CPI's Europe Column Presents:

UK Consumer Rights Act 2015: Showing the Way in EU Private Litigation

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Somewhat hidden in the UK Consumer Rights Act 2015 (CRA 2015), but of great interest to competition lawyers, are provisions which significantly amend the regime for private competition actions in the UK. These provisions are intended further to increase the attractiveness of the UK (particularly English) courts as a venue for private competition litigation generally and to improve small businesses' and consumers' ability to enforce their rights under competition law.

Two main developments

The new rules on competition litigation contained in the CRA 2015 entered into force on 1 October 2015. At a high level, there are two main developments. The rules widen the types of competition cases that the specialist Competition Appeal Tribunal (CAT) hears. It will be able to deal with both "follow on" claims (resulting from a regulatory decision concerning competition law, so that a breach does not have to be demonstrated) and standalone actions (which do not rely on a regulatory decision and which therefore require the claimants to prove any breach of competition law). In addition, the CAT will be able to grant injunctions, including under a new fast-track procedure.

The second main change, and certainly the one which has been most commented on, is the introduction of opt-out collective actions ("class actions") before the CAT for damages suffered by a group of claimants. The opt-out collective actions are class actions since they involve a case being brought on behalf of a group of claimants to obtain compensation for their losses. This can be by representatives on behalf of individuals and/or businesses. Following the U.S. model, claimants would be automatically included into the action unless they "opt out" in a manner as decided by the CAT on a case-by-case basis.

These actions will be in addition to the existing option of starting an opt-in case before the CAT. However, opt-in cases have been singularly unsuccessful, principally due to the difficulty of finding claimants to join an action and also problems with securing funding. The only example (concerning purchases of replica football kit by a small group of end consumers) was settled in 2008 and the claim was withdrawn.

The widened scope of CAT claims

The changes to the UK rules are expressly intended to make the CAT the venue of choice for competition litigation in the UK. This is the specialist competition court and the idea is to push even more cases in its direction.

Although the opt-out collective actions regime has garnered the most attention, it could easily be the case that the extension of the CAT's powers will have most day-to-day impact. Not only

will the CAT be able to hear standalone claims and grant injunctions, but also there will be a cost-efficient fast track procedure before the CAT, including (importantly) a cap on the costs, which a losing litigant will have to pay.

Although in principle open to any litigant, the fast track is squarely aimed at SMEs and consumers. Those types of litigants have to date often been put off litigation by legitimate concerns about the slow pace and vast expense of UK court proceedings. The procedure is not available for collective actions for damages, since it is intended in particular to protect claimants in situations where a quick resolution is needed to a pressing commercial issue such as access to supplies.

An important point in these fast track cases is that the claimant, unlike in standard High Court proceedings or other CAT cases, will not necessarily be required to give a cross-undertaking in damages when it is granted an interim injunction. This further reduces the risk of proceeding this way.

The UK High Court will continue to be an alternative venue for follow-on and standalone claims, plus injunctions. However, the CAT, with its specialist personnel and a more flexible procedure, is likely to take the great bulk of cases.

Class actions of a sort

The drafters of the CRA 2015 were careful, under much pressure, to include various safeguards designed to ensure that the new collective actions, which can be follow-on or standalone claims, do not become full-blown U.S.-style class actions. In particular, the CAT will not be able to award exemplary damages in collective proceedings. Those are damages, permitted in the U.S., which are designed to be punitive rather than simply compensate for the actual loss suffered and which often drive U.S. defendants to settle claims rather than risk huge payouts. The intent is to ensure (as is the case now) that very large damages which do not reflect the losses suffered do not become a feature of UK damages litigation. This also applies to opt-in claims.

In addition, amongst other protections, claims can only be brought by certain suitable representatives, the CAT must certify the case as suitable for a collective action, only UK claimants are automatically included in opt-out cases (non-UK claimants can opt in) and contingency fees (under which some of the damages go to the legal representative) will not be permitted.

Consumer rights groups have welcomed the changes but, despite the safeguards, some lobby groups in the UK continue to warn of the risks. The Confederation of British Industry (CBI), a business lobbying organisation, commented that: “The opt-out scheme runs the risk of

creating lucrative opportunities for those seeking to promote mass litigation and driving moves to a class action culture".

That remains to be seen, and is probably an exaggeration, but it is certainly the case that the ever-increasing number of specialist claimant law firms in the UK, many seeking to import U.S. practices, are chomping at the bit to use the collective claim provisions. Cases based on the various financial services sector cases seem like an obvious possibility. However, the first cases will not move quickly and there will inevitably be many skirmishes around issues such as the rules on funding of claims and how to define a suitable class. The CAT recognises that numerous procedural issues will arise, particularly at the outset, and these will need to be worked through.

It's also important to recall that opt-out actions are what they say. Potential claimants will, as in the U.S., be able to opt-out and bring a separate claim. These claims can in principle result in exemplary damages awards and defendants will inevitably face these at the same time as collective claims.

EU-level changes

In parallel with these changes to the UK regime, the EU Antitrust Damages Directive is now in force and EU Member States are required to bring it into national law. This is the European Commission's contribution to increasing private competition law enforcement in the EU.

These rules will of course also apply in the UK and some further changes to the UK position will be required, but to a large extent the UK regime already incorporates many of the principles contained in the Directive. The Directive will require far more dramatic changes to continental-European regimes which do not, for example, have the concept of disclosure/discovery of documents (a key concept provided for in the Directive). One eye-catching element of the Directive which will require a change to UK law is the presumption that a cartel causes loss (so reversing the burden of proof where a cartel has been identified).

Conclusion

It is inevitable that the changes being introduced by the CRA 2015 will increase private competition litigation in the UK, which will have an impact on aggrieved and infringing parties alike. Even more so than now, the assumption should be that breaches of competition law (by participating in cartels, but also other activities) could well attract private litigation as well as regulatory interest. Class actions will exist and the number of stand-alone cases, including actions for an injunction in a B2B situation, will increase. There is no hiding place (and the policy is that there should not be) so there is even more reason to make sure that suitable competition compliance programmes are in place and used in practice.