The Consumer Rights Act 2015 and the new landscape of UK Competition Litigation

Background

1. On 1 October 2015, the new Consumer Rights Act 2015 ("**CRA**"/ the "**Act**") came into force. The CRA consolidates and amends over 100 difference pieces of legislation but most importantly for the purposes of this note, Schedule 8 of the CRA makes significant changes to the competition litigation regime in the UK, amending large sections of the Competition Act 1998 and Enterprise Act 2002. The aim of these Schedule 8 changes is to significantly extend the jurisdiction of the specialist appeal body for competition claims, the Competition Appeal Tribunal ("**CAT**"/ the "**Tribunal**"), so as to make it more attractive to Claimants, and to transform the CAT into a "*major venue for competition actions*[1]" in the UK. The changes also introduce a new and improved regime for bringing collective actions in the CAT.

2. As the changes introduced by the CRA are designed to extend the jurisdiction of the CAT, the Rules of the CAT have also been updated for the first time since 2003, and these new CAT Rules (the "**Rules**") also came into force on 1 October 2015, along with an updated CAT Guide to Proceedings (the "**Guide**").

Overview of the Current Position

3. Currently, competition claims made by private persons can be brought in either the High Court or the CAT. Competition claims in the High Court are most commonly brought on the basis of a breach of statutory duty, the statute in question being Article 101 and/or 102 of the Treaty on the Functioning of the European Union ("**TFEU**"), or its UK equivalent, Chapters I and II (s1-24) of the Competition Act 1998. Claims in the CAT are brought under s47A and 47B of the Competition Act 1998.

4. Until 1 October 2015, the CAT had a number of procedural disadvantages compared to the High Court, including in relation to limitation periods, types of claim that could be brought and types of relief that could be offered. The new Act is intended to remove these procedural disadvantages in order to make the CAT a more attractive forum for private competition actions. In addition, neither the High Court nor the CAT had a particularly effective procedure for dealing with class actions relating to competition claims, and the Act is intended to implement a more effective method of bringing collective competition proceedings in the CAT.

A: CHANGES APPLYING TO ALL PRIVATE COMPETITION ACTIONS

Standing to bring a Claim

5. As an initial point, whilst the changes to the competition landscape are being brought about by Schedule 8 of the *Consumer* Rights Act 2015, claims under Schedule 8 of the Act can also be brought by companies and SMEs, not just individual consumers.

Standalone Claims

[1] Notes to the CRA 2015

6. Previously, the CAT could only hear "follow-on" claims, meaning that there had to be a pre-existing infringement decision by the European Commission, the CMA or one of the sectoral regulators in respect of a breach of UK or EU competition law before a claim could be brought in the CAT. From 1 October 2015 the CAT will now have jurisdiction to hear stand-alone claims, which have either been issued in the CAT or which are referred to the CAT from the High Court. Stand-alone claims are claims where the CAT is required to determine liability as well as damages.

7. However, note that the CAT is still limited to dealing with competition law claims. It cannot hear the same breadth of claims as the High Court, which can as part of the same set of proceedings, hear both the competition claim and claims unrelated to the competition law claim.

8. It is also unclear the extent to which the CAT can hear "hybrid claims" under the new regime, i.e. proceedings made up of both a competition claim and a claim related to the competition claim, such as a claim for unlawful means conspiracy arising from the same facts as the competition claim. It is not clear in this situation whether both claims could be heard in the CAT or whether part or all of the claim would have to be brought in the High Court. It is also unclear the extent to which the case law under the old regime on this point (see e.g. (*WH Newson v IMI plc [2013] EWCA Civ 1377)* will apply.

Fast Track cases (Rule 58 of the Rules)

9. Rule 58 introduces a new fast-track procedure in the CAT. Where a Tribunal orders that proceedings be subject to the fast track procedure, the main substantive hearing is to be fixed within 6 months of the date of the order. The amount of recoverable costs is also capped at a level that the CAT determines.

10. In deciding whether a case is suitable for the fast track, the court will consider, amongst other things, the length of the hearing (3 days or less is most suitable for a fast-track case), the size and complexity of the claim and the number of witnesses.

11. There are question marks, however, over how often a competition case will in practice be suitable for the fast-track procedure, given that even "simple" competition claims are inherently complex. There are also concerns that having to "front load" costs to prepare everything within a 6 month window may also render the process more expensive than proceedings brought within a longer timeframe or may mean having to run the case in a pared down way (for example by having fewer witnesses than would be ideal etc.). Note also that the fast track procedure does not apply to collective proceedings, most likely because collective proceedings are extremely unlikely to be simple enough to be suitable for fast-track proceedings.

Injunctive relief (Rule 68)

12. Previously, only the High Court was able to grant injunctive relief, but Rule 68 has now extended that power to the CAT.

