Update on English Class Actions: Effect of the Consumer Rights Act on Competition Law Enforcement in the UK

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As a result of the Consumer Rights Act (CRA) taking effect in October 2015, the class action regime in the UK was significantly broadened and has become more akin to US-style class actions, albeit with a limited ambit in respect of consumer rights claims. The regime is now in full force, and two recent cases are testing the waters.

The new regime

Consumers and businesses may bring claims under the CRA in the form of stand-alone claim or follow-on claim. Stand-alone claims require the claimants to prove an infringement of competition law, while follow-on claims are claims to enforce certain competition law infringement already decided by the Competition and Markets Authority (CMA or the Competition Appeal Tribunal [CAT]).

The relevant competition law infringements are limited to anti-competitive agreements or abuse of dominant position in the UK or the EU[1]. Claims can be brought as a class action so long as there are "same, similar, or related issues of fact or law."[2]

The major change under the CRA is that actions may now be brought on an opt-out basis and businesses may also be class members, rather than it being limited to individuals.
Powers and limitations of the CAT

The CMA is the principal enforcement authority of competition laws, appeals of the CMA ruling will go to the CAT, and CAT decisions can only be appealed to the Court of Appeal on a point of law.

The CRA has vested wider jurisdictional power in the CAT as compared to the previous position. While stand-alone claims could only be brought to the High Court in the previous regime, the CAT’s jurisdiction is now extended to hearing both stand-alone and follow-on claims, and the CAT is bound by findings of facts in a CMA investigation[3]. In follow-on claims where infringements are found by the regulatory authority, the CAT is left to determine issues of causation and quantum of compensation.

The decisions of whether to allow a claim to be brought on an opt-in or opt-out basis and whether a purported representative who is not a class member can bring a claim are vested in the CAT. The CAT may also grant or approve a broader range of remedies, from aggregate award of damages to injunctions and collective settlements.

The resulting ambit of the CAT’s power has considerable overlapping with that of the High Court. However, claimants are still entitled to elect to bring an action to the High Court, especially when non-competition issues are involved in the claim.

Safeguards against flood of class actions

Although the American-style opt-out basis will inevitably increase the size of a class in these kinds of actions and may also increase the volume and variety of such actions, several safeguards have been put in place to avoid a flood of class actions. In terms of quantification and distribution of damages, the UK regime differs from the US regime by disallowing exemplary damages,[4] which is of a punitive nature, and rendering damages-based agreements unenforceable to avoid distribution of damages between the claimants and their lawyers.

The “loser pays” principle is still applicable to class actions such that the claimants and the class representative will be liable for the defendant’s costs if the claim is unsuccessful. However, conditional fee arrangements are permitted in the UK, and there a number of litigation funders in operation that may be prepared to back these kinds of claims.

Two new cases under the new regime

Currently there are two cases running under the new regime. In October 2015, the National Pensioners Convention (NPC) alleged that Pride band mobility scooter breached competition law by banning retailers from setting mobile scooters price below their recommended retail price. An opt-out claim was instituted to seek compensation for the overcharged sums, which included around 34,000 consumers who bought mobile scooters from Pride between 2010 and 2012. A case management conference was held in mid-
July 2016 to set a timetable for the action.

On 8 September 2016, the CAT received an application to commence the long talked about MasterCard proceeding, an opt-out follow-on claim for damages, based on a ruling in 2014 that MasterCard had infringed the EU law by imposing interchange fees on cross-border card transactions. The proposed class is individuals who purchases goods and services from business that accepted MasterCard cards during the period 22 May 1992 and 21 June 2008. The class is estimated to be over 46 million people. The CAT released the notice of the claim on 21 September and as yet there are no directions for the case.

As the two cases proceed, it remains to be seen how policy considerations may come into play in the CAT’s decision and how the new regime will affect companies in connection with businesses or consumers in the UK or overseas.

[1] Despite the Brexit vote EU competition law will still be applicable where the conduct of UK businesses has an effect on the EU market.


[3] Unless the finding of fact is peripheral or incidental Para 13, Schedule 8 of the CRA 2015; Para 429 of the CRA 2015 Explanatory Notes.


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