UK for infringements of competition law

The UK's system for the enforcement of competition law through the courts (as an alternative or in addition to a complaint to a regulator) is set to be overhauled by the Consumer Rights Act 2015, which entered into force on 1 October 2015. The reforms contained in the Act are envisaged to make it easier for claimants to bring damages claims in the UK against parties which have been found to have infringed competition law, either at UK or EU level. Competition law claims can include damages claims against cartel members, businesses which have entered into anticompetitive agreements, or businesses which have abused a dominant market position.

The Act seeks to make the Competition Appeal Tribunal, the UK's specialist competition tribunal, the go-to forum for bringing competition damages actions in the UK. It widens the remit of the type of cases the CAT can hear, as well as providing for the amendment of the CAT's rules of procedure so that it is adequately equipped to handle procedural issues arising during litigation (such as ordering disclosure and granting injunctions).

These reforms, coupled with the introduction of measures to promote collective proceedings on behalf of groups of claimants and voluntary redress schemes, should make it easier for claimants to obtain compensation for harm suffered as a result of an infringement of competition law. Conversely, those which have been found to have committed an infringement of competition law, or who are currently under investigation by a competition authority, might find themselves exposed to substantial financial liability.

What the Consumer Rights Act means for businesses operating in the UK

Businesses which have suffered loss as a result of an infringement of competition law should now find a landscape which makes it easier for them to bring a private damages action in the UK courts, in particular in the CAT. Those businesses which choose to bring their claim in the CAT will benefit from having their case heard by specialist tribunal, which is adequately equipped to (i) handle the procedural issues arising during litigation (such as ordering disclosure and granting injunctions); and (ii) understand the complex issues which can arise in competition damages cases. This should result in a more efficient litigation process which will make it easier for claimants to obtain any compensation to which they are entitled.

For those businesses which have been found to have committed an infringement of competition law, or who are currently under investigation by a competition authority, the outlook is not so positive. These businesses will find themselves with an increased exposure to financial liability in the event that they find themselves named as a defendant in a damages action. On top of the costs of defending a claim, defendants will run the risk of having to pay damages (which unlike a penalty issued by a competition authority will not be subject to a cap) to numerous claimants.

Reforms to the jurisdiction and functions of the Competition Appeal Tribunal

The reforms introduced by the Consumer Rights Act widen the CAT's jurisdiction in relation to private damages actions for infringements of competition law. Under the new regime the CAT will be able to hear both follow-on actions (with respect to proven infringement decisions) and standalone actions (infringements with no regulatory decision) – having previously only been able to hear follow-on actions. Not only has the CAT's jurisdiction increased, it has also been given additional functions in order to compete with the High Court as the go-to forum for private enforcement actions. In order to give effect to the CAT's new functions the revised [Competition Appeal Tribunal Rules 2015](#) also entered into force on 1 October 2015.

The key amendments to the CAT's jurisdiction give it the ability to:

- hear stand-alone damages actions;
- grant injunctions; and
- create a fast-track procedure for suitable follow-on damages claims.

Stand-alone damages actions

The Consumer Rights Act expands the jurisdiction of the CAT to hear stand-alone damages actions, formerly the sole jurisdiction of the High Court. A number of the proposed revisions to the CAT Rules focus on ensuring that the process before the CAT is strengthened, thereby increasing the attractiveness of the Tribunal as a forum to hear stand-alone claims. This includes extending the limitation period for bringing a claim in the CAT from two to six years, bringing it into line with the limitation period of the High Court. The revisions particularly focus on empowering the CAT to ensure effective case management, with a view to reducing both costs and the length of time required for proceedings.

The rules on disclosure are also important to those seeking to bring stand-alone damages claims. Under the revised Rules the CAT will retain a broad power to give directions for the disclosure of documents. Building on this power, the revised CAT Rules set out in greater detail the parameters within which the CAT may operate when ordering disclosure. In addition to ruling on disclosure as between parties to the litigation, the CAT will also be able to order disclosure by a person who is not a party to the proceedings where the documents sought are likely to support the case of the applicant or adversely affect the case of one of the other parties provided that disclosure is necessary to dispose fairly of the claim or to save costs.

