Kluwer Competition Law Blog

United Kingdom: Consumer Rights Act 2015 introduces new procedures for competition litigation, including collective follow-on damages actions

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On 1 October 2015, the Consumer Rights Act 2015 ("**CRA 2015**") entered into force. The CRA 2015 makes numerous changes to consumer rights laws in the United Kingdom. Of particular interest to competition practitioners and litigators are the provisions on private actions in competition law, contained in section 81 of and Schedule 8 to the CRA 2015. These are likely to change the face of competition litigation in the United Kingdom, whether brought by commercial entities or groups of consumers. They have been described in the media as introducing "US-style class actions law suits"; whilst this is undoubtedly somewhat hyperbolic, it is clear that things will never be the same again.

The background to the CRA 2015 and related legislative proposals, both in the United Kingdom and at the EU level, were considered in an earlier article, Changes to the private litigation regime in the UK: are more collective damages actions on the way?

The CRA 2015 broadens the jurisdiction of the Competition Appeal Tribunal ("**CAT**") to hear both 'follow-on' claims and standalone actions, both of which may also continue to be brought in the High Court. It also introduces a number of new procedures for damages claims before the CAT, in particular collective proceedings (on either an 'opt-in' or 'opt-out' basis). It also makes provision for collective settlements and for collective redress schemes. It was also necessary to revise the CAT's procedural rules, which are now contained in The Competition Appeal Tribunal Rules 2015 ("**CAT Rules**"), which also entered into force on 1 October 2015. The CAT has also published a new Guide to Proceedings, which provides guidance on relevant procedural matters.

The CAT's extended jurisdiction and powers to hear competition damages cases

The CAT is the United Kingdom's specialist competition law tribunal. Its President and Chairmen are lawyers (many of whom are High Court judges) and its other members have expertise in economics, accountancy and business. It hears and decides cases under both competition and economic regulation legislation. This includes appeals against decisions under the Competition Act 1998 ("**CA 1998**") and the Enterprise Act

2002 ("**EA 2002**") in competition, merger and market investigations cases, as well as under certain sector-specific regulation.

Prior to the CRA 2015 entering into force, the CAT had jurisdiction to hear 'follow-on' damages actions in competition cases, i.e. those brought following a decision of the CMA, a sector regulator with concurrent competition powers or the European Commission finding and infringement of UK competition law (Chapter I and/or II of the CA 1998) and/or EU competition law (Articles 101 and/or 102 TFEU). Claims could also be brought following an earlier CAT decision (on appeal) that an infringement has been committed, for example where the CAT has used its own powers to determine an infringement, rather than remit the case to the CMA. However, the CMA could not hear 'standalone' actions (which could only bet brought in the High Court or its equivalents in Scotland and Northern Ireland) or opt-out group actions, and it could not grant injunctions to restrain anti-competitive behaviour and conduct.

The CRA 2015 extends the CAT's jurisdiction and powers: it may now hear both 'follow-on' and 'standalone' actions for damages, including collective actions (which combine two or more separate claims).

Changes to the CAT's procedures

The CRA 2015 also makes a number of changes to the CAT's procedures.

'Fast track' procedure

The CRA 2015 introduces a new 'fast track' procedure, which is intended to make it easier, quicker and cheaper for individuals and micro, small and medium-sized entities to seek redress for harm suffered as the result of anti-competitive behaviour, with limited exposure to costs risks. However, its use is not restricted to individuals, micro-enterprises and SMEs. It cannot be used for collective proceedings.

'Fast track' cases must be brought to trial within no more than six months of allocation and, in general, trial must take no longer than three days. This is likely to be demanding on both the parties (which will need to be very disciplined in how they conduct litigation) and the CAT itself (which will need to be effective in the use of its case management powers). Therefore, use of the 'fast track' might be restricted to straightforward cases (or those reduced in complexity to the bare minimum through careful and realistic identification of the issues) involving few parties and not requiring significant disclosure or extensive expert evidence. It might also be suitable for cases in which the relief sought is limited to a finding of infringement and the grant of an injunction, e.g. to restrain further infringement, to require a resumption of supplies or to grant access to an 'essential facility'. It may also be possible to use the 'fast track' procedure for bifurcated cases, e.g. for a trial on liability but not for a trial on quantum.

An interesting aspect of 'fast track' cases is that, unlike in court proceedings or other proceedings before the CAT, the CAT will have a discretion as to whether claimant should be required to give a cross-undertaking in damages when granted an interim injunction. This may make it easier for claimants to obtain injunctions (in particular against dominant firms) and lead to cases being resolved at an earlier stage,

potentially without a full trial.

New limitation rules

The CRA 2015 makes changes the current rules on limitation before the CAT, extending the period within which claims must be brought from two to six years, bringing its procedures into line with those in the High Court. These may be suspended in the case of collective actions, to discourage the unnecessary filing of individual actions whilst an application for approval of a proposed collective action is before the CAT.

