Sharpening the CAT's claws

The UK government is significantly reforming competition law private actions with a view to making it easier for consumers and businesses to obtain redress where there has been a competition law infringement. The reforms are contained in Part 3 of the Consumer Rights Bill (the "Bill"), which was introduced into the House of Commons on 23 January 2014 and which amends the Competition Act 1998 and the Enterprise Act 2002. Related to this, the Department for Business, Innovation & Skills ("BIS") consulted last year on reforms aimed at streamlining competition appeals (the consultation closed in September 2013).

This article addresses the most significant resulting proposals and focuses in particular on:

- new powers for the Competition Appeal Tribunal ("CAT");
- changes to the standard of review for appeals;
- new procedures to fast track certain cases; and
- changes to the 'collective actions' procedure.

New powers for the CAT

- Currently the CAT can hear only 'follow-on' damages actions, *i.e.* where liability has already been established in another forum (*e.g.* the High Court). The reforms will enable the CAT also to hear originating actions to establish liability, making the CAT the primary court for competition law private actions in the UK. The limitation period for claims brought before the CAT will also be brought into line with the relevant period for bringing such claims before the High Court (*i.e.* 6 years).
- The changes also give the CAT the power to grant injunctions – to have the same effect as injunctions granted by the High Court. If a party fails to comply with an injunction the CAT will certify the matter to the High Court (*i.e.* set out the facts and evidence) and the High Court will deal with enforcement.
- The Enterprise and Regulatory Reform Act 2013 gives the CAT the power to issue warrants for dawn raids conducted by the Office of Fair Trading (soon to become the Competition and Markets Authority (the 'CMA') which becomes fully operational on 1 April 2014 – click here for a separate article on the creation and operation of the CMA).

Standard of review in appeals

In June 2013, the government consulted on proposed new rules for the standard of review for various appeals, including those under the Competition Act 1998. The consultation closed in September 2013 and the government expects to publish its response early in 2014. This issue had already been

considered in a March 2011 consultation, after which the government accepted a strong consensus from stakeholder replies that the current standard of review (*i.e.* on a full merits basis) should be maintained.

A full merits review means that material findings of fact or law can be challenged. The government has proposed two alternatives for the standard of review: judicial review or introducing focused and specified grounds of appeal. The latter would allow appeals where:

- the decision was based on a material error of law or fact;
- there was a material procedural error;
- the regulator exercised its discretion unreasonably; or
- the regulator made an unreasonable judgment or prediction.

The government's rationale is that appeals would be quicker and cheaper, the period of uncertainty for competition decisions being reduced. However, there has been considerable resistance to this particular reform in the responses to the consultation. The CAT's own response was very critical - its President, Sir Gerald Barling, has commented that *"[o]ne of the main planks in defending retention of administrative decision-making in this context is that there is a full merits appeal to an independent tribunal from such a finding... No convincing justification for [changing the standard of review] is put forward…there has certainly not been a groundswell of opinion seeking to re-open the issue so far as I am aware… It would be deeply troubling if a decision of that kind made by an administrative body carrying out the roles of investigator, prosecutor, judge and jury, were subject to anything less than a full merits review by a court.*"

Under the government's proposal the current standard of review will remain applicable to appeals about the level of any penalty.

Sir Gerald Barling, President of the CAT, on the proposed change to the standard of review

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Fast track procedure

After consultation in 2012, the government outlined its decision to implement a fast track procedure to enable simpler cases, especially those brought by SMEs, to be resolved more quickly and cheaply by the CAT. These cases may be heard by the CAT Chairman alone and will focus on granting injunctions, all fast track cases being considered for injunctive relief very early in the process and prioritised for injunctive relief if possible. Although the government intends this procedure to benefit SMEs principally, there will be no bar to larger companies using the procedure.

In all fast track cases the total amount of recoverable costs will be capped on a case-by-case basis. The CAT rules may allow the CAT to grant an interim injunction to a party who has not given a cross undertaking in damages, or it may impose a cap on the provision for damages required in a cross undertaking. The CAT will also be able to limit the amount of evidence and number of expert witnesses.

