Ashurst London
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Competition briefing

Government response to BIS consultation on reform of competition law private actions

On 29 January 2013, the Government published its response to the BIS consultation on options for reform of private actions in competition law. This briefing summarises the key decisions taken by the Government, which will introduce some radical changes to private enforcement of competition law in the UK.

Overview of key changes

- Introduction of a new opt-out collective actions regime for consumers and businesses, subject to certain safeguards;
- Expansion of the role of the Competition Appeal Tribunal (CAT), making it the main court for competition private actions in the UK;
- A new fast-track procedure for simpler competition claims in the CAT, including claims brought by large companies if approved by the CAT; and
- An emphasis on alternative dispute resolution (ADR), and the introduction of an opt-out collective settlement regime based on the Dutch model.

The Government's response document and accompanying impact assessment are available on the BIS website here.

Competition Appeal Tribunal to become main court for competition actions in the UK

As widely anticipated, the Government has decided to proceed with proposals to expand the powers of the CAT to enable it to hear standalone as well as follow-on private actions, and to grant interim injunctions. The CAT will also be given the necessary consequential powers to accompany its new power to grant interim injunctions, including the ability to require cross-undertakings of damages, and the ability to ensure that injunctions are obeyed. It is intended that as a result of these reforms the CAT should become the main court for competition actions in the UK.

In addition, the High Court will be able to transfer standalone and follow-on competition law cases to the CAT and vice versa – this will be achieved either by activating section 16 of the Enterprise Act 2002 or by other means.

Limitation periods for the CAT will be harmonised with the High Court of England and Wales (or Scotland/NI for those jurisdictions) so that the six-year limitation period as set out in the Limitation Act 1980 will apply to all private action cases in the CAT or High Court of England and Wales, whether standalone or follow-on.

In Scotland, the limitation period will remain five years in line with the Scottish Court of Session. The Limitation Act 1980 provides that the six-year period begins to run from the date on which the cause of action arose (i.e. when the loss was suffered), subject to section 32(1)(b) which provides for suspension of time where there is deliberate concealment (which is likely to be the case where a secret cartel is in operation). The Government's response does not elaborate on how this will be applied in follow-on cases where there are pending appeals against the infringement decision being relied upon (which, particularly in cases involving European Commission decisions, can take many years to resolve).

A new fast-track regime for competition private actions will be introduced in the CAT, with more flexibility than the model originally proposed in the consultation:

- the fast-track procedure will not be limited solely to SME claimants, although it will be "*intended to be principally for the benefit of SMEs*";
- the fast-track procedure will focus on granting injunctive relief;
- the CAT Rules will set out when a case may be allocated to the fast track – there will be a presumption that any case brought by an SME will be considered for fast track; in cases between two

larger companies it may be possible to have the case fast-tracked by mutual consent if the CAT Chair agrees;
- the fast-track procedure will not be available for collective actions or for what the CAT considers to be "novel" cases requiring longer consideration; and
- all cases allocated to the fast track must be cost-capped, and if a cross-undertaking for damages has been awarded for an interim injunction, then those damages must also be capped. However, there will be no pre-set limits – the appropriate level of any cap will be determined by the CAT on a case-by-case basis, at an early stage in proceedings, e.g. first case management conference.

The CAT will also be allowed to award pro bono costs, although the Government has stated that this will not be as high a priority as the other changes.

The Government has, however, decided to drop its original proposal to introduce a rebuttable presumption of loss in cartel cases. The response notes that the majority of responses to the consultation were against this proposal, and these objections have been taken into account.

The Government has also decided not to legislate on the use of the passing-on defence – again, the majority of the responses to the consultation were against this. The Government's response states that it considers that, under general principles of English tort law, there is no reason why the passing-on defence should not be allowed, and the fine details of its application would be better addressed through judicial case law rather than via legislation.

New opt-out collective actions regime

The Government's response states that the proposal to introduce an opt-out collective actions regime in the UK generated the greatest divergence of opinions in responses to the consultation, with strong arguments being put forward both for and against the proposed reforms.

Having considered the various arguments made both for and against the proposals, the Government has decided that a new opt-out collective actions regime will be introduced, subject to certain safeguards:

- Opt-out collective actions will be available in both follow-on and standalone cases, but may only be brought by claimants or by "genuine representatives" of the claimants, such as trade associations or consumer associations, not law firms, third party funders, or special purpose vehicles.
- There will be a requirement for judicial certification of cases by the CAT, to ensure that only meritorious cases are permitted to proceed, and the CAT will determine whether a claim should be allowed to be brought on opt-in or opt-out basis. The CAT's assessment will include:
  - a preliminary merits test;
  - an assessment of the adequacy of the representative; and
  - requirement that a collective action must be the best way of bringing the case.
- The loser-pays rule will be maintained so those who bring unsuccessful cases will pay the full price. This will be expressly clarified in the CAT Rules of Procedure as the starting point for assessments of costs and expenses.
- There will be no treble damages, and no exemplary damages will be awarded in collective actions.
- Contingency fees for lawyers acting in opt-out competition collective actions cases will be prohibited – this will require an amendment to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 for competition cases.
- Any opt-out settlement must be judicially approved, with the approval to include a consideration of the reasonableness of the fees paid to legal representatives, and underlying claimants being given the opportunity to opt-out of the settlement.
- The opt-out aspect of a claim will only apply to UK-domiciled claimants, although non-UK domiciled claimants will be able to opt-in to join the claim if they wish to do so.

With regard to the issue of what happens to any unclaimed funds left in the damages "pot" in opt-out collective damages actions, the Government has confirmed that such funds will be allocated to the Access to Justice Foundation, despite objections raised by a number of respondents to the consultation. However, defendants will be free to settle on other bases, including cy-près or reversion to the defendant, subject to approval by the CAT. Furthermore, the Government's response states that it is also minded to include in any future legislation on this subject an order making power that would allow the destination of unclaimed sums to be altered at a future date, in response to evidence as to how the system is working.

