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UK Government publishes decision on private competition actions

Government will reform CAT jurisdiction and introduce opt-out collective competition claims, with safeguards



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Businesses that suffer losses resulting from anti-competitive conduct are bringing an increasing number of claims for damages and injunctions before the courts and the Competition Appeal Tribunal (CAT). However, there are significant obstacles to claims by small and medium-sized enterprises (SMEs) and individuals in particular. Only one consumer group action (in the Replica Kit case) has been brought to date, and the difficulties encountered in that case make it unlikely that further group claims will be brought under the current rules. A number of gaps in the jurisdiction of the CAT to hear damages claims have also become apparent in the 10 years since it has had that jurisdiction, and have prevented it from fulfilling its intended role as the principal forum for private competition enforcement. The Government consulted in 2012, and the responses generally supported reform.

Key points of the Government's intended reform are as follows:

- The CAT will have jurisdiction to hear stand-alone as well as follow-on claims. The current lack of jurisdiction to hear stand-alone claims has been a major obstacle to an effective CAT, resulting in a number of disputes about the precise extent of the infringement found by the relevant competition authority.
- Limitation periods before the CAT will be aligned with those of the High Court. Actions before the CAT must currently be brought within a two-year window after the underlying



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competition decision, or the end of any appeal against the finding of infringement. Numerous actions have been bogged down in preliminary disputes about the start and finish of this two-year window. In future, the limitation period for both High Court and CAT will be 6 years, although in Scotland, there will be a 5-year prescription period, in line with actions before the Court of Session.

- The CAT will have the power to grant injunctions, although not interdicts in Scotland, which will remain the preserve of the Court of Session.
- There will be a “fast-track” regime for smaller cases, intended primarily to benefit SMEs, although cases involving larger parties may also be fast-tracked if both parties consent. The decision will be taken by a CAT Chair, taking into account factors such as the complexity and size of the dispute. Fast-track cases will be subject to a cost cap, a measure which is opposed by representatives of large defendants, who are concerned about their clients’ ability to defend themselves properly against unmeritorious claims.
- The Government has decided not to introduce a presumption of loss, or to legislate on the passing-on defence, preferring to leave the courts to address these issues.
- The most radical suggestion involves the introduction of an opt-out collective actions regime for both stand-alone and follow-on cases before the CAT. This means that qualifying claimants (for example all purchasers from members of a cartel) will automatically be included in the claim, unless they opt out. This contrasts with an opt-in regime, where claimants must consciously elect to participate in the claim.
- The collective action regime will be subject to a number of safeguards against the perceived weaknesses of similar regimes in other jurisdictions, notably the US. Only genuine representative bodies, rather than law firms, funders or special purpose vehicles, will be able to bring claims. Furthermore, the CAT will be required to certify a collective action, based on a preliminary merits test and assessments of the adequacy of the representative and of the appropriateness of a collective action as the best way to bring the action. Only UK-domiciled claimants will be subject to the opt-out regime, although non-UK claimants will be able to opt in. The losing party will pay costs. Settlements must be judicially approved.
- However, a significant weakness of the opt-out regime is that contingency fees (“no-win, no-fee” arrangements, where the law firm is paid only if the claimant is successful, and is often entitled to a percentage of the damages) will be prohibited in actions before the CAT. This is intended to prevent law firms from concentrating only on the largest cases, but in reality there is equally a risk that instead it will act as a deterrent to smaller claims.
- Alternative Dispute Resolution will be encouraged and the rules on cost-shifting formal settlement offers aligned with those of the High Court.
- The Government has decided not to legislate on the interaction between private and public enforcement at this stage, on the basis that the European Commission is expected to do so within the next few months. The Government indicates that it expects to see protection for leniency documents in civil claims, and also protection of immunity beneficiaries from joint and several liability, along the lines of the “de-trebling” of immunity beneficiaries in the US.

Overall, the reform is to be welcomed as a reinforcement of the current private enforcement regime. It will rightly place the CAT, with its specialist competition expertise, at the centre of a flexible system of individual and collective stand-alone and follow-on claims, removing the anomalies that have made the CAT an unattractive forum. Concerns remain about funding, however, with the decision not to allow contingency fees in collective actions likely to prevent some deserving cases from being brought.

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