The power to grant injunctions

The Consumer Rights Act, for the first time, gives the CAT the power to grant both interim and final injunctions. The revised CAT Rules set out the procedural rules for this new power. Interim injunctions may be granted at any time, including before proceedings are started (in the event that the matter is urgent or it is necessary to do so in the interests of justice) and after judgment has been given. Applications for injunctions must be supported by evidence, which should include all material information regarding the applicant's ability to pay under any undertakings as to damages that the Tribunal may require to be given.

In the event that a party subject to an injunction has failed to comply with its terms, the party wishing to enforce the injunction may apply to the CAT for certification of the matter to the High Court. After giving the parties an

opportunity to be heard, the CAT must make directions as it thinks fit for determining whether to certify the matter to the High Court.

Fast-track procedure

The CAT is also empowered to create a fast-track procedure for suitable follow-on damages claims and the revised Rules set out how this new system will operate. Under the revised Rules parties may request for their case to be allocated to the fast-track or alternatively, the CAT may on its own initiative determine that a case is suitable to be fast-tracked. When considering whether proceedings are suitable for fast-track the CAT may take into account a number of factors including the size of the parties involved, the time estimate for the final hearing and the complexity and novelty of the issues to be heard. The revised Rules provide that costs recoverable in fast-track proceedings will be capped at a level determined by the CAT.

Anticipated effects of the reforms

All in all, these reforms stand to make the CAT a more attractive forum for hearing private damages action – parties to litigation will be able to benefit from the experience and knowledge of a specialist panel, safe in the knowledge that the CAT is sufficiently equipped to handle any procedural issue which might arise throughout the course of the litigation. The fast-track procedure may provide more opportunities for smaller businesses to bring competition claims, though it remains to be seen how much the procedure will be used in practice, given the inevitable complexity of most competition claims.

Out-of-court settlements to be facilitated by the Consumer Rights Act reforms

One of the main reforms to competition law enforcement introduced by the Consumer Rights Act is to grant the Competition and Markets Authority, as well as the UK's sector regulators, the power to approve voluntary redress schemes. A voluntary redress scheme is a statutory compensation programme which is 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 the CMA 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 come into force on 1 October 2015. The Regulations are accompanied by the CMA's [guidance on the approval of voluntary redress schemes for infringements of competition law](#), which sets out further details about how redress schemes will operate. The CMA has also published [template application forms](#) to be used by parties submitting a scheme for approval.

Designing the redress scheme

Where a business wishes to offer a redress scheme, it must first select a board. The 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 Guidance indicates that a business can indicate to the board the parameters within which it would like the scheme to operate, although the Regulations require the board to devise the terms of the scheme, taking account of the following information:

- any evidence of the loss caused to those entitled to compensation;
- the category of persons who will be entitled to claim for compensation under the scheme;
- the application process for compensation, including any evidence the scheme would require to be submitted in support of an application for compensation; and
- how the scheme would be notified to those entitled to compensation.

In addition to devising the terms of the scheme, the board will also be in charge of administering the scheme.

Application to the CMA for approval

Once the terms of the scheme have been agreed by a majority of the board, the proposed voluntary redress scheme must be submitted to the CMA for approval. The application to the CMA must include details of:

- the board which devised and will administer the scheme, including confirmation that there are no conflicts of interest;
- the information the board took account of when devising the scheme and confirmation that a majority of the board agrees with the scheme;
- the anticompetitive agreement or conduct to which the scheme relates;
- the category of persons that will be entitled to compensation pursuant to the scheme;

- the process of applying for compensation and how long it will take to determine applications for compensation and the scope of compensation available;
- the documentation that a claimant is required to submit in order to prove that it has suffered harm as a result of the infringement;
- how the scheme will be notified to those entitled to claim; and
- the independent complaints process available to claimants.

The application should also include confirmation that the scheme will operate for at least nine months and stipulate that a third party may not submit a claim on behalf of those entitled to compensation under the scheme.

