

CONSUMER RIGHTS ACT 2015

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 Miscellaneous and General

Chapter 2: Competition

Summary and Background

417. This Chapter deals with the scope and operation of the Competition Appeals Tribunal. It introduces provisions to make it easier for consumers and businesses to gain access to redress where there has been an infringement of antitrust provisions (“competition law”), and addresses the unintended barriers in the current process to the appointment of Scottish and Northern Irish judges to sit as chairmen in the Competition Appeal Tribunal (CAT).

Section 81: Private actions in competition law

418. Section 81 and Schedule 8 have three main aims:

- To widen the types of the competition cases that the Competition Appeal Tribunal hears (“CAT”) (see paragraph 420 to 433 below) and to make other changes to the procedure of bringing a private action before the CAT;
- To provide for opt-out collective actions and opt-out collective settlements (see paragraphs 434 to 445 below);
- To provide for voluntary redress schemes (see paragraph 446 to 450 below).

419. The Government’s response to the consultation “Private Actions in Competition Law”¹, explains the proposals for reform of claims for damages under the private actions framework in Part 3 of this Act. There are also further proposed changes accompanying these sections in the CAT’s rules which govern how it deals with cases.

Widen the types of cases which the CAT can hear

420. The CAT is a specialist tribunal whose function is to hear cases involving competition issues. However, at present, the CAT is restricted in which competition law cases it can consider. The CAT is able to hear follow-on cases. A follow-on action is brought after an infringement has been found by “a relevant competition authority”, which are the Competition and Markets Authority (“CMA”), European Commission and the following relevant sector regulators with competition powers:

- The Office of Gas and Electricity Markets (“Ofgem”);
- The Office of Communications (“Ofcom”);

¹ <https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform>

- The Water Service Regulation Authority (“Ofwat”);
 - Civil Aviation Authority (“CAA”);
 - Office of the Rail Regulator (“ORR”);
 - Northern Ireland Authority for Utility Regulation (“NIAUR”);
 - Monitor.
421. In contrast, a stand-alone claim requires the party which brings the action to prove an infringement. In *Enron v EWS (I)*,² the Court of Appeal ruled that the scope for the CAT to go beyond the findings of the initial infringement decision is extremely limited. This judgment is widely thought to be one of the contributing factors restricting the role of the CAT in competition law actions in the current regime. Businesses or consumers who wish to bring stand-alone cases must bring their case in the High Court of England and Wales, the Court of Session or the Sheriff Court in Scotland or the High Court of Northern Ireland.
422. In addition, whilst the CAT may award damages for follow-on actions, it does not have the power to grant injunctions (an order which prohibits a party from doing a particular act). This restriction prevents a party from obtaining redress from the CAT in the form of an order prohibiting, for example, anti-competitive pricing. At present, a party seeking an injunction would need to apply to the High Court.
423. [Paragraph 4](#) replaces section 47A of the Competition Act 1998 (“CA”) which currently only provides for follow-on cases to be brought before the CAT. Paragraph 4 enables the CAT to hear a stand-alone claim as well as a follow-on claim and also to have the power to grant injunctions.
424. [Paragraph 31](#) inserts paragraph 15A of the EA to allow rules to be made providing for a fast-track procedure for claims brought under s.47A of the CA. The purpose of this is to enable simpler cases brought by small and medium enterprises (“SMEs”) to be resolved more quickly and at a lower cost.
425. [Paragraph 7](#) introduces a new section 47D of the CA, This provides that an injunction granted under s.47A and in respect of collective proceedings is enforceable as if it were granted by the High Court. This means that if the injunction is breached, a party may bring proceedings for breach of the injunction, such as contempt proceedings which could result in a penalty such as a fine.
426. [Paragraph 24](#) amends Schedule 4 of the EA providing for enforcement of injunctions granted under section 47A of the CA. It does this by providing that where a party fails to comply with an injunction, the CAT may certify the matter to the High Court, i.e. sets out the facts and evidence of the matter.
427. [Paragraph 34](#) amends Schedule 4 of EA to enable rules to be made about the grant of injunctions by the CAT.
428. [Paragraph 8](#) introduces a new section 47E of the CA. This provides that the limitation/prescription periods (the time limit for claims to be brought) for claims before the CAT are the same as the relevant limitation/prescription period for claims before the High Court in England and Wales, the Court of Session in Scotland, the High Court in Northern Ireland. At present, the limitation period for claims before the CAT is two years, compared with six years for a claim before the High Court of England and Wales and the High Court in Northern Ireland and five years for the Court of Session in Scotland. See paragraph 442 below for how the limitation/prescription periods may be suspended in the case of collective actions.

