

Parliament set to bolster private competition actions in the UK

The United Kingdom has one of the most advanced regimes in Europe for competition litigation; however, it has not yet seen a substantial uptake of private competition actions.

The Consumer Rights Act, which received Royal Assent on 26 March 2015 and will pass into law on 1 October 2015, aims to reverse this trend, by increasing the attractiveness and viability of private actions based on infringements of competition law. For businesses, this means greater opportunities to ensure proactively that their competitors, suppliers and business partners compete fairly, but also higher stakes in the event of non-compliance.

This alert explains the key changes contemplated by the Act:

1. establishing the Competition Appeals Tribunal (“CAT”) as the venue of choice for competition litigation;
2. enabling collective actions to be brought on an “opt-out” basis; and
3. promoting alternative dispute resolution for competition claims.

The CAT as a venue of choice for competition litigation

Currently, the CAT has jurisdiction to hear private follow on competition law damages actions only where an infringement has already been established by a regulator’s decision, either unappealed or upheld following final appeal. From 1 October this year, the Act will empower the CAT to hear standalone claims not grounded in a prior regulator decision. It will also enhance the CAT’s procedural powers by enabling it to grant injunctions, extend the statutory limitation

period for the CAT to six years (bringing it in line with the High Court of England and Wales) and enable the CAT to fast-track straightforward follow on actions. These changes, combined with the CAT’s specialism for competition law, increase its attractiveness as a venue of choice for parties contemplating competition claims.

Collective actions on an opt-out basis

A significant reason for the low uptake of collective actions in the UK has been the requirement that consumers actively opt in to participate in the claim. In the only case brought under the current opt-in regime, less than 0.1% of those affected opted to participate. In contrast, in an opt-out regime, the litigation is brought on behalf of the class of consumers who are affected by the anticompetitive behaviour and consumers must actively opt out if they do not want to participate. This brings to mind the US-style class action system, which both businesses and government in the UK are keen to avoid – but Parliament has debated the merits of introducing an opt-out regime and has come out in favour, provided certain safeguards are put in place. Key safeguards are as follows.

- To avoid weak or excessive claims being brought, the Act establishes a robust certification process: the CAT must consider whether the case is suitable for collective action, the class of persons eligible to claim and the appropriateness of the representative.
- The Act specifically states that court may not grant punitive damages and it establishes a presumption that the losing party will pay the other party’s costs.
- Contingency fees, where the claimant’s advisor retains a percentage of the damages awarded, are not permitted.

Alternative dispute resolution for competition litigation

The Act also provides for settlement of opt-out collective actions and, significantly, introduces voluntary redress schemes. This means the UK Competition and Markets Authority may approve an infringer's voluntary proposal to pay compensation to the victims of its infringement, increasing the ability of consumers to obtain redress without having to resort to court.

Conclusion

The Act will come into force on 1 October 2015. The changes it will bring about greatly increase the chance of consumers and smaller businesses obtaining redress. Although it remains to be seen how far redress will be actively pursued, especially in light of uncertainty as to how actions will be funded, the importance of competition compliance has never been higher, and the need for potential claimants to weigh their options carefully has never been stronger.

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