When does an infringement decision become final?

The CRA 2015 makes clear that once an infringement decision has become final, the CAT is bound by it: a decision becomes 'final' when the time for an appeal (or further appeal) expires or any appeal is withdrawn, dismissed or discontinued, or a court confirms the finding of infringement.

Collective damages actions: 'opt-in' and 'opt-out'

The CAT has always been able to hear collective 'opt-in' actions, i.e. where parties choose to join the action. However, these have not been successful, for a variety of reasons, principally identifying potential claimants to join the action and funding.

In a major change, the CRA 2015 gives the CAT jurisdiction to hear both 'opt-in' and 'opt-out' collective actions, for both 'follow-on' and 'standalone' claims, and also introduces new procedures for such actions. Whilst the legislation is titled the 'Consumer Rights Act', these procedures are not limited to consumers and may be used by any person who has suffered harm as a result of anti-competitive behaviour. It is therefore likely that companies, large and small, will also avail of these new collective procedures. It is not necessary that claims combined into a collective action be claims against all defendants.

Under an 'opt-out' action, claimants will automatically be included in the collective action unless they opt-out and bring their own proceedings, whether individually or as part of an 'opt-in' action. It seems likely that claimant lawyers will seek to bring 'opt-out' proceedings, thereby representing all potential victims of a cartel or other anti-competitive conduct, as in the United States. Some potential claimants will doubtless opt-out of such proceedings, if they consider that they can recover greater damages by bringing their own proceedings or joining an 'opt-in' collective action. Defendants are therefore likely to have to face a number of parallel damages actions arising out of the same infringement. It is notable that foreign claimant are not automatically included in an 'opt-out' action and must actively opt-in to such proceedings.

Collective actions, whether 'opt-in' or 'opt-out', may only be brought with the CAT's permission, by the making of a 'collective proceedings order'. Collective actions must be brought by a 'representative'. This may be a consumer body or trade association, but could be any properly constituted body, presumably even an ad hoc 'action group', or other appropriate person. The representative need not be a party to the action: therefore, law firms and third party funders can also apply to be approved as a

representative, provided that no conflict of interest would be occasioned between the class and its representative.

The CAT will approve a collective action only if satisfied both that it is just and reasonable (i.e. appropriate) for the proposed representative to act as representative of the claimants and all the claims raise the same, similar or related issues of fact or law. This will require the proposed representative to prepare a detailed plan of how it will manage the claim. It is likely that there will be hard-fought preliminary litigation over issues such as: whether a proposed claim is suitable for being a collective action; the scope of the class (and any sub-classes) covered by it; the sources of funding available to the representative; and whether the proposed representative should be approved. As in the US, there may well be disputes between different applicants to be approved as the representative. There are also likely to be disputes at this stage as to whether the members of the putative class have suffered any loss at all, including by having passed-through any over-charge to their own customers.

The CAT may award damages in collective actions. Its judgment is binding upon all represented persons. The CAT may not award exemplary damages: if a claimant wishes to seek exemplary damages (which are related to the defendant's conduct and not the claimant's losses), as in *Cardiff Bus* and *Albion Water*, it must opt-out and bring an individual claim. In assessing damages, the CAT will not consider the damages due under each individual claim forming part of the action, but will assess the claims as a group. In the case of an 'opt-out' action, unclaimed damages will be paid to charity (presently the Access to Justice Foundation), although the CAT may direct that they be used to pay costs of the claimant representative. It remains unclear how damages are to be distributed, which will vary on a case-by-case basis and require the CAT's approval.

Collective settlements

Most 'follow-on' damages actions settle. So too do many 'standalone' actions, at least once liability and causation are determined in the claimant's favour. This is reflected in the CAT being able to approve collective settlements in 'opt-out' collective actions, whether or not a collective proceedings order has been made. It will therefore be possible to enter into collective settlements at an early stage, even before proceedings are actually commenced.

The claimants' representative plus each defendant who wishes to be bound by a collective settlement must apply to the CAT for approval. The CAT will approve a collective settlement where it is just and reasonable to do so. The settlement will be binding upon all persons falling within the class of persons described in the collective proceedings order, other than those who have opted-out. Collective settlement does not apply to 'opt-in' actions, for which the claimants are individually identifiable and can therefore consent to the settlement.

Where the CAT has not yet made a collective proceedings order, it must make a 'collective settlement order', authorising a representative and describing the class of persons to whom it applies. The settlement will then be binding upon all persons in that class unless they subsequently opt-out within a specified time.

Collective voluntary redress schemes

To further encourage resolution of competition disputes, including without the need for legal proceedings, provision is made for alternative dispute resolution ("**ADR**"). This may reduce costs and enable victims to receive compensation more quickly than through litigation. The CAT Rules permit it to stay proceedings whilst ADR is explored, including through a voluntary redress scheme.

