

Are collective actions set to take off?

1. IN BRIEF

With effect from October, the Consumer Rights Act 2015 will change competition litigation in three main ways.

- (i) It will allow claimants to bring actions on behalf of entire classes of businesses and consumers, meaning that competition claims may be much bigger in future.
- (ii) It will allow defendants to settle claims with all claimants at once using a collective settlement endorsed by the court.
- (iii) It will allow potential defendants to try to head off litigation by establishing voluntary redress schemes to compensate victims.

2. BACKGROUND

On 26 March 2015, the Act received Royal assent. Most of its provisions are expected to come into force in October 2015. The Act introduces several new procedures into competition litigation. These procedures are designed to facilitate redress for victims of competition law infringements, especially where the victims are consumers.

3. MAJOR REFORMS

Collective proceedings

- 3.1 When the UK Government consulted on competition law reform in 2011, it identified a gap in enforcement. While competition authorities were capable of imposing fines, and large businesses were willing to bring private actions, consumers and small businesses tended not to seek compensation for losses suffered as a result of competition law infringements. It appeared that this was partially because the losses suffered by each claimant tended to be too small in comparison to the overall costs of litigation.
- 3.2 The solution was thought to lie in encouraging claimants to join their claims together. This way, the costs would be more proportionate to the amount being recovered. The old "*consumer action*" already allowed this: any "*specified body*" could bring claims before the Competition Appeal Tribunal (CAT) on behalf of consumers. However, the procedure was ineffective: the consumer association *Which?* was the only specified body, and had said it would not use the procedure again following disappointing results in a case against JJB Sports. Accordingly, the Act has replaced the consumer action with "*collective proceedings*", which will be more flexible in at least three ways.

- 3.3 First, collective proceedings will not only be available to consumers. For claims to be included in collective proceedings, they will merely have to raise “*the same, similar or related issues of fact of law*” and be “*suited to be brought in collective proceedings*”. This appears to be a fairly low bar. For example, even though businesses and consumers could be affected quite differently by a cartel, any claims they brought against the cartellists would certainly raise “*related*” issues of fact and law. All their claims might therefore be eligible for inclusion in the same set of collective proceedings.
- 3.4 Secondly, any entity will be able to act as the representative in collective proceedings, as long as the CAT deems it “*just and reasonable*” for the entity to have that role. This will allow a wide range of groups to bring actions on behalf of their members. The Government has said that it does not intend law firms, litigation funds, or special purpose vehicles to be eligible to act as representatives. However, since there is no such prohibition in the Act, the CAT will have to use the “*just and reasonable*” test and its own rules of procedure to give effect to this intention. It remains to be seen exactly how the CAT will do this.
- 3.5 Thirdly, collective proceedings will be available on an opt-in or an opt-out basis. In opt-in proceedings, the representative will claim on behalf of only those parties that have expressly chosen to participate. In opt-out proceedings, the representative will claim on behalf of all members of a specified class except for those who have expressly chosen not to participate. This could allow the number of claimants in collective proceedings to become very large indeed. For example, a claim against a utility company could theoretically be brought on behalf of all the company’s customers. In such a case, even if the damage to each consumer were small, the overall value of the claim could be in the tens or hundreds of millions.
- 3.6 The European Commission has said in an official Recommendation that group litigation should generally use the opt-in model: the use of any other model should be “*duly justified by reasons of sound administration of justice*”. Therefore, by making opt-out proceedings available, the UK has put itself in a minority in Europe. However, since opt-out proceedings will allow for much larger claims, the UK may also find itself becoming a favoured destination for claimants with a choice where to bring their claims.
- 3.7 If a representative claimant in collective proceedings wins, the next question will be how to apportion any damages awarded. Members of the class will need to come forward to claim their fair shares. If any money is left unclaimed after the long-stop date (which the CAT will set in each case), the money may be used to defray the representative’s expenses. If any money remains after that, it will be donated to the Access to Justice Foundation.
- 3.8 Since April 2013, it has been possible for claimants to pay lawyers using damages-based agreements (DBAs). Under DBAs, lawyers get a certain percentage of any damages awarded when a case succeeds, and no fees at all when a case fails. This, in combination with third-party funding, has allowed an attractive model to develop, whereby claimants take no risk of having to pay any costs unless their cases are won. In opt-out proceedings, however, DBAs will not be allowed. As a result, the no-risk model is unlikely to be available. This is expected to have a moderating effect on claims. Would-be representatives may not want to bear the risk of having to pay substantial legal costs if their cases are lost. As a result, there may be a limited number of organisations that will leap at the chance of acting as the representative in opt-out proceedings.

Collective settlement

- 3.9 To put an end to opt-out proceedings before judgment, defendants will be able to use the new collective settlement mechanism. Collective settlements will bind all defendants that wish to be bound and all claimants who have not opted out. To be effective, a collective settlement will need to be approved by the CAT. The CAT will only give its approval if it is satisfied that the settlement is “*just and reasonable*”. This is

very similar to the requirement in the US, where the court will only approve a proposed class settlement if the proposal is "*fair, reasonable and adequate*". However, since in the UK damages generally cannot exceed the actual loss suffered by the claimant, the scale of settlements is unlikely to approach that sometimes seen in the US.

Redress schemes

- 3.10 Potential defendants who wish to nip claims in the bud even earlier will be able to use another novel mechanism, the statutory voluntary redress scheme, to compensate victims outside court. Although the statutory mechanism is new, voluntary redress schemes have been used informally before. In 2005, the Office of Fair Trading, the CMA's predecessor, investigated 50 independent schools for information sharing. To resolve the investigation, the schools established the Schools Competition Act Settlement Trust, a charity designed to benefit pupils who attended the schools during relevant period.
- 3.11 Businesses will be able to apply to the CMA to approve redress schemes. Once the CMA has approved a scheme, it will become binding. Both the CMA and private parties will then be able to enforce the scheme through the courts. However, the mere existence of a redress scheme will not prevent victims from being able to bring traditional civil claims against the business in question.
- 3.12 Redress schemes may become attractive to potential defendants for three reasons. First, the CMA may take them into account when setting fines, leading to fine reductions of up to 10%. Secondly, they may help to resolve controversy more swiftly, and so have reputational benefits. Thirdly, those who receive compensation under redress schemes are likely to be required to do so in full and final settlement of any claims they may have, which will reduce the potential defendants' exposure to private actions later.

4. CONCLUSION

- 4.1 The Act will make it easier for large groups of claimants to bring actions together, especially with the introduction of opt-out proceedings. As a result, defendants may start to face much bigger claims. However, the ban on using DBAs will mean that the number of such actions will inevitably be limited.
- 4.2 Furthermore, defendants will have two new tools to stop or deter group proceedings before they reach the court: collective settlements and voluntary redress schemes. Both have the potential to be effective in settling disputes early.
- 4.3 Together, the DBA ban and the new resolution mechanisms make it improbable that the English courts will see a surge in competition litigation, but these reforms will contribute to the trend of increasing private enforcement of the competition rules.



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