2 *English Welsh & Scottish Railway Limited v Enron Coal Services Limited* [2009] EWCA Civ 647, 1 July 2009.

429. [Paragraph 13](#) amends section 58 of the CA to make clear that the CAT is bound by a finding of fact of the CMA, unless it directs otherwise. This is to ensure the CAT has sufficient flexibility when dealing with case and is in the same position as a court which hears a competition case. A court is already able to make such a direction.
430. [Paragraph 9](#) amends section 49 of the CA to provide for a right of appeal against a decision of the CAT in proceedings brought under section 47A of the CA (stand-alone or follow-on actions) or 47B of the CA (collective proceedings). Where the appeal concerns section 47B, it may only be brought by the representative in those proceedings.
431. [Paragraph 14](#) replaces existing section 58A of the CA. The purpose of this is to make clear when a court or the CAT is bound by a decision that there has been an infringement of competition law. This ensures the position is the same for the court and the CAT. New section 58A ensures that once an infringement decision has become final, the court or the CAT is bound by it. New section 58A sets out when a decision becomes final, for example when the time for appealing against the decision has expired without an appeal having been brought.
432. [Paragraph 32](#) amends paragraph 17 of Schedule 4 to the EA, to enable rules to be made to enable the CAT to order payments to a legal party who has been acting on behalf of a business or consumer for free (i.e. on a pro bono basis).
433. [Paragraph 33](#) inserts paragraph 20A of Schedule 4 to the EA which enables rules to be made which enable the CAT to stay or sist proceedings under section 47A and 47B. This is because the CAT may wish to stay (or sist) proceedings, for example if the original infringement decision is subject to appeal and that appeal has not yet been decided.

Collective actions and opt-out collective settlements

434. The second aim is to introduce an opt-out collective actions regime and an opt-out collective settlement regime (both of which involve a case being brought forward on behalf of a group of claimants to obtain compensation for their losses). Cases would be able to be brought by representatives on behalf of individuals and/or businesses.
435. The CAT can already hear opt-in collective actions under the existing section 47B of the CA. An opt-in regime requires claimants to “opt-in” to the legal action to be able to obtain any damages. However, the CAT does not currently have the power to hear opt-out collective actions. An opt-out regime means claimants are automatically included into the action unless they “opt-out” in a manner as decided by the CAT on a case by case basis. The purpose of introducing opt-out collective actions is to allow consumers and businesses to easily achieve redress for losses they have suffered as a result of breaches of competition law.
436. The function of a collective settlement regime is to introduce a procedure for infringements of competition law, where those who have suffered a loss and the alleged infringer may jointly apply to the CAT to approve the settlement of a dispute on an opt-out basis. The collective settlement regime will operate on the same opt-out principles as the opt-out collective proceedings.
437. [Paragraph 5](#) replaces section 47B of the CA so as to provide for opt-out collective proceedings, as well as continuing to provide for opt-in collective proceedings. Subsection (11) defines opt-out collective proceedings and also provides that a person who is not domiciled in the United Kingdom must opt-in to become part of the proceedings. Subsection (10) defines opt-in collective proceedings. Subsection (4) provides that collective proceedings may only be progressed if the CAT makes a collective proceedings order. Subsection (5) provides that that CAT may only make a collective proceedings order if it considers the person who brought the proceedings meets the requirements of subsection (8) and the claims are eligible for inclusion in collective proceedings (they fall within the claims provided for in section 47A of the CA, so the proceedings may either be stand-alone or follow-on). Subsection (8)

provides that a representative must be a person whom the Tribunal considers it is just and reasonable to appoint as a representative. The current section 47B of the CA only allows for named representative bodies to bring opt-in collective actions. Currently, this only includes the consumer organization Which?. The new subsection (8) will enable any appropriate representative, such as a consumer body or trade association to bring claims on behalf of consumers or businesses, as long all the claims raise the same, similar or related issues of fact or law under section 49B(6).