As well as the well-established forms of ADR, in particular mediation, the CMA (or a sector regulator) may certify a voluntary redress scheme entered into by businesses that have infringed competition law, enabling victims of anti-competitive conduct to be compensated without needing to bring legal proceedings. The CMA would, whether before of after adopting an infringement decision, consider whether to approve a voluntary redress scheme. It will not itself determine the compensation to be paid. The CMA may also approve a redress scheme following an infringement decision of the European Commission. Failure to comply with an approved scheme can be enforced through the courts, for damages and/or an injunction to ensure compliance.

The Secretary of State for Business, Innovation and Skills has the power to make regulations for the approval of redress schemes. In addition, following consultation, in August 2015 the CMA published guidance, *Guidance on the approval of voluntary redress schemes for infringements of competition law* . This guidance sets out in detail the requirements that must be satisfied for a scheme to be approved, including as to the process to be followed in establishing the scheme; this in turn includes the terms and operation of the scheme, the compensation available and those entitled to claim compensation.

It seems likely that the process of devising and approving redress schemes will be complex and time-consuming. Nevertheless, this provides an opportunity for defendants anticipating collective actions to settle early, through a redress scheme that covers an entire class of potential claimants.

Conclusions

The CRA 2015 introduces a new form of action into competition litigation, opt-out collective actions. Claimant lawyers are already identifying suitable cases to bring, particularly where potentially huge numbers of claimants may have suffered losses, such as the manipulation of foreign-exchange rates. A major issue will remain the funding of claims; whilst damages-based agreements (where some damages are paid to the claimants' lawyers) will not be allowed in 'opt-out' actions, there remains a vibrant market for the funding of competition damages actions.

Whilst many details will remain to be worked out through interlocutory skirmishes and satellite litigation, it is clear that defendants will be facing increased claims for compensation for losses caused by their anti-competitive conduct. This is likely to have a wider impact upon compliance and upon companies' strategies in the competition investigations that proceed follow-on actions, including questions of leniency and settlement: no longer will companies be able to cooperate to limit fines and then keep their fingers crossed that they will not be sued for damages.

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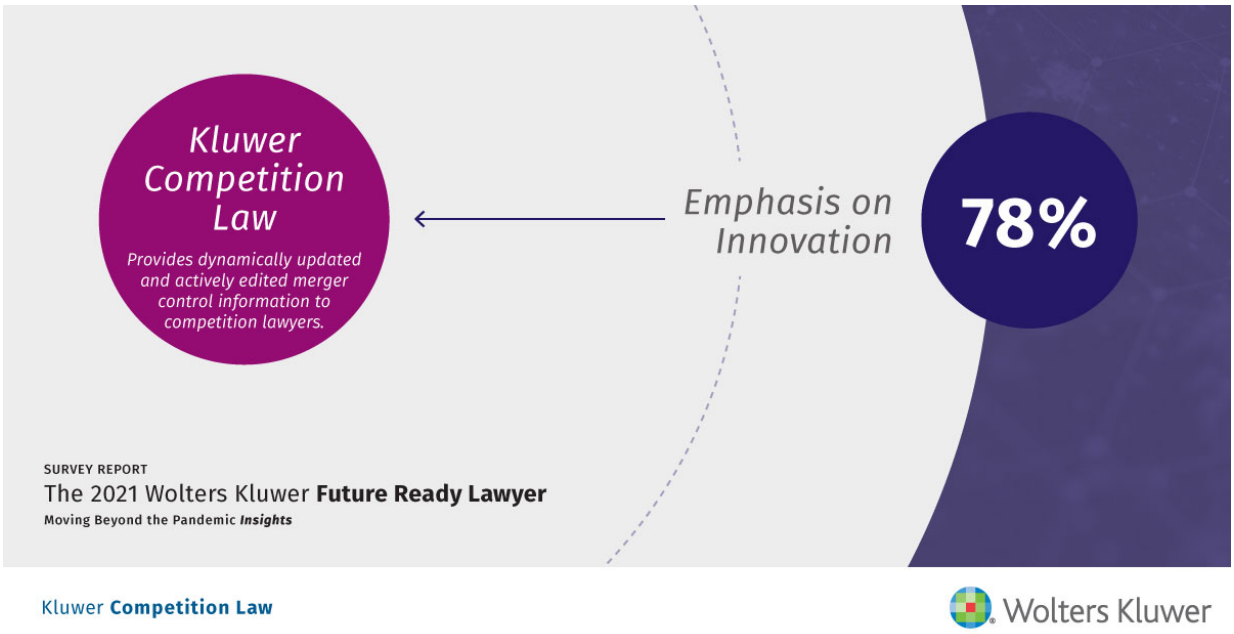

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