ADR to be promoted in competition cases

The Government's response emphasises that wherever possible, disputes should be resolved without resorting to the courts, and ADR will be strongly promoted in competition law private actions.

Businesses which have had claims made against them will be able to propose collective settlements to the CAT through a new opt-out collective settlement regime similar to the Dutch Mass Settlement Act of 2005. This would involve a potential defendant and a representative of those who believe they have suffered loss as a result of an infringement of competition law applying to the CAT to approve a mutually agreed settlement agreement on an opt-out basis. The Government's response states that it would in principle be possible for a defendant to settle with multiple representatives, each representing different categories of claimants (e.g. direct and indirect purchasers) simultaneously. In each case, the CAT would consider whether the proposed settlement was "fair, just and reasonable", and if it concluded that it was, the settlement would be approved. The CAT would be able to hold a hearing to determine the approval of the settlement, and could appoint an expert for the purpose of assisting it in making its decision.

The opt-out nature of any such collective settlement would only apply to UK-domiciled claimants, although claimants outside the UK could opt-in if they wished to do so.

In addition, the Office of Fair Trading (OFT) (or, in due course, the Competition and Markets Authority (CMA)) will be given a limited role in certifying voluntary redress schemes: the OFT/CMA will have the discretionary power to certify a voluntary redress scheme, but not to impose one. Certification in this context would be in respect of the process followed (i.e. that the scheme has been created in accordance with a reasonable process) rather than in respect of whether the amount of compensation is reasonable. The Government's response states that the effect of certification by the OFT/CMA would be that the scheme would become legally binding in the sense that the OFT/CMA and a beneficiary who chooses to receive compensation under a voluntary redress scheme will be able to take statutory enforcement action against a business which fails to comply with the terms of the voluntary redress scheme.

Infringing businesses who offer a voluntary redress scheme could also qualify for a possible reduction of fine, in accordance with the OFT's current guidance.

Finally, the CAT Rules governing formal settlement offers (sometimes referred to as "Caldebank Offers") will be aligned with those of the High Court.

Complementing the public enforcement regime

With regard to protection of leniency materials from disclosure in private actions, the Government has decided not to take domestic action in this area on the basis that the European Commission is expected to bring forward proposals within the next few months on this issue. If the European Commission's proposals are significantly delayed, then the Government will consider taking action at the domestic level.

The Government has also decided to take a number of steps to help ensure that consistency is maintained between the CAT and the OFT/CMA:

- amending the CAT Rules to require the CAT to notify the CMA when competition private actions are initiated;
- amending the CAT Rules to give an explicit power to the OFT/CMA to act as intervener, where appropriate, in competition private actions; and
- ensuring that the CAT has the power to stay cases being investigated by a competition authority.

Comment

There should be no doubt that despite sensible provisions to moderate their effects, the Government has embarked upon fairly radical reforms to the ability of parties to sue for competition law breaches in the UK.

In particular, the decision to adopt an opt-out model for representative class actions will facilitate the introduction of large scale claims brought by an entire class of consumers or businesses for breaches of competition law for the first time. Whilst such actions and the suitability of the party seeking to represent the members of the class will be carefully controlled by the CAT at the certification stage, this new model will fundamentally change the cost dynamic for such actions. In other words, cases in which it would never have been worth the risk for an individual consumer or business to bring a claim will become viable in circumstances where the damages sought extend to the entirety of the losses suffered by the class of claimants even where its members are as yet unidentified.

The importance of this development will be compounded by the settlement procedures introduced under the ADR section of the reforms. These will permit wrong doers and claimants to design a voluntary settlement package which is then put before the CAT for approval. Equivalent measures have been

very powerful in other jurisdictions in bypassing technical legal issues to create large-scale settlement funds whereby losses are then redistributed to affected claimants after the fund has been approved by the court. This is likely to be an extremely important mechanism to promote early settlement. It will be supplemented by the ability of the OFT (or its successor, the CMA) to approve voluntary redress schemes at an even earlier stage of proceedings, although we suggest the application of this option is more uncertain save in the clearest of infringement cases where all parties accept liability early on in the investigation.

Finally, as expected the CAT has had its jurisdiction widened, in the sense it is now permitted to hear stand-alone actions (i.e. originating actions which seek to establish liability and loss before the CAT for competition infringements) rather than, as at present, limited to hearing appeals and follow-on actions after liability has already been established by the regulator. This will mean that, for the first time, the CAT presents a realistic alternative forum for victims of alleged competition infringements to establish liability and obtain a remedy. As such, it seeks to address the "enforcement gap" between the option of high cost and uncertain actions before a High Court judge or, on the other hand, a complaint to a resource-stretched competition regulator who may simply not have the appetite or time to take the matter forward. The key to whether this mechanism works in practice will be the ability of the CAT to simplify its processes to hear "fast track" cases under the framework proposed in the reforms in a manner that threads the needle of ensuring a fair hearing but reducing costs. The CAT has been given a wide discretion to exercise its powers in this regard and the success of this initiative is very much in the CAT's own hands.

Next steps

The majority of the Government's decisions will need to be implemented via primary legislation, which will be subject to Parliamentary timing and approval. The Government response does not expressly indicate when draft primary legislation will be introduced, but it is anticipated that this will be during the next Parliamentary session (i.e. May 2013-April 2014).

In relation to other aspects of the reforms which do not require Parliamentary approval, the Government's response states that it will work in parallel with the competition authorities and other stakeholders to implement those reforms, but does not provide any further indication as to timing.

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