Approval and enforcement of redress schemes

The CMA may not approve a scheme until the relevant competition authority (for example, at EU level, the European Commission or in the UK, the CMA) has issued a final infringement decision, although an application can be made before a final decision has been made. The CMA will assess the proposed scheme to determine whether or not it has been created in accordance with the Regulations, but will not look at the details of the scheme itself. Once a decision has been reached, the CMA's decision, along with brief reasons, will be published on the CMA's website. Approved schemes will become binding on the applicant and gives an enforceable right to those entitled to compensation. The CMA is also empowered to take enforcement action where it is considered that the applicant is in breach of its duty to comply with the approved scheme.

What will redress schemes mean for those affected by a competition law infringement?

It should be made clear to claimants applying to the scheme that they do so in full and final settlement. This means that once a claimant has received compensation through the scheme, they will not be able to bring a claim for damages in the courts with respect to the same harm caused by that infringement. In the event that the board does not approve a claim for compensation, the claimant will not be prevented from seeking damages through the courts. Equally, the existence of an approved voluntary redress scheme does not preclude an individual from seeking compensation via an alternative route such as by bringing an individual private action for damages in the UK courts, or from participating in collective proceedings.

The obvious benefit of a redress scheme is that it will save all parties involved in a competition law dispute the high costs of litigation. For parties which fall within the scope of a redress scheme it means a clear path to compensation without all the uncertainties associated with litigation – however, it remains to be seen whether the compensation awarded pursuant to a scheme will be comparable to the level of damages awarded by a court.

In addition, infringing parties stand to gain some benefit from engaging in a voluntary redress scheme. The CMA has indicated in its Guidance that volunteering to enter into a redress scheme might stand as a mitigating factor in the calculation of a penalty for breach of competition law. The CMA has discretion to grant a penalty discount where it considers it appropriate, and it is thought that creating a voluntary redress scheme is likely to amount to a reduction of up to a maximum of 10% of the penalty the CMA would otherwise have imposed. A reduction of fine is an obvious inducement for infringing parties to seriously consider creating a redress scheme.

Another advantage for infringing parties is that by setting up a redress scheme the infringing party can, to some extent, control the scope of those entitled to compensation as well as the amount of compensation awarded. Of course, any party that considers it has suffered a loss as a result of the infringement can still choose to pursue compensation through the courts regardless of whether it is entitled to compensation from the scheme or not – but to the extent that fewer claimants bring damages actions because of the existence of a redress scheme, infringing parties will have more control over the financial liability arising as a consequence of the infringement.

Collective proceedings revamped by the Consumer Rights Act

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, the victims of a particular infringement of competition law). They can be divided into two categories:

- Claimants to opt-in collective proceedings will only join collective proceedings when they actively assert membership of a class.
- Claimants to opt-out collective proceedings will automatically fall within a 'class' for the purposes of the proceedings unless they take the necessary prescribed steps to opt-out.

Collective proceedings can be an effective mechanism to assist victims of infringements of competition law in obtaining compensation because they negate the need for each individual party which has suffered loss as a result of an infringement of competition law to bring separate claims.

The Consumer Rights Act significantly expands the scope of collective proceedings before the Competition Appeal Tribunal in the UK by revising section 47B of the Competition Act 1998. Under the previous regime collective proceedings were very restrictive in scope; only opt-in collective proceedings were permitted and could only be brought by the Consumers' Association, the charitable arm of Which?. The new regime permits opt-in and opt-out collective proceedings, and allows any nominated representative, approved by the CAT, to bring the claim on behalf of a defined group of claimants, who will then share the award of compensation. The procedure governing the new regime is set out in the [Competition Appeal Tribunal Rules 2015](#), which entered into force on 1 October 2015.