13. One interesting aspect of the new power of the CAT to grant injunctions is that under Rule 68(5), the CAT has the power either to cap or to waive entirely the usual requirement that the party in whose favour

the injunction is granted provided a cross undertaking in damages in the case of fast-track proceedings (a cross undertaking in damages being an undertaking given by the party applying for the injunction to compensate the other party if it turns out that the granting of the injunction was not justified).

Limitation (Rule 119 and Rule 31)

14. The rules regarding limitation periods for claims in the CAT under the CRA and the Rules are complex and problematic and are likely to be the subject of significant preliminary issue litigation.

15. Broadly, Rule 31 of the old 2003 CAT Rules provided that the limitation period for CAT claims was two years from the later of either: i) the date on which an infringement decision was made, for example by the Commission or CMA; or ii) the date on which the damage was suffered.

16. New limitation rules were introduced by s47E[2] of the new CRA, which were intended to extend the limitation period so that it matched the 6 year period for breach of statutory duty claims in the High Court. However, Rule 119 of the Rules states that the old Rule 31 will continue to apply to claims arising before 1 October 2015 (and therefore such claims will continue to be subject to a 2 year limitation period).

17. A number of criticisms can be made of Rule 119, but of particular concern is the fact that a typical cartel will involve concealment and will last for a considerable period, meaning that the cause of action is likely to have arisen a long time prior to 1 October 2015. This means that Rule 31 (and the 2 year limitation period) is likely to apply to the vast majority of cartel cases which have yet to be issued, which in turn means that Claimants in this type of case are likely to be out of time to bring a claim in the CAT[3].

Settlement: Rule 45 Offers

18. Rules regarding settlement offers known as "Rule 45 offers" (because they are set out in Rule 45 of the Rules) have been introduced. They operate in broadly the same way as Part 36 offers under the CPR in relation to High Court proceedings, in that they, amongst other things, result in costs sanctions being imposed following judgment on a party who has unreasonably refused a Rule 45 Offer to settle. Note that these new Rule 45 Offers do not apply to collective proceedings.

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[2] Note that strictly, the references in this note to sections of the CRA are in fact references to the Competition Act 1998 as amended by the CRA, but for the sake of brevity, they are referred to in this note simply as sections of the CRA.

[3] There has been commentary suggesting that one way round the problem would be to argue that there is no limitation period at all in relation to claims such as these as there is no infringement decision to start the limitation period running, as arguably required by Rule 31. However, Rule 31(2) makes it clear that permission is required to bring a claim in the CAT if there is no infringement decision, so it will still be necessary to ask the CAT to grant permission to bring a claim. Existing case law suggests that the CAT is restrictive in when it will allow a claim to be brought prior to an infringement decision being made. However, the Guide does state specifically at **5.13** that Rule 31 and the requirement to give permission "*will be made in the context of the new regime for private actions before the Tribunal introduced by the 2015 Act*", so it may be that the CAT will now be willing to grant permission in most or all cases.

Voluntary Redress (CRA s49C)

19. The CRA also provides that a Defendant may apply to the CMA for approval of a voluntary redress scheme (essentially a regulator-approved settlement proposal) designed to compensate the Claimant. The advantage to the Defendant of proposing such a redress scheme is both that they have control over the structure of such a scheme (albeit it needs CMA approval) and that it can result in a reduction in the level of the fine they would otherwise have to pay, up to a maximum of 20%.

B: CHANGES SPECIFICALLY APPLYING TO COLLECTIVE PROCEEDINGS

20. In addition to those provisions of the CRA and the Rules that affect claims brought in the CAT generally, there are also provisions in the new CRA and Rules that deal specifically with collective proceedings in the CAT, which are set out below. It is largely these changes that have triggered (to an extent hyperbolic) comments about the new CRA and Rules resulting in a move towards more US-style class actions.

Class representatives and certification

21. Unlike ordinary civil proceedings, collective proceedings must be approved by the Tribunal before they can be commenced. This approval takes two forms:
    21.1. Tribunal authorisation of the class representative; and
    21.2. Tribunal certification of the proceedings as eligible for inclusion in collective proceedings (**Rule 77(1), s47B(5)CRA**).

22. It is generally thought that there is likely to be a significant amount of preliminary issue litigation around who the authorised class representative should be and/or if the proceedings should be certified as appropriate for collective proceedings.

Authorising a class representative (Rule 78.1 and Guide 6.29).

23. Note that the Tribunal can approve a class representative who is not a class member and does not have a personal claim against the proposed defendant, but in all cases has to consider whether it is just and reasonable for the applicant to act as a class representative.

