

# ENYO LAW

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**The Consumer Rights Act 2015:**  
**A new settlement for collective claims in**  
**competition law**

## **Introduction**

On 1 October 2015, the Consumer Rights Act (the “**CRA**”) is expected to come into force. When it does so, it will herald a comprehensive overhaul of the UK’s competition litigation landscape.

The CRA will hand greater power and authority to the Competition Appeal Tribunal (the “**Tribunal**”), which is intended to become the principal forum in which competition damages claims can be brought. The CRA will also permit individuals to bring damages claims not simply on a “follow-on” basis, but also on a “standalone” basis (i.e. it will no longer be a requirement for there to be an existing finding by the Competition and Markets Authority (“**CMA**”) or the relevant sectoral regulator, of competition law infringement, for an individual to bring his or her own damages claim).

In addition, the CRA introduces three new procedures into competition litigation. In summary these will:

1. Allow claimants to bring actions on behalf of entire classes of businesses and

consumers, meaning that competition claims may be much bigger in the future.

2. Allow defendants to settle claims with all claimants at once using a collective settlement endorsed by the court.
3. Allow potential defendants to try to head off litigation by establishing voluntary redress schemes to compensate victims.

## **Individual damages claims**

The CRA introduces important amendments to the Competition Act 1998 (“**CA 98**”), which is the legislation through which private competition damages claims are brought.

A revised section 47A to the CA 98 will permit a claim to be issued where a person has suffered loss or damage in respect of a proven infringement (a follow-on claim) and also an alleged, but as yet unproven, infringement of competition law (a standalone claim).

The CRA makes a number of additional changes to the procedure for bringing a private competition enforcement claim:

- The limitation period is extended from two to six years, aligning it with the limitation period for causes of action commenced in the High Court.

- The Tribunal is awarded the power to grant injunctions.
- A streamlined procedure may be introduced by the Tribunal for bringing private actions before it.
- The Tribunal rules will be amended so that it can make appropriate orders in respect of other procedural elements of the litigation (such as disclosure and evidence).

### **Group and collective damages claims**

The existing law provides a wholly inadequate framework for collective damages actions for breaches of competition law in England. Section 47B of the CA 98 permits specified consumer groups to bring damages claims on behalf of at least two individuals, provided that an infringement of competition law had been established (i.e follow-on claims only) and provided that each of the individuals concerned has consented to bring or continue the claim (i.e. the claim is on the “opt-in” basis only). Only the consumer organisation “Which?” received the special status that enables it to bring such claims, only one such claim has ever been brought<sup>1</sup>, and that case settled before the effectiveness of the provision could be fully tested.

The CRA introduces a radical new regime for groups of claimants to obtain compensation

through collective proceedings. These collective proceedings operate on the principle that a representative from the class of claimants brings the damages claim on behalf the entire class of claimants. Section 47B CA 98 is replaced by a new provision which permits collective proceedings in the form of both follow-on claims and standalone claims, and in the form of an “opt-in” or an “opt-out” collective action.<sup>2</sup>

**“Opt-in”** collective proceedings are brought on behalf of each class member except where any class member opts in by notifying the representative that the claim should be included in the collective proceedings

**“Opt-out”** collective proceedings are brought on behalf of each class member except: (i) where a class member has opted out by notifying the representative that the claim should not be included in the collective proceedings, and (ii) any class member who is not domiciled in the UK at a specified time and who does not opt in the claim.

Importantly, for collective proceedings to be brought, it is not necessary that all of the claims are against all of the defendants; the collective proceedings may combine individual claims (brought under s. 47A) with the consent of the individual who made that claim with those that have not.

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<sup>1</sup> Involving JJB Sports, brought by the Consumers’ Association in March 2007 (Case No. 1078/7/9/07, The Consumers Association v JJB Sports Plc).

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<sup>2</sup> A revised section 47B CA 98 inserted by paragraph 5, Schedule 8 CRA.