These changes will be effected through the CAT Rules.

Collective actions

At present the CAT can hear only 'opt-in' collective actions, in which group members are identified before a claim is brought. Owing to very limited use of collective actions to date, the proposed reforms will allow the CAT to hear 'opt-out' collective actions as well. These are proceedings where an action is filed by one or several named claimants on behalf of all who have suffered a common loss (subject to procedural exceptions and safeguards). The government's view is that consumers must be able to bring actions collectively in order to overcome the complexities and costs of competition law damages cases, and that only an opt-out regime will achieve this aim. There are various safeguards in the Bill which are intended to reduce the risk of unmeritorious litigation:

- once a claim has been made, the CAT must make an order to allow proceedings to continue and will only do so if:
    - the person who brought the claim is capable of being authorised as a representative (see below); and
    - the claims raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings;
- collective proceedings must have a CAT authorised representative. This may or may not be a member of the class of claimants eligible for inclusion in the proceedings. In either case the CAT must consider it just and reasonable for that person to be the representative. Representatives who are not class members could be trade or consumer associations for example (as opposed to law firms or third party funders);
- the CAT cannot award exemplary damages *i.e.* damages which are designed to be punitive rather than to compensate for the loss suffered;
- damages-based agreements, in which a portion of the damages is paid to legal representatives, will be prohibited in opt-out collective actions;
- the opt-out aspect of a claim will apply only to UK-domiciled claimants. As such, the regime will not enable defendants to reach a global settlement for global cartels;
- settlements must be judicially approved;
- any unclaimed funds left in the damages 'pot' after a specified period of time (experience of collective actions in the U.S. shows this may often be greater than 50%) will be allocated to a charity specified by the Lord Chancellor under section 194(8) of the Legal Services Act 2007 (currently the Access to Justice Foundation). The damages paid out by the defendants will therefore be based on the losses of the whole class, not only those who have come forward in the claim.

Related changes at EU level

In June 2013, the European Commission adopted a proposal for a Directive which aims to remove procedural obstacles and to make it easier for victims of competition law infringements, particularly consumers and SMEs, to obtain damages. A Recommendation (which is non-binding on EU Member States) encouraging Member States to set up mechanisms for collective redress for infringements of all EU law (not just for competition law infringements) was published with the draft Directive. These recent

developments are considered in more detail in a separate article, see here. Interestingly, the Commission considers that opt in collective actions are preferable to opt out actions. At present, collective actions are dealt with only in the Recommendation (which would enable the UK Government to legislate for opt out actions, owing to the Recommendation's non-binding status). However, there has been a recent proposal to re-introduce collective actions into the draft Directive, which has the potential to cut across the UK Government's proposals. This is something to be kept under review.

Conclusion

The current reforms to the CAT are part of the government's continuing initiative to enhance the UK's reputation as a premier jurisdiction for competition law enforcement and to enhance efficiency and expediency of proceedings. SMEs will welcome the new fast track procedure in particular.

In relation to collective actions, it remains to be seen how the UK's competing policy aims of increasing redress for competition law breaches, without leading to disproportionate risks of unmeritorious claims or undue pressure on defendants can be best achieved. The suggested safeguards may help achieve this balance and, in our view, combined with the lack of other US style incentives such as triple damages and the retention of a 'loser-pays' principle in the UK, should help to ensure that collective actions procedures are not abused. It will be interesting to see the draft CAT rules in relation to collective actions, which BIS has confirmed will be available for public scrutiny shortly, as these will contain important operational details. UK businesses will also be watching developments on collective actions at the EU level closely as these have the potential to affect the UK position.

The Bill is currently only at the early stages of the legislative process, with the second reading scheduled for 28 January. The proposed CAT reforms, along with the creation of the CMA, certainly ensure that 2014 is likely to be an interesting year for UK competition lawyers and their clients!

Helen Hopson ***Louisa Jacobs***

If you would like further information, please contact Helen Hopson (helen.hopson@bristows.com) or Louisa Jacobs (louisa.jacobs@bristows.com).