The new collective proceedings regime

From 1 October 2015, any person wishing to represent a group of claimants in collective proceedings can file a claim with the CAT. However, a claim for collective proceedings will not be permitted to continue until the CAT has made a collective proceedings order (CPO). The CAT will only make a CPO if it considers firstly, that it is able to authorise the person who brought the claim to act as representative in the collective proceedings and secondly, that the claims raise the same, similar or related issues of fact and law. The CPO itself must:

- Authorise and name the class representative;
- Name each defendant;
- Describe the class of persons eligible for inclusion in the proceedings (class members) and the claims to be included in the collective proceedings;
- State the remedy sought;
- Specify whether the proceedings are opt-in or opt-out, including details of how class members can opt-in/out and the deadline for doing so; and
- Order the publication of a notice to the class members.

Once a CPO has been issued, a collective proceedings claim is subject to the same procedural steps as a private action for damages.

Damages

On awarding damages in opt-out collective proceedings the CAT will not be required to undertake an individual assessment with respect to the damages recoverable by each person represented by the collective action. Instead the award will be made by an order for the whole of the collective action. This will be paid to the representative (or any other person the Tribunal sees fit) on behalf of the individual claimants, although the CAT may also 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 CAT is unable to award exemplary damages in collective proceedings.

When making the damages award the CAT can determine that in the event that the damages awarded are not claimed within a specified period of time, the authorised representative may use that money to pay all or part of the costs or expenses incurred in connection with the proceedings.

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 CAT setting out the claims to be settled and the proposed settlement terms. Where the CAT considers the terms of a proposed settlement are just and reasonable it will approve the settlement. The collective settlement will be binding on all people in the class defined by the CPO, except those class members which choose to opt out of the collective settlement by the time specified in the collective settlement approval order handed down by the CAT.

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 CAT or have not yet been issued a CPO, a collective settlement order (CSO) can be obtained from the CAT. To apply for a CSO the person who proposes to be the settlement representative and the person who would be the defendant in the action must apply to the CAT setting out the details of the claims to be settled and the proposed settlement terms. 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. The CSO itself will authorise the settlement representative to act on behalf of the collective settlement and include a description of the class of persons whose claim falls within the scope of the settlement. Once approved, the settlement will be binding on all people in the class defined by the CSO.

Will the reforms facilitate collective proceedings?

Reforming the collective proceedings regime was identified by the UK government as one way of driving down the cost of litigation, quickening the resolution of disputes as well as making it easier for consumers to stand up for their rights. It has been recognised that there is a growing demand for consumer actions, and it is hoped that the new regime will be more effective than the former, under which only one claim was brought. Whether the new system will prove more effective in facilitating consumer actions remains to be seen.

The view from Europe

In addition to the reforms to the competition enforcement in the UK, the European Commission has also introduced reforms of its own. After nearly a decade of consultations and debate the 'Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union' ([Damages Directive](#)) was published in December 2014. Member States will now have until 27 December 2016 to transpose the Directive into national law.

The Directive seeks to harmonise certain procedures across the European Union for claimants seeking to bring damages actions for harm caused by businesses which have been found to have infringed competition law. The Directive reflects what EU law-makers hope is an appropriate balance between effective public enforcement of competition law by the European Commission and national competition authorities, and access to private enforcement of competition law in national courts. Paving the way for follow-on damages, the Directive has the potential to increase liability substantially for those businesses found to have infringed competition law. Key changes introduced EU-wide in the Directive include:

- requiring EU Member States to ensure that both direct and indirect victims of an infringement of competition law must have the right to claim full compensation, covering compensation for actual loss, loss of profit and interest;
- clarification of the binding status of infringement decisions by national competition authorities;
- the establishment of a five-year minimum limitation period for bringing a damages action;
- strict new rules on disclosure; and
- the codification of the so-called passing-on defence.

For more details please see Olswang article '[The EU Damages Directive for competition law claims](#)'.

Although the UK already practises most of the procedural rules set out in the Damages Directive, it is yet to be transposed into UK legislation – and this is likely to mean that more reforms to competition litigation in the UK are on the horizon. Whilst it is unlikely that the transposition of the Directive into UK law will have a major impact on the new regime introduced by the Consumer Rights Act, further looming reforms might well impact the appetite of would-be claimants to bring new damages actions until the legislative environment is more certain.

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