Also of note is that: (i) the Tribunal is prohibited from awarding exemplary damages in collective proceedings; and (ii) contingency fees such as damage-based agreements (“DBAs”) are also prohibited as a method of funding opt-out collective proceedings. (It would seem that DBAs are, however, permitted in respect of opt-in collective proceedings.) This restriction may limit the take-up of the new CRA regime for group actions which are well-suited to being – and in the US often are – funded on a DBA-basis.

The new regime concerning collective proceedings will apply equally to claims arising before and after the CRA comes into force.

#### Which forum for these claims?

The intended consequence of the reforms is to make the Tribunal a more attractive forum to potential litigants who may otherwise have favoured pursuing a claim in the High Court, or – in the case of those individuals wishing to pursue a standalone damages claim – have so far had no option but to do so.

Alongside the introduction of these reforms, the absence of any filing fees in the Tribunal (compared with fees of up to £10,000 in the High Court), and the knowledge that cases concerning competition issues will be dealt with by a specialist and dedicated panel, the Tribunal may become the preferred choice of forum for private damages claims in competition law.

However, there will still be circumstances where a claim in the High Court is preferable, such as where:

- The claim is founded on a number of different causes of action which the High Court (unlike the Tribunal) has jurisdiction to hear and is better suited to determine. It may be that cases such as complex financial services disputes are pleaded on the basis of a number of causes of action including not only anti-competitive behaviour, but also, for example, unlawful means conspiracy, misrepresentation and breach of contract. The High Court would remain the most suitable forum in which to bring such claims.
- Declaratory relief is sought.
- The claim includes a claim for exemplary damages<sup>3</sup>.
- The claim is for follow-on proceedings where the focus will largely be on quantum, and the claimants may prefer the recognised commercial experience and expertise of the Commercial Court judges over the Tribunal, whose constituent members’ commercial experience may be less developed and established.

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<sup>3</sup> Paragraph 6 of Schedule 8 CRA (which introduces a new section 47C into the CA 98) prohibits the award of exemplary damages by the Tribunal.

- The case would be suited to the established robust and proactive case management operating in the Commercial Court which could maintain momentum and greater encourage ADR and settlement<sup>4</sup>.

The collective proceedings (both opt-in and opt-out) introduced by the CRA are intended to be dealt with by the Tribunal. However, many competition damages claims have historically been brought in both the Chancery Division (by virtue of the rule in the Competition Law Practice Direction) and the Commercial Court (by virtue of the carve-out in CPR 58.1(2) for commercial claims). It is unclear at this early stage whether it will be possible for claimants to bring collective proceedings under the CRA in the High Court rather than the Tribunal, and the rules for transferring cases from the High Court to/from the Tribunal are yet to be finalised. The forum in which to commence a claim is an important consideration for litigants, and developments in this area should be watched closely once the CRA and the new collective proceedings regime comes into force.

### **Collective settlements**

Under a new procedure introduced by the CRA, defendants will be able to put an end to opt-out

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<sup>4</sup> The effectiveness of the new Tribunal rules in respect of case management remains to be tested. Until such time as the Tribunal has established a reputation for efficient and proactive case management, the Commercial Court may, where appropriate, remain the forum of choice for litigants.

collective proceedings before judgment is given if a “collective settlement” is reached. The collective settlement must be approved by the Tribunal which will only be granted if it considered the agreement to be “just and reasonable”.<sup>5</sup>

The CRA also permits the Tribunal to approve a collective settlement even where collective proceedings have not been commenced. The Tribunal may approve a proposed collective settlement agreement if it is satisfied that the threshold and requirements under the CRA for bringing the collective proceedings would be met, including that the proposed representative could be approved and the claims would be eligible in proceedings.

Such a settlement agreement would be equally binding on all persons falling within the class of persons described in the collective settlement order made by the Tribunal other than those who opt out or those domiciled outside the UK and who do not opt in within the specified time.

