

Collective Actions: A New Era for Competition Damages Claims in the UK

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On 1 October 2015 the Consumer Rights Act 2015 (the "Act") came into force, introducing a raft of changes to the existing regime governing competition claims brought in the UK.

The Act introduces an "opt-out" collective actions regime, designed to enable defined classes of claimants, such as consumers or small and medium-sized enterprises ("SMEs"), to seek damages from companies found to have infringed competition law. This is an important change to the pre-existing regime, under which consumers or SMEs were required individually to sign up to litigation, or bring individual claims and expose themselves to the costs risks associated with doing so, in circumstances where their individual damages made litigating uneconomical.

But also of importance are several other changes brought about by the new regime, which taken together are intended to facilitate access to effective redress by victims of competition law infringements.

"Opt-out" collective actions

The Act introduces, for the first time in the UK, an "opt-out" collective action regime, under which a "class representative" is able to bring "collective proceedings" in the UK's specialized Competition Appeal Tribunal ("CAT") on behalf of a "class" of victims of a competition law infringement who have not chosen to "opt out" of the litigation. This marks a significant departure from the various ways in which victims of competition law infringements were able to seek redress in the past – notably, from the previous "opt-in" proceedings that have existed for over a decade but been used only once[1] in that time, which required all those seeking to claim to actively sign up to the litigation.

Key elements of the new collective actions regime include:

- A process of "class certification" by the CAT – whereby the claim's suitability, and the suitability of the class representative to represent everyone in the class, are assessed before the claim is allowed to proceed;
- Safeguards designed to prevent unmeritorious claims – including restrictions on the type of persons who can act as a class representative; strict conditions to be met by the class representative before being authorized to act; strict conditions to be met before a claim is approved as suitable for bringing as a collective action, and as an "opt-out" claim as opposed to "opt-in"; and rules governing damages and costs; and
- Limits to geographical scope – the "opt-out" provisions only apply to UK-domiciled consumers or companies. Those residing outside the UK must actively "opt in" to the claim.

The way in which the collective actions regime is set up makes it likely that the "certification" stage will be a key battlefield for claimants and defendants in the early days of the Act, and some satellite litigation around these issues is inevitable. Nevertheless, in circumstances where the new regime is intended to facilitate access to redress by victims of competition infringements, it is to be hoped that the CAT (and the Court of Appeal) will deal swiftly with peripheral issues in order to ensure the effectiveness of the new provisions.

Other key changes brought in by the Act

The Act also contains important provisions extending the general powers of the CAT, in particular by introducing a number of changes that are intended to consolidate competition claims in the CAT as opposed to the High Court:

- It extends the CAT's jurisdiction, to hear not only damages claims that follow on from a competition regulator's decision finding an infringement of competition law ("follow-on" claims), but also to "stand-alone" claims – i.e. claims that are not based on a prior infringement decision. This frees up claimants to seek damages for any competition law infringements – not just those the regulators have chosen to pursue;
- It gives the CAT jurisdiction to grant injunctions, and to dispense with the usual requirements (applicable in High Court proceedings) for claimants in such cases to give a (burdensome and potentially prohibitive) cross-undertaking in damages;
- It creates a fast-track procedure in the CAT for suitable follow-on damages claims, under which trials will be heard within six months and the CAT will have powers to cap claimants' exposure to defendants' costs; and
- It gives the CAT jurisdiction to approve collective settlement of claims, in circumstances where a collective action has been authorized but also where it has not – affording the opportunity for class representatives to conclude binding settlements for claimants without the need for protracted litigation.

It remains to be seen whether the new regime will translate into real success for victims of competition law infringements. But on any view, private enforcement in the UK is entering a new era.

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[1] The Consumers Association v JJB Sports PLC – the "replica football shirts" litigation.