438. **Paragraph 6** introduces new section 47C of the CA. Subsection (1) prohibits the CAT from awarding exemplary damages in collective proceedings, i.e. damages which are designed to be punitive rather than simply compensate for the actual loss suffered. This is to avoid very large damages being awarded which do not reflect the losses suffered. Subsection (2) enables the CAT to determine the damages due in collective proceedings without being required to consider each claim which forms part of the action. This is designed to avoid the CAT having to spend time assessing many individual claims and instead enables the CAT to group the claims together for the purpose of assessing damages. Subsection (5) provides that damages not claimed in opt-out collective proceedings must be paid to a charity specified by section 194(8) of the Legal Services Act 2007, unless under subsection (6) the Tribunal decides to award part or all of any unclaimed damages to the claimant's representative to cover their costs. Currently, the charity is the Access to Justice Foundation as recommended by the Jackson Review of Costs³, the Civil Justice Council and HM Treasury's Financial Services Rules committee as a suitable body to receive unclaimed sums. Subsection (7) allows the Secretary of State to make regulations to substitute a different a different charity for one being prescribed at the time. Subsection (8) provides that damages-based agreements are not allowed in opt-out collective actions. A damages-based agreement is where some of the damages are paid to the legal representatives. Paragraph 37 amends section 58AA of the Courts and Legal Services Act 1990, to make clear this restriction on damages-based agreements applies, notwithstanding the other provisions of that Act.
439. **Paragraph 25** amends Schedule 4 of the EA to allow representatives in a collective action to be able to take action to enforce an order concerning damages in collective proceedings.
440. **Paragraph 26** replaces paragraph 6(a) and amends paragraph 6(b) of Schedule 4 EA to provide that where damages are awarded in a collective action to a person who is not a party to the order (i.e. they are not the representative or another person who the CAT considers are suitable to hold the damages and then distribute) or costs or expenses are awarded to a person in respect of a claim made under section 47A of the CA before it became part of the collective proceedings, it may only be enforced if permission is granted by the High Court or the Court of Session. This is to provide some judicial control over the volume of enforcement claims being made by persons who are not the representative or another person who the CAT considers is suitable to hold the damages.
441. **Paragraph 27** amends paragraph 7 of Schedule 4 of the EA so that where any award of costs is made against a representative in collective proceedings, the person who is being represented (i.e. a particular business or consumer) may not be held responsible for those costs. This provision is designed to prevent legal costs being passed on from the representative to the persons who are being represented.
442. **Paragraph 8** (see paragraph 428 above) introduces new section 47E of the CA which makes provisions about the limitation/prescription periods for claims before the CAT. Subsection (4) provides for there to be a suspension of the limitation/prescription period where claims are made under section 47B of the CA (collective proceedings). The purpose of this is to discourage parties from also commencing separate section 47A proceedings before the CAT, so as to protect their position. This is because the collective proceedings may only progress if a collective proceedings order is made.

³ *Review of Civil Litigation Costs*, <http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf>

As this may not be made for some time, a party may be tempted to bring separate section 47A proceedings before the CAT to avoid the limitation/prescription period expiring before it knows whether the collective proceedings can be continued. The suspension of the limitation/prescription period offers protection to claimants who might otherwise be time-barred in bringing a single claim if the collective proceedings fail. Subsection (5) sets out when the limitation/prescription period will resume, such as where the Tribunal declines to make a collective proceedings order. Paragraph 29 replaces paragraph 11(2)(a) of Schedule 4 EA to enable rules to be made about the operation of the limitation and prescription periods.

443. The Government is also keen to encourage parties to settle disputes. To do this it is providing for collective settlements in opt-out collective proceedings where a collective proceedings order has been made as well as in cases where a collective proceedings order has not been made. The Government is also introducing voluntary redress schemes (see paragraphs 446 – 450 below). Paragraph 10 provides for a new section 49A of the CA which provides for collective settlements where a collective proceedings order has been made. Subsection (2) provides that the representative and the defendant must apply for approval of the proposed collective settlement. Subsection (4) provides that where there are multiple defendants, the defendants who want to be bound by an approved collective settlement must apply to the CAT. Subsection (5) provides that the CAT may approve the collective settlement if it is satisfied the terms are just and reasonable. Subsections (6) to (10) describes which persons are bound by the collective settlement.
444. [Paragraph 11](#) introduces a new section 49B of the CA which enables a collective settlement to be made where a collective proceedings order has not been made. This procedure may be relevant if parties are at an early stage of the litigation. Subsection (4) requires that the CAT may only approve the collective settlement if it makes a collective settlement order. Subsection (5) provides that this requires the CAT to consider the person who proposes to be the settlement representative is a person who the CAT could approve as being a settlement representative and that if collective proceedings were brought, the claims would be suitable for inclusion in such proceedings. Subsection (8) provides the CAT may only approve the collective settlement if it considers its terms are just and reasonable. Subsections (9) and (10) provide for who is bound by a collective settlement order.
445. [Paragraph 31](#) introduces paragraph 15C to Schedule 4 of the EA to provide that rules can be made about collective settlements. It also enables rules to be made to provide for costs to be paid by an underlying claimant who is not the representative in a collective action, in limited circumstances where he or she makes an application. For example, where a claimant makes an application to have their representative removed.