### Collective settlements in the Netherlands

To date, the only European jurisdiction which has promoted collective settlements has been the Netherlands. The procedure for collective settlements which is available in that jurisdiction is known as the “WCAM Settlement”<sup>6</sup>, which is

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<sup>5</sup> Sections 49A and B CA 98, introduced by Schedule 8 CRA.

<sup>6</sup> *Wet Collectieve Afwikkeling Massaschade*

described as a mechanism for the collective redress in mass damages claims.

Since the time when the implementing legislation was introduced in 2005, it has been possible for parties who are able to reach a collective settlement agreement prior to proceedings being commenced<sup>7</sup>, to request that the Amsterdam Court of Appeal recognise it as a binding agreement. Such a settlement operates on an **opt-out** basis and therefore becomes binding on all parties within the scope of the agreement and the specified class, unless they have specifically opted out.

The territorial extent of WCAM settlements is potentially very wide. The Dutch courts have been enthusiastic in accepting jurisdiction in respect of proposed settlement agreements under this scheme and have accepted jurisdiction to make a collective settlement agreement binding even in cases where none of the defendants were domiciled in the Netherlands and only a very small proportion of the claimants were domiciled in the territory<sup>8</sup>.

A further advantage of obtaining a WCAM settlement is that it is approved and sanctioned by way of a judgment of the Dutch courts, and as

such it is binding and enforceable in other EU Member States by virtue of the Brussels Regulation<sup>9</sup> (or Recast Regulation)<sup>10</sup>.

### **Voluntary redress schemes**

The CRA will also grant the CMA the power to approve “voluntary redress schemes”. A voluntary redress scheme is a statutory compensation programme which enables those who have suffered loss as a result of a competition law infringement to obtain compensation without having to go to court.

Entities which have committed an infringement of either EU or UK competition law may make an application to the CMA for it to approve the terms of a redress scheme through which the infringing entity voluntarily agrees to pay compensation to the injured parties.

This mechanism enables potential defendants who wish to nip claims in the bud to do so at an early stage. However, although once approved, the voluntary redress scheme will be binding and enforceable by both the CMA and the parties to it, this will not prevent victims from being able to bring traditional civil claims against the business in question.

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<sup>7</sup> At the present time, there is no mechanism in Dutch law for a collective damages action, and so a Dutch court cannot determine the liability of alleged defendants and cannot determine the amount of damages which should be awarded.

<sup>8</sup> See the case of Scor Holdings AG (f/k/a Converium Holdings AG) in the Amsterdam Court of Appeal (Gerechtshof Amsterdam) 12 November 2010 (NJ 2010/683).

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<sup>9</sup> Regulation EC/44/2001

<sup>10</sup> Regulation EC/1215/2012

## Conclusion

The CRA radically improves the ability of businesses and consumers who have suffered loss as a result of infringement of competition law in seeking redress for those losses. Once the CRA comes into force, it will be much easier to bring private damages claims in the UK courts, and before the Tribunal in particular.

The CRA is designed to ensure that adequate compensation can be sought where competition law infringement has taken place, and new mechanisms which it introduces will hopefully mean that such compensation can be achieved both in and out of court.

The powers of the Tribunal are widened and enhanced, meaning it is likely to become a real and viable alternative forum in which competition claims may be brought.

However, whilst the ability to bring collective proceedings under the CRA on both an opt-in or an opt-out basis is of course a major selling point and significant improvement on the existing arrangements, there are a number of features to the regime - such as the prohibition on funding claims through DBAs - which may present significant obstacles to its ultimate success.

The High Court is therefore likely to remain the forum of choice for complicated and high value consumer redress claims based on multiple causes of action. In such complex, "big-ticket", litigation, it may still therefore be the case that

the best option for a group of litigants and their lawyers is to take their chances with a traditional group claim.

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