24. In considering whether it is just and reasonable for an applicant to act as a class representative, relevant considerations for the Tribunal include whether the representative is competent to manage the case, whilst at the same time representing the best interests of the class. The court will also consider whether the representative has prepared a plan for the collective proceedings, including a cost estimate. The existence of conflicts of interest is also relevant, as is the ability of the representative to pay both the other side's costs and its own costs if ordered to do so (though funding arrangements can be taken into account here).

25. There has been some debate as to whether legal advisors, funders and SPVs are permitted to be non-member representatives of a class. In the original government consultation, the government was keen that legal advisors, funders and SPVSs be excluded from the scope of who could be a class representative. However, ultimately there is no specific provision to that effect in the CRA or the Rules. That said, the

Guide does state that "*whilst there is no blanket prohibition against certain types of organisation taking on the role of class representative… [T]he potential conflict between the interests of a law firm or third party funder and the interests of the class member may mean that such a body is unsuitable to act as a class representative.*.". This might mean that in practice, law firms and funders may find it difficult to obtain Tribunal approval to act as authorised representatives.

Certification

26. In addition to authorising a class representative, the CAT must also be satisfied that the claims are eligible to be included in the proceedings before making a collective proceedings order.

27. The three requirements determining eligibility are that:
    27.1. The claims must be brought on behalf of an identifiable class of person;
    27.2. The claims must raise common issues (being "*the same, similar or related issues of fact or law*"); and
    27.3. The claims must be "suitable" to be brought in collective proceedings. (**Rule 79(1)(a)-(c)**).

Opt in/opt out Proceedings

28. Opt-in proceedings are those where each class member has to actively sign up to participate in the proceedings. Opt-out proceedings are those where each person in a class is automatically included in the proceedings unless they actively choose not to be.

29. The CRA updates s47B of the Competition Act 1998 to allow for collective proceedings to be brought in the CAT on an "opt-out" basis. Whilst it has always been possible to bring collective proceedings in the CAT, it was previously only possible to do so by way of "opt-in" proceedings, which were almost never used. Only one set of opt-in proceedings has ever been brought (*Consumers Association v JJB Sports PLC*) and that settled.

30. This shift to/addition of opt-out proceedings is driven by the fact that small/low value competition claims were not being pursued under the old Rules and old Competition Act 1998, and the view that creating an opt-out system might make it easier with those with such claims to bring a collective action and obtain relief for competition law breaches.

31. The new opt-out proceedings apply only in relation to UK domiciled parties falling within a class. Any party domiciled outside the UK will have to (slightly confusingly) opt-in to the opt-out proceedings in order to take part in that particular collective action.

32. It is the Tribunal who will decide whether the proceedings will be opt in or opt out (though the class representative will make submissions in relation to this). The Tribunal will consider all matters it thinks fit when determining whether proceedings should be opt in or opt out, though Rule 79(3) lists two specific factors that the Tribunal will consider:
    32.1. The strength of the claims **(Rule 79(3)(a))**; and

32.2. whether it is practicable for the proceedings to be brought as opt-in proceedings **(Rule 79(3)(b)).**

Damages (CRA 47C)

33. Whilst there has been concern that the introduction of the new competition regime by way of the CRA of the new Rules and Guide will lead to a "US-style class action law suits", the CRA and the Rules make it clear that the new CAT regime, punitive damages (or anything akin to the US-style "treble damages") are not permitted under the new collective proceedings regime.

34. Damages based agreements are also specifically stated to be unenforceable to the extent they relate to opt-out collective proceedings. It is not clear, though is arguably implied that this means that damages based agreements are still permitted where the proceedings are opt-in proceedings. CFAs also still appear to be permissible.

35. In terms of the practicalities of distributing a damages award, where the CAT makes an award of damages in opt-out proceedings, that award of damages will be made to the class representative or such other person as the CAT designates, other than a class member. Note that any damages award in collective proceedings will be for the whole class, rather than the court having to conduct an assessment of each individual class member's damages.

36. Note also that any damages that are not collected by the members of a class within a specified period must be paid to charity, unless the CAT orders that it is instead paid to the representative (in order to pay its costs and expenses incurred by the representative in connection with the proceedings).

Collective settlements

37. From 1 October, the CAT will also be able to authorise collective settlements that have been reached between the class representative on behalf of the entire class and the defendant(s) where it is "just and reasonable to do so". The settlement will bind the entire class unless a member of the class opts-out within the period specified by the CAT. In addition, as with collective proceedings, the collective settlement will not apply to those domiciled outside the UK unless they agree to be bound by it.

C: CONCLUSION

38. Whilst the introduction of a new regime designed to increase the utility of the CAT as a venue for bringing competition claims and collective actions is to be welcomed, the limitation problems caused by the late stage introduction of Rule 119 into the Rules are concerning. Its existence may mean that that cases that would otherwise be ideal candidates for litigation in the new and improved CAT are diverted back to the High Court purely because they are time-barred in the CAT.