Voluntary redress schemes

446. The third aim is to define a voluntary redress scheme (referred to in legislation as a “redress scheme”) so as to put it on a statutory footing. The government is keen for parties who are found liable for a breach of competition law to enter into negotiations with consumers or businesses where possible rather than the first route being a private action proceeding through the courts. The intention is to provide suitable, alternative mechanisms to allow for alternative dispute resolution. One mechanism is to allow the CMA to certify voluntary redress schemes that are entered into by businesses that have been found to have infringed competition law.
447. To support this goal, Government is introducing a new power enabling the CMA to certify redress schemes. Even without the certification, voluntary redress schemes can still be offered. However, Government wishes to place voluntary redress schemes on a firmer legal footing by allowing the CMA to approve binding, voluntary undertakings as to a compensation scheme. The intention would be that the CMA could take into

account whether a business had bound themselves to provide redress when assessing the level of fine for the competition law breach.

448. Accordingly, paragraph 12 introduces new section 49C, which provides that the CMA may decide to approve a voluntary redress scheme (which may be put forward to the CMA prior to an infringement decision or after the decision has been made). Where a scheme is submitted prior to the CMA making an infringement decision, the CMA may approve an outline of the voluntary redress scheme, if it makes an infringement decision. The CMA may then require the business to create the full scheme afterwards which complies with any conditions imposed, such as the provision for further information by a set date. If the business does not comply with the conditions, the CMA may withdraw its approval of the voluntary redress scheme. Although the CMA will not determine the level of compensation that should be paid under the scheme, subsection (3) allows the CMA to take into account the amount or value of compensation when deciding whether or not to approve a voluntary redress scheme. This is to permit the CMA to reject a scheme, if the compensation on offer seems exceptionally low. Subsection (8) provides that the Secretary of State may make regulations about the approval of voluntary redress schemes. These regulations may make provisions about the procedure for approval, including the information to be provided. In addition, they may set out the factors the CMA should or should not take into account when considering applications for approval.
449. [Paragraph 12](#) also inserts new section 49D to the CA. Section 49D provides that the CMA may require a person who applies for the approval of a voluntary redress scheme to pay the CMA's reasonable costs. The CMA will incur costs in considering an application for approval. In addition, paragraph 12 also inserts new section 49E to CA which provides in subsection (1) that a party who has a voluntary redress scheme approved has a duty to comply with its terms. Subsection (3) provides that if a business or consumer suffers as a result of a breach by a business of the terms of voluntary redress scheme, they may bring legal proceedings before a court for damages or another remedy, such as an injunction. This is to ensure there are remedies available for a breach of a voluntary redress scheme.
450. [Paragraph 17](#) amends Schedule 8 of CA to allow for a business to appeal to the CAT against any costs imposed by the CMA in respect of a voluntary redress scheme.

Section 82: Appointment of Judges to the Competition Appeal Tribunal

451. This section changes the current process for appointing judges to the CAT to make it easier for judges from Scotland and Northern Ireland to be able to sit in the Tribunal as chairmen. It does this by providing for the Lord Chief Justices of England and Wales, and Northern Ireland and the Lord President of the Court of Session to be able to nominate judges sitting in their respective High Courts or the Court of Session for deployment as CAT chairmen.
452. Under the new provisions, the Lord Chief Justice of England and Wales will be able to nominate suitably qualified judges sitting in any Division of the High Court to be deployed as a judge in the CAT to sit as a chairman; currently, only judges appointed to the Chancery Division are appointed as CAT Chairs.
453. As a consequence of the change, the current eight year limit on appointment of judges in the CAT to sit as chairmen will not apply to those judges nominated to sit in the CAT and they will be able to sit until their retirement from the judiciary.